



Scottish
Civil Justice
Council

BUSINESS & REGULATORY IMPACT ASSESSMENT:

If extending the simplified procedures for divorce and dissolution

PREPARED BY: the Secretariat to the Scottish Civil Justice Council (SCJC)

REGARDING: the business and regulatory impacts of the draft rules that have been published as part of the consultation on the extension of the simplified procedures.

LAST UPDATED: **19 November 2024**

Step 1 – POLICY BACKGROUND

The purpose and intended effect

Background

The “*simplified procedures*” for parties seeking a divorce, or the dissolution of a civil partnership, provide long established rules. Whilst those procedures work effectively at present; the ability to access those procedures could be widened for some potential users.

Policy Objectives

The policy objectives are:

- *To encourage negotiation and reduce conflict* – by extending access to the *simplified procedures* to uncontested cases where the parties are able to agree suitable arrangements for the welfare of children of the relationship that are under 16;
- *To protect the best interests of each child* – by including a requirement for the court to make appropriate enquiries into all of the arrangements made for children¹; and
- *To make the rules “easy to understand”* – by addressing other miscellaneous amendments requested since the last amendments made.

To achieve those objectives the proposal is:

- To extend the availability of both ‘*simplified procedures*’ to uncontested cases where the parties have been able to agree arrangements suitable to the court for the welfare of any children under the age of 16.

¹ Under section 12 of the Children (Scotland) Act 1995

Rationale for this intervention

This is an area of high transaction processing for the courts, and the proposed change to the criteria will deliver continuous improvement. An extension would make the procedures more accessible to a material number of applicants; providing they have agreed arrangements for the welfare of their children and are not contesting the application made.

The method of consultation

This consultation by the Council will gather the widest possible range of views on the proposed extension of the simplified procedures used by the courts; as those procedures support a significant life event that has impacts on the parties, the children of the parties and the communities they live in.

The sectors and groups affected

Who is affected?

The 'recurrent users' who interact with the court on an almost daily basis:

- The judiciary, and the court staff who support them;
- The legal practitioners who routinely appear in civil court and/or generate the case documentation used within divorce or dissolution proceedings; and
- Third sector organisations who provide advice to court users, may assist with preparing documents and may appear in court

The 'occasional users' who interact with the court on very few occasions during their lifetime:

- Most represented parties
- Most unrepresented parties (i.e. party litigants)
- Most witnesses called under civil court procedure

How are they affected?

These amended rules will:

- Widen the ability to progress straightforward uncontested cases through the justice system.

The options

Option 1 - Do Nothing

The do nothing option maintains the status quo. The parties to a divorce or dissolution that have been able to agree arrangements for their children would need to continue to use the *procedure for family actions* (incurring higher legal costs and court fees, and delaying the issue of their decree).

Option 2 – New Rules

Adopting these amended rules will:

- Reduce cost and delay - for the subset of parties to a divorce or dissolution who are able to agree arrangements for the upbringing of the children of the relationship; and
- Enable the court to fully consider the best interests of the children.

The benefits

Benefits - Option 1 - Do Nothing

Nil

Benefits - Option 2 – New Rules

The expected benefits are:

- *Reduced conflict* – once they have agreed and lodged the “do it yourself” forms most parties will be able to simply await their decree without being put in situations where they need to engage further with their former spouse /partner, and without the potential stress involved in familiarising themselves with the *procedure for family actions*.
- *Reduced delay (for end users)* – the cases that can shift to having decisions made on the papers will take less end-to-end time, allowing those court decrees to be received more timeously and without unnecessary judicial involvement.
- *Reduced cost (to end users)* – applicants with children who choose to use a simplified procedure will incur lower court fees; along with lower legal costs (if choosing to be represented).
- *Reduced cost (to the public purse)* – subject to the number of cases that do shift to using simplified procedure, SLAB will see a reduction in their funding of civil legal aid.

The expected dis-benefits:

- *Legal Services Market* – the positive reduction in costs incurred by end users will drive a loss of fee income for law firms. That may be perceived negatively in the legal services market until firms can adjust their business models in response to that shift. For some firms that response may include charging differential fees to those with children and those without.

The costs

Costs - Option 1 - Do Nothing

Nil

Costs - Option 2 – New Rules

The expected costs to amend these rules for this extension are

DRAFTING COSTS – the existing budget of the Lord Presidents Private Office will meet the costs of preparing, making and laying these amendments.

TECHNOLOGY COSTS – processing live divorce and dissolution actions within the courts case management system (ICMS) may require some minor software development to accommodate these amended rules and the accompanying forms.

FAMILIARISATION COSTS – The judiciary, legal profession and court officials will need time to familiarise themselves with the amendments made.

