



The Scottish Parliament
Pàrlamaid na h-Alba

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Justice Committee Comataidh a' Cheartais

The Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2019 No.

EXITING THE EUROPEAN UNION

FAMILY LAW

JUDGMENTS

CHILDREN AND YOUNG PERSONS

The Jurisdiction and Judgments (Family, Civil Partnership
Marriage (Same Sex Couples)) (EU Exit) (Scotland)
(Amendment etc.) Regulations 2019

Made - - - - 2019

Coming into force in accordance with regulation 1

The Scottish Ministers make the following Regulations in exercise of the powers conferred by paragraphs 1(1) and (3) of schedule 2, and paragraph 2 of schedule 3 of the European Union (Withdrawal) Act 2018(a) and all other powers.

In accordance with paragraph 1 of schedule 2 of the European Union (Withdrawal) Act 2018, the Secretary of State.

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Justice Committee

The Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019, 7th Report, 2019 (Session 5)

Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx>



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Introduction

1. At its meeting on 5 March 2019, the Justice Committee ("the Committee") considered the following Scottish Statutory Instrument:
 - [The Jurisdiction and Judgments \(Family, Civil Partnership and Marriage \(Same Sex Couples\)\) \(EU Exit\) \(Scotland\) \(Amendment etc.\) Regulations 2019](#)
2. The instrument was laid before the Parliament on 25 January 2019 and referred to the Committee. The Committee is required to report to the Parliament on the instrument by 14 March 2019. The instrument is subject to the affirmative procedure.
3. This instrument is being made to address deficiencies in retained European Union law in relation to some family cases if the United Kingdom leaves the European Union on 29 March 2019 without a negotiated settlement.
4. In relation to the recognition and enforcement of overseas orders on family cases, the Scottish Government has decided to rely on the reciprocal arrangements provided under the the 1996 Hague Conventions on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ("the Hague Conventions").


Purpose of the instrument

5. Currently, EU Council Regulation 2201/2003 (known as "Brussels IIa") makes provision on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.
6. The objective of the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 is to make provision in relation to Brussels IIa if the UK leaves the EU without a negotiated settlement.
7. If the UK leaves the EU without a negotiated settlement, the necessary reciprocity for Brussels IIa to operate effectively between the UK and the EU will cease to exist.
8. The Hague Conventions provide mutual reciprocity for family law cases between jurisdictions. The Scottish Government considers that it would be preferable to rely on the Hague Conventions in the event of a 'no deal' scenario, as opposed to relying on Brussels IIa where there would be no mutual reciprocity. The instrument, therefore, makes the necessary provision for such cases to be dealt with under the Hague Conventions.

Consideration by the Delegated Powers and Law Reform Committee

9. On 5 February 2019, the Delegated Powers and Law Reform Committee considered the scrutiny procedure under which the instrument has been laid.
10. During that consideration, Mary Fee MSP sought ¹ clarity on any unintended consequences the instrument may have for custody disputes involving individuals who live in different countries. She asked whether the process would be "mirrored" across both the countries involved in such cases.
11. In response to this issue, the Scottish Government wrote ² to the Justice Committee on 26 February 2019. In that letter, the Scottish Government set out its reasons for deciding to rely on the structures under the Hague Conventions for the recognition and enforcement of overseas judgements. This, the letter states, is the best alternative available to deal with this issue in the circumstances where the UK leaves the EU without a deal.
12. Following its initial consideration of the scrutiny procedure for the instrument, the Delegated Powers and Law Reform Committee considered the detail of the instrument at its meeting on 19 February 2019. The Delegated Powers and Law Reform Committee agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

