

Hossein Esmaeili, Jenny Richards,** Marinella Marmo*** and Lana Zannettino*****

TRANSFORMATION FROM THE INSIDE OUT: COMMUNITY ENGAGEMENT AND THE ROLE OF ISLAMIC LAW IN ADDRESSING FAMILY VIOLENCE WITHIN AFGHAN REFUGEE AND MIGRANT COMMUNITIES IN SOUTH AUSTRALIA†

ABSTRACT

This article uses doctrinal research and incorporates evidence from an empirical research project undertaken in 2019–20 to analyse the nature and dynamics of family violence in Afghan migrant and refugee communities in South Australia. This article aims to generate a new understanding of the potential role of Islamic law¹ and community culture in addressing family violence. After briefly discussing family violence in Australia and the applicable Australian laws and procedures, the article then identifies factors contributing to the nature and dynamics of family violence in the South Australian Afghan community, namely cultural and religious barriers. The article analyses the community's engagement with the justice system and discusses strategies to improve engagement. The article argues that Islamic law itself, as a key part of Muslim community culture and as a code of conduct, can be central to effective strategies to prevent and reduce

* Associate Professor of Law, College of Business, Government and Law, Flinders University.

** Lecturer in Law, College of Business, Government and Law, Flinders University; Senior Associate, Old Port Chambers, Adelaide.

*** Associate Professor of Criminology, College of Business, Government and Law, Flinders University.

**** Associate Professor in Social Work, College of Education, Psychology and Social Work, Flinders University.

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¹ The overwhelming majority of Afghan refugees and migrants in South Australia are Shia Muslims. Although Islamic law is an umbrella term for a variety of different laws and interpretations adopted by different branches of Islam, particularly Sunni and Shia Muslims, Islamic law principles in general are applicable to both Shia and Sunnis as these principles are fundamentally the same. The difference is mainly relevant to theories of State (caliphate). In terms of personal law, particularly family law, applicable Islamic law is very similar: see Ann Black, Hossein Esmaeili and Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Edward Elgar Publishing, 2013) 12–15.

this form of violence. This functions alongside collaboration between Muslim community leaders and justice system personnel. As there are shared features among various Muslim communities in Australia, results of this research may also be relevant to other Afghan and Muslim migrant and refugee communities nationally.

I INTRODUCTION

Violence against women is a significant social, political, and legal concern within Australia.² Some populations, such as Muslim women in migrant and refugee communities, are more vulnerable to family violence³ and experience particular difficulty accessing the justice system.⁴

² Australia underwent a comprehensive review of legislation relating to family violence in two inquiries, including one jointly by the Australian Law Reform Commission and the NSW Law Reform Commission in 2009: Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (Final Report Nos 114 and 128, October 2010) vol 1; Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks* (Final Report No 117, November 2011). Further, the Council of Australian Governments endorsed the *National Plan To Reduce Violence against Women and Their Children 2010–2022*, aimed at progressively implementing its own response to those inquiries and conducting resultant research: ‘National Plan To Reduce Violence against Women and Their Children’, *Australian Government* (Web Page) <<https://plan4womenssafety.dss.gov.au/>>; Council of Australian Governments, *National Plan To Reduce Violence against Women and Their Children 2010–2022* (Report, February 2011) (‘*National Plan*’). For discussion of current family violence law and legal responses, see generally: Renata Alexander, *Family Violence in Australia: The Legal Response* (Federation Press, 2018); Julie Stubbs and Jane Wangmann, ‘Australian Perspectives on Domestic Violence’ in Eve S Buzawa and Carl G Buzawa (eds), *Global Responses to Domestic Violence* (Springer, 2017) 167, 167–88; Heather Douglas, ‘Prosecuting Domestic Violence Cases: Listening to Victims’ in Victoria Colvin and Philip Stenning (eds), *The Evolving Role of the Public Prosecutor: Challenges and Innovations* (Routledge, 2019) 154, 154–68.

³ While men can be victims of family violence, the Project (and this article) focuses on violence against women, as family violence is widely recognised as a gendered phenomenon in Australia: see Our Watch, Australia’s National Research Organisation for Women’s Safety and VicHealth, *Change the Story: A Shared Framework for the Primary Prevention of Violence against Women and Their Children in Australia* (Report, 2015) 12, 26–8 <<https://dovac.org.au/wp-content/uploads/2021/04/Change-the-story-framework-prevent-violence-women-children-AA-new.pdf>> (‘*Change the Story*’). In this article, we use the term ‘family violence’ rather than the more commonly used term ‘domestic violence’. The term ‘family violence’ is inclusive of a variety of types of family violence and of family-like relationships, making it particularly relevant to the experiences of migrant and refugee women. Our use of the term ‘family violence’ includes violence between intimate partners, as well as violence between family members (for example, between children and parents).

⁴ In this article, the term ‘justice system’ refers to criminal law and other responses to family violence such as civil protection orders. See, eg: Trishima Mitra-Kahn, Carolyn

Islam is the most prominent non-Christian religion in Australia with an overall population of 600,000.⁵ Research conducted by Australian bodies into family violence amongst Muslim communities in Australia suggests that women in these communities face particular challenges, although such research is limited.⁶ In particular, the existing literature has not adequately considered the potential role of Islamic law and community culture in reducing family violence.

Australia has a secular legal system. Therefore, Islamic law, also known as *sharia*, does not form part of Australian law.⁷ Nonetheless, Islamic law, as the Muslim code of conduct,⁸ has considerable influence in regulating the personal life of Muslims in Australia. This article combines a discussion of legal principles and scholarship

Newbiggin and Sophie Hardefeldt, 'Invisible Women, Invisible Violence: Understanding and Improving Data on the Experiences of Domestic and Family Violence and Sexual Assault for Diverse Groups of Women' (State of Knowledge Paper, Australia's National Research Organisation for Women's Safety, December 2016); Department of Social Services, *Hearing Her Voice: Report from the Kitchen Table Conversations with Culturally and Linguistically Diverse Women on Violence against Women and Their Children* (Report, 2015); *ibid*.

- ⁵ Australian Bureau of Statistics, 'Census Reveals Australia's Religious Diversity on World Religion Day' (Media Release, 18 January 2018) <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/8497F7A8E7DB5BEFCA25821800203DA4?OpenDocument>>.
- ⁶ These difficulties commonly include lack of language skills, cultural barriers, unemployment or financial dependency: Nada Ibrahim, 'Experiences of Abused Muslim Women with the Australian Criminal Justice System' (2022) 37(3–4) *Journal of Interpersonal Violence* 1, 6. See also: Jahirul Islam et al, 'Challenges of Implementing Restorative Justice for Intimate Partner Violence: An Islamic Perspective' (2018) 37(3) *Journal of Religion and Spirituality in Social Work* 277; Nada Ibrahim, 'Domestic and Family Violence and Associated Correlates among Muslims in Australia' in Anisah Bagasra and Mitchell Mackinem (eds), *Working with Muslim Clients in the Helping Professions* (IGI Global, 2019) 155; Pamela Constable, 'For Some Muslim Wives, Abuse Knows No Borders', *Washington Post* (online, 8 May 2007) <<https://www.washingtonpost.com/wp-dyn/content/article/2007/05/07/AR2007050701936.html?hpid=topnews>>; Nafiseh Ghafournia, 'Muslim Women and Domestic Violence: Developing a Framework for Social Work Practice' (2017) 36(1–2) *Journal of Religion and Spirituality in Social Work* 146, 154–8 ('Muslim Women and Domestic Violence').
- ⁷ Hossein Esmaeili, 'Australian Muslims: The Role of Islamic Law and Integration of Muslims into Australian Society' (2015) 17(1) *Flinders Law Journal* 69, 74.
- ⁸ The terms *sharia* and Islamic law are often used interchangeably in English literature and in some Islamic texts as well. The term 'Islam' refers to the religion of Islam as a whole, which includes a theological belief system, ritual practices, morality, culture and law. By contrast, *sharia* refers to ritual practices and the obligatory rules of conduct within Islam but does not include the theological belief system. *Sharia* is translated in Western literature as Islamic law but, it 'is indeed the whole philosophy, legal theory, ideology, value system and legal system of Islam. It would be problematic to view Shariah in a simplistic way which correlated exactly to Western understandings of law and its relationship to the state': *ibid* 81. Despite these differences, and also considering that neither form part of Australian law, the terms 'Islamic law' and

with evidence from an empirical research project⁹ ('Project') conducted within an Afghan Muslim community in South Australia. This article seeks to identify a potential role for Islamic law to address family violence within Muslim communities in Australia by harnessing internal perspectives of the community.

First, this article canvasses the dynamics of family violence against women in Australia within migrant and refugee communities and provides an in-depth exploration of specific issues relevant to the nature of family violence in the Afghan community in South Australia. Second, the article briefly outlines Australian criminal law and intervention order provisions on family violence. These sections provide the background to the central argument — that Islamic law may potentially fill the gaps left by Australian law in addressing family violence within Muslim communities. The Project results will also be analysed in order to highlight contributory factors to family violence amongst Afghan community members, as well as cultural and religious barriers to engagement with the justice system. Crucially, this article identifies ways to improve engagement with the justice system and potential ways to reduce family violence within the Afghan refugee and migrant communities in South Australia. It is argued that Islamic law, along with the involvement of religious and other community leaders, can have a potentially constructive role in addressing family violence. Collaboration between community leaders and justice system personnel, particularly regarding community education initiatives on Islamic law and Australian law, is therefore imperative.

II METHODOLOGY

While this article is primarily based on doctrinal research, analysis of the issues will also incorporate empirical evidence from the Project titled 'Family Violence in the Afghan Refugee Communities in South Australia: Improving Engagement with the Criminal Justice System'¹⁰ and the *Project Report* discussing the Project findings.¹¹ The Project was centred around 12 semi-structured interviews lasting between one and two hours with Afghan community leaders (three women and nine

'sharia' can be used interchangeably in everyday circumstances where it would not alter their overall meanings, and it is in this everyday sense that the terms are used in this article.

⁹ Hossein Esmaeili et al, *Afghan Migrant Community Responses to Family Violence in South Australia: The Interaction of Islamic Law, Australian Law, and the Role of Community Leaders* (Final Report, November 2020) <<https://researchnow.flinders.edu.au/en/publications/afghan-migrant-community-responses-to-family-violence-in-south-au>> ('*Project Report*').

¹⁰ Where this article refers to statements made by the project participants and the Project interviews (apart from those referenced in the *Project Report*), only a general reference to the Project will be given to comply with the ethic requirements for the responsible conduct of research.

¹¹ *Project Report* (n 9). Unless expressly stated, and where references are provided to specific Project interviews, the remaining statements, discussion, and analysis contained in the article are based on doctrinal research or existing literature.

men).¹² Additionally, several workshops and meetings were held with the Project participants and other members of the community to provide education on family violence and *sharia*, and to discuss and disseminate results. The interviews were analysed thematically by the Project investigators.¹³

The Project utilised a participatory research approach in order to maximise the involvement of the target community. Participatory research is a form of collaborative research which places a high value on the perspectives of persons who have first-hand experience of the issues and dynamics of a particular problem.¹⁴ As well as prioritising the participants' knowledge and understanding, participatory research aims to facilitate awareness amongst participants through the use of group work and other participatory methods.¹⁵ This method is designed to produce knowledge using 'a "bottom-up" approach with a focus on locally defined priorities and local perspectives'.¹⁶

The interviews conducted in the Project elicited the perspectives of Afghan refugee community leaders about the dynamics and effects of family violence on the community, and the barriers faced in accessing the justice system. The interviews also focused on the role of community leaders in educating their community about

¹² The Project team contacted well-known members of the Afghan community who were recognised as formal and informal community leaders within their culture and invited them to participate in the Project. These leaders were identified through extensive networking among the Afghan community, through social media and publicising the Project within the community after holding a number of preliminary meetings with well-known community leaders at the commencement of the Project. The leaders were known to have been involved in supporting women who have experienced family violence. They included leaders involved in Afghan community institutions and centres such as Mosques, women's centres, sporting organisations, legal firms and migration agencies. The status of these particular participants as representative and authoritative leaders in their community, coupled with their experience and knowledge, made them ideally placed to participate in this kind of exploratory Project despite constituting an otherwise small cohort. We estimate that they are largely representative of the Afghan migrant and refugee community in South Australia. Women in leadership among Australia's Afghan community are relatively low in numbers as they are an emerging group. Despite this, the Project team was able to reach a 25% inclusion rate of women. Participants were interviewed by members of the research team and research assistants, including one non-Muslim woman, one Muslim woman and one Muslim man. Two of the interviewers spoke the language of the participants. The Project was granted ethics approval by the Social and Behavioural Research Ethics Committee (SBREC) at Flinders University (approval 2019/8292).

¹³ For further information on data analysis and the themes identified at this stage of the Project, see generally *Project Report* (n 9) 21–3.

¹⁴ *Ibid* 19.

¹⁵ Janet L Finn, 'The Promise of Participatory Research' (1994) 5(2) *Journal of Progressive Human Services* 25, 26.

¹⁶ Andrea Cornwall and Rachel Jewkes, 'What Is Participatory Research?' (1995) 41(12) *Social Science and Medicine* 1667, 1667.

Islamic law and the impacts of family violence, as well as on working with the government and other agencies in reducing and responding to family violence. The Project focused on identifying religious and culture-specific elements that may assist in the development of constructive steps towards more inclusive legal solutions to family violence. In this way, the Project results can be explained by and can reflect issues raised by the theory of cultural hybridity.¹⁷ Cultural hybridity is a highly relevant theory in discussions about multiculturalism, integration versus assimilation, social and political discourse, and racism.¹⁸

This research approach was chosen because Islamic law, as part of Muslim culture,¹⁹ is central to an integrated community-led response to family violence and is becoming increasingly viewed as a priority in both addressing and reducing religious family violence.²⁰ Community-led responses can assist members of Muslim migrant communities to engage more easily with the justice system.

Although the Project participants were Afghan migrants and refugees in South Australia, the results are potentially relevant to Afghan communities nationally. Furthermore, the results are broadly applicable to other Muslim migrant and refugee communities in Australia due to the pivotal role of Islamic law, Muslim culture, and community leaders in responding to social problems and crimes such as family violence in those communities.

