**Criteria for Civil Nullity of Marriage under the Australian Family Law Act contrasted with Annulments under Jewish, Muslim and Catholic religious laws.**

 Australian Civil Law[[1]](#footnote-1)

The legislative framework for a decree of nullity (or annulment) is set out in the *Marriage Act* *1961* (Cth) and the *Family Law Act* 1975 (Cth).

Under Australian law, a decree of nullity indicates that there was never a valid marriage in the first place. The grounds for nullity are as follows:

* At the time the parties were married, one of them was married to someone else;
* The parties are in a prohibited relationship;
* The parties did not comply with the laws in relationship to marriage in the place in which they were married;
* Either party was not of a legal age to marry;
* Either of the parties did not give their real consent to the marriage because consent was obtained by duress or fraud;
* One party was mistaken as to the identity of who they were marrying or the nature of the ceremony; and
* One party was mentally incapable of understanding the nature and the effect of the marriage ceremony.

The Court will not declare a marriage invalid on the following grounds:

* Non-consummation of the marriage;
* Never having lived together;
* Family violence; or
* Other incompatibility situations.

Subject to certain exceptions, an overseas marriage will be considered valid under Australian law if it was a valid marriage under the local law where the marriage took place.

Making an application for a decree of nullity is not subject to the 12 month separation period that applies to divorce. When the Court grants a decree of nullity, it is effective immediately.

Jewish divorce/annulment

There are two processes in Jewish law to bring a marriage to an end. The first and far less frequently used is an annulment. This involves a Jewish court proclaiming that there never was a marriage between the husband and wife due to a fault in the formal requirements of the marriage ceremony itself or due to significant misrepresentation by one party to the marriage to the other. Annulment is rarely used because Jewish law has a recognised and religiously acceptable pathway to divorce*.[[2]](#footnote-2)*

Jewish law requires that Jewish people follow the law of the land, which means that a civil divorce is also necessary, but this cannot be a substitute for a Halachic[[3]](#footnote-3) separation. So regardless of how long the couple may have lived apart, and no matter how many civil documents they may hold, in the eyes of Jewish law, the couple is still married until released from their marriage bonds by Jewish decree.

The “document of severance” is known as a ‘*get*’ (an Aramaic word). The transmission of this bill of divorce from husband to wife releases the couple from the bonds of matrimony. It is proof of the dissolution of the marriage. It can be particularly important if remarriage is a future option.

As with civil law, the form of the document is important. It must be dated and witnessed, and in it, the husband expresses his intention to divorce his wife. A qualified Jewish person acts as the agent of the husband and composes the *get*, which is individually tailored for each couple. The document must apply expressly to the couple at hand.

The *get* can be written in any language but usually it is written in Aramaic. The *get* is usually written in twelve lines, with participatory signatures required underneath.

Rabbinic law requires the presence of experts, and any *get* not written and transmitted (to the parties involved) in front of experts is invalid. The husband hands it to his wife in the presence of two kosher witnesses. The *Beth Din*[[4]](#footnote-4) official then gives both parties a certificate which confirms their new status. Mutual agreement is a key requirement. If one or other party is unable to be present, an agent or emissary can be appointed.[[5]](#footnote-5)

In the Melbourne *Beth Din*, one of the parties completes the application form and provides a copy to the other party, or perhaps the *Beth Din* will do so. A date for a hearing in front of the *Beth Din* is set, usually in about three to six months’ time, although if circumstances dictate, the process may be shortened. A fee is paid. Once the hearing is over, the *get* is effective. Faced with non-cooperation, the *Beth Din* undertakes discussion and negotiation with a view to obtaining consensus, especially in the areas of finance and children.

If the parties are living apart, there is an unconditional obligation on the husband to give his wife a *get*, and similarly, the wife must receive it. Despite the fact that there is no minimum period of separation in Jewish law, the *Beth Din* prefers that an application for a *get* be made following a civil divorce, and that all issues in dispute already be resolved.

Islamic Divorce/Annulment in Australia

Muslim law (known as Sharia law) generally does not require both partners to consent to divorce in order for the divorce to be final. Muslim women need their husband’s consent to an annulment. Obtaining an Australian civil divorce is not sufficient; unless the couple is divorced under Islamic law, the husband can insist that the wife is still his wife, and she will be unable to remarry. Islamic religious divorces are not recognised in Australian law for the purposes of remarriage.

Neglect, abandonment, failure to provide financially or sexually, cruelty, taking her property, imprisonment, insanity, having leprosy or venereal disease, and failing to treat her as well as he treats his other wives; all are grounds for a woman to obtain a divorce under Sharia law.

