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Justice Committee Comataidh a' Cheartais

Consent notification considered by the Justice Committee, 24 September 2019



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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.



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Introduction

1. At its meeting on 24 September 2019, the Justice Committee considered a notification from the Scottish Government proposing that it consent to the following UK Statutory Instrument (SI) being made under the European Union (Withdrawal) Act 2018:
 - The Civil Jurisdiction and Judgments (Civil and Family) (Amendment) (EU Exit) Regulations 2019
2. The Official Report for this session can be found on the Committee's [webpage](#).

Background

3. The European Union (Withdrawal) Act 2018 (the 2018 Act), passed by the UK Parliament, allows the UK and Scottish parliaments to consider regulations to convert non-domestic European Union (EU) law into UK law.
4. As part of the process by which the UK leaves the EU, consideration must be given as to whether current UK law needs to be amended to the UK's new status as a non-EU member. For example, there are currently many references in regulations to EU bodies and the EU itself that will no longer be applicable after the UK has left the EU.
5. Some of the necessary changes to the statute book will be done through Scottish Statutory Instruments (SSIs) in the usual way. However, a number will be done through Statutory Instruments (SIs) passed in the UK Parliament with the consent of the Scottish Parliament which itself is based on the recommendation of the Scottish Government (these are called SI notifications). Consent will be sought as these SIs will make changes to devolved powers and/or executive competences. Such changes should be broadly technical in nature. Protocols governing arrangements for both of these processes have been agreed to with the Scottish Government (see below).

Protocol agreed between the Scottish Government and the Scottish Parliament

6. In order to prepare devolved legislation for UK withdrawal from the EU, Scottish Government and Scottish Parliament officials developed a protocol governing UK Statutory Instruments. The protocol is intended to ensure the Scottish Parliament can scrutinise the Scottish Government's approach to instruments it considers are better dealt with by the UK Government.
7. In a [letter](#) to the Conveners of the Finance and Constitution Committee and the Delegated Powers and Law Reform Committee, Michael Russell MSP, Cabinet Secretary Government Business and Constitutional Relations wrote that, "This [process] is not about the question of where devolved powers will be exercised after

EU withdrawal. Instead it is about the technical task of ensuring that important schemes and regulations can continue to operate despite withdrawal."

8. He continued, "Where the policy outcome being sought is consistent across administrations, then it could be appropriate and in Scotland's interests to agree a UK-wide approach to statutory instruments (for example, to avoid duplication of effort, or where only technical or minor amendments are required). Where a different way of dealing with EU withdrawal, or a different policy outcome, is required in Scotland, we will pursue our own statutory instruments in the Scottish Parliament."
9. Under terms of the protocol, Scottish Ministers will notify the Scottish Parliament of any proposal to consent to the UK Government using its powers in devolved areas. Lead committees are then be invited to scrutinise the proposal to consent, and report to Parliament with a recommendation as to whether consent should be given to the consideration of instrument in question taking place at the UK Parliament.

The Civil Jurisdiction and Judgments (Civil and Family) (Amendment) (EU Exit) Regulations 2019

10. The [SI notification](#) for the Civil Jurisdiction and Judgments (Civil and Family) (Amendment) (EU Exit) Regulations 2019 (the proposed Regulations) was laid before the Scottish Parliament on 5 September 2019. The UK Government has not yet published the proposed Regulations.
11. According to the SI notification, the proposed Regulations will correct errors in an earlier SI which made provision in relation to the EU Maintenance Regulation. The EU Maintenance Regulation provides rules on jurisdiction and for the recognition and enforcement of family maintenance decisions between EU Member States.
12. An error was identified in the amendments made by the earlier SI to re-instate pre-EU jurisdiction rules in Scotland. This error would have the unintended effect that, post exit, an applicant domiciled or habitually resident in Scotland seeking alimony (on a standalone basis - i.e. where that is not connected to divorce or other proceedings) would be limited to pursuing the paying party in their courts. This was not the intention which was rather to revert to the pre-EU jurisdiction rules, which also provided for jurisdiction in the courts of the person pursuing the claim. The proposed Regulations are necessary to address this error.
13. The proposed Regulations will also clarify that, post exit, the relevant Hague Convention rules on jurisdiction will take precedent over domestic jurisdiction rules. This is in response to feedback from family law stakeholders, who advised that failing to make this clear creates uncertainty and would be likely to require the matter to be tested before a court, with unnecessary cost for the parties.

Justice Committee consideration

14. The Committee considered the SI notification at its meeting on 24 September 2019. Members had no comments or questions on the notification.
15. The Justice Committee is content for the Scottish Government to give its consent for the UK Ministers to lay a Statutory Instrument in the UK Parliament on the Civil Jurisdiction and Judgments (Civil and Family) (Amendment) (EU Exit) Regulations 2019.