III FAMILY VIOLENCE IN AUSTRALIAN MIGRANT AND REFUGEE COMMUNITIES

Family violence is a complex and controversial criminal and social issue.²¹ Its nature and scope are difficult to define and there is no uniform definition of the term in social science or Australian law. It is particularly hard to identify the nature, extent and contributory factors of family violence within migrant and refugee communities

¹⁷ For discussion of cultural hybridity in relation to the Project and its results, see below nn 117–25 and accompanying text.

¹⁸ Pnina Werbner, ‘Introduction: The Dialectics of Cultural Hybridity’ in Pnina Werbner and Tariq Modood (eds), *Debating Cultural Hybridity: Multicultural Identities and the Politics of Anti-Racism* (Zed Books, 2nd ed, 2015) 4–8.

¹⁹ In this article, there are references to Islamic law as a part of Muslim culture. This is the case as, in Australia and many other countries — including some Muslim countries such as Turkey — Islamic law is not part of the legal system of the state. Rather, it operates as a code of conduct, and provides non-state customs and cultures that govern the lives of Muslims. See Black, Esmaili and Hosen, *Modern Perspectives on Islamic Law* (n 1) 4–6.

²⁰ Department of Social Services, *Third Action Plan 2016–2019 of the National Plan To Reduce Violence against Women and Their Children 2010–2022* (Report, 2016) 10 (*‘Third Action Plan’*).

²¹ See Harvey Wallace, Cliff Roberson and Julie L Globokar, *Family Violence: Legal, Medical, and Social Perspectives* (Routledge, 9th ed, 2019) 6–7.

in Australia. This is due to differing interpretations of legal and nonlegal definitions of family violence, and the various approaches to the study of this phenomenon. For example, a study undertaken in the United Kingdom indicates there are certain factors across a range of cultures and contexts that can contribute to family violence within migrant communities, including one's understanding of family violence, economic dependence, language, immigration status and community traditions.²² In Australia, many studies of family violence do not include a statistically valid sample of women from Culturally and Linguistically Diverse ('CALD') backgrounds. For example, while the Personal Safety Survey data²³ is the largest national prevalence study of its kind, it was mainly undertaken in English, and the 2012 sample of women from CALD backgrounds was too small to derive statistically valid information about the nature and extent of family violence from that group.²⁴ In addition, prevalence studies rarely provide an understanding of how migrant and refugee women's experiences of family violence differ from those of other women in countries of resettlement.²⁵

In 2020, the Australian Bureau of Statistics recorded that, in South Australia, 50% of physical assaults, 43% of sexual assaults and 47% of homicide-related offences involved family violence.²⁶ Research findings are inconclusive in determining whether there is a higher incidence of family violence in migrant and refugee communities than in non-migrant communities. Some studies indicate that the occurrence of family violence is higher within migrant communities than in the

²² See Suaad El-Abani et al, 'Migration and Attitudes towards Domestic Violence against Women: A Case Study of Libyan Migrants in the UK' (2018) 9(1) *Migration and Development* 112, 115.

²³ The most recent survey is Australian Bureau of Statistics, *Personal Safety, Australia 2016* (Catalogue No 4906.0, 8 November 2017).

²⁴ Peta Cox, *Violence against Women in Australia: Additional Analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (Research Report, Australia's National Research Organisation for Women's Safety, October 2015) 9; Nafiseh Ghafournia and Patricia Easteal 'Are Immigrant Women Visible in Australian Domestic Violence Reports That Potentially Influence Policy?' (2018) 7(32) *Laws* 1, 3; Multicultural Centre for Women's Health, Submission No 97 to Senate Finance and Public Administration References Committee, Parliament of Australia, *Inquiry into Domestic Violence in Australia* (7 August 2014) 4; Nada Ibrahim, 'Perpetration and Victimization Prevalence for Intimate Partner Violence in the Australian-Muslim Community' (2021) 12(4) *Partner Abuse* 432 ('Perpetration and Victimization').

²⁵ Cathy Vaughan et al, *Promoting Community-Led Responses to Violence against Immigrant and Refugee Women in Metropolitan and Regional Australia: The ASPIRE Project* (Research Report, Australia's National Research Organisation for Women's Safety, December 2016) 10 ('Promoting Community-Led Responses').

²⁶ Australian Bureau of Statistics, *Recorded Crime: Victims, 2020* (Catalogue No 4510.0, 24 June 2021). See also Australian Institute of Health and Welfare, *Australia's Welfare 2021: Data Insights* (Australia's Welfare Series No 15, 16 September 2021) <<https://www.aihw.gov.au/getmedia/ef5c05ee-1e4a-4b72-a2cd-184c2ea5516e/aihw-aus-236.pdf.aspx?inline=true>>.

general population, yet others show that the prevalence of family violence is lower in migrant communities than in the wider population.²⁷

In Australia, it is understood that family violence affects all sectors of society, and interdisciplinary work utilising a primary prevention approach is increasingly viewed as being able to better influence public policy, as it ‘aims to stop or prevent a health-related problem from occurring in the first place, by trying to address the underlying factors or causes of a problem’.²⁸ Further, interdisciplinary work can inform strategies that would address underlying causes and societal attitudes which underpin family violence.²⁹

Generally, studies indicate that migrant and refugee women report comparable types of family violence as women from non-migrant backgrounds. However, a significant difference is that migrant and refugee women may experience violence from a broader range of perpetrators, including extended family and community members.³⁰ In addition, migrant and refugee women have unique circumstances and vulnerabilities that can be exploited by perpetrators, such as their limited understanding of the English language, social isolation, and limited access to information about their immigration rights.³¹ These vulnerabilities mean that perpetrators can often misinform women about their visa status and threaten them with deportation and removal of their children.³² Immigration policies can also contribute to dependency on perpetrators for financial security and residency status.³³

²⁷ See Nafiseh Ghafournia, ‘Battered at Home, Played down in Policy: Migrant Women and Domestic Violence in Australia’ (2011) 16(3) *Aggression and Violent Behavior* 207, 208.

²⁸ Inara Walden and Liz Wall, ‘Reflecting on Primary Prevention of Violence Against Women: The Public Health Approach’ (ACSSA Issues Paper No 19/2014, Australian Institute of Family Studies, July 2014) 2 <<https://aifs.gov.au/sites/default/files/publication-documents/i19.pdf>>.

²⁹ See generally: Walden and Wall (n 28); *Change the Story* (n 3); Emma Williams, Jenny Norman and Keri Nixon, ‘Violence against Women: Public Health or Law Enforcement Problem or Both?’ (2018) 20(3) *International Journal of Police Science and Management* 196.

³⁰ Walden and Wall (n 28) 11; Elizabeth Orr, *Building Safe Communities for Women and Their Children: A Compendium of Stories from the Field* (ANROWS Insights No 02/2018, Australia’s National Research Organisation for Women’s Safety, 2018); Cathy Vaughan et al, *Multicultural and Settlement Services Supporting Women Experiencing Violence: The MuSeS Project* (Research Report No 11/2020, Australia’s National Research Organisation for Women’s Safety, May 2020) (‘*Multicultural and Settlement Services*’).

³¹ Vaughan et al, *Promoting Community-Led Responses* (n 24) 11.

³² Ibid.

³³ Ibid; JaneMaree Maher and Marie Segrave, ‘Family Violence Risk, Migration Status and “Vulnerability”’: Hearing the Voices of Immigrant Women’ (2018) 2(3) *Journal of Gender-Based Violence* 503, 505–6.

The effects of family violence on migrant and refugee women's health and well-being are similar to those experienced by non-migrant victims.³⁴ However, some studies have found that migrant and refugee women were more likely to stay in abusive relationships for prolonged periods of time.³⁵

The *National Plan To Reduce Violence against Women and Their Children 2012–2022* outlines a plan for Australian women and their children to live free from violence and highlights the diversity of women living in Australia.³⁶ Within the plan, the National Priority Area 3.9(b) aimed to assist religious and other community leaders to effectively address family violence occurring in their communities.³⁷ Delegates at the National Summit for Women's Safety in September 2021 identified partnerships with community-based organisations as a continuing priority for the next National Plan, including faith-based and culturally appropriate services for refugee and migrant women.³⁸

Australian and international literature on family violence in migrant and refugee communities is limited.³⁹ In 2015, the Australian National Research Organisation for Women's Safety ('ANROWS') published a paper on migrant and refugee women and family violence in Australia with an emphasis on the need for responses that were 'community-led'.⁴⁰ The paper contains a significant body of literature on

³⁴ Vaughan et al, *Promoting Community-Led Responses* (n 24) 11; Orr (n 30).

³⁵ Vaughan et al, *Promoting Community-Led Responses* (n 24) 11.

³⁶ *Third Action Plan* (n 19).

³⁷ *Ibid* 20.

³⁸ 'Statement from Delegates: 2021 National Summit on Women's Safety' (Conference Paper, National Summit on Women's Safety, 6–7 September 2021) 3–4, 7 <<https://regonsite.eventsair.com/national-summit-on-womens-safety>>.

³⁹ See generally: Cecilia Menjivar and Olivia Salcido, 'Immigrant Women and Domestic Violence: Common Experiences in Different Countries' (2002) 16(6) *Gender and Society* 898; Susan Rees and Bob Pease, 'Domestic Violence in Refugee Families in Australia: Rethinking Settlement Policy and Practice' (2007) 5(2) *Journal of Immigrant and Refugee Studies* 1 ('Domestic Violence in Refugee Families'); Ghafournia and Easteal (n 23); Susan Rees and Bob Pease, 'Refugee Settlement, Safety and Wellbeing: Exploring Domestic and Family Violence in Refugee Communities' (Violence Against Women Community Attitudes Project Paper No 4, Immigrant Women's Domestic Violence Services, August 2006); Lorana Bartels, *Emerging Issues in Domestic/Family Violence Research* (Report No 10, Australian Institute of Criminology, April 2010); Vaughan et al, *Multicultural and Settlement Services* (n 30); Lana Zannettino et al, *Improving Responses to Refugees with Backgrounds of Multiple Trauma: Pointers for Practitioners in Domestic and Family Violence, Sexual Assault and Settlement Services* (Practice Monograph 1, Australian Domestic and Family Violence Clearinghouse, 26 August 2013); Australian Migrant Resource Centre and Myriad International Consulting Services, *Working with New and Emerging Communities To Prevent Family and Domestic Violence: Good Practice Resource* (Report, 2017) ('*Working with New and Emerging Communities*').

⁴⁰ Vaughan et al, *Promoting Community-Led Responses* (n 24).

family violence in different migrant communities in Australia.⁴¹ However, the final research report asserts that despite this significant body of literature

there are currently too few studies to provide a robust evidence base for understanding the range, diversity and complexity of immigrant and refugee women's experiences and help-seeking behaviours in response to family violence in Australia.⁴²

While race and ethnicity are not the cause of violence against women, they may be linked to certain factors which shape attitudes of individuals and communities towards violence against women. These factors include beliefs and behaviours that reflect a disrespect for women, low support for gender equality, and adherence to rigid or stereotypical gender roles, relations and identities.⁴³ As discussed in Part IV, these beliefs may be held by some members of the Afghan migrant and refugee community as part of their understanding of their culture and religion.

IV SOUTH AUSTRALIAN AFGHAN MIGRANT AND REFUGEE COMMUNITIES AND FAMILY VIOLENCE

A The History and Background of Afghan Refugees

Afghanistan was occupied by the Soviet Union in 1979 and was plummeted into a civil war which continues to this day.⁴⁴ Following the September 11 attacks, Afghanistan was occupied by the United States and its allies, including Australia. As a result, a large number of Afghan refugees fled to Australia — most of whom were of Hazara background⁴⁵ from rural areas in districts such as Ghazni, Uruzghan,

⁴¹ Ibid 10–12.

⁴² Ibid 12.

⁴³ See Michael Flood and Bob Pease, 'Factors Influencing Attitudes to Violence against Women' (2009) 10(2) *Trauma, Violence, and Abuse* 125.

⁴⁴ On the occupation of Afghanistan by the former Soviet Union, see generally: Thomas T Hammond, *Red Flag over Afghanistan: The Communist Coup, the Soviet Invasion, and the Consequences* (Westview Press, 1984); Amin Saikal, 'The Afghanistan Conflict: Gorbachev's Options' (Canberra Papers on Strategy and Defence No 42, Strategic and Defence Studies Centre, Research School of Pacific Studies, Australian National University, 1987); Geraint Hughes, 'The Soviet-Afghan War, 1978–1989: An Overview' (2008) 8(3) *Defence Studies* 326.

⁴⁵ See, eg: Niamatullah Ibrahim, *The Hazaras and the Afghan State: Rebellion, Exclusion and the Struggle for Recognition* (Hurst Publishers, 2017); Hossein Esmaeili and Belinda Wells, 'The "Temporary" Refugees: Australia's Legal Response to the Arrival of Iraqi and Afghan Boat-People' (2000) 23(3) *University of New South Wales Law Journal* 224, 226–7; Amy Neve, 'Building a Life in Australia: Young Hazara Men and the Journey to "Adulthood"' (2022) 35(1) *Journal of Refugee Studies* 454.

Bamiyan and Ghor.⁴⁶ Around 15–20% of the population in Afghanistan are Shia Muslims who are persecuted by the Taliban.⁴⁷ Their language is a dialect of Farsi/Dari (Persian) and their racial background is Asian, which makes it difficult for them to hide their religion as the overwhelming majority of Hazara people are known as Shia Muslims.⁴⁸ The Hazara people are a vulnerable minority in Afghanistan due to their religion and race.

In South Australia, the Afghan migrant population is growing. According to the 2016 Census, between 2011 and 2016, the overall population of Afghanistan-born people in Australia increased by over 63%, with 6,313 Afghanistan-born people living in South Australia in 2016.⁴⁹ Afghan migrant and refugee communities in South Australia, particularly in the northern part of Adelaide contribute richly to their community, being heavily involved in businesses, such as manufacturing and building industries, restaurants and catering, and other services.⁵⁰ Since the early 2000s, the Afghan migrant and refugee community has developed a significant business precinct along Prospect Road, spanning Blair Athol and Kilburn.⁵¹ This community has also established a number of sporting clubs along with several mosques, places of worship and other Islamic centres and institutions.⁵²

B *Afghan Refugee Women*

Afghan refugee women come from a country where a large percentage of women and girls are illiterate, and access to education for girls is an issue of considerable

⁴⁶ Denise Phillips, 'Wounded Memory of Hazara Refugees from Afghanistan Remembering and Forgetting Persecution' (2011) 8(2) *History Australia* 177, 182; Phil Sparrow, *From under a Leaky Roof: Afghan Refugees in Australia* (Fremantle Arts Centre Press, 2005) 114.

