

## FAMILY LAW COMMITTEE: SCOTTISH CIVIL JUSTICE COUNCIL

### PROPOSED EXTENSION OF SIMPLIFIED DIVORCE AND DISSOLUTION PROCEDURES TO CASES WHERE THERE ARE CHILDREN UNDER 16 AND NO DISPUTE ABOUT THEIR WELFARE - POTENTIAL COSTS AND SAVINGS

#### Purpose

1. This is a paper from the Scottish Government.
2. In line with usual practice, the Scottish Government consultation will be accompanied by Impact Assessments. The suite of Impact Assessments which may accompany consultations of this nature are:
  - Business and Regulatory Impact Assessment (BRIA)
  - Child Rights and Wellbeing Impact Assessment (CRWIA)
  - Data Protection Impact Assessment (DPIA)
  - Equality Impact Assessment (EQIA)
  - Fairer Scotland Duty Assessment (FSDA). [This relates to socio-economic disadvantage].
  - Island Communities Impact Assessment (ICIA)
  - Strategic Environmental Assessment (SEA).
3. It has been decided previously by the Family Law Committee that the consultation by the Scottish Civil Justice Council (on the draft rules) and the consultation by the Scottish Government should be separate and run in parallel. The Scottish Government will co-ordinate with the Secretariat on the timetable to issue both consultations in 2023.
4. As part of its consultation, the Scottish Government would intend to include drafts of a BRIA, CRWIA, and an EQIA and, potentially, an FSDA.
5. In relation to the BRIA, the Scottish Government has interviewed legal practitioners and obtained further information from the Scottish Courts and Tribunals Service (“the SCTS”) and the Scottish Legal Aid Board (“SLAB”). The estimates in this paper reflect these interviews and information. **The estimates are dependent on assumptions, such as about the number of newly eligible cases which are likely to proceed using an extended simplified process. We will continue to work with the SCTS and SLAB to test and refine the information on costs and benefits for the BRIA which will accompany the SG consultation.**
6. This is an **open** paper.

#### Estimated number of newly eligible cases for simplified procedure

7. The vast majority of divorce and dissolution actions are in the Sheriff Court rather than the Court of Session. Table 5 of Civil Justice Statistics Scotland show

that 7,231 divorce and dissolution cases were raised in the civil courts in 2020/21 and table 6 shows that 77 of these were initiated in the Court of Session<sup>1</sup>.

8. We do not have accurate data on undefended ordinary actions of divorce and dissolution which cannot proceed as simplified actions because there are children under 16. In 2019, we estimated, based on data from SLAB, that there could be 1,800 to 1,900 actions that might be newly eligible to use the simplified procedure if it was so extended. However, this could overestimate the potential numbers. In particular, the number of divorces has been steadily reducing.

### Potential costs and benefits for SCTS

9. The Scottish Government has received the following information from SCTS on the potential recurring costs for cases in the sheriff courts.<sup>2</sup>

Range of estimated number of new applications	1,800	1,900	2,000
Potential fee loss <sup>3</sup>	£183,600	£193,800	£204,000
Additional costs (staff/ judicial time/ postage costs etc.) under new proposals	£57,767	£60,976	£64,185
Additional costs involved in fixing and conducting a hearing under section 12 of the Children (Scotland) Act 1995 (assuming this is required in 10% of all cases)	£12,620	£13,321	£14,022
<b>Total additional ongoing costs per annum, excluding loss of court fees</b>	<b>£70,387</b>	<b>£74,297</b>	<b>£78,207</b>

10. The potential exists for a reduction in SCTS income to be addressed by amending the court fees orders in relation to divorces and dissolutions or in some other way.

11. SCTS advise that their current estimates of potential one-off costs for IT changes<sup>4</sup> are between £370,000 to £598,000.

<sup>1</sup> [Supporting documents - Civil justice statistics in Scotland 2020-21 - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>2</sup> The data does not include the Court of Session given the low volume of simplified divorce/dissolution applications made there.

<sup>3</sup> Courts fees are lower for simplified divorce and dissolution applications than for ordinary divorces and dissolutions. See entries 7 and 8 of schedule 2 of [The Sheriff Court Fees Order 2022 \(legislation.gov.uk\)](https://www.legislation.gov.uk) There are a number of exemptions from paying fees including when a person is in receipt of civil legal aid and, in relation to simplified divorce and dissolution, in receipt of advice and assistance: <https://www.legislation.gov.uk/ssi/2022/181/article/8/made>

<sup>4</sup> The figures include Court of Session IT changes.

