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Executive Summary

- Research conducted by the authors in 2010-11 exploring the marriage and divorce jurisdiction of three religious tribunals, including the Shariah Council of the Birmingham Central Mosque, found that adherents made use of the Council’s marital jurisdiction in order to obtain licence to remarry within their faith.

- Those who had entered into a civil marriage were expected to have obtained a civil divorce before seeking an Islamic divorce. However, over half of the cases involved couples who had either not married under English civil law or had married abroad and whose marital status in English law was unclear. Such litigants have limited remedies under English civil law.

- The Cardiff research showed that the issues raised by the existence and operation of Shariah councils are not unique to Islam and that the different religious tribunals we studied (Roman Catholic, Jewish and Islamic) had much in common in relation to marital disputes.

- Each of the tribunals we studied firmly recognised and supported the ultimate authority of civil law processes when it came to marriage and divorce and none sought greater ‘recognition’ by the State

- The research concluded that there is a need primarily for greater education rather than legal reform. If reform is considered necessary, we advocate a system based on registration and regular inspections and we strongly contend that the approach taken in the Arbitration and Mediation Services (Equality) Bill, introduced into the House of Lords by Baroness Cox, should be avoided. We have included as an appendix a draft Bill, which we have previously published, which seeks to overcome the misunderstandings found in Baroness Cox’s Bill.

Written Evidence
1. This written evidence is based upon the ‘Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts’ research project (the ‘Cardiff project’) conducted in 2010-11 funded by the AHRC/ESRC Religion and Society Programme, and subsequent research and publications by the authors at Cardiff University.¹ The Cardiff project, conducted by a multi-disciplinary team of researchers at Cardiff Law School and the Centre for the Study of Islam in the UK at Cardiff University, consisted of a year-long study, which explored how religious law already functions alongside civil law in the area of marriage and divorce. The project examined the workings of three religious tribunals in detail: the Catholic National Tribunal for Wales, the London Beth Din and the Shariah Council of the Birmingham Central Mosque.² The project built upon a long-standing interest in the interaction between religious law and State law at Cardiff University which is home to the LLM in Canon Law (the first degree of its type since the Reformation), the Centre for Law and Religion (the first research centre dedicated to the subject in the United Kingdom) and the Interfaith Legal Advisers Network (the first UK association for those who advise religious groups).

2. At the outset, we would like to stress that the three case studies should not be considered to be ‘typical’ or ‘representative’ of Jewish, Christian or Islamic tribunals in general. This is because there is no monolithic community representing the entire body within any of the three faiths we studied. There is a multiplicity of religious tribunals within the different communities in terms of the basis of their authority and adherence by those using these tribunals. Different communities within these faiths may have their own religious tribunals ruling on matters relevant to their adherents. Moreover, since our empirical investigation consisted mainly of interviews with tribunal personnel, the data collected derives from the perspective of the tribunal rather than of the users. This is an area where further research is needed.³

¹ Our published report can be found at http://www.law.cf.ac.uk/clr/research/cohesion.html. The research team was led by Professor Gillian Douglas and also included Professor Norman Doe, Professor Sophie Gilliat-Ray, Dr Russell Sandberg and Asma Khan.
² This spelling of the word ‘Shariah’ is used throughout this written evidence since it was the spelling adopted by the Muslim Shariah Council we studied.
³ There is very limited empirical research in relation to users, confined to shariah councils: see S Shah-Kazemi, Untying the Knot: Muslim Women, Divorce and the Shariah (Nuffield Foundation, 2001), S Bano, Muslim Women and Shari’ah Councils (Palgrave, 2012) and J R Bowen, On British Islam (Princeton University Press, 2016).
3. We would like to provide answers to the following questions raised in the call for written evidence:

**Question 1: The Services offered by Shariah Councils and the Reasons why they are Used**

4. The Cardiff Project carried out a number of interviews and observational studies at the Shariah Council of the Birmingham Central Mosque. The Council shared a meeting room with the Mosque’s Family Support Service. This meeting room was furnished in a modern style with desks, computers, filing cabinets etc and obviously functioned as a working office. At the time of our research, the Council had been operating for approximately ten years. It was originally set up as a personal initiative of the current chairman of the Mosque which was approved by the Central Mosque’s Council of Management.4