⁴⁷ See generally: Yahia Baiza, 'The Hazaras of Afghanistan and Their Shi'a Orientation: An Analytical Historical Survey' (2014) 7(2) *Journal of Shi'a Islamic Studies* 151; Amin Saikal, 'Afghanistan: The Status of the Shi'ite Hazara Minority' (2012) 32(1) *Journal of Muslim Minority Affairs* 80.

⁴⁸ See: Sayed Askar Mousavi, *The Hazaras of Afghanistan: An Historical, Cultural, Economic and Political Study* (Routledge, 2016) ch 3; Cheryl Lange, Zahra Kamalkhani and Loretta Baldassar, 'Afghan Hazara Refugees in Australia: Constructing Australian Citizens' (2007) 13(1) *Social Identities* 31, 34.

⁴⁹ Australian Bureau of Statistics, *Afghanistan-Born Community Information Summary* (Report, 2018) <<https://www.homeaffairs.gov.au/mca/files/2016-cis-afghanistan.PDF>>.

⁵⁰ See Jock Collins, Katherine Watson and Branka Krivokapic-Skoko, *From Boats to Businesses: The Remarkable Journey of Hazara Refugee Entrepreneurs in Adelaide* (Report, 2017) 1, 3.

⁵¹ *Ibid.*

⁵² *Project Report* (n 9) 12.

concern.⁵³ Many of these women may have experienced psychological, sexual and physical forms of violence, including family violence, in Afghanistan. According to an international survey conducted from 2010 to 2011, 92% of Afghan women (aged 15–49) believe that a husband has the right to beat his wife.⁵⁴ A 2008 study found that just over 87% of women in Afghanistan have been subjected to one or more forms of violence, including psychological violence, or forced marriage.⁵⁵ Such violence may well continue to be inflicted in Australia, and consequently, Afghan refugee women are often left to deal with and respond to the violence without the cultural, tribal, and extended family supports available to them in their home country.

C The Significance of Religion in Afghan Communities

While Afghan refugee and migrant women may experience the same difficulties as other migrant and refugee women — which may affect their capacity to access the justice system as well as be aware of and respond to family violence — they may also have specific traumas resulting from the 40 years of war and conflict in their home country. Further, these women may feel obliged to follow the parallel system of Islamic or *sharia* law in their country of resettlement, particularly when governing their family relationships.⁵⁶

⁵³ Human Rights Watch, *'I Won't Be a Doctor, and One Day You'll Be Sick': Girls' Access to Education in Afghanistan* (Report, 17 October 2017) <<https://www.hrw.org/report/2017/10/17/i-wont-be-doctor-and-one-day-youll-be-sick/girls-access-education-afghanistan>>. See also Saira Inayatullah, 'Women's Education in Afghanistan: Disparities in Education under the Taliban Affecting Women's Capabilities Development' (Bachelor Thesis, Malmö University, 2022).

⁵⁴ Central Statistics Organization and UNICEF, *Afghanistan Multiple Indicator Cluster Survey 2010–2011* (Final Report, January 2013), cited in World Health Organization, *Addressing Violence against Women in Afghanistan: The Health System Response*, WHO Doc WHO/RHR/15.26 (2015) <https://apps.who.int/iris/bitstream/handle/10665/201704/WHO_RHR_15.26_eng.pdf;jsessionid=3F5297168AE683FF3FBCEC32F2C1602A?sequence=1>.

⁵⁵ Diya Nijhowne and Lauryn Oates, *Living with Violence: A National Report on Domestic Abuse in Afghanistan* (Report, Global Rights: Partners for Justice, March 2008). See also Marie S Huber, *Afghanistan Gender Equality Report Card: Evaluating the Government of Afghanistan's Commitments to Women and Gender Equality* (Report, Equality for Peace and Democracy, February 2015).

⁵⁶ On the relevance and unofficial practice of Islamic personal law in Australia, see generally: Ann Black and Kerrie Sadiq, 'Good and Bad Sharia: Australia's Mixed Response to Islamic Law' (2011) 34(1) *University of New South Wales Law Journal* 383; Ann Black, 'Accommodating Shariah Law in Australia's Legal System: Can We? Should We?' (2008) 33(4) *Alternative Law Journal* 214; Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not To Recognise* (Melbourne University Publishing, 2014); Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 3rd ed, 2011); Black, Esmaeili and Hosen (n 1).

Afghan migrants and refugees who are religious are required to follow both secular and religious law.⁵⁷ It is therefore common for practicing Muslims to arrange and regulate their private legal matters such as wills and estates or marriage and divorce, according to principles of Islamic and *sharia* law alongside Australian law.⁵⁸

For Afghan communities in Australia and for many other Muslim communities, religion has a central role and operates with a level of autonomy which is similar to that of the law and legal institutions in Australia. This is because many Muslims accord religion and religious principles the same kind of moral authority and respect — or ‘positive obligation’⁵⁹ — that Australians commonly attribute to law on the basis of its centrality.⁶⁰

Religious observance among this community takes various forms. It may include attendance at mosques and other places of worship, observance of rituals, consumption of *halal* products and paying religious duties.⁶¹ It is also common for Muslims to follow principles of *sharia* or Islamic law in conducting and formalising their personal relationships such as marriage, religious divorce, wills and some private financial and non-financial agreements.⁶²

⁵⁷ See David Radford and Heidi Hetz, ‘Aussies? Afghans? Hazara Refugees and Migrants Negotiating Multiple Identities and Belonging in Australia’ (2021) 27(3) *Social Identities* 377.

⁵⁸ See Hussain (n 56) 256:

Since Muslims are bound to obey Islamic religious law as well as the laws of the country they live in, it is possible that Muslims may sometimes be put in a position of conflict. Generally, however, there are very few areas where Islamic law directly conflicts with the secular law, although there are very considerable differences between them.

⁵⁹ According to Patrick Parkinson, the law ‘derives authority and respect from a deep sense within the community that the law ought to be obeyed, not merely for fear of sanction, but from a feeling of positive obligation’: Patrick Parkinson, *Tradition and Change in Australian Law* (Lawbook, 5th ed, 2013) 28.

⁶⁰ *Ibid* 26–8.

⁶¹ Religious duties include *Zakat* (alms tax) and *Khums* (for Shia Muslims). While these two are different, they both remain religious financial duties that Muslims (Shia or Sunni) have to pay. For discussion on *Zakat*, see generally Ahmed E Taha and Sohaib I Khan, ‘Charity Disparity: The Challenge of Applying Religious Law on Zakāt in the United States’ (2018) 14(1) *Northwestern Journal of Law and Social Policy* 1.

⁶² See Jenny Richards and Hossein Esmaeili, ‘The Position of Australian Muslim Women in Polygamous Relationships under the Family Law Act 1975 (Cth): Still “Taking Multiculturalism Seriously”?’ (2012) 26(2) *Australian Journal of Family Law* 142, 145–6.

D Family Violence in the Afghan Community in Australia

Generally, there are limited accurate statistics of the rates of family violence in most Muslim countries⁶³ and Muslim communities in Western countries such as Australia.⁶⁴ Muslims tend to keep family disputes and family violence private to a greater extent than Western families due to the sacred nature of family in Islamic culture. This affects the visibility of family violence and the accessibility of the justice system and support services.⁶⁵

Some highly publicised cases seem to indicate that some women in the Afghan community in Australia experience and are at significant risk of family violence. In November 2007, in Victoria, an Afghan man killed his wife in front of their baby and toddler.⁶⁶ Further, in an advisory meeting of Islamic activists and community leaders, Nazir Yousufi, President of the Victorian Afghan Associations Network stated that in 2018 ‘three Afghan Victorian women ... lost their lives to family violence’.⁶⁷

The position in South Australia appears to be similar. In *R v Abrahamzadeh*,⁶⁸ an Afghan man murdered his wife by stabbing her during a Persian New Year function held at the Adelaide Convention Centre in 2010 in front of her daughter and hundreds of other attendees. This murder followed many years of family violence carried out by him against his wife and children. In response to Mrs Abrahamzadeh’s death, a new Domestic Violence Portfolio was established in South Australia by the South Australian Police Department, along with numerous key policy changes.⁶⁹

⁶³ This proposition is supported by the authors’ extensive research projects on Muslim countries and Islamic law, as well as their research experience in family violence. Particularly, Associate Professor Hossein Esmaili has been internationally publishing on Islamic law since 1997. See also Dheeshana Jayasundara et al, ‘Intimate Partner Violence in Muslim Communities’ (2014) *Arts and Social Sciences Journal* S1-003:1–12, 1.

⁶⁴ Lisa Hajjar, ‘Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis’ (2004) 29(1) *Law and Social Inquiry* 1, 8; Ibrahim, ‘Perpetration and Victimization’ (n 24) 432–60.

⁶⁵ Hajjar (n 64) 8–13.

⁶⁶ *R v Azizi* [2010] VSC 112.

⁶⁷ Besmillah Mohabbat, ‘Family Violence Has Dramatically Increased among Afghan Migrant Families in Victoria, Says Victorian Afghan Associations Network (VAAN)’, *SBS Dari* (online, 21 January 2019) <<https://www.sbs.com.au/language/english/family-violence-has-increased-among-victorian-afghans-community-leaders-say>>.

⁶⁸ (2012) 279 LSJS 308.

⁶⁹ South Australian Multicultural and Ethnic Affairs Commission, *Report on Domestic Violence in CALD Communities* (Report, December 2016) 2 <https://www.dpc.sa.gov.au/__data/assets/pdf_file/0017/43064/SAMEAC-CALD-Domestic-Violence-Report-Dec-2016.pdf>.

V DEFINITION OF FAMILY VIOLENCE UNDER AUSTRALIAN LAW

Family violence intersects with the law in a wide range of areas. Nonetheless, the main ways in which the law responds directly to family violence are by criminalising various forms of conduct and by providing for civil protection orders against people who either commit family violence or threaten to do so. This section broadly canvasses the criminal law and civil protection order provisions relating to family violence, with emphasis on issues relevant to the experiences of migrant and refugee women, such as emotional abuse and coercive control. This section also discusses the collaboration between support agencies, community members and justice system personnel.

A *Family Violence and Criminal Law*

Most Australian jurisdictions do not have a specific criminal offence of ‘family violence’.⁷⁰ Instead, many instances of general criminal offending including physical assault, indecent assault, rape, murder, attempted murder, torture, strangling, threatening harm, stalking, endangering life, damaging property, and harming pets are treated as family violence if committed against a spouse, domestic partner or certain family members. Strangling and other similar conduct which restricts breathing is recognised as a highly dangerous form of family violence in its own right, and one that can be a precursor to escalating levels of violence.⁷¹ For this reason, states and territories are increasingly introducing new offences of strangling in circumstances of family violence, or amending existing general strangulation offences to better capture that context.⁷² Provisions vary between jurisdictions but offences of personal violence attract a higher penalty when committed as an instance of family violence, either by being charged as an aggravated offence,⁷³ or by their commission

⁷⁰ However, Tasmania has a composite offence of ‘persistent family violence’: *Criminal Code Act 1924* (Tas) s 170A.

⁷¹ Heather Douglas and Robin Fitzgerald, ‘Strangulation, Domestic Violence and the Legal Response’ (2014) 36(2) *Sydney Law Review* 231, 232–6.

⁷² See: *Crimes Act 1900* (ACT) ss 27(3)(a), 28(2)(a); *Crimes Act 1900* (NSW) s 37(1A); *Criminal Code Act 1983* (NT) s 186AA; *Criminal Code 1899* (Qld) s 315A; *Criminal Law Consolidation Act 1935* (SA) s 20A; *Criminal Code Act 1913* (WA) s 298. See also Harriet Ketley, ‘Domestic Violence Reforms Commence’ (2018) 30(11) *Judicial Officers Bulletin* 110. Even following the introduction of s 37(1A) in New South Wales, the general offence in s 37(1) can also be applied to a family violence offence depending on the status of the victim: *R v Quintyn Aloese* [2018] NSWDC 210; *R v Yee (a pseudonym)* [2019] NSWDC 326; *R v Leonard* [2019] NSWDC 628.

⁷³ *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g); *Criminal Code Act Compilation Act 1913* (WA) s 221(1)(a). In the Australian Capital Territory, offences committed against pregnant women which harm the foetus are deemed as aggravated under the *Crimes Act 1900* (ACT) s 48A.

against a family member constituting a common law or legislative aggravating factor in sentencing.⁷⁴

Some jurisdictions have enacted specific criminal offences for broader abusive conduct — including emotional and economic abuse,⁷⁵ cyberbullying,⁷⁶ and forms of intimidation or threats of physical harm designed to control the victim — which would otherwise only be covered in a civil protection order.⁷⁷ These forms of criminalisation make some progress towards addressing the difficulties that arise in conceptualising and criminalising family violence in a way that adequately encompasses the harm caused. The concept of ‘coercive control’ is being increasingly applied⁷⁸ to situations of family violence, and debates over the potential criminalisation of this conduct⁷⁹ form an important part of the current family violence discourse. Coercive control has particular relevance in religious settings where men may be bolstered in their decisions to take authority over their wives and exercise coercion over them due to

⁷⁴ See, eg, *Penalties and Sentences Act 1992* (Qld) s 10A. In New South Wales, it is an aggravating factor in sentencing if the offence is committed in the home of the victim: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(eb).

⁷⁵ See: *Family Violence Act 2004* (Tas) ss 8, 9; Marilyn McMahon and Paul McGorrery, ‘Criminalising Emotional Abuse, Intimidation and Economic Abuse in the Context of Family Violence: The Tasmanian Experience’ (2016) 35(2) *University of Tasmania Law Review* 1.

⁷⁶ See especially *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7(1)(a). See also at s 12.

⁷⁷ *Ibid* s 13.

