Scottish Civil Justice Council

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Providing your response

If you have chosen to provide a separate written response, then please complete the first page of this Respondent Information Form and attach it to your response.

If you wish to include your responses within this Respondent Information Form, please insert your responses to each consultation question in the (expandable) boxes below:

Question 1 – Do you agree that both the '*simplified procedure for divorce*' and the '*simplified procedure for dissolution*' should be extended to parties who are able to agree suitable arrangements for the upbringing of any children still under the age of 16? If not, why not?

Yes. We agree with the proposed extension to the simplified procedure to allow use by parties with children under 16.

Question 2 – Do you think the 4 new forms added *(F33B / CP30A / 49.73-D / 49.80B)* on the arrangements made for children will gather sufficient information for the court to consider the welfare of the children of a marriage or civil partnership? If not, why not?

We consider that the new forms will enable the court to gather sufficient information. We qualify this answer with reference to the comments below and with reference to my answer to Question 4.

Insofar as the court requires to enquire into the welfare of the child, the questions on the proposed forms do appear to be focussed on addressing the particular orders that the court can make in terms of s11 of the 1995 Act, the statutory tests for the making of those orders (including the need to take account of the child's views) and eliciting information which may be relevant to establishing whether a s67 ground might exist. To that extent the form will gather sufficient information; however we would question the necessity, rather than the sufficiency, of the level of information sought on this form. See answer 4.

Question 3 – Do you agree that for OCR rule 33.73 (1) and 33A.66 the term "mental disorder" should be replaced with a reference to "mental capacity"? If not, why not?

Yes, we strongly support this change.

Question 4 – Are there any additional changes you would suggest regarding the procedures for a simplified divorce or a simplified dissolution?

We consider that the proposals should go further than they do in simplifying the process for applicants. We would question the necessity of requiring the applicant and their spouse to provide detailed information regarding children to enable the court to carry out its duties in terms of s12 of the Children (Scotland) Act 1995. In our view the proposed forms fail to achieve the stated objectives of this reform to simplify the process and to encourage negotiation and reduce conflict.

We consider that the proposed forms also raise questions regarding respect for privacy. Public attitudes to privacy have moved on significantly over the last few decades and in our experience many people who require to apply for divorce are unhappy with what they consider to be unnecessary and unjustified intrusion into their private family life.

These observations are based on our experience as family law solicitors, all practising for more than 20 years.

As a context for the following comments, we should say that in our time in practice we have never come across a situation where a child welfare issue which required court or other state intervention came to light as a result of the requirements of s12 of the 1995 Act. Our experience is that whatever the intention of this provision, its practical effect is as a procedural barrier to divorce, not as a beneficial measure for promoting the welfare of children in Scotland.

Our experience of the current ordinary cause divorce procedure is that the affidavit procedure which is used in undefended actions (which would encompass all applications that might be made under the new simplified procedure) does not usually require applicants to provide the level of detail which the new forms would seem to require. A much lighter touch can usually be taken. It is many years since we had the experience of affidavits being rejected for lack of sufficient information. We are concerned that one of the consequences of the proposed reform is that it will result in more information being required of applicants in relation to their children than is currently the case in practice.

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This concern is amplified because the information required relates to a third party – the child. We would question whether it is consistent with the best interests of a child to require the applicant to provide information about "*any* (our emphasis) health conditions… which have an impact on the child's life". The child may be old enough to be "Gillick competent" and have a very clear sense of privacy. They may not wish their parent to disclose medical information which, while having an impact on the child's life, could not reasonably be considered information that would lead the court to conclude that a s11 was necessary or appropriate. There are other areas of the form (such as the suggestion that it is appropriate to provide information as to whether the child shares a bedroom) which we find hard to see justification for in the statutory provisions, and which some applicants may find offensive.

We are also concerned that unlike the current undefended ordinary cause affidavit procedure, the new forms require the other parent to sign to confirm their consent. Many arrangements for children post separation are the result of a careful (and often uneasy) compromise reached in recognition of the overwhelming benefit to the child of reaching agreement and avoiding conflict. One of the stated aims of the proposed reform is to promote the reduction of conflict. We are concerned that the new form has the potential to promote conflict as it will require both parents to "sign off" on a detailed statement of the child's arrangements. There may well be details (e.g. schooling or contact) where the parties have differing views or place different emphasis on the importance of certain points. We would be concerned that the form itself has the potential to become a focus of dispute. In undefended ordinary cause actions, the pursuer's affidavits are not usually seen by the defender, and certainly do not require a response or "approval". For this reason, we anticipate there would still be a substantial number of cases which would proceed under ordinary cause rather than the new simplified procedure.

Having regard to the court's specific duty in terms of s12, we would question whether it is necessary to go as far as is proposed to "secure sufficient relevant information about the children". We also observe that even in circumstances where the court can conclude that is "likely" that it requires to exercise powers under s11 or s62, only exceptional circumstances would allow the court to take the step of postponing decree.

The current simplified procedure effectively allows applicants to "self-certify" the date of their separation. It does not require the applicant to provide the evidential basis for their assertion in order that the court can carry out its own assessment as to when the parties stopped living as husband and wife. A simple statement of a date coupled with the applicant's affidavit, is considered sufficient to "hold the party to account for the accuracy of statements made" (para 20 of the consultation document). While we acknowledge that the interests of any child involved might be seen to be a different context, that context is arguably one in which provision of detailed personal information in relation to a third party requires a to meet higher bar to be justified.

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We consider that it would be more appropriate for the new form:

- to set out in brief terms the court's statutory duty in terms s12
- to set out the types of orders the court could make in terms of s11 and then to ask the applicant whether they are aware of any circumstances relating to their child which might give rise to the need for an order to be made (and if so to provide details of those circumstances)
- to set out the s67 grounds and then to ask the applicant whether they are aware of any circumstances relating to their child which might give rise to a s67 ground (and if so to provide details of those circumstances).

In our view this would better achieve the consultation's stated aims.