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The Scottish Parliament
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Dear Convener

JURISDICTION AND JUDGMENTS (FAMILY, CIVIL PARTNERSHIP AND MARRIAGE (SAME SEX COUPLES)) (EU EXIT) (SCOTLAND) (AMENDMENT ETC.) REGULATIONS 2019

The Justice Committee is due to consider this draft SSI, which is subject to the affirmative procedure, on 5 March.

When the Delegated Powers and Law Reform Committee considered the scrutiny procedure under which this draft SSI has been laid and the categorisation that the Scottish Government applied to it, Mary Fee MSP raised a point about custody cases. I attach, as an annex to this letter, the relevant extract from the *Official Report*, for ease of reference. This letter outlines the Scottish Government's position on the point raised by Mary Fee.

The first thing to say is that the Scottish Government does not want to be in this position. As the Business and Regulatory Impact Assessment (BRIA) laid with this SSI says¹, the Scottish Government believes that staying in the EU is the best option for the whole of the UK and Scotland. The Scottish Government's preferred option is another referendum which includes the choice to remain in the EU. Failing that, the Scottish Government supports a compromise option: continued membership of the European Single Market and Customs Union. However, if the UK leaves the EU without a deal, the Scottish Government needs to take appropriate action.

The BRIA also indicates that if the UK does leave the EU without a deal, the best approach in this area is to rely on international (the Hague) Conventions. We did consider whether to make provision so that incoming orders under Brussels IIa, the EU Regulation which this

¹ The BRIA is at http://www.legislation.gov.uk/sdsi/2019/9780111040652/pdfs/sdsifia_9780111040652_en.pdf
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draft SSI revokes, would continue to be recognised. However, the general approach taken in the draft SSI in relation to recognition and enforcement of overseas judgments (including those relating to parental responsibility or custody) is to rely instead on Hague Conventions. As Mary Fee's question highlights, reciprocity is required for these arrangements to operate effectively. In the event of no deal, it seems preferable to rely on Conventions where there is mutual reciprocity, rather than use an EU Regulation where there would be no mutual reciprocity. This very much reflects the point made by Mary Fee about the process being mirrored across both the countries concerned.

In relation to custody cases, there is a Hague Convention 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.² This is a very helpful fall-back, being similar to the provisions in Brussels IIa.

The Scottish Government does consider that there are significant downsides in this area as a result of leaving the EU. Some stakeholders have noted that relying on Hague Conventions rather than EU provision would be slower and more expensive. However, there is also general agreement that it is hard to quantify this.

In addition, EU provision in this area is increasingly recognising the importance of obtaining the voice of the child in family cases. For example, Brussels IIa is currently being re-cast.³ The re-cast includes more provision on the voice of the child. The Scottish Government intends to make domestic provision to enhance how the voice of the child is heard in family cases when we introduce our Family Law Bill into the Scottish Parliament later this year.



ASH DENHAM

² The Hague Convention is at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>

³ Information on the re-cast of Brussels IIa is at https://www.consilium.europa.eu/en/press/press-releases/2018/12/07/council-agrees-on-more-effective-rules-to-solve-cross-border-parental-responsibility-issues/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Council+agrees+on+more+effective+rules+to+solve+cross+border+parental+responsibility+issues#

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ANNEX

EXTRACT FROM THE OFFICIAL REPORT FOR THE DELEGATED POWERS AND LAW REFORM COMMITTEE MEETING ON TUESDAY 5 FEBRUARY 2019

Mary Fee (West Scotland) (Lab): Would it be possible to get some clarity on custody disputes involving individuals who live in different countries? I want to make sure that the instrument will have no unintended consequences and that the process will be mirrored across both the countries concerned.

The Convener: Thank you. That is a very good point, which we can flag up to the lead committee. Are you content that we do that?

Mary Fee: Yes—thank you.

The Convener: Thank you for raising the issue.

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11929&mode=pdf>

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