⁷⁸ See: generally Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007). South Australia and New South Wales are considering the introduction of criminal offences to cover coercive behaviour: *Crimes (Domestic and Personal Violence) Amendment (Coercive and Controlling Behaviour) Bill 2020* (NSW); *Criminal Law Consolidation (Abusive Behaviour) Amendment Bill 2021* (SA); Parliament of New South Wales, *NSW Government Response to NSW Joint Select Committee on Coercive Control* (Government Response, 17 December 2021) <<https://www.parliament.nsw.gov.au/ladocs/inquiries/2626/Government%20response%20-%20Joint%20Select%20Committee%20on%20Coercive%20Control%20-%2017%20December%202021.pdf>>. The government of Queensland has also committed to criminalising coercive control by the end of 2023. See Marina Trajkovich, ‘Coercive Control To Be Criminalised in Queensland under New Domestic Violence Laws’, *9news* (online, 10 May 2022) <<https://www.9news.com.au/national/coercive-control-to-be-criminalised-in-queensland/c396be33-fdcl-4429-8753-769f9e96bfc5>>.

⁷⁹ See, eg: Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020); Madeleine Causbrook, ‘Taking Controlling and Coercive Behaviour Seriously: Criminalising Domestic Violence in NSW’ (2018) 43(2) *Alternative Law Journal* 102; Sandra Walklate and Kate Fitz-Gibbon ‘Why Criminalise Coercive Control? The Complicity of the Criminal Law in Punishing Women through Furthering the Power of the State’ (2021) 10(4) *International Journal for Crime, Justice and Social Democracy* 1; Jackie McMillan, *Defining and Responding to Coercive Control* (Policy Brief, Australia’s National Research Organisation for Women’s Safety, January 2021).

their interpretations of various religious texts and teachings.⁸⁰ It features a deliberate course of conduct designed to wear down and subjugate, dominate and effectively control the day-to-day life of the victim and may include a vast range of conduct far removed from individual examples of criminal offending.⁸¹

Most notably, in 2018, Tasmania introduced an offence of ‘persistent family violence’,⁸² which is applicable where a person has committed three or more instances of a ‘family violence offence’. Coercion is also classed as a ‘family violence’ offence.⁸³ The ‘persistent family violence’ offence is structured similarly to offences of persistent sexual exploitation of a child, with similar evidentiary provisions which go some way towards obviating difficulties in proving and obtaining consensus from jury members about which precise conduct occurred on which particular day.⁸⁴ Importantly, being a course of conduct offence, the nature of family violence as a pattern of behaviour and its continual effects over time can be both recognised and responded to by the criminal law. A similar offence of persistent family violence was introduced in Western Australia in 2020.⁸⁵

B *Family Violence and Civil Law*

Alongside criminal offences, civil law protection orders form a key part of the law’s direct response to family violence. Protection orders are designed to obviate the inherent difficulties in criminalising some forms of family violence by covering a broader range of harms due to their focus on protection and a lower standard of proof.⁸⁶ While these orders are civil in nature, the police will usually apply for them

⁸⁰ Shane Sharp, ‘Resisting Religious Coercive Control’ (2014) 20(12) *Violence Against Women* 1407, 1409–11; Nicola Sharp-Jeffs, Liz Kelly and Renate Klein, ‘Long Journeys toward Freedom: The Relationship between Coercive Control and Space for Action’ (2018) 24(2) *Violence Against Women* 163, 178.

⁸¹ Stark (n 78) 205–6.

⁸² *Criminal Code Act 1924* (Tas) s 170A.

⁸³ *Family Violence Act 2004* (Tas) s 7(a)(ii).

⁸⁴ *Criminal Code Act 1924* (Tas) s 170A(4). For examples of offences capturing persistent sexual offending against children see: *Crimes Act 1900* (NSW) s 66EA; *Criminal Code Act 1983* (NT) s 131A; *Criminal Law Consolidation Act 1935* (SA) s 50; *Criminal Code Act 1924* (Tas) s 125A. For further discussion of this type of ‘exploitation offence’, see Elizabeth Dallaston and Ben Mathews, ‘“Unlawful Sexual Relationships”: A Comparative Analysis of Criminal Laws against Persistent Child Sexual Abuse in Queensland and South Australia’ (2021) 42(1) *Adelaide Law Review* 1.

⁸⁵ *Criminal Code Act Compilation Act 1913* (WA) s 300, as inserted by *Family Violence Legislation Reform Act 2020* (WA) s 6.

⁸⁶ See generally: Heather Douglas, ‘Domestic Violence Protection Orders and Their Role in Ensuring Personal Security’ in Kate Fitz-Gibbon et al (eds), *Intimate Partner Violence, Risk and Security: Securing Women’s Lives in a Global World* (Routledge, 2021); Christopher Dowling et al, ‘Protection Orders for Domestic Violence: A Systematic Review’ (Trends and Issues in Crime and Criminal Justice No 551, Australian Institute of Criminology, June 2018) <https://www.aic.gov.au/sites/default/files/2020-05/ti_551_050618.pdf>.

on behalf of the victim.⁸⁷ The breach of such orders constitutes a criminal offence which will be investigated and prosecuted by the police.⁸⁸ Accordingly, this article considers these orders as a feature of the justice system's response to family violence.

The definitions used for protection orders in all Australian jurisdictions align closely with social science understandings of the dynamics, features and relational harms of family violence. Consequently, a broad range of conduct is also regarded as family violence for the purposes of obtaining a protection order. Some examples of this conduct include emotional, verbal, financial and psychological abuse, and harming someone by denying their personal autonomy (which is commonly seen as an example of emotional harm).⁸⁹ The inclusion of this kind of conduct aims to bring behaviours which in practice reflect coercive control within the ambit of at least the civil protection order regimes, even where a jurisdiction has not taken the step of criminalising these behaviours.⁹⁰

It is widely recognised that domestic and family violence is a gendered issue with women and children usually being the victims of such violence, and men the perpetrators.⁹¹ The legislation itself, however, is gender neutral. Additionally, breaching a protection order is a criminal offence in all Australian jurisdictions.⁹² Victoria has an additional offence for persistent breaches of a protection order or a safety notice under the *Family Violence Protection Act 2008* (Vic),⁹³ and higher penalties for multiple breaches are mandated under the Western Australian *Restraining Orders Act 1997* (WA).⁹⁴

⁸⁷ See, eg, *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ss 18, 20. See also Kim M Shearson, 'Seeking Help from Police for Intimate Partner Violence: Applying a Relationship Phase Framework to the Exploration of Victims' Evolving Needs' (2021) 36(3–4) *Journal of Interpersonal Violence* 1745, 1748.

⁸⁸ See Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2007) 30(3) *Sydney Law Review* 439, 444.

⁸⁹ See generally: McMahon and McGorrery (n 75); Stark (n 78) 226.

⁹⁰ See, eg: *Intervention Order (Prevention of Abuse) Act 2009* (SA) ss 8(4)(a)–(p), 8(5)(a)–(i); *Family Violence Protection Act 2008* (Vic) s 5. Much conduct which amounts to emotional abuse could also form part of coercive controlling behaviour. See McMahon and McGorrery (n 75) 3.

⁹¹ See *Change the Story* (n 3) 12, 26–8.

⁹² See, eg: *Family Violence Act 2016* (ACT) s 43; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14; *Domestic and Family Violence Act 2007* (NT) s 120; *Domestic and Family Violence Protection Act 2012* (Qld) s 177; *Protection Orders (Prevention of Abuse) Act 2009* (SA) s 31; *Family Violence Act 2004* (Tas) s 35; *Family Violence Protection Act 2008* (Vic) s 123; *Restraining Orders Act 1997* (WA) s 61(1).

⁹³ *Family Violence Protection Act 2008* (Vic) s 125A.

⁹⁴ *Restraining Orders Act 1997* (WA) s 61A.

The criminal law and protection order regimes address only part of the response needed to reduce and prevent family violence. Protection orders only work if they are respected and enforced.⁹⁵ In the absence of private prosecutions, criminal charges can only be prosecuted for offences which are reported to the police. Violence against women, including sexual violence, is notoriously under-reported,⁹⁶ and protection orders have a mixed reputation and utility.⁹⁷ Some men who commit family violence due to beliefs about their rights over their wife may be disinclined to pay attention to legal sanctions and may well be further provoked by the involvement of police and the justice system. It is widely recognised within the family violence prevention sector that the prevention of violence requires legal and justice responders to work alongside other service providers and community and faith leaders to maximise the effectiveness of responses, particularly for CALD women who may experience underreporting of family violence and might be reluctant to involve the police.⁹⁸ Significantly, the Project demonstrated that there is a possibility for this kind of interdisciplinarity and complementarity between justice system personnel, community leaders and other stakeholders.

⁹⁵ Annabel Taylor et al, *Domestic and Family Violence Protection Orders in Australia: An Investigation of Information-Sharing and Enforcement with a Focus on Interstate Orders* (Final Report, Australia's National Research Organisation for Women's Safety, November 2017) 20, 26–8, 50, 94.

⁹⁶ See Isabella Voce and Hayley Boxall, 'Who Reports Domestic Violence to Police? A Review of the Evidence' (Trends and Issues in Crime and Criminal Justice No 559, Australian Institute of Criminology, September 2018) <https://www.aic.gov.au/sites/default/files/2020-05/ti_559_250918.pdf>; Caroline S Taylor and Leigh Gassner, 'Stemming the Flow: Challenges for Policing Adult Sexual Assault with Regard to Attrition Rates and Under-Reporting of Sexual Offences' (2010) 11(3) *Police Practice and Research* 240.

⁹⁷ For a comprehensive overview of protection orders and research into their effectiveness see especially Dowling et al (n 86) 5. This report found protection orders led to a small but statistically significant reduction in further family violence offending: at 5. See also: Robin Fitzgerald and Heather Douglas, 'The Whole Story: The Dilemma of the Domestic Violence Protection Order Narrative' (2020) 60(1) *British Journal of Criminology* 180; Douglas (n 86); Alicia Jillard and Julia Mansour, 'Women Victims of Violence Defending Intervention Orders: The Latest Developments in Practice and Policy in NSW' (2014) 39(4) *Alternative Law Journal* 235; Heather Douglas and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

⁹⁸ See M Truong et al, 'Faith-Based Communities' Responses to Family and Domestic Violence' (Working Paper No 1/2020, Centre for Social Research & Methods, Australian National University, February 2020) 31–3; Vaughan et al, *Promoting Community-Led Responses* (n 24) 26.

VI THE POSITION OF ISLAMIC LAW ON FAMILY VIOLENCE

There are different and sometimes conflicting views and literature on the position of Islam on violence in general,⁹⁹ particularly in relation to family violence. The issue of rights of women and family violence in Muslim societies is an ongoing debate, and sometimes, this issue is highly politicised. According to some literature, Islam is a traditional religion developed in the harsh environment of the Arabian society of the 7th century.¹⁰⁰ Hence, the social customs of many Muslim societies condone some forms of male dominance and family violence.¹⁰¹ It is also said that this issue is not unique to Muslim communities, as a wide range of groups in Australia and globally, including those of Christian faith, have used culture and religion to hide, excuse or justify family violence.¹⁰² According to some Muslim feminists, the religion of Islam is no more oppressive to women than most other religions.¹⁰³ There are 57 Muslim-majority nations and close to 1.8 billion Muslim people¹⁰⁴ with diverse ethnicities, languages and cultural backgrounds, and many interpretations of religious texts. The issues of status of women, gender equality and family violence are

⁹⁹ Following the collapse of Ottoman Empire after the first world war in 1922 and specifically following the September 11 attacks and the wars and conflicts which resulted from those events, there have been extensive scholarly debates on Islam, religious ideology, jihad and violence in the Middle East and the Muslim world. See generally: Mihran Dabag, 'Knowledge, Order and Formative Violence in the Middle East: On the Relation between Islam and Nation State from the Ottoman Empire to the Present' in Steffen Bruendel and Frank Estelmann (eds), *Disasters of War: Perceptions and Representations from 1914 to the Present* (Wilhelm Fink Verlag, 2019) 33; M Steven Fish, Francesca R Jensenius and Katherine E Michel, 'Islam and Large-Scale Political Violence: Is There a Connection?' (2010) 43(11) *Comparative Political Studies* 1327.

¹⁰⁰ See generally: Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam*, tr Mary Jo Lakeland (Perseus Books, 1991); Irshad Manji, *The Trouble with Islam Today: A Muslim's Call for Reform in Her Faith* (St Martin's Griffin, 2005); John Stone, 'The Muslim Problem and What To Do about It' (2006) 50(9) *Quadrant* 11.

¹⁰¹ On a discussion of family violence and Islam see generally: Anna King, 'Islam, Women and Violence' (2009) 17(3) *Feminist Theology* 292, 316–17; Mohammad Mazher Idriss and Tahir Abbas (eds), *Honour, Violence, Women and Islam* (Routledge, 2011); Nawal H Ammar, 'Wife Battery in Islam: A Comprehensive Understanding of Interpretations' (2007) 13(5) *Violence Against Women* 516; Saskia E Wieringa, 'Gender Harmony and the Happy Family: Islam, Gender and Sexuality in Post-Reformasi Indonesia' (2015) 23(1) *South East Asia Research* 27.

¹⁰² Sarah Wendt and Lana Zannettino, *Domestic Violence in Diverse Contexts: A Re-Examination of Gender* (Routledge, 2015) ch 5; Truong et al (n 98) 18.

¹⁰³ King (n 101).

¹⁰⁴ Pew Research Center, *The Changing Global Religious Landscape* (Report, 5 April 2017) 8 <<https://www.pewforum.org/2017/04/05/the-changing-global-religious-landscape/>>; Organisation of Islamic Cooperation, *Member States* (Web Page, 29 April 2022) <<https://www.oic-oci.org/states/?lan=en>>.

determined, enhanced or impeded by the social, political and economic development of a people's history, the dynamic way in which politics, national identity, gender relations and religion are enmeshed, and the diverse cultural factors that impact on Islamic values and attitudes to women within the variety of nations that belong to the Muslim world.¹⁰⁵

Nevertheless, there are some seemingly vague principles in the traditional and classical Islamic texts which may have been used by some abusive Muslim men to justify the manipulation and control over their wives by using physical violence. For example, Chapter 4 of the Quran, among other things, provides that men are the protectors and maintainers of women (and hence, have authority over their wives), and that righteous women are to be obedient and, if they disobey, their husbands may '*idhrabu*' them according to *Sureh Nissa*, verse 34. This Arabic word has many meanings, including to: beat; set up; provide examples; condemn; have sexual intercourse; and seal.¹⁰⁶ According to a few interpretations, this verse of the Quran justifies wife-beating.¹⁰⁷ However, many other scholars have understood the verse differently, applying different interpretations to the meaning of the words and limiting the application of this verse.¹⁰⁸

A second approach to Islam holds that, consistent with its very name, Islam is a religion founded on and expressive of peace. Therefore, particularly in its modern versions, Islam condemns family violence in any form. For example, Chapter *Al Rum* (verse 21) of the Quran provides that 'God created for you partners from among yourselves that you dwell in tranquillity and God put love and mercy into your hearts'. There are a large number of principles in the Quran and other Islamic texts which oblige men and women to approach marriage with mutual kindness and equality. Many Islamic jurists and scholars interpret the Quran and other sources of Islamic *sharia* principles to not only provide for relational equality in marriage but to condemn family violence as being the antithesis of the way that a Muslim husband is required by God to treat his wife and his family.¹⁰⁹ According to this approach, Islam does not expand specific rules of past societies into modern times without adjusting them to meet current circumstances.¹¹⁰

¹⁰⁵ King (n 101) 322.

