
WRITTEN EVIDENCE SUBMITTED BY DR NORTON AN DR AHMED

TO: RT HON KEITH VAZ MP
FROM: DR JANE CALDERWOOD NORTON AND DR FARRAH AHMED
SUBJECT: HOME AFFAIRS COMMITTEE'S INQUIRY ON SHARIA COUNCILS.
DATE: JULY 20, 2016

INTRODUCTION

We are writing to contribute to your inquiry on sharia councils. We are legal academics with a specialization in religion and the law. We recently published an article on religious tribunals (specifically sharia councils): 'Religious tribunals, religious freedom, and concern for vulnerable women' (2012) 4 Child and Family Law Quarterly 363-388.

Dr Jane Calderwood Norton (Auckland Law School) is a British citizen with a doctorate in law from the University of Oxford. She has written a monograph on religious organizations that examines the relationship between English law and religious organizations (including sharia councils) and the position of vulnerable women within these organizations: *Freedom of Religious Organizations* (OUP 2016).

Dr Farrah Ahmed is an Associate Professor at Melbourne Law School, University of Melbourne. She has written on religious dispute resolution processes in the United Kingdom (UK), Canada and India and is currently a Chief Investigator on an Australian Research Council Discovery grant studying these processes. Her book on religious personal laws systems in family law was published earlier this year (*Religious Freedom under the Personal Law System*, OUP 2016).

SUMMARY

Our evidence addresses four of your inquiry's Terms of Reference:

1. The relationship between sharia councils and the British legal system.
2. The services offered by sharia councils and the reasons why they are used.
3. The extent to which sharia councils might discriminate against women.
4. The role that the government could have in overseeing sharia councils.

We conclude:

1. Sharia councils have no official role in the British justice system. They can operate under the Arbitration Act 1996, but only in certain areas of law.
2. Sharia councils operate in diverse and complex ways. Sharia councils can offer services which supplement and complement state family law. They supplement

British law by facilitating mediation agreements. All mediation agreements related to the family are scrutinised by civil courts before they are enforced. They complement British law by advising on family matters and resolving disputes that are not legally cognizable (for example release from religious marriages). They also offer services which support religious practices and religious freedom.

3. While sharia councils can potentially discriminate against women, they also offer advantages to women.
4. Government actors should take care not to assume that the activities of sharia councils are harmful, dangerous or discriminatory towards women. Where there is evidence that the activities of sharia councils are harmful or discriminatory towards women, the government should encourage individuals to make better use of the British legal system, if this would serve their interests better. More generally, the state should seek to inform users of sharia councils of their rights and options under the British legal system.

1. THE RELATIONSHIP BETWEEN SHARIA COUNCILS AND THE BRITISH LEGAL SYSTEM

- 1.1 Sharia councils have no official role in the British legal system. The law does not prohibit private individuals or groups (family members, friends, experts etc.) from deciding disputes between parties: such decisions are simply neither recognized nor enforced by law. The parties to the dispute are not legally bound to this decision. This is true of many disputes decided by sharia councils as well.
- 1.2 Sharia councils also offer religious rulings, and recognise and change religious relational statuses like *religious* divorce and *religious* marriage. The religious rulings of sharia councils, are not legally binding. When sharia councils recognize or change a person's *religious* marital status, this does not, in itself, change their *civil* marital status.
- 1.3 Some sharia councils provide mediation services – an informal, voluntary and non-binding method of dispute resolution, which can be informed by religious principles. Some also offer civil arbitration services involving civil disputes – such as those in contract or tort – and operate within civil law but usually imbued with religious norms.