5. The Shariah Council had four members (including one woman), all of whom were volunteers. The panel was chaired by the chairman of the Mosque as the fourth member. The members of the Council were chosen by the chairman of the Mosque on the basis of their knowledge of the Qur’an and Sunnah and also to ensure that the Council membership reflected different backgrounds.5

6. The Council provided rulings, guidance and advice on a range of issues including inheritance issues and requests to learn more about Islam.6 However, about ninety percent of the Council’s time was spent dealing with marital issues. The applicants were almost always wives. In terms of its jurisdiction to terminate a marriage according to Islamic law, the council had to be satisfied there were valid grounds for declaring the marriage over, based on evidence submitted by the applicant and in light of any conflicting evidence from the other spouse.

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4 The Council of Management was elected every year and any major changes require the consent or sanction of the Council of Management.
5 In particular, the chairman of the Mosque was keen to select members who are not bound by a particular school of thought. No formal qualifications were necessary.
6 Council members are approached on matters such as conversion. Questions concerning status are dealt with by the chairman of the Mosque.
7. Cases presented to the Council were first dealt with by the Family Support Service. Two members of staff (both part time) were responsible for sifting the material and reaching a conclusion as to whether the case should be put to the Shariah Council. Where it was decided that a case should be put to the Council, a report was compiled setting out the basis of the case and three letters would then be sent out at monthly intervals inviting the other party (typically the husband) to appear. Where the applicant had had a civil divorce then only one letter would go to the other party as a courtesy. Where there had not been a civil divorce (usually because the marriage was not registered under civil law), the three letters were sent out by recorded delivery to try to ensure that the person had received notice of the proceedings.

8. The case proceeded once the three letters had been sent. Commonly, the husband did not appear. In the hearing itself, the parties could be represented by a solicitor, but this was very rare; more usually, an applicant was represented by a relative (usually male) or would represent herself and might be accompanied by a relative or friend. People other than the parties were occasionally called to give evidence, including children. The Council had not called any expert witnesses to date. If, as was rare, the husband appeared at the hearing, he and the wife were not heard within the Council itself at the same time, but sequentially – so they did not have the opportunity to hear and comment directly, much less cross-examine, on what each other or any witnesses said. Nor were they necessarily informed of what the other might have said or written about them.

9. The focus was on determining whether the marriage was no longer workable and there was a mandatory mediation stage prior to a ruling being given to see if the marriage could be saved, conducted by the Family Support Service. Proof that the marriage was not workable was based on grounds which, like English civil law, might include fault factors. Where a civil divorce had been obtained, this in itself was taken as proof of irretrievable breakdown; the decision by the Council was sought to provide reassurance that the parties could remarry within their faith. Those who had entered into a civil marriage were expected to have obtained a civil divorce before seeking an Islamic divorce. The council would not usually grant its divorce until the civil divorce had been obtained. Over half of the cases dealt with by the Shariah Council that we
studied involved couples who had either not married under English civil law or had married abroad and whose marital status in English law was unclear.7

10. The Shariah Council met monthly, usually for about three to four hours at a time. Each case took around five to six minutes given the preliminary work provided by the Family Support Service. The Council dealt with around 150 cases a year. The Council worked by consensus or by majority decision in the rare case of there being a dissenting voice. No reasons for decisions were given. Prior decisions were not understood as constituting binding precedents. As one interviewee remarked: ‘From a practical point of view, our practical experience, things are not that complicated that we are looking for precedents or anything. There are very similar situations, just recurring situations along the same pattern.’

