

Scottish Civil Courts Review

Response of the Scottish Council of Jewish Communities

The Scottish Council of Jewish Communities welcomes the opportunity to respond to the Scottish Civil Courts Review, and will comment on only one issue, namely the arrangements for making the rules of civil procedure (6.24-6.28). Our comments are informed by our experience in relation to section 15 of the Family Law (Scotland) Act 2006, which inserted a new clause 3A into the Divorce (Scotland) Act, relating to religious divorce.

Background information

Section 15, which was included in the Act at the specific request of the Jewish community, comes into effect when

- (2)(a) the applicant is prevented from entering into a religious marriage by virtue of a requirement of the religion of that marriage;*
- and*
- (2)(b) the other party can act so as to remove, or enable or contribute to the removal of, the impediment which prevents that marriage.*

As the representative body of all of the Jewish communities in Scotland, we were actively involved in every stage of the primary legislation, from consultation through to Stage 3 of the Bill. In particular we had extensive discussions with the Scottish Executive Bill Team and lawyers, to ensure that the wording of section 15 achieved the desired aim, that it was admissible in the Scottish Courts, and that it did not cause any difficulty for any other group.

However we were not consulted about the relevant secondary legislation, SSIs 2006 Nos. 206, and 207, which relate to the Court of Session and the Sheriff Court respectively, and we were not informed when they were made. We have also been given to understand that the Rules Councils did not ask the Scottish Executive Family Law Bill team to advise about, or comment on the wording of these Statutory Instruments.

We only became aware by chance, a few days before they came into force, that the SSIs had been published. On reading them it was immediately apparent that there were two major problems resulting from the fact that the wording did not reflect the conditions set out in (2)(a) and (b) above. Instead the SSIs

- a) refer to a *religious impediment to remarriage* rather than to an impediment to a religious marriage
- b) omit the second condition entirely.

Section 15(2) of the Family Law Act states the conditions under which section 3A of can be used, namely when there is an impediment to a future religious marriage **and** it is possible for that impediment to be removed by the action of one of the parties to the divorce.

Great pains were taken with the primary legislation to ensure that there was no conflation between Church and State, but the wording of these SSIs, and therefore also of the Court documents they prescribed, did precisely that.

The condition in (2)(b) is particularly important to the Roman Catholic Church because there is an impediment to a Catholic who has a civil divorce entering into a subsequent religious marriage, but there is no means by which either party can act so as to remove that impediment. Without section (2)(b) it would theoretically be possible for a Catholic applicant's civil divorce to be delayed indefinitely. (In Judaism, it is a simple matter for the impediment to a religious remarriage to be removed by the co-operation of both parties in giving and accepting a *get* (religious divorce).)

It is evident that these SSIs were drafted without adequate understanding of the primary legislation or appreciation of its intention. Furthermore, when we alerted the Rules Councils to the problems, it took much time and effort on our part, and on the part of Roman Catholic Canon Lawyers, to convince them that serious errors had been made, by which time court documents repeating these errors had already been printed.

Once they understood the problems caused by the wording of the SSIs, and acknowledged that amending SSIs would have to be published to correct the errors, both Rules Councils liaised closely with us and with the Scottish Executive to ensure that the revised wording would be fit for purpose. However, due mainly to the procedural requirements of the Rules Councils, the amending SSIs, 2007 No.6 and 2007 No. 7 did not come into force until 26 February 2007, nearly a year after the original Rules.

Summary of what went wrong

- The Rules Councils, their lawyers, and draftspeople did not appreciate the importance of carrying across the exact wording of section 15 of the Family Law Act into the secondary legislation.
- The Rules Councils apparently did not consult with the Family Law Bill Team, who would have advised of the necessity of carrying across the exact wording, and who would probably have advised that we should comment on the draft before the SSI was made. (At the same time as SSIs 2006 Nos. 206 and 207 were being drafted, the Scottish Executive was drafting another SSI that related to section 15, and liaised with us throughout the process to ensure that it would achieve all of what was intended.)
- SSIs 2006 Nos. 206 and 207 were made on 12 April 2006, but their text was only publicly available from 28 April 2006 (just 6 days before they came into force) when they appeared on the Office of Public Sector Information website. They were briefly considered by the Scottish Parliament subordinate Legislation Committee on 25 April 2006, but their text was only circulated to Committee members and was not published on the Scottish Parliament website.
- Considerable resistance on the part of the Rules Councils to accept that there was any problem with the SSIs. The impression we received was of a reluctance to accept that a lay body might have a greater understanding of the

primary legislation than did the Rules Councils, enabling it to highlight major errors that had otherwise gone unnoticed.

- Indecision on the part of the Rules Councils as to whether they should resolve the issue separately or in tandem.

Consequences of what went wrong

- No opportunity for interested parties to comment in advance of the Scottish Parliament Subordinate Legislation Committee meeting at which the SSIs were considered, due to late publication, and only extremely limited opportunity to comment before the SSIs came into force.
- Conflation between Church and State, owing to the instruction that Courts must act to prevent a “*religious impediment to marriage*” (instead of an “*impediment to religious marriage*”).
- Potential problems for Roman Catholics seeking a civil divorce, since they are unable to “*act so as to remove, or enable or contribute to the removal of, the impediment which prevents that marriage*”.
- Potential confusion among lawyers and court officials, and consequent negative reaction that may have brought the Act into disrepute.
- Additional cost of printing new interim guidance for the Sheriff Court, and of reprinting all relevant court documents after the amending SSIs 2007 Nos 6 and 7 came into force.

Recommendations

- Before drafting an SSI, the Rules Councils should always consult with all relevant parties, including the appropriate Scottish Government department, the lawyers who advised on the primary legislation, and any other interested parties, to ensure that the purpose of the primary legislation is fully understood.
- The relevant Scottish Government Bill Team may sometimes have been disbanded by the time secondary legislation is being prepared. Mechanisms should, however, be put in place to ensure that the relevant expertise is nonetheless available to the Rules Councils.
- The text of all SSIs (including those not laid before the Parliament) should be published at the time they are made so that interested parties are able to comment well before the date they come into force.
- A clear and straightforward process should be implemented to enable issues that come to light at any stage of the process to be addressed without undue delay.

Note: The Scottish Council of Jewish Communities is the representative body of all the Jewish communities in Scotland comprising Glasgow, Edinburgh, Aberdeen and Dundee as well as the more loosely linked groups of the Jewish Network of Argyll and the Highlands, and of students studying in Scottish Universities and Colleges.