Arbitration

- 1.4 Sharia councils can sit as arbitral tribunals in respect of civil disputes, in which case the Arbitration Act 1996 will apply. As with any other arbitration body, religious or otherwise, any decision made is then considered an arbitration award and legally enforceable in civil courts provided it complies with the requirements of the Act. The parties can agree to be bound by certain religious norms rather than English law or the rules of a national legal system.ⁱ Arbitration agreements will be unenforceable where they are considered by the courts to be unreasonable or contrary to public policy.ⁱⁱ There is also a general duty on arbitrators to comply with principles of natural justice – they must act fairly and impartially and avoid unnecessary delay or expense.ⁱⁱⁱ Only one sharia council currently operates under the Act: the Muslim Arbitration Tribunal. The decisions of the rest are not legally binding and depend on the parties to implement them.^{iv}
- 1.5 The Arbitration Act does not, however, extend to all areas of law; it is confined solely to civil disputes. It would not replace criminal prosecutions and would not oust the jurisdiction of civil family courts. This is because the Act preserves certain matters to be governed by the common law. Moreover, the jurisdiction of civil family courts cannot be ousted by contractual agreement. Other statutes protect the jurisdiction of the civil courts in relation to family matters. Section 34 of the Matrimonial Causes Act 1973, prevents any party from using a maintenance agreement to restrict the right to apply to a court for an order containing financial arrangements and it is arguable that s 10 of the Children Act 1989 implicitly preserves the jurisdiction of the court to make orders with respect to the welfare of children in family proceedings.^v The protection of the jurisdiction of civil courts in these matters applies to all such settlements of family disputes – whether arrived at through a sharia council or any other body.
- 1.6 Recently the High Court has been willing to endorse and facilitate the use of **non-binding** religious arbitration to reach an agreement regarding both children and financial arrangements on the breakdown of a marriage. In *AI v MT*^{vi} the court explicitly supported the parties' proposal to refer their dispute to arbitration before the New York Beth Din. **The judge made it clear, however, the while the outcome of that process was likely to carry considerable weight with the court, it would not be binding and would not preclude either party from pursuing applications to the court in respect of any of the matters in issue.**^{vii} Before doing so, the judge requested further information as to the principles and approach to be adopted by the rabbinical authorities to resolving disputes.^{viii} The judge observed that this arrangement avoided antagonism between the religious and secular elements of society. The court was able not only to accommodate the parties' wish to resolve their dispute by reference to their religious authorities, but also to support that

process at crucial stages.^{ix} To the judge's mind, '[t]he parties' devout beliefs had been respected. The outcome was in keeping with English law whilst achieved by a process rooted in the Jewish culture to which the families belong.^x

- 1.7 While there is currently some uncertainty about the precise weight courts will give arbitration awards in family disputes,^{xi} it is clear that (with the exception of awards on inheritance disputes) such awards are not legally binding. It is also clear that the family court's jurisdiction cannot be ousted. A *dispute* concerning a family matter (rather than simple enforcement of an arbitral agreement) would be within the jurisdiction of the family court and where a party wished to avoid the arbitral award and invoke the jurisdiction of the family court to resolve the dispute, they can still do so.

Consent orders

- 1.8 Regardless of whether sharia councils can conduct binding family law arbitration, it is clear that sharia councils can assist parties in *negotiating* agreements outside of the auspices of the Arbitration Act on matters ancillary to a divorce such as child contact or financial arrangements. Such agreements are not legally binding until a draft consent order embodying the terms of any agreement reached through the council is approved by the courts. This is because a tribunal cannot fetter the discretion of the family courts and therefore such agreements are considered as evidence in the exercise of the courts' discretion.^{xii} The court will question any agreement that appears unfair, including those that are unconscionable or go against English law regardless of how it came about.^{xiii} In the case of orders for residence or contact, for example, the court must examine the proposed order in accordance with the Children Act 1989 under which the child's welfare is the paramount consideration. In the case of financial orders, the court must apply the relevant provisions of the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004.

2. THE SERVICES OFFERED BY SHARIA COUNCILS AND THE REASONS FOR WHY THEY ARE USED

- 2.1 Sharia councils supplement or complement rather than conflict with British law and its institutions. By supplement, we mean that they add to existing family dispute resolution mechanisms by providing services, such as mediation services, in addition to those that already exist and which support the civil family law system. By complement, we mean that they resolve disputes or advise on non-contentious matters that the State is unable to resolve.
- 2.2 Sharia councils also support religious practice, and are important for religious freedom. They do so in four main ways: as a source of religious knowledge or

guidance; by changing and recognising religious statuses; by supporting communal aspects of religion; and by providing religious adjudication.

Religious knowledge or guidance

- 2.3 Access to religious knowledge and expertise is an important aspect of religious freedom, especially for Islam where there is scripture, authorities, rituals and rules over which one can have varying degrees of expert knowledge.^{xiv} Those who want to practise their religion often require expert advice in order to do so. Religious tribunals regularly make rulings and provide guidance on aspects of religious practice. For instance, sharia councils produce expert reports - sometimes referred to as *fatwa* - on matters of Muslim religious doctrine and custom.^{xv} Research on these councils suggests that they spend a significant portion of their time issuing such *fatwa*.^{xvi} Jewish religious tribunals perform a similar function.

