

SCOTTISH CIVIL JUSTICE COUNCIL: FAMILY LAW COMMITTEE

UPDATE PAPER BY THE SCOTTISH GOVERNMENT

PROPOSED EXTENSION TO SIMPLIFIED DIVORCE AND DISSOLUTION PROCEDURES WHERE THERE ARE CHILDREN UNDER 16 AND NO DISPUTE ABOUT THEIR WELFARE

POSTPONEMENT OF DECREE OF DIVORCE OR DISSOLUTION WHERE RELIGIOUS IMPEDIMENT TO REMARRY EXISTS FOR PEOPLE OF THE JEWISH FAITH

Introduction

1. This is an **open** paper.
2. It asks the Family Law Committee to **note**:
 - that the Scottish Government has re-started work on the proposal to bring forward an Order under section 8(4) of the Civil Evidence (Scotland) Act 1988¹ (“the 1988 Act”) to disapply the need for third party evidence in divorce and dissolution cases where there are children under 16 and no dispute about their welfare. This would in turn permit changes to court rules and forms to extend the simplified divorce and dissolution procedures to such cases;
 - a potential timeline at Annex A for Scottish Government work on extending simplified divorce and dissolution procedures;
 - estimated costs and savings of extending simplified divorce and dissolution procedures;
 - work by the Scottish Government to bring forward a Scottish Statutory Instrument (SSI) to replace SSI 2006/253 (in connection with the postponement of a decree of divorce where a religious impediment to re-marriage exists) to update references to the Jewish community. The intention is also that this SSI would make equivalent provision in connection with the postponement of a decree of dissolution as provided for under the Civil Partnership (Scotland) Act 2020.

Proposed extension of simplified divorce and dissolution procedures

Introduction

3. For simplified divorce and dissolution procedures to be extended:
 - The Scottish Ministers have to make an SSI, subject to the affirmative procedure in Parliament, under section 8(4) of the 1988 Act to disapply the need for third party evidence in divorce and dissolution cases where there are children under 16 and no dispute about their welfare²;
 - Changes are required to rules of court.

¹ [Civil Evidence \(Scotland\) Act 1988 \(legislation.gov.uk\)](#)

² Two Orders have been made previously under section 8(4) of the 1988 Act. These are at [The Evidence in Civil Partnership and Divorce Actions \(Scotland\) Order 2012 \(legislation.gov.uk\)](#) and [The Evidence in Divorce Actions \(Scotland\) Order 1989 \(legislation.gov.uk\)](#)

4. The Scottish Government intends to consult on the proposed extension to simplified divorce and dissolution procedures. This work will involve updating a number of draft Impact Assessments to be issued, in line with usual practice, with the consultation.
5. This will include:
 - a draft Business and Regulatory Impact Assessment (“BRIA” - to consider costs and savings);
 - a draft Equality Impact Assessment (“EQIA” - to consider impact on the protected characteristics in the Equality Act 2010); and
 - a draft Child Rights and Wellbeing Impact Assessment (“CRWIA” - to consider the impact on children and young people).
6. An estimated time-line for the Scottish Government’s work is at Annex A.
7. The Scottish Civil Justice Council (“Council”) decided previously that a parallel and separate Council consultation would be required to cover the proposed changes to court rules. The Scottish Government assumes this remain Council’s intention. The Council [approved](#) a draft Act of Sederunt and a draft Council consultation at its meeting on 19 March 2018.

Costs and savings - general

8. Work has previously been carried out to estimate costs and savings of extending the simplified procedures. Some estimates are outlined below. The Scottish Government will check these estimates with the Scottish Legal Aid Board (“the Board”) and with the Scottish Courts and Tribunals Service (“the SCTS”) when preparing the draft BRIA.

Costs and savings – legal aid

9. Extending simplified procedures could lead to savings for the legal aid budget of around £0.5 million.
10. There should also be savings for couples seeking a divorce or dissolution and who have agreed all matters, including in relation to children.
11. Section 12 of the Children (Scotland) Act 1995 (“the 1995 Act”) requires the court in actions of divorce and dissolution to consider whether to exercise its powers under section 11 of the 1995 Act (on matters such as parental responsibilities and rights) in light of information on the arrangements proposed for the upbringing of a child.
12. Under the proposals to extend simplified divorce and dissolution procedures, the draft rules make provision for a court which is not satisfied from the information provided in the application to arrange for a hearing with the parties for the purpose of making further enquiries.