11. Parties were free to take their case to another Shariah Council if they were unhappy with the Council’s decision.8 This was not as a form of appeal but highlighted the phenomenon of ‘forum shopping’. The absence of a court hierarchy in the Muslim community studied (as well as in the Jewish community) meant that litigants could, to some extent, choose which council they go to according to the way in which (they think) Islamic law will be applied to them or to what they perceive will be the extent of recognition of the Council’s decision across their community. As one interviewee at the Shariah Council commented: ‘because there are different schools of thought and there are different views ... they’d say well if somebody doesn’t agree with a decision they’ll say “well what does he know?” ... When you have different mosques I suppose people go to different places don’t they? Where they feel comfortable with, where they feel they would accept the decision from and where they think they’ve been understood’. When we asked one of our interviewees at the Shariah Council whether this forum shopping concerned them, their response was as follows: ‘It doesn’t cause problems for me because ultimately the decision is theirs, which is what I say to them, it’s up to yourself. ... If they can choose to go with what this mosque is saying and if a mistake has been made then the sin would be on the members who have made that decision with that information.’

7 Recognition of an overseas marriage depends on capacity and domicile, and some marriages (e.g. potentially polygamous) might not have been recognized as valid.
8 Other Councils may come back to the original Council to verify any evidence and the Council’s original decisions.
12. The Shariah Council, like the other two tribunals we studied, derived its authority from its religious affiliation, not from the State, and this authority extended only to those who chose to submit to them. Adherents made use of the Council in order to obtain licence to remarry within their faith. For believers, being able to remarry within the faith served both to enable them to remain within their faith community and to regularise their position with the religious authorities. All of the institutions we studied saw their work as a religious duty. They regarded themselves as providing important mechanisms for the organisation of community affairs and the fulfilment of community need.

**Question 3: The Relationship between Shariah Councils and the Legal System**

13. Unlike many European countries, English law does not include detailed registration schemes for religious groups. However, this does not mean that religion is not regulated. Although registration is not compulsory under English law, a multitude of overlapping laws have been enacted to recognise and regulate both religious groups and religious individuals, enabling them to benefit from legal and fiscal advantages. English law tends to provide recognition of religious institutions and their laws rather than their courts. As a matter of public law in England and Wales, the variously styled courts and tribunals of all religious communities other than the Church of England are not subject to review by the courts of the State. Religious bodies other than the Church of England are regarded as voluntary associations. Their rules and structures are binding on assenting members as if they had been bound by contract; the courts of the State will exceptionally intervene to enforce the laws of a religious group, or the decision of a body within it, where there is a financial interest and in relation to the disposal and administration of property, or where a civil right is involved.

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14. The Cardiff project found that none of the institutions we studied operated under the Arbitration Act 1996 in relation to their divorce jurisdiction. Their authority to rule on the validity/termination of a marriage did not derive from the parties’ submission of their ‘dispute’ to the Council (indeed, there may be no dispute). We are only aware of one Muslim tribunal, the Muslim Arbitration Tribunal, which makes use of the Arbitration Act 1996.

15. Typically, those who approached the religious tribunals in the study were seeking a termination of their religious marriage. Those who were married under English civil law usually had already sought a termination of their civil marriage through the civil law of divorce. All three institutions expected the parties to obtain a civil divorce, if applicable, before seeking a religious termination. However, as noted above, the Shariah Council dealt with a significant number of litigants who did not have a marriage recognised under English law. It is clearly a matter of concern that these people have little redress under English civil law, which currently offers few financial remedies to cohabiting couples.

16. Popular understandings of religious tribunals often stress their coercive nature. However, our research showed that each of the institutions firmly recognised and supported the ultimate authority of civil law processes when it comes to marriage and divorce and none sought greater ‘recognition’ by the State. The Shariah Council advised parties to make use of the civil courts to resolve disputes regarding ‘ancillary’ matters (that is, those relating to the consequences of the ending of the marriage in relation to arrangements for the parties’ children, or money and property). However, it did advise the parties on what should be done with mahr (dower).

Question 7: Comparisons between Shariah Councils and Similar Institutions for other Faiths

17. The Cardiff study innovated by providing a comparative account of three particular religious tribunals across the Abrahamic faiths. Our research showed that the issues raised by this Shariah Council were not unique to Islam. It also underscored that in
some respects the Shariah Council studied had more in common with State institutions than the other tribunals. For instance, it could be said that the Shariah Council had a view of the process closest to the basis of current English divorce law as both focus on whether the marriage has ‘irretrievably broken down’, using a combination of fault and no-fault facts to establish this.