Religious statuses

- 2.4 Sharia councils can enhance religious freedom by changing and recognising religious statuses. Religious practice often presupposes a certain religious status. 'Religious status' can mean both one's status as a member of that religion (ie as a Jew, Muslim, Christian, Sikh, Parsi, etc) and as having a relational status (as married, divorced, father, mother, brother, adopted child, etc). Both kinds of statuses are often necessary to engage in religious practice.
- 2.5 Sharia councils are particularly important because they change and recognize these statuses in ways that a secular court cannot. Their remit includes conversions, recognition of religious status, religious marriages and religious divorces. For example, Muslim converts who wish to perform the hajj are required by the Saudi Arabian authorities to provide a certificate confirming their status as Muslims notarised by an 'Islamic Center.'^{xvii} Sharia councils may perform this function. They also play an important role in recognising and changing relational statuses like divorce and marriage. A secular divorce is not necessarily the equivalent of a religious divorce (and, of course, civil courts cannot grant religious divorces). Therefore a person who wishes to have a second religious marriage may not be able to do so without the assistance of a sharia council. The majority of cases before sharia councils come from women seeking a divorce because they have been unable to obtain one from their husbands.^{xviii} These cases often concern couples who were not married under British law and therefore the civil courts have no jurisdiction regarding the status of their marriage.^{xix} A religious divorce delivered by a sharia council therefore allows a woman to 'satisfy relatives and neighbours (and perhaps herself) that she has not sinned'.^{xx}

Community

- 2.6 Sharia councils support the communal aspects of religion by forming the centre of a religious community. They can provide the infrastructure and the organization that a religious community needs to give effect to their communal aspirations. The wide-ranging roles performed by these councils – dispensing religious advice and guidance on a range of matters, certifying food, recognising and changing religious statuses and providing dispute resolution services – show that they are often the nerve-centre of their community. This communal aspect of religion is especially important for minority religious groups which may not have as many opportunities for communal activities as larger religious groups, such as those connected to the established Church of England.

Adjudication

- 2.7 Some people consider adjudication by religious tribunals a religious duty. Sharia councils thus enable individuals to perform a religious duty that they consider important.^{xxi} The fact that some consider religious adjudication a religious duty, however, also raises concerns for vulnerable women.

3. THE EXTENT TO WHICH SHARIA COUNCILS MIGHT DISCRIMINATE AGAINST WOMEN

- 3.1 While sharia councils can potentially discriminate against women, they also provide advantages to women.

Potential for discrimination against women

- 3.2 Sharia councils differ in how they operate. Empirical research into how sharia councils operate, however, does show that the decisions or processes of these councils may, in some cases, lead to injustice. Women may not be aware of their entitlements under civil family law and thus accept decisions or recommendations of their sharia council that are inconsistent with these entitlements.
- 3.3 In addition to potential injustices in the substantive norms applied, the processes of sharia councils can lead to injustice. Women may be coerced or manipulated into participating in reconciliation sessions with their husbands even though they were reluctant to do so. This can include instances where the wife has an existing injunctions issued against her husband on the grounds of violence. Mediation in family law cases can be problematic because it may be conducted in accordance with religious principles that prioritise keeping a marriage together even where there are allegations of spousal abuse.^{xxii} Nor is this only a concern with sharia councils, similar concerns have been raised with

respect to other religious communities.^{xxiii}

Advantages for women

- 3.4 Sharia councils provide advantages for women, including in some cases, greater access to justice for women than the civil court system. Because of the functions they perform, sharia councils are sometimes better-placed than civil courts to consider the welfare of religious women. Civil law may be incapable of resolving family disputes and assisting some women because it does not recognize certain aspects of religious family law or ritual.^{xxiv} Where the civil family court does not recognize a religious marriage, for example, it cannot then grant a civil divorce.
- 3.5 An example of where a sharia council may provide an advantage for women is with the problem of so-called 'limping marriages'. Here a husband refuses to give his wife a *talaq* (religious divorce) despite having obtained a civil divorce. Such refusals can create situations of great hardship and leave women unable to remarry without violating the tenets of their religion while the husband is free to enter a polygamous union.^{xxv} In response to problems such as these and other difficult marital disputes - which the civil authorities are unable or unwilling to resolve - sharia councils can step in and resolve these disputes in accordance with Islamic family law, without breaking English law. Sharia councils can therefore enable a person to leave an unhappy or abusive marriage.^{xxvi} In addition, sharia councils can potentially award financial relief to a woman obtaining a religious divorce where she was prevented from making a claim against her husband in the family court because the marriage was not recognized under civil law.