¹⁰⁶ Ammar (n 101) 523.

¹⁰⁷ Nafiseh Ghafournia, 'Towards a New Interpretation of Quran 4:34' (2017) 15(3) *Journal of Women of the Middle East and the Islamic World* 1, 7–9.

¹⁰⁸ See, eg: Ammar (n 101) 516, 518–22; Saqib Hussain, 'The Bitter Lot of the Rebellious Wife: Hierarchy, Obedience, and Punishment in Q 4:34' (2021) 23(2) *Journal of Qur'anic Studies* 66.

¹⁰⁹ Nada Ibrahim and Mohamad Abdalla, 'A Critical Examination of Qur'an 4:34 and Its Relevance to Intimate Partner Violence in Muslim Families' (2010) 5(3) *Journal of Muslim Mental Health* 327; Hajjar (n 64).

¹¹⁰ See generally: Hossein Esmaeili, Irmgard Marboe and Javaid Rehman, *The Rule of Law, Freedom of Expression and Islamic Law* (Hart Publishing, 2020) ch 3; Hossein Esmaeili, 'The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World' (2011) 26(2) *Connecticut*

Perhaps the best approach may be that while Islam cannot generally be categorised as condoning family violence (or any other kind of violence), some ambiguity may remain. Although a detailed practical and scholarly treatment of these issues and differences is beyond the scope of this article, it is clear that much depends on how different Muslim individuals, communities and societies interpret, approach and practise Islam. Islam is not static and rigid, and neither are its laws and legal principles. Muslim societies in all parts of the world have different cultures, languages, ethnic backgrounds and traditions which influence their religious practice and interpretation, and their approach to Islam and its legal system. Similarly, Muslim communities in Australia, while they all share a common faith, have come to Australia from more than 180 countries of origin, thus ‘making them one of the most ethnically and nationally heterogeneous communities in Australia’.¹¹¹ This diversity involves different social, cultural, racial, and linguistic backgrounds as well as different interpretations of Islam and *sharia* law.

The best approach in relation to Islam and Islamic law on family violence should be to recognise that Islam and Islamic law, similar to other legal systems including the common law tradition, has a historical background in which violence against women including family violence was sometimes condoned. However, Australian law has gradually changed and developed new principles and positions on family law and family violence. Christianity has likewise developed over time and now increasingly embraces and reflects modern social and moral principles on this issue, both overseas and in Australia.¹¹² Islam and Islamic law are no exception to these developments. As far back as the 7th century, Islam enhanced the position of women and provided certain rights, such as full property rights, which would not be afforded to women under other legal and religious traditions until much later.¹¹³ For

Journal of International Law 329; Hossein Esmaili, ‘On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System’ (2009) 26(1) *Arizona Journal of International and Comparative Law* 1.

¹¹¹ Riaz Hassan, *Australian Muslims: A Demographic, Social and Economic Profile of Muslims in Australia 2015* (Report, International Centre for Muslim and Non-Muslim Understanding, University of South Australia, 2015) 19.

¹¹² Mark D Jordan, ‘Derrick Sherwin Bailey’ in John Witter Jr and Gary S Hauk (eds), *Christianity and Family Law: An Introduction* (Cambridge University Press, 2017) 381; Nancy Nason-Clark, *The Battered Wife: How Christians Confront Family Violence* (Westminster John Knox Press, 1997). For Australian research discussing family violence responses and Christian teachings see Lynne M Baker, *Counselling Christian Women on How To Deal with Domestic Violence* (Australian Academic Press, 2010).

¹¹³ For example, a woman’s rights of inheritance and independent rights to property, including within marriage, have always formed part of Islamic law. See: Quran, 4:32,7; Wael B Hallaq, *An Introduction to Islamic Law* (Cambridge University Press, 2009) 68–70; Niaz A Shah, ‘Women’s Human Rights in the Koran: An Interpretive Approach’ (2006) 28(4) *Human Rights Quarterly* 868, 885. In comparison, full property ownership was only available to women in western and common law countries generally in the 19th Century: Florence Griswold Buckstaff, ‘Married Women’s Property in Anglo-Saxon and Anglo-Norman Law and the Origin of the

all of these reasons, modern Muslim societies' approaches to Islam and its position on family relations and family violence cannot be viewed as remaining unchanged through history, but instead as having developed to condemn family violence, and to provide teachings which assist victims in responding to it where it occurs.

Islamic law forms an inherent part of culture for Muslims, and the utilisation of Islamic law within the boundaries of Australian law can contribute to the task of reducing and preventing family violence within the Afghan community and, by extension, in other Muslim communities in Australia. According to an empirical study, 73% of Muslims in Australia 'complete[ly] trust' or 'mostly trust' their mosque.¹¹⁴ In this way, Islamic law can contribute to the peaceful ordering of both one's personal and social lives. Additionally, its precepts can be utilised to address family violence at the individual level and during any engagement with the justice system.

VII PROJECT RESULTS AND DISCUSSION

The results of the Project and its analysis provide a crucial initial knowledge-base for understanding and addressing family violence amongst the Afghan migrant and refugee community, and a valuable addition to existing research on family violence among Afghan migrant and refugee communities in Australia. The results confirm that this community experiences family violence and that it can be an isolating and devastating experience. Nearly all participants (11 out of 12) indicated that family violence is a problem in their community, and some (5 out of 12) expressed that they thought the prevalence of the problem was increasing. There was a general consensus (10 out of 12) that family violence is incredibly damaging to families and to the wider community as a whole.

While current Australian statistics indicate that emotional abuse occurs in around 1 in 4 cases of family violence,¹¹⁵ psychological and emotional abuse were viewed by participants as the most common types of family violence encountered by women within their community, rather than physical violence.¹¹⁶ Violence most commonly occurred between intimate partners, such as a husband and wife, and all but one participant (11 out of 12) reported that both men and women approached them for help and advice on issues of family violence.

Common-Law Dower' (1893) 4(2) *Annals of the American Academy of Political and Social Science* 33, 64. Until then, under the common law, property notionally used by or belonging to women was held by men on behalf of the family, and once a woman married, any such property of her own was transferred to her husband: Parkinson (n 59) 11.

¹¹⁴ Halim Rane et al, 'Towards Understanding What Australia's Muslims Really Think' (2010) 47(2) *Journal of Sociology* 123, 133.

¹¹⁵ Yinjunjie Zhang and Robert V Breunig, 'Gender Norms and Domestic Abuse: Evidence from Australia' (Working Paper 5/2021, Tax and Transfer Policy Institute, March 2021) 2.

¹¹⁶ *Project Report* (n 9) 21. See also Project (n 10) participants 9 and 12, both female.

Cultural hybridity can be utilised to theorise the Project's findings discussed in this article, and thus more sharply illuminate the findings in light of the relevant cultural and religious issues involved.¹¹⁷ While hybridity itself is a diverse concept, for Homi K Bhabha, cultural hybridity conceptualises a third space which is situated in between dichotomous cultural identities, and is a model or theory which allows a new identity to emerge,¹¹⁸ importantly without any preference between them, as 'the possibility of a cultural hybridity ... entertains difference without an assumed or imposed hierarchy'.¹¹⁹ In relation to the Project, hybridity theory conceptualises the experiences of family violence and responses to it as occurring in various locations or contexts simultaneously: Afghan culture; the Muslim religion; and Australian law, with this dynamic resulting in 'cultural hybridity'. Similarly, research conducted in the United Kingdom has applied the theory of cultural hybridity to Muslim experiences in the medical sector,¹²⁰ recognising that this hybridity allows for the Project data to form part of social discourse in relation to social institutions¹²¹ and, by extension for purposes of this article, legal institutions.

It should be noted that cultural hybridity has been criticised for potentially minimising negative elements of the dominant culture which can impact upon marginalised or minority cultures, particularly violence and power imbalances.¹²² Hybridity can also be used to determine who is and is not 'acceptable' in the dominant culture, and this has been noted in social and political discourses in relation to Muslims in the United States.¹²³ Paradoxically, this can at times have the effect of reinforcing models of white superiority.¹²⁴ Nonetheless, cultural hybridity can be a useful theoretical tool for conceptualising the experiences of refugee and migrant Muslims in Australia both in terms of their ethnicity and their religion as they engage with the wider Australian community.¹²⁵

The Project results will be discussed in three parts: first, perceived contributory factors to the dynamics and nature of family violence within the Afghan migrant and refugee community; second, cultural and religious barriers to engagement with the justice system; and third, improving engagement with the justice system.

¹¹⁷ Homi K Bhabha, *The Location of Culture* (Routledge, 2nd ed, 2004).

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid* 5.

¹²⁰ Neil Small et al, 'Evidence of Cultural Hybridity in Responses to Epilepsy among Pakistani Muslims Living in the UK' (2005) 1(2) *Chronic Illness* 165.

¹²¹ *Ibid.*

¹²² See generally Smeeta Mishra and Faegheh Shirazi, 'Hybrid Identities: American Muslim Women Speak' (2010) 17(2) *Gender, Place and Culture* 191, 196.

¹²³ Stephanie L Gomez, "'Not White/Not Quite": Racial/Ethnic Hybridity and the Rhetoric of the "Muslim Ban"' (2018) 8(1-2) *Journal of Contemporary Rhetoric* 72, 72.

¹²⁴ *Ibid* 78-82.

¹²⁵ Rachel Woodlock, 'Being an Aussie Mossie: Muslim and Australian Identity among Australian-Born Muslims' (2011) 22(4) *Islam and Christian-Muslim Relations* 391.

A Perceived Contributory Factors to Family Violence

1 Prior Histories of Trauma and War

Many Afghan migrants and refugees suffer from psychological distress resulting from decades of war and conflict.¹²⁶ The effects of previous violent and traumatic experiences on both women and men are known to influence the dynamics of family violence and the way in which violence is responded to, understood and experienced.¹²⁷ This interrelationship is also apparent when considering family violence experienced among Afghan communities in Australia¹²⁸ and among the women supported by the participant community leaders who were interviewed.

Some Project participants (4 out of 12) noted that war, conflict and violence in Afghanistan, along with migration, detention, and visa problems can be contributing factors to family violence in Afghan communities.¹²⁹ They suggested that post-traumatic experiences are relevant considerations in understanding the nature of family violence in their communities because of issues such as Post-Traumatic Stress Disorder and difficulties in managing emotions.¹³⁰

It is clear that previous experiences of trauma and the multilayered nature of family violence that attends them are relevant when considering the most appropriate service provider and stakeholder responses.¹³¹ The connections identified in existing literature between the impacts of physical and sexual violence in a wartime and public context as well as impacts experienced and exacerbated during the course of domestic and family violence¹³² are relevant for this population and stakeholders engaging with them.

2 Religious and Cultural Factors and Conflicts

Cultural traditions and beliefs form an important context through which to consider and respond to family violence.¹³³ The different cultural and societal beliefs and

¹²⁶ Qais Alemi et al, 'Psychological Distress in Afghan Refugees: A Mixed-Method Systematic Review' (2014) 16(6) *Journal of Immigrant and Minority Health* 1247, 1248.

¹²⁷ Zannettino et al (n 39).

¹²⁸ In *R v Abrahamzadeh* (2012) 279 LSJS 308, [4], previous traumatic experiences were noted to have contributed to the violence committed by the defendant against his wife.

¹²⁹ *Project Report* (n 9) 19. See also Project (n 10) participant 1, male, religious leader.

¹³⁰ *Project Report* (n 9) 21, 36. See Project (n 10) participant 10, male, lawyer. See also *R v NK [No 3]* [2015] NSWSC 1257 in which previous trauma experienced by the appellant in Afghanistan was noted to reduce moral culpability for sentencing purposes: at [97]–[98].

¹³¹ See: Bartels (n 39); Rees and Pease, 'Domestic Violence in Refugee Families' (n 39) 1–19; Vaughan et al, *Multicultural and Settlement Services* (n 30).

¹³² Zannettino et al (n 39) 6.

¹³³ Madeline Fernández, 'Cultural Beliefs and Domestic Violence' (2006) 1087(1) *Annals of the New York Academy of Sciences* 250, 250–1.

traditions between Afghan-Muslim culture and the broader Australian culture are recognised as risk factors for family violence.¹³⁴ The Afghan community is dominated by Muslim culture and Islamic law. To a Muslim, religion is a comprehensive system which deals with obligations to God and duties the people may perform in their interpersonal and social relationships.¹³⁵ Some Muslim men who use violence may see some of their views and violent behaviour as necessary for preserving their family integrity and honour, particularly if they adhere to traditional gender roles.¹³⁶ In a previous study, particular beliefs were seen as cultural elements contributing to family violence, such as ‘the sanctity of the family, the role of women in keeping the family together, hierarchical gender roles and the stigma attached to divorce’.¹³⁷

Many participants interviewed also identified differences between Australia’s Western culture and Afghan culture, and most participants (7 out of 12) agreed that the differences in culture can contribute to family violence and make it difficult to address family violence. Participants said that their community is very traditional and that cultural differences were experienced across different aspects of Australian society such as government affairs, values, religion, and family life.