18. Given the common legal framework that applies to religious groups and their tribunals as voluntary associations, it is important that the effect upon all religious tribunals of any reform, support or education offered in respect of Shariah Councils is fully considered. This requires further research given that we currently do not have a thorough understanding of how religious rules are applied by different communities within the Abrahamic faiths let alone how they are applied in respect of other religions or beliefs.

**Question 9: The Role that Government has, or could have, in Overseeing or Monitoring Shariah Councils**

19. The Cardiff project found that, although there were clearly areas of concern (particularly the problem of non-registration of Muslim marriages under civil law), there was a need primarily for greater education rather than legal reform. Our subsequent publications, however, endorse Ayelet Shachar’s call for the recognition of ‘joint governance’, that is, the recognition that religious group members feel themselves to have an allegiance to both the group and the State and therefore should be able to rely upon the legal rights, privileges and obligations that they enjoy by virtue of their membership of the group as well as their citizenship of the State.\(^{13}\) We have suggested that this could be achieved through a system based on the registration and regular inspection of religious tribunals. Inspiration for such an endeavour may be found in models already in use.\(^{14}\) These include several voluntary registration systems which provide certain tangible and desirable benefits for registrants, for example, legislation which allows religious groups to register their buildings as places of public


religious worship,\footnote{Places of Worship Registration Act 1855, Marriage Act 1949 s 4.} as well as the model in relation to independent faith schools where the State continues to ‘intervene’ to ensure that certain standards are met, even though it has no financial interest in doing so.\footnote{See R Sandberg, Law and Religion (Cambridge University Press, 2011) chapter 8.} However, before adopting such a scheme thought needs to be given to the tendency within certain religious communities not to make use of the registration systems that are already provided under English law. Our study suggested that lack of education and knowledge is in part responsible for this.

20. If legislative reform is required to regulate religious tribunals (and we consider that to be an unproven ‘if’), then we strongly contend that the approach found in the Arbitration and Mediation Services (Equality) Bill, introduced into the House of Lords by Baroness Cox, should be avoided since it is based upon several misunderstandings. Most notably, the provisions in the Bill which seek to regulate religious arbitrations would not apply to most religious tribunals in the UK because these do not purport to be offering arbitration services. We have developed an alternative draft Bill which seeks to overcome the problems found in the Arbitration and Mediation Services (Equality) Bill and which develops the understanding of consent as found in the Sexual Offences Act 2003 to outlaw any decisions of religious tribunals where the parties did not give full consent to the proceedings.\footnote{Originally published as R Sandberg and F Cranmer, ‘Appendix: Non-Statutory Courts and Tribunals (Consent to Jurisdiction) Bill in R Sandberg (ed) Religion and Legal Pluralism (Ashgate, 2015) 273.} This draft Bill is included as an appendix to this written evidence.

The following Draft Bill is designed to illustrate how the reform suggestions made in Chapter 15 might be incorporated into the law of England and Wales. The primary purpose is to address concerns about the genuineness of consent to the jurisdiction of tribunals which operate outside the State legal system. The provisions of the draft would apply equally to religious and secular tribunals. In short, the purpose of the proposal is as follows.

Clause 1 would create a statutory offence of exercising or attempting to exercise a judicial or quasi-judicial function in respect of a person without that person’s consent. It makes specific exclusions for the State courts and tribunals of England and Wales; for arbitrators and mediators appointed by the parties to the dispute; and for the ecclesiastical courts of the Church of England. The ecclesiastical courts are excluded on grounds that they are part of the judicial system and subject directly to the supervisory jurisdiction of the High Court, unlike the disciplinary tribunals of other religious organisations. Given their contractual obligations, we assume that the basic requirement under Clause 1 for consent to the proceedings of non-statutory courts and tribunals would not allow ministers of religion and employees and office-holders to avoid the jurisdiction of legitimate internal disciplinary tribunals.