4. THE ROLE THAT GOVERNMENT DOES, OR COULD, HAVE IN OVERSEEING SHARIA COUNCILS

Current state oversight

- 4.1 Generally, where parties seek to enforce the decisions of a sharia council in a civil court, the processes and decisions of sharia councils may be scrutinized by courts. (The case of *AI v MT*^{xxvii} mentioned earlier relating to a Jewish Beth Din is an example of how this may happen.) Where the parties have agreed to submit a dispute to arbitration, the Arbitration Act applies standards of fairness and impartiality to arbitrations.^{xxviii} Civil courts also question the legality of a

religious tribunal award or the way in which it was procured if it were contrary to public policy.^{xxix}

- 4.2 Courts will also scrutinise settlement agreements before issuing consent orders in family matters. Settlement agreements may result from mediation services operated by sharia councils where they use religious principles to guide the parties towards a settlement. In mediation, however, decisions are not supposed to be imposed on the parties and nor is the mediator supposed to rely on the interpretation and application of rules or make rulings. Instead, the parties should arrive at any agreement themselves. This agreement will have legal status only if it is a valid contract and is thus ratified by the courts. In relation to family settlements, a consent order would not be issued where the agreement appeared to be manifestly unjust. For example, where finances or children are involved, one judge has explained that the court is 'very paternalistic on money' and is likely to declare an arrangement unfair even if the wife has agreed to it. The court will 'be reluctant to agree to a settlement where', for example, 'the wife surrenders her right to come back and ask for maintenance ... at a later stage, should conditions change.'^{xxx} Thus where parties wish the State to enforce a mediation agreement arrived at through the assistance of a sharia council, the State still retains ultimate authority by subjecting the agreement to scrutiny before granting a consent order. This oversight provides some manner of protection against unjust agreements. Thus John Bowen's excellent new book on sharia councils concludes:

'Shari'a councils do not, then, produce documents that are rubber-stamped in civil court, as some charge. Judges accept, indeed encourage, agreements between husbands and wives about children and assets, but judges inspect such agreements to see if they are fair and in the best interests of the child. English justice abides by its own rules and principles.'^{xxxi}

- 4.3 Nonetheless, there is still activity of sharia council that is beyond the scrutiny of state courts either because the disputes concern matters not legally cognizable (eg religious divorces) or because neither party wishes to bring the matter to a state court (eg spousal maintenance or child custody disputes). This leaves a large area of sharia council decision-making outside the oversight of the state.

The need for further state oversight?

- 4.4 Government actors should take care not to *assume* that the activities of sharia councils are harmful, dangerous or discriminatory towards women. They should be particularly careful not to be swayed in their evaluation of these activities

by prejudice towards Muslims or Muslim organisations, or implicit biases against these groups.

- 4.5 The government should be mindful of the fact that sharia councils may, in some cases, be better placed than government to serve the interests of those approaching these councils. For example, as already explained, the state is not in a position to help women seeking religious divorces, while sharia councils are.
- 4.6 Where there is evidence that the activities of sharia councils are harmful or discriminatory towards women:
- 4.6.1 If the activities of sharia councils have been genuinely consented to by those using them, then the government should consider whether it may be inconsistent with the liberal values underpinning the British constitution to prohibit these activities.
- 4.6.2 It would not be illegitimate, however, for the government to *encourage* individuals to make better use of the British legal system, if this would serve their interests better. In such cases, the government could encourage religious group members to have their disputes resolved within the state system by running campaigns to make them aware of their rights within that system.^{xxxii}
- 4.7 More generally, the state should seek to inform users of sharia councils of their rights and options under the state legal system.

Dr Jane Calderwood Norton
Dr Farrah Ahmed

ⁱ Arbitration Act 1996, s 46(1)(b); *Halpern v Halpern* [2008] QB 195 (Jewish law applied to the compromise agreement).

ⁱⁱ Arbitration Act 1996, s 81; *Soleimany v Soleimany* [1999] QB 785.

ⁱⁱⁱ Arbitration Act 1996, s 33.

^{iv} These decisions may, however, be 'enforced' through community and social pressure.

^v [2013] EWHC 100 (Fam).