Consideration by the Justice Committee

13. The Minister for Community Safety lodged motion S5M-15920 proposing that the Justice Committee recommends approval of the instrument.
14. At its meeting on 5 March, the Justice Committee took evidence on the instrument from Ash Denham MSP, Minister for Community Safety, Simon Stockwell, Civil Law Division, and Rosemary Lindsay, Directorate for Legal Services, Scottish Government.
15. The Minister outlined the approach adopted by the Scottish Government to dealing with this issue, and the way in which the regulations set out in instrument with operate.
16. Members raised questions in relation to how the regulations would operate with regard to cases involving same-sex relationships. In response, the Minister confirmed that it is generally accepted that the current Brussels IIa regulations do not extend to same-sex relationships, given the varied legal recognition afforded to same-sex relationships across the different EU member states.
17. In terms of Scotland's approach in the event of the UK leaving the EU without a deal, the Minister confirmed that the Scottish Government has decided to make domestic provision to put the jurisdiction of the Scottish courts for same-sex cases on the same footing as for mixed-sex cases.
18. Members also raised wider concerns relating to the cumulative impact of changes requiring to be made to Scotland's criminal and civil law by virtue of the UK's decision to leave the EU. The Minister was asked whether the Scottish Government has made any impact assessment, or plans to make such an assessment, of the potential negative "cumulative effect" EU Exit-related regulations passed, or consented to by the Parliament, is having on the legal environment in Scotland.
19. The Minister informed the Committee that an assessment had been made of the number of cases in Scotland coming under the Brussels IIa procedures and which may potentially be affected by the instrument.
20. On the wider cumulative impact, Simon Stockwell of the Scottish Government saidⁱ-
 When we have looked at the impact of Brexit on civil law more generally, our very broad conclusion on family law is as the minister has mentioned: there are good fallbacks in relation to Hague, although there might be gaps in terms of recognition of judgments and so on, where some of the fallbacks might not be so good. On family law, in very broad terms, there are good fallbacks; on civil law more generally, the fallbacks are possibly not quite so good.
21. The Committee also considered whether the Scottish Government could issue updated guidance and advice to legal practitioners, and others, in the event of the UK leaving the EU without a deal. The aim of such guidance would be to assist in avoiding some of the potential delays and expense which may arise as the legal

ⁱ Justice Committee, Official Report 5 March 2019 (Col 4): <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11975&mode=pdf>

system in Scotland adjusts to a new regime under the Hague Conventions, instead of the existing EU Brussels Ila arrangements.

22. Scottish Government officials advised the Committee that they are currently assessing whether to publish guidance material on the Government's website relating to the implications for people involved in "cross-EU cases" as a result of the changes. Furthermore, the Government is considering sending more technical advice material to legal practitioners, to keep them informed of the changes.
23. However, officials stated that the development of such guidance would be difficult in the short-term, as the final shape and nature of the legal relationship between the UK and the EU, post-Brexit, was unknown.
24. Officials also indicated that many of the procedures used under the current Brussels Ila arrangements are largely based on those of the Hague Conventions procedure. Therefore, the scale and nature of any disruption caused by the change in procedures is difficult to quantify.
25. Following the debate, the Minister moved the motion (S5M-15920)—That the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] be approved.
26. **The motion was agreed to without debate or division.**

Conclusions

27. The Committee recognises the challenge of assessing the cumulative impact of the numerous changes being made to landscape of both civil and criminal law in Scotland as a result of Brexit-related secondary legislation. At present, the nature of the UK's future relationship with the EU is not yet clear.
 28. In light of this, the Committee agreed to produce a report which will draw together the various changes made to civil and criminal law in Scotland by way of Brexit-related secondary legislation which has been scrutinised by the Committee to date. This report will be published in due course.
29. The Committee is content that the regulations set out in the instrument are necessary in the event that the UK should leave the EU without a negotiated settlement being agreed.
30. Consequently, the Justice Committee recommends to the Parliament that it approve the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft].

- 1 Delegated Powers and Law Reform Committee, Official Report 5 February 2019 (Col 1): <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11929&mode=pdf>
- 2 Letter from the Minister for Community Safety, 26 February 2019:
https://www.parliament.scot/S5_JusticeCommittee/General%20Documents/20190226MfCStoMM-JurisdictionAndJudgmentsSSI.pdf