This proposal excludes any major investment in the use of technology:

AUTOMATION OF THE FORMS - A major investment of say £1M to £2M would be required if the Scottish Courts and Tribunals Service (SCTS) was to offer an Online Portal that fully automated the processing of the forms lodged by applicants and the interlocutors issued by the courts. That creates a dependency between the capital funding that can be secured in future years and the other prioritisation choices to be made within their Digital Strategy.

Step 2 – ASSESSMENT OF LIKELY IMPACTS – ON BUSINESS

What feedback has arisen from business engagement?

Engagement to date has been via the members of the Family Law Committee. The aim in running this consultation is to expand on that feedback.

How has that feedback fed into the development of this proposal?

Members of the Family Law Committee have informed the development of the draft rules.

Step 3 – ASSESSMENT OF LIKELY IMPACTS – ON COMPETITION

To support initial screening for competition impacts, the Council uses the checklist of four questions recommended² by the Competition and Markets Authority (CMA):

Will the measure directly or indirectly limit the number or range of suppliers?

NO – these amended rules would not drive a shift in volumes at a scale that would be large enough to change the number of suppliers within the legal services market

Will the measure limit the ability of suppliers to compete?

NO – all suppliers will access and use the same amended rules.

Will the measure limit suppliers' incentives to compete vigorously?

NO – all suppliers will access and use the same amended rules.

² [Competition impact assessment: part 1 overview \(Sep 2015, CMA\)](#)

Will the measure limit the choices and information available to consumers?

NO – straightforward cases will follow the same updated rules irrespective of whether a consumer chooses to be represented or unrepresented.

Step 4 – ASSESSMENT OF LIKELY IMPACTS – ON CONSUMERS

To support initial screening for consumer impacts, the council mirrors the best practice³ guidance from Scottish Government which uses the following six questions:

Does the policy affect the quality, availability or price of any goods or services in a market?

POSSIBLY - a number of firms do offer low fixed price legal services for a simplified divorce. They may revisit those prices, or shift to differential prices, if they wish to adjust for the additional forms required when an applicant has children under the age of 16.

Does the policy affect the essential services market, such as energy or water?

NOT APPLICABLE

Does the policy involve storage or increased use of consumer data?

NO – the consumer data held by the courts will not change. Personal data on children is provided “on the papers” under the *procedure for family actions*. For the caseload that elects to shift to the *simplified procedure* that same data will be held via the new forms provided for that purpose.

Does the policy increase opportunities for unscrupulous suppliers to target consumers?

NO

Does the policy impact the information available to consumers on either goods or services, or their rights in relation to these?

YES – the updated consumer information will confirm that parties with children under the age of 16 will have an improved choice on whether (or not) to use the simplified procedure.

Does the policy affect routes for consumers to seek advice or raise complaints on consumer issues?

NO

Test run of business forms

Does this proposal introduce new legal Forms that are materially different in style and content to the existing legal forms in general use?

NO – Whilst there are new forms they are not materially different.

³ <https://www.gov.scot/publications/business-regulatory-impact-assessment-bria-toolkit/>

Step 5 – ASSESSMENT OF LIKELY IMPACTS – DIGITAL

Digital Impact Test

Public services are increasingly being delivered online. To test for relevant opportunities the Council mirrors the best practice⁴ guidance from Scottish Government and uses the following five questions:

Does the measure take account of changing digital technologies and markets?

YES – the rule changes are made within the wider context of the SCTS Digital Strategy.

Will the measure be applicable in a digital/online context?

These rules assume both the submission of paper based applications and the electronic transmission of those documents where appropriate (via secure email / civil online etc.). Any subsequent end-to-end automation of the *simplified procedures* via an *online portal* remains as a future development option within the SCTS Digital Strategy (subject to the availability of sufficient capital and revenue funding).

Is there a possibility the measures could be circumvented by digital / online transactions?

NO

Alternatively will the measure only be applicable in a digital context and therefore may have an adverse impact on traditional or offline businesses?

NO

If the measure can be applied in an offline and online environment will this in itself have any adverse impact on incumbent operators?

NO

Step 6 – ASSESSMENT OF LIKELY IMPACTS – ON REGULATIONS

Court Fee Orders

Will the proposal require changes in the *court fee orders*?

NO – the fee rates and the fee narratives set out in the current Fee Orders can remain unchanged by this proposal. When consulting on the next three yearly cycle of changes to the fee orders, the Scottish Government will analyse the actual change in volumes and assess whether that change is material enough to warrant a rebalancing of fees overall.

⁴ <https://www.gov.scot/publications/business-regulatory-impact-assessment-bria-toolkit/>

Readers should note Annex 1 which summarises relevant content from schedules in the current *statutory charging instruments*. The volume of people using the *simplified procedure* will increase, allowing that subset of applicants to select the “inclusive fee” that applies when using the *simplified procedure*. That volume shift will reduce the overall level of cost recovery under the *procedure for family actions* as it charges stepped fees to applicants as they progress through that legal process.