12. However, **these estimated IT costs include the potential costs for the development of an online submission process for simplified divorce/dissolution.**

13. On this, the Committee may wish to consider if the consultation process should also include a question on the development of an online submission process for simplified divorce/dissolution. Pending the identification of any legislative barriers, the Scottish Government's initial view is that if there should be an additional question on this, it may be better placed in the SCJC consultation as a procedural matter.

### **Potential costs and benefits for SLAB**

14. SLAB has advised that it expects to have some initial one-off costs.

15. SLAB estimates that an extension of the simplified procedure as envisaged could result in savings of around £400,000 to £500,000 annually in civil legal aid and advice and assistance.

16. In addition, under the proposals to extend simplified divorce and dissolution, there may be an additional hearing in some instances so the court can be satisfied the application should continue to be dealt with under simplified procedures.

17. This additional hearing may have legal aid implications and the Scottish Government may need to make an SSI to ensure that a form of legal aid is available for these hearings, subject to the usual tests. SLAB has suggested an initial estimate of around £165 cost per hearing to the legal aid fund, inclusive of VAT.

### **Potential costs and benefits to individuals**

18. For the vast majority of divorces and dissolutions raised under the ordinary procedure, the applicant will have no practical alternative to instructing a solicitor.

#### *Simplified procedure- applicant does not use solicitor*

19. While applicants under the simplified procedure may choose to instruct a solicitor, the procedure is designed to make it unnecessary to do so, and it is assumed that this would continue to be the case under the proposed extension of the procedure.

20. Where such a newly eligible applicant decided not to employ a solicitor, the costs to them might be:

- Sheriff Court fee of £134 (exemptions may apply).
- There is an affidavit on the application form which needs to be sworn before a Justice of the Peace, Notary Public, or Commissioner for Oaths. This service is free if it is sworn before a Justice of the Peace. Fees charged by a Notary Public will vary but may perhaps be between £50 and £100.

- In some cases there may be additional fees if service of the action is required by a sheriff officer or messenger-at-arms.<sup>5</sup>

### *Simplified procedure- applicant uses a solicitor*

21. For those applicants who choose to instruct a solicitor fees will, of course, vary but the available evidence suggests that the current fee may be around £300.

22. Initial indications from the work carried out on the BRIA are that, as more work will be involved, the fee charged by solicitors when employed in relation to a simplified divorce or dissolution application where there are children would be higher.

23. The evidence nevertheless suggests that, even where a solicitor is instructed on a self-funding basis, the costs incurred by an applicant under the simplified procedure might be expected to be in the region of £500 to £1,000 lower than the corresponding costs for an ordinary action. This reflects that legal fees for an undefended ordinary divorce or dissolution might perhaps be around £1,000 to £1,500 and that court fees are also higher for ordinary divorce and dissolution.

### *General*

24. Another potential benefit to the party is it may be possible to obtain a divorce or dissolution more quickly through the simplified procedure.

25. Civil legal aid is not available in simplified divorce actions.<sup>6</sup> Advice and Assistance may be available but is subject to limits.

26. Working with the SCTS, the Scottish Government will update on-line guidance on simplified divorce and dissolution to ensure that parties are given up to date information on what is available and how costs can be minimised.

### **Summary and conclusion**

27. Members of the Family Law Committee are invited to:

- consider if the consultation process should also include a question on the development of an online submission process for simplified divorce/dissolution.
- note this paper generally.

### **Scottish Government April 2023**

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<sup>5</sup> The SCTS has advised that it is not uncommon for an action raised using the simplified procedure to require service by a sheriff officer, as instructed by the sheriff clerk. In such cases, there will be a further court fee of £13 plus the sheriff officer's or messenger-at-arms are fixed by Act of Sederunt, at £110.01 for personal service or £31.27 for postal service: [Act of Sederunt \(Fees of Messengers-at-Arms and Sheriff Officers\) \(Amendment\) 2021 \(legislation.gov.uk\)](#).

<sup>6</sup> Paragraph 3(b) of Part II of Schedule 2 of the [Legal Aid \(Scotland\) Act 1986](#).