Clause 2 provides the basic definition of ‘consent’ for the purposes of the Act, modelled on the approach taken in the Sexual Offences Act 2003.

Clause 3 empowers the courts to set aside any order of a non-statutory court or tribunal in the absence of proof as to the genuine consent of both parties to the terms of the order.

Clause 4 provides for a specific offence of falsely claiming jurisdiction where the person making the complaint has committed or has been charged with a ‘relevant criminal offence’. This is to ensure that non-statutory courts and tribunals do not deal with matters which are the subject of criminal prosecutions. The purpose of the relevancy test is to prevent a

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18 See, for example, R v Chief Rabbi of the United Hebrew Congregations of Great Britain ex parte Wachmann [1992] 1 WLR 1036.
complainant convicted of or charged with, for example, careless driving from using that fact to block the proceedings of a legitimate disciplinary tribunal in relation, for example, to alleged sexual misconduct – bearing in mind that sexual conduct which may be perfectly legal in secular law may properly give rise to disciplinary proceedings in a religious tribunal.\textsuperscript{19} The offence is one of strict liability.

\emph{Clause 5} provides for a specific offence where a non-statutory tribunal falsely claims to exercise jurisdiction over a child under the age of 16: again, the offence is one of strict liability. In cases involving children it is not possible for informal non-statutory tribunal to oust the jurisdiction of the High Court, even with the agreement of the parties.\textsuperscript{20} \textit{A fortiori}, we would argue that for an informal tribunal falsely to purport to do so should be brought within the ambit of the criminal law.

\emph{Clauses 6 and 7} outline the evidential basis for presumption of consent in relation to offences under the Act. Again, this follows the Sexual Offences Act 2003. \emph{Clause 6} strikes the balance on the presumption about consent against someone accused of an offence under subsection 1(1) where that person has done the relevant act unless there is adequate evidence to put the issue of consent in doubt. \emph{Clause 7}, however, provides that where the accused did the act in question and in doing so intentionally deceived the victim, absence of consent is to be conclusively presumed.

\emph{Clause 8} prescribes criminal penalties for offences under the Act and \emph{Clause 9} provides for citation, commencement and extent. It is not proposed that the Act should extend to Scotland or Northern Ireland because, in the case of both jurisdictions, matters of criminal law are devolved.

Our draft is offered in order to stimulate debate rather than as a definitive solution to concerns about the genuineness of the consent of parties – particularly women caught up in family or matrimonial proceedings – to the proceedings of informal tribunals.

\textsuperscript{19} See, for example, \textit{Percy v Church of Scotland Board of National Mission} [2005] UKHL 73.

\textsuperscript{20} See, for example, \textit{AI v MT} [2013] EWHC (Fam) 100: ‘the court’s jurisdiction to determine issues arising out of the marriage, or concerning the welfare and upbringing of the children, cannot be ousted by agreement’ (per Baker J at para 12).
Non-Statutory Courts and Tribunals (Consent to Jurisdiction) Bill

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BILL

TO

Make provision about consent in relation to the jurisdiction of non-statutory courts and tribunals; and for connected purposes.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: –

1 Claiming jurisdiction without consent

(1) A person or body (A) is guilty of an offence if that person or body –

(a) purports to be exercising or attempts to exercise a judicial or quasi-judicial function in respect of another person (B); and

(b) B does not consent to A exercising that function.

Subsection (1) above shall not apply to any person who –

(a) has been appointed to any court or tribunal under the law of England and Wales and is acting in accordance with that appointment;

(b) is, or is a member of, a tribunal for the purposes of the Tribunals, Courts and Enforcement Act 2007 and is exercising a power under that Act;

(c) has been appointed to any court or tribunal exercising a judicial function under the terms of the Ecclesiastical Jurisdiction Measure 1963 or the Clergy Discipline Measure 2003 and is acting in the exercise of that function;

(d) makes any provision in relation to mediation by agreement between the parties for the purposes of section 24 of the Tribunals, Courts and Enforcement Act 2007; or

(e) makes any provision in relation to any arbitration agreement or process for the purposes of the Arbitration Act 1996.