Legal Aid Regulations

Will the proposal require changes in the *legal aid* regulations?

YES – At present users of the *simplified procedure* are specifically excluded from seeking civil legal aid, on the basis that this is designed as a “do it yourself” procedure. A material number of applications will transfer from the *procedure for family actions* (which is eligible for legal aid) to the *simplified procedure* (which is ineligible for legal aid). To the extent that shift happens, the total level of legal aid being funded by the taxpayer will reduce.

The draft rules do add a potential hearing (by exception) as a safeguard if the court needs to further explore the arrangements made for children. The planning assumption made is that the legal aid regulations will be adjusted so that a legal aid payment is made available for such hearings.

Regulations for Judicial Taxation

Will the proposal require changes in the *judicial taxation* regulations?

NO

Enforcement and/or sanctions

Will compliance be enforced, and if so how?

NOT APPLICABLE

Are there sanctions for non-compliance?

NOT APPLICABLE

Step 7 – ASSESSMENT OF LIKELY IMPACTS – WITH IMPLEMENTATION

Implementation Plan

What is the timescale for this proposal to be implemented?

Setting a target date for commencement is subject to the prerequisite law changes being consulted on, scrutinised by the Scottish Parliament, and then enacted.

How will this proposal be implemented?

Once the procedural rules have been updated for the feedback from this consultation:

- The Committee will consider the draft rules, and propose them to the Council;
- If content, the Council will propose those draft rules to the Court of Session; and
- The Court of Session will consider and approve the rules instrument.

Those draft rules instruments would then be kept on hold pending the prerequisite law changes being consulted on, scrutinised and enacted.

Once those prerequisite law changes are in hand the Court of Session will:

- Approve and sign the rules instrument;
- Lay that instrument in the Scottish Parliament and have it published on legislation.gov.uk;
- Make the rules available for download via the SCTS website; and
- Include a period of time prior to the rules coming into force to support familiarisation across the profession, along with the development of guidance and IT systems.

Monitoring

Will the resultant changes be monitored, and if so how?

YES – The arrangements for monitoring include:

Qualitative Monitoring:

- Monitoring requests lodged for clarification of the extension;
- Monitoring media coverage on the transition to the amended rules; and
- Monitoring the feedback on the ‘rules in use’.

Quantitative Monitoring:

- Monitoring the increasing volumes of cases under the *simplified procedures*; and
- Monitoring the decreasing volume of cases under the *procedures for family actions*.

Will the resultant changes be evaluated, and if so how?

POSSIBLY- if there was a number of negative user experiences reported on the changes made, the secretariat would initiate an “Evaluation Report”.

Post Implementation Review

Will a post implementation review need to be undertaken, and if so when?

POSSIBLY- where an Evaluation Report evidences significant negative user experiences following the implementation of new or amended rules, the secretariat would undertake a more detailed “Rules Review” exercise.

ANNEX 1 – STATUTORY CHARGING INSTRUMENTS

Each fee order is a *statutory charging instrument* which the SCTS is tasked with administering on behalf of the Scottish Government.

The narratives for each fee item, and the rates fixed, are subject to review by the Scottish Government on a three yearly cycle.

Sheriff Court Fees Order

The following rates, effective from 1 November 2024, are as fixed in part 1 of the [schedule](#) to the Sheriff Court Fees Order 2024 ([SSI 2024/235](#)):

The simplified procedure

An application under *simplified procedure* has a flat fee of £151 (*fee item 8*)

The procedure for family actions

An application under *the procedure for family actions* incurs fees for the steps in process:

- £171 – when lodging an initial writ (*fee item 5*)
- £185 – when lodging defences (*fee item 23 (b)*)
- £65 - when lodging a motion (*fee item 29*)
- £153 – when lodging a closed record (*fee item 24*)
- £66 – when a hearing is fixed (*fee item 26*)
- £282 – per hearing day or part thereof (*fee item 27*)

Fee exemptions may apply for some users.

Fees for sheriff officers to serve documents may be incurred by some users.

Court of Session Fees Order

The following rates, effective from 1 November 2024, are as fixed in the [schedule](#) to the Court of Session Fees Order 2024 ([SSI 2024/238](#)):

The simplified procedure

An application under *simplified procedure* has a flat fee of £157 (*fee item B4*).

The procedure for family actions

An application under *the procedure for family actions* incurs fees for the steps in process:

- £207 – when lodging an initial writ (*fee item B3*)
- £207 – when lodging defences (*fee item B6*)
- £123 - when lodging a motion (*fee item B21*)
- £246 – when lodging a closed record, payable by each party (*fee item B14*)
- £248 – per 30 minutes or part thereof for a hearing before 1 or 2 judges (except for the first 30 minutes) payable by each party (*fee item 16*)

Fee exemptions may apply for some users.

Fees for messengers at arms to serve documents may be incurred by some users.