A Muslim man can end his marriage simply by announcing “I divorce you” three times. Most jurists say this should be done according to strict guidelines, including that the three pronouncements should occur three months apart and at a time when the woman is not menstruating and the couple have not had sex.

A Muslim man who divorces his wife is supposed to give her a financial settlement, but this does not always occur in practice. A woman who seeks a divorce against her husband’s wishes has no financial rights and has to pay back the marriage dowry. Usually, the mother will obtain custody of a young child.

An informal system operates in Victoria, under the auspices of the Australian National Imams’ Council, an umbrella group of Islamic clerics. The principles espoused are that women should get justice and the welfare of the children is paramount. According to Sheikh Moustapha Sarabiki the National Imams Council “acts as a Tribunal and after deeply assessing the situation, the Tribunal holds the religious authority to issue the wife an Islamic dissolution or redemption”.

Catholic Annulments

A decree of nullity is a declaration by the Church that, at the time the couple attempted to exchange wedding vows, an essential element was lacking in the consent of at least one of them and thus the union which followed such a consent is not considered to be an obstacle to either party remarrying in the Catholic Church.[[6]](#footnote-6)

In Australia, ecclesiastical annulments have no civil effect, and a civil divorce decree must be obtained before any formal action to investigate a marriage may be taken at a Catholic Tribunal. A Catholic annulment usually takes about 12 months in addition to the 12 months required for a civil divorce.

The Church will look at the following five matters:

* The form of the marriage;
* The freedom of the parties;
* The parties’ capacity for entering into marriage;
* Their knowledge of marriage itself and of each other; and
* Their intentions in entering into marriage.

If something is lacking in any one of these areas, a marriage could be declared invalid. A Catholic who has suffered the breakdown of their marriage and has gone through a civil divorce can approach the Catholic Marriage Tribunal to examine the marriage. If they are able to present appropriate evidence that one or more of these elements was lacking, the marriage may be considered appropriate for annulment.

The Catholic Marriage Tribunal conducts an initial interview after which it will make a preliminary assessment as to whether the case is worth pursuing.

Next, the person will be invited to write a “life history” which will give the Tribunal a clear picture of the circumstances in which the marriage was undertaken. Provision of the names of three or four people who are prepared to be interviewed by the Tribunal about their views on the marriage and how it played out is required. There are some costs associated with annulment, although these are heavily subsidised by the Church.

The Tribunal (consisting of several canon lawyers) does not itself annul the marriage. It has an investigative role. There are only two findings open to it:

* “Proven not binding for life”; and
* “Not proven” in which case the marriage in the Church’s eyes continues to be binding for life.

If the former, the case is forwarded to the Appeal Tribunal of Australia and New Zealand for a second judgment. In front of three canon lawyers, it must receive affirmative judgment from at least two of these. If the decision is in the affirmative, a decree of nullity is issued. According to canon lawyer and member of the Tribunal, Rev Father Ian Waters [[7]](#footnote-7), the system is attracting criticism at present due to the length of time involved in obtaining an annulment, and many hope that the forthcoming synod in Rome may recommend a streamlining that will reduce the length of time involved.

1. ###  English Common Law did not provide for annulment. Prior to the mid-nineteenth century, the only Courts in England with the power to annul an invalid marriage, where fairness required it, were the ecclesiastical Courts. In Australia, prior to the Family Law Act, a marriage could be declared void (no marriage at all). A voidable marriage was considered a valid marriage until it was annulled by judicial decree. The advent of the *Family Law Act* in 1975 ushered in the current status (according to A Dickey’s *Family Law* [2007] which is that a decree of nullity can now be made only if a marriage is void. The FLA abolished prospectively voidable marriages.

 [↑](#footnote-ref-1)
2. Sam Tatarka, Barrister, Foley’s List [↑](#footnote-ref-2)
3. Halakha, Jewish religious law. [↑](#footnote-ref-3)
4. A ***Beth Din***  is a rabbinical court of Judaism. In ancient times, it was the building block of the legal system in the Biblical Land of Israel. [↑](#footnote-ref-4)
5. http://www.chabad.org/library/article [↑](#footnote-ref-5)
6. http://www.cam.org.au/Tribunal [↑](#footnote-ref-6)
7. Very Rev Prof Ian Waters M Church Admin (CUA) JCL (St Paul, Ottawa) MCL (Ottawa) JDC (Ottawa) PhD (Ottawa) is the Emeritus Judicial Vicar (Presiding Judge) of the Catholic Tribunal for Victoria and Tasmania. He is a Senior Fellow of Catholic Theological College and a member of the Department of Moral Theology and Canon Law [↑](#footnote-ref-7)