The cultural differences between the Afghan community and the broader Australian community can make it more difficult for individuals and families experiencing family violence to get the help they need. One participant noted that family violence can have a deeper and longer-term impact on the Afghan community because the community’s structure is tightly bound and insulated:

There is so much more reliance on family so that a woman victim not only suffers emotionally at the hands of the perpetrator, but also socially, as divorced or separated women are perceived negatively. Same with children of divorce ... the impact on men is tied to collective families and societies, issues of honour. A man whose partner divorces or leaves him has lost honour in the community ... he will be seen as not strong enough to keep his family together.¹³⁸

¹³⁴ See, eg, *R v Azizi* [2010] VSC 112 in which King J commented that the offender believed his wife was becoming ‘too Australian’ and too aware of her rights, in the days before he murdered her, and that he was accustomed to dominating and controlling his wife: at [21]–[22].

¹³⁵ Abdulaziz Sachedina, ‘Guidance or Governance? A Muslim Conception of “Two Cities”’ (2000) 68(5–6) *George Washington Law Review* 1079, 1079; Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* (Harper San Francisco, 2002) 117.

¹³⁶ Marialuisa Gennari, Cristina Giuliani and Monica Accordini, ‘Muslim Immigrant Men’s and Women’s Attitudes towards Intimate Partner Violence’ (2017) 13(4) *Europe’s Journal of Psychology* 688, 689.

¹³⁷ Ghafournia, ‘Muslim Women and Domestic Violence’ (n 6) 157.

¹³⁸ Project (n 10) participant 10, male, lawyer (interview transcript).

One participant¹³⁹ reported that the conflict between Afghan and Australian values contributes to family violence and that marital conflict is greater amongst couples where one person was raised in Australia and the other was raised in Afghanistan. One example he gave was that Afghan men who came to Australia to marry Afghan women may want to exercise control over individuals with whom the wife may socialise, as this is a norm in Afghanistan. However, he believed that a young Afghan woman who was raised in Australia would object to such control. As such, in his opinion this conflict in values could be a risk factor resulting in family violence.

While cultural differences influence the conduct and behaviour of migrant communities, this is more evident in the Afghan traditional community since Afghan culture is blended with religious tradition, including the code of conduct known as *sharia*, to a significant degree.¹⁴⁰ Education on appropriate and inappropriate behaviours towards one's spouse according to Australian law and cultural norms, and Islamic law was seen by participants as an important way to reduce the occurrence of family violence.

3 *Arranged and Forced Marriages*

Forced marriage is a worldwide issue, recognised as a violation of human rights and increasingly as a form of violence against women and children.¹⁴¹ It is an issue that is becoming increasingly concerning in Australia,¹⁴² with victims coming to Australia from various countries including Afghanistan.¹⁴³ Forced marriage has been a federal criminal offence since 2013.¹⁴⁴ A marriage is defined as a 'forced marriage' if it was entered into without free and full consent of the victim aged under 16 due to 'coercion, threats or deception', or where the victim was 'incapable of understanding the nature and effect of the marriage ceremony'.¹⁴⁵ It is an offence to take part in conduct that causes a person to enter a forced marriage, or to be a party to a forced marriage (excluding the victim of the forced marriage).¹⁴⁶

¹³⁹ Ibid participant 3, male (interview transcript).

¹⁴⁰ Ali Wardak, 'Building a Post-War Justice System in Afghanistan' (2004) 41(4) *Crime, Law, and Social Change* 319, 323–5.

¹⁴¹ Khatidja Chantler, 'Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse' (2012) 13(3) *Trauma, Violence, and Abuse* 176, 176.

¹⁴² See, eg: Heli Askola, 'Responding to Vulnerability? Forced Marriage and the Law' (2018) 41(3) *University of New South Wales Law Journal* 977; Chloe Patton, 'Racialising Domestic Violence: Islamophobia and the Australian Forced Marriage Debate' (2018) 60(2) *Race and Class* 21.

¹⁴³ Samantha Lyneham and Samantha Bricknell, *When Saying No Is Not an Option: Forced Marriage in Australia and New Zealand* (Research Report No 11, Australian Institute of Criminology, 15 June 2018) vii.

¹⁴⁴ *Criminal Code Act 1995* (Cth) s 270.7B, as inserted by *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) sch 1.

¹⁴⁵ *Criminal Code Act 1995* (Cth) s 270.7A(1).

¹⁴⁶ Ibid s 270.7B(1)–(2).

It is very common for young Afghan men and women to travel from Australia to Afghanistan, marry, then return to Australia. Most Afghan migrants marry according to Islamic law and Muslim culture in which the fundamentals of marriage law are largely consistent with Australian law.¹⁴⁷ Consent of both parties is a central requirement for a valid marriage under Islamic law. This requirement is based both on the practice of the Prophet and several *Hadiths* (sayings of the Prophet Mohammad).¹⁴⁸

Under certain schools of Islamic law, parents may arrange a marriage for their children prior to their children becoming adults.¹⁴⁹ In those circumstances, the parents would consent to a marriage on behalf of their child, and the child's consent is obtained once they reach adulthood. At that point they may also choose not to proceed with the marriage.¹⁵⁰ However, according to the majority of Islamic schools of law, the consent of parties is necessary for the validity of the marriage.¹⁵¹ Some schools of Islamic law (for example, Hanbali and Shia) provide that consent to a marriage, in certain circumstances, may be withheld by the *Wali* (father or male legal guardian) of the bride.¹⁵² The role of the *Wali* in withholding consent may be seen as a contributor to forced marriages, particularly forced or coerced marriages of minors and young women.¹⁵³ Nevertheless, the *Wali* cannot compel a woman to marry against her will.¹⁵⁴ In practice, in contemporary Muslim communities in countries such as Afghanistan and Pakistan, the role of the *Wali* is becoming more symbolic, similar to the common Western tradition of the father 'giving away' the bride at her wedding.¹⁵⁵ Despite this, the practice of arranged marriages which involve the parties' families determining the match is very common amongst Muslim and Middle Eastern families, including those living in Australia. These arranged marriages are very different from forced marriages as the bride consents to her parents seeking out an appropriate partner for her. The bride is also required to approve the proposed husband.¹⁵⁶ It is recognised, however, that arranged marriage and forced marriage could be part of the same continuum and may blur together.¹⁵⁷

¹⁴⁷ Jamila Hussain (n 56) 256–7. See Richards and Esmaili (n 62) 148–56.

¹⁴⁸ See generally Niaz Muhammad and Kalsoom Bibi, 'Women's Consent in Marriage: A Critical Study in Islamic Perspectives' (2012) 3(2) *Peshawar Islamicus* 45, 51.

¹⁴⁹ Ann Black, 'Islamic Family Law' in Ann Black et al (eds), *Modern Perspectives on Islamic Law* (Edward Elgar, 2013) 107, 116.

¹⁵⁰ *Ibid* 130.

¹⁵¹ Sheik Sayyed Sabiq, *Fiqh al-Sunna* [Sunni Jurisprudence] (Dar al-Fiker, 2nd ed, Beirut, 1998) vol 2, 90–1.

¹⁵² Black, Esmaili and Hosen (n 1) 115.

¹⁵³ *Ibid* 116.

¹⁵⁴ Black (n 149) 130.

¹⁵⁵ *Ibid* 116.

¹⁵⁶ *Ibid*.

¹⁵⁷ For discussion on forced marriage in South Australia, see Marinella Marmo, *Slavery and Slavery-Like Practices in South Australia* (Report, Flinders University, October 2019) 28. Regarding forced marriage in Muslim communities and in Australia generally, see: Lyneham and Bricknell (n 143); Jennifer Burn, 'Putting an End to

A half of the participants (6 out of 12) raised that family problems, including family violence, could be a result of arranged marriages where Afghan families go to Iran, Afghanistan and Pakistan to find a partner for their son or daughter. In those situations, the betrothed does not know each other well and may also have conflicting cultural differences.¹⁵⁸ The Project interviews did not disclose the occurrence of forced marriages within the Afghan community in South Australia.

It seems that the practice of matchmaking using arranged marriage is very common among Afghan migrant communities in South Australia and probably also in other states.¹⁵⁹ The interviews in the Project suggest that many of those arranged marriages can lead to family problems and family violence. While these practices may not be categorised as forced marriages, they are certainly not based on the kind of mutuality, commitment and shared understanding of parties which may be necessary for stable and safe marriages. Further, there is a need for both parties to an arranged marriage, whether from Australia or overseas, to understand Australian law and Islamic law in order to reduce the potential for cultural tensions in the relationship that may lead to family violence.¹⁶⁰ Overall, forced marriages — and to a lesser extent, arranged marriages which lack the active involvement of both parties — may contribute to family disputes and therefore, to a higher risk of family violence within the community.

4 *Tensions and Differences between Generations*

In addition to the cultural differences between the Afghan communities and the wider Australian community, there are cultural differences between the younger and the older generations within Afghan communities in Australia. While these differences can occur in all societies, migrants moving from a society entrenched in tradition to a country with more relaxed cultural values may experience particular influences, including in their parent and child relations. The different values and beliefs between generations may create additional tensions, contributing to risk

Forced Marriage in Australia', *The Conversation* (online, 19 October 2013) <<https://theconversation.com/putting-an-end-to-forced-marriage-in-australia-17827>>; Nafiseh Ghafournia, *Faith in Freedom: Muslim Immigrant Women's Experiences of Domestic Violence* (Melbourne University Publishing, 2019); Australian Institute of Health and Welfare (n 25).

¹⁵⁸ A large number of Afghan migrants and refugees in South Australia who first moved to Iran and Pakistan before coming to Australia, still have families there. See generally Graeme Hugo, Mohammad Jalal Abbasi-Shavazi and Rasoul Sadeghi, 'Refugee Movement and Development: Afghan Refugees in Iran' (2012) 1(2) *Migration and Development* 261.

¹⁵⁹ Deborah J Smith, 'Decisions, Desires and Diversity: Marriage Practices in Afghanistan' (Issue Paper, Afghanistan Research and Evaluation Unit, February 2009) 15.

¹⁶⁰ One religious leader noted this issue in his interview in the Project (n 10) participant 1, male, religious leader: '[I]f a girl has gone to university, the mother should not insist that this girl should marry her cousin overseas. The girl has grown up here, knows English, knows the culture, and marrying someone who is not familiar with this culture may create problems.'

factors in relation to family violence, for example where very traditional parents are arranging a marriage for their child as discussed above. This disparity is a common issue for migrant communities and an important factor in addressing social and community engagement for younger second-generation migrants who may experience marginalisation.¹⁶¹ Several participants (4 out of 12) raised this in their interviews, noting that the older generations tend to hold onto more traditional values while younger people are more inclined to distance themselves from these values.

Several participants (5 out of 12) also reported that the younger generation within their community is different to the older generation, and that younger migrants are more likely to come forward to seek support for family violence. In older generations, women are more tolerant of the abusive behaviour of their partners, but the younger generations are less likely to tolerate such behaviour. As a result, family violence may appear to be more prevalent and more readily reported amongst younger couples.

It was also suggested by some participants (3 out of 12) that younger people can find it more difficult to understand or navigate the freedoms afforded to them in Australia which can lead to relationship conflict. It is therefore crucial that this issue be considered as part of stakeholder responses to family violence.¹⁶²

B *Barriers to Engagement with the Justice System and Help-Seeking*

Experiencing family violence can affect a victim's ability to obtain help and engage with the justice system in a myriad of ways. Additionally, elements such as the misuse of legal processes by perpetrators, and the way in which family violence is conceptualised and understood, further complicate general issues associated with accessing justice such as procedural complexity, lack of legal representation, delays and expenses.¹⁶³

In addition to this, research indicates that some members of refugee and migrant communities have other concerns relating to police or formal justice system involvement,¹⁶⁴ including distrust of the police and experiences of racism.¹⁶⁵ Alongside

¹⁶¹ See Fethi Mansouri and Amelia Johns, 'Social Networks and Perceptions of Intergenerational Difference among Migrant Youth in Australia' (2017) 53(1) *Journal of Sociology* 127.

¹⁶² See generally: *Working with New and Emerging Communities* (n 39); Riffat Munawar, 'Intergenerational Cultural Differences among Muslim Women in Wollongong' (MA Honours Thesis, University of Wollongong, 1997).

¹⁶³ Janet E Mosher, 'Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners' (2015) 32(2) *Windsor Yearbook of Access to Justice* 149, 157–9.

¹⁶⁴ Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts* (Report, 2016) ('*The Path to Justice*').

¹⁶⁵ Vaughan et al, *Promoting Community-Led Responses* (n 25) 11, 26.

this, there are several elements of the justice system which may not fit the circumstances of CALD women as readily as they do other women, which may also disincentivise CALD women from seeking help from the police and the justice system. Protection orders and ‘pro-prosecution’ policies are two such examples.¹⁶⁶ Further, factors that may impede access to the family law system including cultural and religious barriers can negatively influence family relationships and potentially worsen the violence because victims fail to receive support.¹⁶⁷

Concerns about barriers to help-seeking were mirrored in Project interviews, with several participants (4 out of 12) stating that most victims of family violence do not seek legal help or take action through the justice system. Instead, most seek help from their extended family or from community and religious leaders, and try to resolve the situation according to *sharia* law. One participant noted that the majority of his community members try to resolve relationship issues according to Islamic law prior to using Australian law, police or the courts.¹⁶⁸

There are a number of elements impacting upon the community’s engagement with the justice system: a general reluctance to engage with the legal system for cultural reasons; issues of gender and Islamophobia; dissatisfaction with police involvement; and a lack of knowledge about rights and the law in Australia.

1 *Cultural Barriers, Gender Issues and Islamophobia*

Muslim, Middle Eastern and Afghan cultures have many differences compared to the broader Australian culture.¹⁶⁹ This includes the sacred and private nature of family, including family relationships,¹⁷⁰ and gender roles in both the family and the community.¹⁷¹ Violence against women can often be a result of the lower

¹⁶⁶ See: *ibid*; Shearson (n 87) 1747. For a discussion of the difficulties and nuances surrounding criminalisation and pro-prosecution policies generally, see especially Douglas (n 88) 442–6. According to some studies, CALD women’s versions of events are misconstrued by responding officers, and hence, they are less likely to seek help from police, including seeking intervention orders: Ellen Reeves, ‘Family Violence, Protection Orders and Systems Abuse: Views of Legal Practitioners’ (2020) 32(1) *Current Issues in Criminal Justice* 91, 96.

¹⁶⁷ Vaughan et al, *Promoting Community-Led Responses* (n 25) 34–7.