Subject to subsection (2) above, for the purposes of this Act a person or body is deemed to be exercising a judicial or quasi-judicial function where A exercises or purports to exercise a specialised jurisdiction and makes or purports to make a decision concerning the legality of an action by B.
(4) Subject to subsection (2) above, for the purposes of this Act a person or body is deemed to be exercising a judicial or quasi-judicial function whether or not the words ‘court’ or ‘tribunal’ form part of that person’s or body’s title.

(5) Sections 2, 5, 6 and 7 apply to an offence under this section.

2 Consent

(1) For the purposes of this Act a person consents if he –
   (a) agrees by choice;
   (b) has the freedom to make that choice;
   (c) does not lack the capacity to do so; and
   (d) is not making that choice under duress.

(2) For the purposes of this section ‘lack of capacity’ shall have the same meaning as in section 2 of the Mental Capacity Act 2005.

3 Court orders

A court may issue a declaration setting aside any order based on any negotiated agreement if it concludes that one or other party did not consent to the terms of that order.

4 Falsely claiming jurisdiction

(1) A person (A) is guilty of an offence under section 1 if –
   (a) that person purports to be exercising a judicial or quasi-judicial function in respect of another person (B) for the purposes of that section; and
   (b) B has been convicted of or has been charged with a relevant criminal offence triable under the law of England and Wales.

(2) In this section, ‘relevant criminal offence’ means an offence relevant to the issue over which A purports to be exercising a judicial or quasi-judicial function.

(3) Section 8 applies to an offence under this section.

5 Falsely claiming jurisdiction over a child

(1) A person (A) is guilty of an offence under section 1 if –
   (a) that person purports to make an order in respect of another person (B) for the purposes of section 1; and
   (b) B is under the age of 16.

(2) In this section, ‘order’ means –
(a) a contact order, a prohibited steps order, a residence order or a specific issue order as defined in section 8(1) of the Children Act 1989; or

(b) a special guardianship order as defined in section 14A(1) of the Children Act 1989.

(3) Section 8 applies to an offence under this section.

6 Evidential presumption about consent

(1) A person (B) is taken not to have consented to the exercise of a judicial or quasi-judicial function (‘the relevant act’), unless sufficient evidence is adduced to raise an issue as to whether or not he consented, if any of the following circumstances existed –

(a) that A did the relevant act;

(b) that any of the circumstances specified in subsection (2) existed; and

(c) that A knew that those circumstances existed,

B is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether or not he consented.

(2) The circumstances are that –

(a) any person was, at the time of the relevant act or immediately before it began, using violence against B or causing B to fear that immediate violence would be used against him;

(b) any person was, at the time of the relevant act or immediately before it began, causing B to fear that violence was being used, or that immediate violence would be used, against another person;

(c) any person was, at the time of the relevant act or immediately before it began, putting B through psychological coercion to induce participation in the relevant act;

(d) because of B’s physical or mental disability, B would not have been able at the time of the relevant act to communicate to A whether or not B consented;

(e) any person had administered to or caused to be taken by B, without B’s consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling B to be stupefied or overpowered at the time of the relevant act; or

(f) B was not informed of his legal rights, including alternatives to the relevant act.
7 **Conclusive presumption about consent**
If in proceedings for an offence under this Act it is proved that –
(a) A did the relevant act; and
(b) A intentionally deceived B as to the nature or purpose of the relevant act,
it is to be conclusively presumed that B did not consent to the relevant act.

8 **Penalties for offences**
A person guilty of an offence under this Act is liable –
(a) on conviction on indictment, to imprisonment for a term not exceeding two years
or a fine not exceeding level 5 on the standard scale (or both); or
(b) on summary conviction, to imprisonment for a term not exceeding three months or
a fine not exceeding level 3 on the standard scale (or both).

9 **Short title, commencement and extent**
(1) This Act may be cited as the Non-Statutory Courts and Tribunals (Consent to Jurisdiction) Act 20xx.
(2) This Act shall come into force six months after the day on which it is passed.
(3) This Act extends to England and Wales only.