13. Civil legal aid is not available for divorce actions under the simplified procedure³. Provision needs to be made to extend the availability of legal aid to hearings under an extended simplified procedure. It may be possible to extend the availability of ABWOR (assistance by way of representation) or civil legal aid for the purposes of such hearings, by way of a SSI, subject to the affirmative procedure, made by the Scottish Ministers. This issue will be covered in the Scottish Government consultation.

Costs and savings – the SCTS

14. Previous estimates suggest that there would be costs to the SCTS of around £250,000 per annum through, for example, lost fee income and costs associated with any hearings required to make further inquiries.
15. There would also be one-off costs for SCTS to change IT systems to accommodate the proposed changes to the simplified procedure. These costs have been estimated previously at around £160,000.
16. The SCTS would also have costs in staff time to update the guidance for applicants using the simplified procedure.

Removal from simplified procedure of cases on ground of grant of interim Gender Recognition Certificate

17. At this Committee's meeting of [8 May 2017](#), consideration was given as to whether rules of court should continue to be in place so that the simplified procedure remains available when the divorce or dissolution is on the grounds of the issue of an interim Gender Recognition Certificate ("GRC").⁴
18. This Committee decided at that meeting that simplified divorce and dissolution should no longer continue to be provided for where the ground of divorce or dissolution is the issue of an interim GRC.

Further changes to existing draft forms required if simplified procedure to be extended

19. The Scottish Government considers some minor changes are needed to the draft Act of Sederunt prepared previously. This is because of amendments since then to court rules and forms, particularly as a result of consequential changes made following Brexit. Annex B of this paper lists the amendments so far identified to the draft forms and also makes some minor points on those forms.

³ See paragraph 3 of part 2 of schedule 2 of the Legal Aid (Scotland) Act 1986: [Legal Aid \(Scotland\) Act 1986 \(legislation.gov.uk\)](#)

⁴ The numbers of divorces and dissolutions on this ground is very low. The [Civil Justice Statistics 2020-2021](#) (Divorce and Dissolutions Supplementary Tables, Tables 2 and 3) indicate that there have been 6 divorces in total granted on this ground since 2011 and 1 dissolution. Since 2018-2019 none have been granted on this ground.

Postponement of decree of divorce or dissolution where religious impediment to re-marriage

20. Section 3A of the Divorce (Scotland) Act 1976⁵ gives a court in a divorce action the power to postpone granting decree until any impediment has been removed which would prevent a party to the action from entering into a future religious marriage.
21. The section defines “religious marriage” by reference to the marriage being solemnised by a marriage celebrant of a religious body prescribed in regulations. SSI 2006/253⁶ prescribes “any Hebrew Congregation” as a religious body for this purpose.
22. The Scottish Council of Jewish Communities (“ScoJeC”) have noted that the term “Hebrew Congregation” in legislation needs to be amended.⁷
23. The Civil Partnership (Scotland) Act 2020⁸ (“the 2020 Act”) introduced mixed sex civil partnerships from 1 June 2021. Section 11 of the 2020 Act inserted section 121A into the Civil Partnership Act 2004 (“the 2004 Act”) to make equivalent provision to section 3A of the 1976 Act in respect of the dissolution of civil partnerships. No religious body has yet been prescribed for this purpose.
24. Working closely with SCoJeC, the Scottish Government intends to make an SSI to update how the Jewish community is described for the purposes of section 3A of the 1976 Act and to prescribe the Jewish community body for the purposes of section 121A of the 2004 Act. This will have minor implications for court rules and forms. Again working closely with SCoJeC, the Scottish Government will submit a policy paper to this Committee on proposed consequential changes to court rules and forms.

Conclusion

25. The Scottish Government asks the Committee to note this paper.

**Family Law Policy
Scottish Government
October 2022**

⁵ [Divorce \(Scotland\) Act 1976 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/1976/11)

⁶ [The Divorce \(Religious Bodies\) \(Scotland\) Regulations 2006 \(legislation.gov.uk\)](https://legislation.gov.uk/ssi/2006/253)

⁷ See this response by SCoJeC to a consultation [The Marriage and Civil Partnership \(Scotland\) Bill: Response from the Scottish Council of Jewish Communities \(scojec.org\)](https://www.scojec.org/) (bottom of page 7 and page 8). Changes have already been made to how Jewish bodies are described in an SSI prescribing bodies so all of their celebrants are authorised to solemnise mixed sex marriage.