¹⁶⁸ Project (n 10) participant 8, male, religious leader.

¹⁶⁹ On cultural differences between Islam and broader Australian culture, see generally: Bernard Lewis, *Cultures in Conflict: Christians, Muslims and Jews in the Age of Discovery* (Oxford University Press, 1995); Bernard Lewis, *Islam in History: Ideas, People, and Events in the Middle East* (Open Court Publishing, 2nd ed, 2001).

¹⁷⁰ Zulkeplee Othman, Rosemary Aird and Laurie Buys, ‘Privacy, Modesty, Hospitality, and the Design of Muslim Homes: A Literature Review’ (2015) 4(1) *Frontiers of Architectural Research* 12.

¹⁷¹ See generally Anne Sofie Roald, *Women in Islam: The Western Experience* (Routledge, 2001).

social position of women, which is one way such subjugation can be perpetuated.¹⁷² Consistent with other migrant and refugee women experiencing family violence,¹⁷³ community members struggle to engage with support services and many do not even consider doing so, often due to characterisation of family violence as a private family matter to be resolved internally.¹⁷⁴

Patriarchal cultural values and norms about marriage and family, which label women as subservient, are generally recognised as contributing to or worsening the incidence of family violence among refugee and migrant communities, along with potentially harmful attitudes and responses of community members.¹⁷⁵ These dynamics and issues were mostly evident in the interviews and were seen as operating either in addition to or alongside religious beliefs or teachings, which in itself generally accords with the nuanced connection between and intersection of religion and culture in relation to family violence.¹⁷⁶ It is more common for cultural factors to be seen as contributors to family violence and a barrier to help-seeking instead of the religion itself.¹⁷⁷ Similarly, participants in the Project clearly identified a variety of cultural differences between the Afghan community and the wider Australian community as a key barrier to their community members accessing either the legal system or other social support services.¹⁷⁸

In the Project interviews, some participants (3 out of 12) reported that it is considered taboo for Afghan families to discuss their personal family conflicts with others, as they are seen as private and a matter of honour, as well as safety. This can make it more difficult for victims to seek help for family violence outside their own communities.¹⁷⁹ Additionally, some women may not recognise abusive conduct as being

¹⁷² Emma Fulu and Stephanie Miedema, 'Globalization and Changing Family Relations: Family Violence and Women's Resistance in Asian Muslim Societies' (2016) 74(11–12) *Sex Roles* 480, 486.

¹⁷³ See: Vaughan et al, *Promoting Community-Led Responses* (n 25); Rees and Pease, 'Domestic Violence in Refugee Families' (n 39); Bartels (n 39); Vaughan et al, *Multicultural and Settlement Services* (n 30).

¹⁷⁴ Vaughan et al, *Promoting Community-Led Responses* (n 25) 84.

¹⁷⁵ See: Kerrie James, 'Domestic Violence within Refugee Families: Intersecting Patriarchal Culture and the Refugee Experience' (2010) 31(3) *Australian and New Zealand Journal of Family Therapy* 275; Bartels (n 39); *Working with New and Emerging Communities* (n 39); Vaughan et al, *Multicultural and Settlement Services* (n 30); Susan Rees, 'Human Rights and the Significance of Psychosocial and Cultural Issues in Domestic Violence Policy and Intervention for Refugee Women' (2004) 10(1) *Australian Journal of Human Rights* 97.

¹⁷⁶ For a discussion of the connection between religion and culture as they relate to incidences of family violence see generally: Ghafournia, 'Muslim Women and Domestic Violence' (n 6); Truong et al (n 98); Rees (n 175).

¹⁷⁷ See Truong et al (n 98).

¹⁷⁸ *Project Report* (n 9) 23.

¹⁷⁹ Project (n 10) participant 11, female, religious leader.

illegal under Australian law. If they consider such conduct to be a normal part of a marriage, they will be less likely to disclose its occurrence.¹⁸⁰

Some participants (5 out of 12) reported that traditional gender roles can often leave women more vulnerable in situations of family violence. A lack of English language proficiency and education and spending large amounts of time performing house duties can all lead to a lack of confidence in engaging with broader community services.¹⁸¹

Islamophobia and discrimination against Muslims in Australia may contribute to many social problems and may also impede members of the community from approaching and engaging with the justice system. The literature on Islamophobia in Western countries and in Australia is extensive.¹⁸² The increase of negative attitudes towards Islam in Australia has detrimental consequences, including that members of Muslim communities are alienated and are less likely to seek justice, particularly in cases of family violence. Studies in Australia have demonstrated the serious and multilayered effect that Islamophobia can have on women who are subjected to family violence. For example, some Muslim women may have concerns that calling police or support services or even calling attention to the violent behaviour may feed into Islamophobic beliefs and portray their communities negatively.¹⁸³ Muslim women may feel that taking action against members of their community can fuel existing negative 'external judgements' towards Muslims and reinforce certain stereotypes, such as that Islam condones violence against women.¹⁸⁴ Their own experiences of racism in Australia may lead to a concern that police will take a more punitive approach against their husbands, particularly if they have experienced racism or persecution in their countries of origin.¹⁸⁵

2 *Dissatisfaction with Police Involvement*

Migrant and refugee communities have reservations about involving police in their family disputes for a number of reasons. They may have experienced persecution or other traumatic experiences involving authorities police in their home countries or

¹⁸⁰ Ibid participant 4, female, community leader.

¹⁸¹ Ibid.

¹⁸² See: Alice Aslan, *Islamophobia in Australia* (Agora Press, 2009); Gary D Bourma, 'Islamophobia as a Constraint to World Peace: The Case of Australia' (2011) 22(4) *Islam and Christian-Muslim Relations* 433; Kevin M Dunn, Natascha Klocker and Tanya Salabay, 'Contemporary Racism and Islamophobia in Australia: Racializing Religion' (2007) 7(4) *Ethnicities* 564; Sharam Akbarzadeh, 'The Muslim Question in Australia: Islamophobia and Muslim Alienation' (2016) 36(3) *Journal of Muslim Minority Affairs* 323; George Morgan and Scott Poynting (eds), *Global Islamophobia: Muslims and Moral Panic in the West* (Routledge, 2016).

¹⁸³ See the studies discussed in Vaughan et al, *Promoting Community-Led Responses* (n 24) 35.

¹⁸⁴ Ibid 83.

¹⁸⁵ Ibid.

prior to arriving in Australia, resulting in fear and distrust of police and other figures of state authority.¹⁸⁶ The cultural designation of the family as a private sphere and the requirement for private resolution of family disputes is also relevant.¹⁸⁷ There may be a perception that the involvement of police not only brings significant consequences and disruption to the family unit, but also brings the dispute into the public domain. Therefore, a woman who calls the police, rather than the perpetrator of the violence, may be viewed as the catalyst of family disruption and blamed for the shame and stigma experienced by the family because she has exposed such violence publicly. A 2018 report by the Australian Institute of Family Studies and Child Family Community Australia identifies the fear and distrust of authorities, including police, as a key barrier to service engagement by women from refugee backgrounds.¹⁸⁸

These dynamics of fear and distrust of police involvement are also evident within the Afghan refugee community in South Australia. Half of the interview participants (6 out of 12) were of the view that family violence issues are best addressed through avenues such as formal psychological counselling, extended family and community support, or through Islamic *sharia*, rather than through the justice system. They believed that community members would prefer to address family violence through these avenues with police and courts being viewed as a final option. For example, one Imam (a prayer leader in a mosque) noted that private resolution within the extended family and community should be the first option used, followed by recourse to lawyers if the first avenue is not successful. Only after those attempts had failed should help be sought from police and the courts.¹⁸⁹ Another participant noted that temporary separation and counselling should both be used prior to police involvement.¹⁹⁰ Most Project participants (8 out of 12) agreed that police involvement could make family violence situations worse or lead to the permanent destruction of families through separation and divorce. However, there was recognition that physical violence would necessitate police involvement in order to avoid further escalation.¹⁹¹

Some participants (3 out of 12) noted fears relating to family breakdown, stigma and the loss of social profile for men, potentially resulting from the criminalisation of family violence. While involving police can demonstrate to the perpetrator that the law condemns such violent behaviour, legal responses can bring consequences that

¹⁸⁶ Vaughan et al, 'Multicultural and Settlement Services' (n 30) 2–3; Maher and Segrave (n 32) 503, 511.

¹⁸⁷ See generally: Zannettino et al (n 39); Vaughan et al, *Promoting Community-Led Responses* (n 25); Marie Segrave, *Temporary Migration and Family Violence: An Analysis of Victimisation, Vulnerability and Support* (Report, Monash University, 2017).

¹⁸⁸ Alissar El-Murr, 'Intimate Partner Violence in Australian Refugee Communities: Scoping Review of Issues and Service Responses' (Child Family Community Australia Paper No 50/2018, Australian Institute of Family Studies, December 2018) 11.

¹⁸⁹ Project (n 10) participant 5, male, Imam.

¹⁹⁰ Ibid participant 4, female.

¹⁹¹ Ibid participant 11, female.

are beyond what the victim is comfortable with, particularly if the victim's focus is on ending the conduct, rather than punishing it.¹⁹²

In addition to these concerns, 7 out of 12 Project participants said that police involvement should be a last resort in dealing with family violence because it can interfere with community support for affected victims and families. One community leader participant noted that 'we had some cases where we asked the police to let us talk with the families, but the police didn't let us. I don't blame them, maybe they are doing their job.'¹⁹³

Interestingly, these participants highlighted a further and related issue — the need for justice system personnel and community leaders to work together intentionally in order to maximise not only cultural safety but the effectiveness of their own respective roles in responding to family violence. These concerns emphasise the importance of cultural safety not only among social support services but also among justice system personnel.¹⁹⁴

3 *Lack of Knowledge of Legal Rights and Australian Law*

The lack of knowledge of legal rights or legal provisions is a clear and common barrier to help-seeking for migrant and refugee women experiencing family violence. This is not specific to the Afghan refugee community: an Australian study concerning refugee communities from West Africa showed that socio-cultural factors, including social norms in the victim's country of origin, and a lack of knowledge of the law or recognition of their experiences were relevant factors for victims in their decision not to disclose their experience of violence nor seek emotional or legal support.¹⁹⁵ Further, in Tasmania, a project conducted by ANROWS reported that 87% of CALD people who were surveyed declared a lack of knowledge that domestic and family violence can in fact be a criminal offence in Australia.¹⁹⁶ Similarly, the Project demonstrated that the cultural differences discussed above are compounded by a lack of knowledge of women's rights under Australian law, and in many instances a lack of knowledge of the position of Islam on family violence. A view of family violence as being a private matter — which should only be resolved using personal strategies and religious beliefs — rather than a criminal matter of public concern contributes to this lack of knowledge. This poses an additional barrier to the involvement of the legal system, particularly when accompanied by fears of family breakdown and alienation.¹⁹⁷

¹⁹² Ibid participant 9, female, religious leader; participant 10, male, lawyer.

¹⁹³ Ibid participant 9, female, religious leader.

¹⁹⁴ *The Path to Justice* (n 164) 37, 44–5.

¹⁹⁵ Olayide Ogunsiji et al, 'Suffering and Smiling: West African Immigrant Women's Experience of Intimate Partner Violence' (2012) 21(11–12) *Journal of Clinical Nursing* 1659.

¹⁹⁶ Orr (n 30) 6.

¹⁹⁷ See: *The Path to Justice* (n 164); Frederic G Reamer 'Social Work and Criminal Justice: The Uneasy Alliance' (2004) 23(1–2) *Journal of Religion and Spirituality in Social Work* 213.

Most participants (7 out of 12) indicated that family violence often occurs because people in the community are not always aware of the position of Australian law on family violence, and that knowledge of the law may not only empower the wife in seeking help from the justice system but may also dissuade the husband from being violent.¹⁹⁸ Half of the participants (6 out of 12) reported that there is a lack of information about laws and rights in Australia, and not knowing about legal rights can prevent people from getting help for family violence. This is evident in one interviewee's statement: 'I think mainly [people do not ask for help] because they don't know their rights. If one party knew how the law is supporting them, then it would be different.'¹⁹⁹ Some participants (3 out of 12) also noted that not being able to speak English and/or not having information presented in Farsi can prevent victims from accessing important information about their rights. Some Afghan women may also be illiterate, putting them in an even more vulnerable position.²⁰⁰

The Project demonstrated that better knowledge about the full range of conduct that is classified as family violence under Australian law, particularly in relation to emotional and financial abuse and coercive behaviour, may lead to a reduction of such violence.²⁰¹ This is supported by the modern interpretation of Islam which suggests that a Muslim should follow the secular law of the country in which they reside.²⁰² The interpretation cuts across any tendency to view the justice system as an alternative to private resolution of violence within the family, guards against victims perceiving that they need to choose between the two avenues of resolution, and itself provides a crucial opportunity for integrated and holistic responses.²⁰³

C *Improving Engagement with the Justice System*

Migrant communities are also disadvantaged in relation to participating in the justice system in two respects, both internally and externally. First, as previously discussed, they experience social, cultural and language barriers, compounded by a lack of knowledge of the law and the legal system itself, presenting an internal challenge. Second, the justice system in Australia is commonly experienced by cultural minorities as inaccessible.²⁰⁴ The major strategy which can specifically improve the Afghan migrant community's engagement with the justice system is the recognition and promotion of the role of community leaders in using Islamic law to: address family violence; build constructive relationships between community and

¹⁹⁸ Project (n 10) participant 1, male, religious leader.

¹⁹⁹ Ibid.

²⁰⁰ Vaughan et al, *Promoting Community-Led Responses* (n 25) 66.

²⁰¹ See discussion below establishing that a lack of knowledge about Australian law as a barrier to the justice system as well as a potential contributor to the dynamics of family violence. See also *Project Report* (n 9) 22.

²⁰² Hossein Esmaeili, 'Australian Muslims and Citizenship: Sharia Law and the Democratic Nation-State' (2011) 36(4) *Alternative Law Journal* 258, 262.

²⁰³ *The Path to Justice* (n 164).

²⁰⁴ Parkinson (n 59) 279–80.

the government; and educate both the migrant communities and the Australian legal community on Muslim culture, Islamic law, and Australian law on family violence.