^{vi} [2013] EWHC 100 (Fam).

^{vii} *ibid* [15].

^{viii} *ibid* [12].

-
- ix *ibid* [35].
- x *ibid* [37]. The judge quoted Archbishop Rowan Williams' 2008 lecture 'Civil and Religious Law in England: a Religious Perspective' that 'citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land, to the common benefits of secular citizenship' (at [35]).
- xi L Ferguson, 'Arbitration in Financial Dispute Resolution: The Final Step to Reconstructing the Default(s) and Exception(s)?' (2013) 35 *Journal of Social Welfare and Family Law* 115-138.
Ferguson, L., (2015) Case Comment on *S v S* [2014] EWHC 7 (Fam): 'Arbitral Awards: A Magnetic Factor of Determinative Importance, Yet Not To Be Rubber-Stamped?' *Journal of Social Welfare and Family Law* 99.
- xii Matrimonial Causes Act 1973, s 7.
- xiii Parliamentary debates also show a firm belief that English law takes precedence over religious law. See Jack Straw MP, *Hansard*, HC Deb, vol 483, col 866W (24 November 2008); Lord Bach, *Hansard, Lords Debates*, vol 705, col WA247 (24 November 2008) and vol 705, col WA81 (6 November 2008). Such consent 'will not easily be given to any arrangement that is not satisfactory.' Lord Bach, *Hansard, Lords Debates*, vol 711, col 297 (7 June 2009).
- xiv Access too such knowledge, and thus access to religious tribunals, may therefore be particularly important for Judaism and Islam.
- xv Bano, 'Islamic family arbitration, justice, and human rights in Britain' 2007 (1) *Law, Soc Just & Gbl Dev Jnl* 1, at 10.
- xvi Bano, 'Islamic family arbitration, justice, and human rights in Britain' 2007 (1) *Law, Soc Just & Gbl Dev Jnl* 1, at 23.
- xvii <http://www.saudiembassy.net/services/umrah_visas.aspx> accessed 18 July 2012.
- xviii Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce, and Sharia* (Nuffield 2001), 9-10.
- xix Half of the cases dealt with by the Birmingham Sharia Council concerned couples who are not married under English law: Douglas (n 3) 6.
- xx John Bowen, 'Private arrangements "recognizing sharia" in England' *Boston Review* (March/April 2009) available at <[www.http://bostonreview.net/BR34.2/bowen.php](http://www.bostonreview.net/BR34.2/bowen.php)> accessed 25 February 2016.
- xxi The tribunals themselves see their role as performing a religious duty: Cardiff report, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff 2011) 48: 'All of the institutions studied see their work as a religious duty. They regard themselves as providing important mechanisms for the organization of community affairs and the fulfilment of community need.'
- xxii *ibid*; Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce, and Sharia* (Nuffield 2001), Bowen (n xx).
- xxiii Bowen, *ibid* ('researchers have reported similar forces at work in Hindu families, and one might ask whether persons embedded in Anglican or Catholic networks also experience pressure to make marriages work').
- xxiv For a more extensive discussion of how English law fails to recognise certain aspects of Muslim family law, see Pearl and Menski (n 10) Chs 6, 9 and 10.
- xxv Douglas (n 3) 142-143.
- xxvi Bowen (n 3) 413.
- xxvii [2013] EWHC 100 (Fam).
- xxviii Eg Arbitration Act 1996, ss 1, 4, and 33 and sch 1.
- xxix *Soleimany v Soleimany* [1999] QB 785.
- xxx Bowen (n xx).
- xxxi John R Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shari'a Councils* (Princeton University Press 2016) 183

xxxii See, for example, *Leela Förderkreis E V v Germany*, App no 58911/00 (6 November 2008) where the ECtHR found that the German government's lack of neutrality towards particular religious associations by launching 'a large-scale information and education campaign' warning adolescents of their dangers was not an unjustified interference with the applicant associations' Article 9 right to manifest their religion. The court considered that any interference with the applicant associations' right was in pursuit of legitimate aims – namely the protection of public safety and public order and the protection of the rights and freedoms of others – and was not disproportionate. See also the recommendations made by Marion Boyd in her review of Ontario's Arbitration Act for the Attorney General: *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (December 2004) <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>> accessed 26 February 2016. For example, Recs 25-30 recommend public legal education initiatives to meet 'the need for useful, accessible information so vulnerable women ... are aware of their legal options to resolve disputes' (at 138).