⁸ [Civil Partnership \(Scotland\) Act 2020 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2020/11)

ANNEX A: KEY TASKS AND POTENTIAL TIMESCALES

Task	Likely timings
The Scottish Government will seek comments from the Board and the SCTS on updated material about costs and savings for the draft Business and Regulatory Impact Assessment	The request for comments will be issued by end of November 2022
The Scottish Government will update/draft other impact assessments ⁹ and seek comments from other bodies as required.	The request for comments will be issued by end of December 2022
The Scottish Government will update its draft consultation and seek comments from other bodies as required.	Any requests for comments will be issued by end of January 2023
The Scottish Government will finalise its consultation.	February and March 2023
The Scottish Government will prepare its consultation for publication on Citizen Space, the on-line consultation platform used by the Government.	April 2023
Consultation published. [The SCJC previously decided on a parallel consultation on court rules and forms, so it may be helpful if both consultations issue at the same time.]	End April 2023

**Scottish Government
October 2022**

⁹ The other Impact Assessments will include a Child Rights and Wellbeing Impact Assessment and an Equality Impact Assessment and may include an Island Communities Impact Assessment, a Fairer Scotland Duty Assessment and a Data Protection Impact Assessment

ANNEX B: SIMPLIFIED DIVORCE AND DISSOLUTION CHANGES TO DRAFT COURT FORMS AND GUIDANCE IN DRAFT ACT OF SEDERUNT

Draft form (Court of Session)	Point
49.73-A (divorce, one year)	<p>Current form 49.73-A including guidance has changed as a consequence of changes to the court's jurisdiction following Brexit.¹⁰</p> <p>Amendments would be needed as a result of the proposed SSI on postponement of decree of divorce where religious impediment to marriage.</p> <p>See also form F31 for the Sheriff Court.</p>
49.73-B (divorce, two years)	<p>Current Form 49.73-B including guidance has changed as a consequence of changes to the court's jurisdiction following Brexit.</p> <p>Amendment to existing material required by proposed SSI on postponement of decree of divorce where religious impediment to marriage.</p> <p>See also form F33 for the Sheriff Court.</p>
49.80B-A (dissolution, one year)	<p>Current form 49.80B-A has changed material on jurisdiction.</p> <p>New material would also be required by proposed SSI on postponement of decree of dissolution where religious impediment to marriage.</p> <p>See also form CP29 for the Sheriff Court.</p>
49.80B-B (dissolution, two years)	<p>Current form 49.80B-B has changed material on jurisdiction</p> <p>New material would also be required by proposed SSI on postponement of decree of dissolution where religious impediment to marriage.</p> <p>See also form CP30 for the Sheriff Court.</p>

¹⁰ The relevant changes to forms were made in the [Act of Sederunt \(Rules of the Court of Session 1994 and Sheriff Court Rules Amendment\) \(Miscellaneous\) 2021 \(legislation.gov.uk\)](#)

Minor points on simplified divorce and dissolution forms

1. Both current and draft forms refer to a leaflet called “Do it yourself Divorce”. The Scottish Government cannot locate a leaflet (at least one published online) called that. This may refer to either this webpage - [Simplified-Do it Yourself Procedure \(scotcourts.gov.uk\)](https://www.scotcourts.gov.uk/simplified-divorce-procedure) or to the [Simplified Divorce and Dissolution of Civil Partnership Guidance Notes \(scotcourts.gov.uk\)](https://www.scotcourts.gov.uk/simplified-divorce-dissolution-civil-partnership-guidance).
2. A similar reference to a leaflet called “Do it yourself dissolution” is made in the CP forms highlighted in this table.
3. When the forms and guidance are finalised, checks will need to be made to ensure that:
 - applicants are advised to approach National Records of Scotland for an extract of the entry in the marriage or civil partnership register (the marriage or civil partnership certificate) only when the marriage or civil partnership took place in Scotland. When the marriage or civil partnership took place elsewhere, applicants will need to supply the certificate issued by the authorities in the relevant jurisdiction.
 - when referring to fees, references are made to the SCTS’ title of “Scottish Courts and Tribunals Service”.

**Scottish Government
October 2022**