1 *The Role of Community Leaders*

The centrality of cultural and religious beliefs as both a risk and a protective factor is significant within many migrant and refugee communities in Australia, particularly Afghan communities and the wider Muslim community. On the one hand, ‘a failure to meaningfully engage faith leaders and communities can be considered as a contributing factor for violence against women and family violence in faith settings’.²⁰⁵ On the other, some community leaders may be responsible for reinforcing cultural and religious views that can contribute to violence or may use their influence in the community to control the actions of community members affected by violence.²⁰⁶ As the victims in these communities commonly seek support from extended family members and their own community leaders, the role of community leaders in shaping responses to and outcomes for family violence is significant.

Within Muslim migrant communities, Imams and community leaders have significant authority in relation to religious and legal matters. One reason for this is the high level of trust which most Muslims in Australia place in their religious institutions.²⁰⁷ The Project results indicate a similar level of trust among the Afghan community, with many women and men commonly viewing their religious leaders as a first port of call for advice on family and personal issues.²⁰⁸ Consistent with existing research on faith leaders and their importance in responding strongly to family violence,²⁰⁹ Imams and other community leaders in the Afghan community are a vital source of support for victims and families. Their counsel is especially sought both pastorally for information on family violence and Islam, and for broader information on what other support or assistance may be available from the legal system. However, several studies show that some religious community leaders do not have effective education, skills and resources to respond to family violence in their communities.²¹⁰ For this reason, other studies have noted the importance of ensuring community and faith leaders are themselves able to access support and

²⁰⁵ Cathy Vaughan and Claire Sullivan, ‘Faith Communities Supporting Healthy Family Relationships’ (Technical Paper, University of Melbourne, 2019) 12.

²⁰⁶ Ghafournia, ‘Muslim Women and Domestic Violence’ (n 6).

²⁰⁷ See Rane et al (n 114).

²⁰⁸ *Project Report* (n 9) 23.

²⁰⁹ See, eg: Truong et al (n 98); Vaughan and Sullivan (n 205); Cathy Vaughan et al, *What Works To Address Violence against Women and Family Violence within Faith Settings* (Evidence Guide, University of Melbourne, 2020); Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, 2014) vol 1, 104. See generally: *Royal Commission into Family Violence: Summary and Recommendations* (Report, March 2016) vol 5, 34; Ghafournia, ‘Muslim Women and Domestic Violence’ (n 6) 146–63; Bartels (n 39).

²¹⁰ See Vaughan and Sullivan (n 205) 24.

training on family violence, its causes and contributing factors, as a key element in violence prevention and response.²¹¹

Bearing in mind that Project participants are community leaders, it is important to note that the majority (10 out of 12) were of the view that community leaders have a pivotal role to play in preventing or reducing family violence in their communities. One participant commented that education should be provided to address the lack of information about law and rights, ideally including information provided by police, and that the community leaders themselves must build a culture that encourages the rights of women.²¹²

Three quarters of Project participants (9 out of 12) described a range of roles for community leaders in preventing and addressing family violence, including raising awareness of family violence and providing information and education about rights and cultural differences. As well as providing information to the community themselves, a small number of participants (2 out of 12) suggested that community leaders have a role to play in organising more formal educational opportunities for community members on building strong family foundations as they saw ignorance as leading to bigger issues within their community. Additionally, some participants (5 out of 12) suggested that community leaders should provide advice and support, including information about Australian law to community members in times of crisis or high need.

Some research indicates that individual religious leaders may themselves be a barrier to help-seeking,²¹³ and this may be true with respect to general Muslim communities in Australia. However, the Project results demonstrate the potential for some religious leaders in the Afghan community to utilise their understanding of Islam²¹⁴ and their own authority as community leaders to act as a bridge to the wider Australian community and especially to the legal system.

2 Strengthening Relationships between Community and Government Institutions

Previous experiences of trauma and persecution which generate mistrust towards the police can likewise lead to a general sense of mistrust and fear of government authorities and the legal system. Community leaders can provide a crucial point of endorsement and connection between their community members and government agencies.

²¹¹ See Truong et al (n 98) 30, 35.

²¹² Project (n 10) participant 1, male, religious leader.

²¹³ Anahid Kulwicki et al, 'Barriers in the Utilization of Domestic Violence Services among Arab Immigrant Women: Perceptions of Professionals, Service Providers and Community Leaders' (2010) 25(8) *Journal of Family Violence* 727, 733; Truong et al (n 98) 21–2.

²¹⁴ However, it should be noted that not all Muslim religious leaders subscribe to a progressive understanding of Islam: see Ghafournia, 'Muslim Women and Domestic Violence' (n 6) 153–4.

The importance of holistic intersectional engagement of service providers and government agencies with migrant, refugee and Muslim communities has been recognised as a means to reduce and respond to family violence. In particular, it reflects a response option that is culturally appropriate, taking Islamic law and other faith-related factors into account.²¹⁵ The Project therefore provided important insight into initial ways forward — most notably in the way in which religious literacy²¹⁶ on behalf of service providers, combined with the involvement of faith and community leaders in both community education and pastoral support — could assist community members to access the justice system.²¹⁷

Several participants (5 out of 12) were of the view that community leaders can have more of an impact on the community than government organisations because the community is traditional and religious. They suggested that community members are more likely to contact community leaders or clergy for help with family violence than other sources of support in the broader community because they feel that their religious and cultural beliefs will be better understood and respected. One participant noted that the government has an important role in educating community members about Australian law.²¹⁸

Some participants (3 out of 12) reported that there is currently a disjuncture between the Afghan community and government organisations. Community leaders are in a prime position to facilitate the development of reciprocal relationships between the community and government organisations, particularly police, that may better protect victims of family violence.

Community leaders' recognition of the justice system as an appropriate option for women experiencing violence to utilise with appropriate safeguards,²¹⁹ and their position as an avenue to the justice system provides opportunities for informed and comprehensive community-led responses to family violence.²²⁰ Research which builds on the Project findings is warranted to enable these opportunities to be further explored.

3 *Education on Islamic Law and Australian Law*

The importance of knowledge of Australian law and Islamic law on family violence was highlighted in the Project results. A number of religious leaders interviewed

²¹⁵ Ibid 158; Truong et al (n 98) 38.

²¹⁶ Ghafournia, 'Muslim Women and Domestic Violence' (n 6); Bartels (n 39); Truong et al (n 98); Beth R Crisp et al, 'Religious Literacy for Responding to Violence and Abuse Involves the Capacity to Go beyond Stereotypes' (2018) 11(2) *International Journal of Human Rights in Health Care* 100.

²¹⁷ Zannettino et al (n 39); Vaughan et al, *Multicultural and Settlement Services* (n 30).

²¹⁸ Project (n 10) participant 2, male, mosque Council Member.

²¹⁹ *The Path to Justice* (n 164).

²²⁰ See generally: Vaughan et al, *Promoting Community-Led Responses* (n 25); Bartels (n 39); Vaughan et al, *Multicultural and Settlement Services* (n 30) 62–3.

stated that community members frequently asked for their advice on the position of Islamic law on family violence. One religious leader who works in a mosque said that he refers women who ask for his religious advice on family violence to leading religious scholars in Qom (Iran), Najaf (Iraq) or Afghanistan.²²¹ Another participant with religious authority noted that all of the women who sought his advice on family violence asked him whether it was prohibited by their religion. He would always counsel and reassure them that family violence is never allowed in Islam.²²²

Surprisingly, it seems that for many members of the community, including the community leaders, obtaining knowledge of Australian law is comparatively easier than for Islamic law. There are different interpretations and versions of the latter, which may lead to confusing and contradictory information by different people. For this reason, informed and rational education on Islamic law and its teachings on the position of women in society is an important part of addressing family violence within this community. One participant considered that more men in the community need to know that women have a high status within Islamic law and for that reason, violence against them is prohibited.²²³

Understanding Islamic law and its position on family violence would involve: first, demonstrating that family violence is against Islamic law as discussed above; and second, providing an explicit connection and entry point to police and support services and the justice system more broadly. These aims would be aided by building on the understanding of the obligation to follow the secular laws of one's community. Some participants (5 out of 12) commented that knowledge of legal rights under Australian law could prevent or reduce some forms of family violence in their community, with one participant noting that such knowledge is one reason why physical violence is not as prevalent in the community. In her view, men do not often use physical violence because they are aware it is against the law, and if it became more widely known that other forms of family violence, such as emotional abuse or coercive control, are also against Australian law, that may similarly reduce the incidence of such abuse.²²⁴

The *sharia* requirement that a country's secular law must be followed allows space for Muslims in Australia to adhere to criminal law and observe any protection orders which may be made. It also makes explicit the entitlement of women to the full protection of the justice system, and therefore demonstrates more clearly to Muslim women that availing themselves of that protection is consistent with the tenets of their faith. Understanding the position of Islamic law alongside Australian law is equally important for Muslims, given that many Muslim women may think that men have rights and privileges in the family relationship which justify family

²²¹ Project (n 10) participant 8, male, religious leader. These two cities in Iran and Iraq are the main centres of scholarship in the Shia world, where religious leaders preside and work.

²²² Ibid participant 5, male, religious leader.

²²³ Ibid participant 3, male.

²²⁴ Ibid participant 9, female.

violence. Yet, as demonstrated from the Project results, a reformed and rational approach to Islamic law condemns it.

The importance of cultural hybridity is evident in the Project results concerning cultural and generational tensions and beliefs regarding gender relations and the role of religion. The literature has also shown that Muslims experiencing family conflict or violence tend to turn to their families, particularly elders, for support and assistance, and then to community elders and leaders, including Imams.²²⁵ Likewise, the results of the Project showed that the Afghan community readily turned to community leaders to address issues of family conflict and family violence. Seeking support and assistance for family violence from community leaders was a way for community members to navigate and address the barriers they faced in engaging with the justice system. For example, community members' concerns about not being understood by welfare and legal organisations or fear of involving authority figures, such as the police, in private family matters could be abated by speaking to community leaders instead of or in addition to these other measures. Turning to community leaders, who often act as gatekeepers and cultural brokers between the Muslim community and the wider community, can enable a cultural hybridity that is 'inclusive, not divisive'.²²⁶ Moreover, it could guard against tendencies in our political and social climate which marginalise and view Muslims in Australia as not fitting within the 'Australian' way or community.²²⁷ Instead, this may be one step toward 'developing a new model of community to fill [the] gap' left by the tendency away from multiculturalism and social inclusion of Muslims.²²⁸ Additionally, the results of this Project potentially provide an important counter-narrative to many myths and stereotypes about Muslims which have been called for elsewhere,²²⁹ and the Islamophobia raised by participants.

VIII CONCLUSION

The Afghan community is a new and emerging refugee and migrant community in Australia which forms part of the wider Muslim migrant community. Similar to other CALD communities, members of the Afghan community experience family violence — the dynamics of which are affected by many factors, but notably protracted war and trauma, religious and cultural issues, arranged marriages and Islamophobia.

²²⁵ See Mehzabin Farazi, *Experiences of the Australian Bangladeshi Muslim Community in Family Dispute Resolution* (LLM Thesis, University of Sydney, 2020).

²²⁶ Graeme Turner, 'After Hybridity: Muslim-Australians and the Imagined Community' (2003) 17(4) *Continuum* 411, 414.

²²⁷ *Ibid.*

²²⁸ *Ibid.* 416.

²²⁹ See: *ibid.*; Suvendrini Perera, 'A Line in the Sea: The Tampa, Boat Stories and The Border' (2002) 8(1) *Cultural Studies Review* 11.

Family violence is not a *sui generis* category in Australian criminal law. Nevertheless, recent reforms have enabled the criminal law to respond to some instances of family violence alongside a national system of civil protection orders which are designed to cover an increasingly broad range of conduct. Despite these developments, Australian criminal law does not have the capacity to respond comprehensively to all forms of family violence. The need remains to ensure that violence experienced by refugee and migrant women is appropriately addressed, as a proportion of family violence offending remains hidden and the multifaceted nature of family violence for these women requires holistic and nuanced responses.

Afghan refugee and migrant communities may experience difficulties in engaging generally with the justice system, and particularly in relation to family violence. The Project investigated these issues within the Afghan community in South Australia using participatory research. Cultural issues, gender issues and Islamophobia, alongside dissatisfaction with police involvement as well as a lack of knowledge about legal rights and the law in Australia were found to be barriers to engaging and participating in the justice system. The Project highlights the centrality of Islamic law, the important role of community leaders, both men and women, and better cooperation between the community leaders and government institutions (including the police) as all being crucial to improving the effectiveness of responses to family violence among the Afghan refugee communities in South Australia. The potential for community education by community leaders and justice system personnel on Islamic law and Australian law as a collaborative primary prevention strategy to redress barriers to engaging with the justice system was clearly demonstrated. It is submitted that this may be broadly applicable to other Afghan communities, as well as other Muslim communities in Australia.

The nature and expression of Islamic law in Australia has been influenced by a variety of factors. Islamic law is subject to various interpretations as well as historical development. Diverse cultural values among Muslim societies represented in Australia also impact upon Islamic law and values. There are some general ambiguous principles in classical Islamic texts which have been used to justify certain controlling and violent behaviours in family relationships. While some of this ambiguity may remain, Islamic law, like other legal systems, has developed in the modern world. With a rational approach, Islamic law condemns all forms of family violence. For this reason, Islamic law, as an inherent part of the culture of Muslim communities in Australia, may contribute to the task of reducing and preventing family violence.

While Islamic law is not recognised in Australia as part of the legal system, a significant finding of the Project and this article, is that it may nevertheless be an important factor in dealing with family violence within Afghan and other Muslim communities due to its status of a code of conduct in Muslim culture. Islamic law influences several dynamics which are key to a targeted and effective response to family violence: leadership and strong involvement of community leaders; education on law; and integrated, community led responses. The Project results, used as evidence to support some propositions in this article, demonstrate that Islamic law, if interpreted and approached rationally and reasonably within Afghan and

Muslim communities, may be a unique and powerful mechanism in preventing and responding to family violence in Muslim communities. Islamic law has the potential to encourage the engagement of community members, particularly women, with the Australian justice system. Once Muslim women understand their rights and are aware that any form of family violence is prohibited by both Islamic and Australian law, some of the concerns which act as barriers to help-seeking may be alleviated, and this assurance will assist them in not only obtaining the protection of their faith but seeing this protection actualised within the Australian legal system.