



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

32nd Meeting, 2018 (Session 5)

Tuesday 4 December 2018

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Decision on taking business in private:** The Committee will decide whether to take item 4 in private.
2. **Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Kenny Donnelly, Procurator Fiscal, High Court, Crown Office and Procurator Fiscal Service;

Dorothy Bain QC, Faculty of Advocates;

Grazia Robertson, Criminal Law Committee, Law Society of Scotland;

Euan McIlvride, Casework Team, Miscarriages of Justice Organisation Scotland;

and then from—

Detective Chief Inspector Graeme Lannigan, Public Protection Specialist Crime Division, Police Scotland;

Kate Rocks, Head of Public Protection and Children's Services, East Renfrewshire Health and Social Care Partnership, representing Social Work Scotland.

3. **European Union (Withdrawal) Act 2018:** The Committee will consider a proposal by the Scottish Government to consent to the UK Government legislating using the powers under the Act in relation to the following UK statutory instrument proposals—

The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2018;

The Civil Jurisdiction and Judgments (Amendment etc.) (EU Exit) Regulations 2018;

The European Institutions and Consular Protection (Amendment etc.) (EU Exit) Regulations 2018.

4. **Proposed Family Law (Scotland) Bill:** The Committee will consider whether to commission external research for its scrutiny of the proposed Bill at Stage 1.

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The papers for this meeting are as follows—

**Agenda item 2**

Paper by the clerk - Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill J/S5/18/32/1

Private paper - Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill J/S5/18/32/2 (P)

**Agenda item 3**

Paper by the clerk - EU (Withdrawal) Act 2018 J/S5/18/32/3

**Agenda item 4**

Private paper - Proposed Family Law (Scotland) Bill J/S5/18/32/4 (P)

**Justice Committee**  
**32nd Meeting, 2018 (Session 5), Tuesday 4 December 2018**  
**Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill**  
**Paper by the clerk**

**Introduction**

1. The Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill is a Scottish Government Bill and was introduced in the Scottish Parliament on 12 June 2018. The Bill and accompanying documents can be found [here](#). A SPICe briefing on the Bill can be found [here](#).
2. The Bill sets out reforms relating to the use of special measures<sup>1</sup> in criminal cases. In particular, it seeks to improve the way in which the evidence of child and other vulnerable witnesses is dealt with by encouraging greater use of pre-recording evidence in advance of a criminal trial.
3. It is currently possible for a vulnerable witness to give evidence in advance of any criminal trial using the following special measures:
  - prior statement – allowing evidence to be given in the form of a written statement or recorded interview
  - evidence by commissioner – using a recording of evidence taken before a sheriff or High Court judge (questioning of the witness is still carried out by prosecution and defence lawyers).
4. The Bill introduces a “new rule”, applying to child witnesses in the most serious cases,<sup>2</sup> which would generally require all of the child’s evidence to be given using a prior statement and/or evidence by commissioner. This rule would not, however, apply to child accused.
5. The Scottish Government would have the power to extend the application of the rule in the future, for example, to other offences or to adult deemed vulnerable witnesses (i.e. witnesses who are the complainers in cases involving a sexual offence, human trafficking, domestic abuse or stalking).
6. The Bill makes various other changes to the current process for the pre-recording of evidence. For example, the Bill introduces a new procedural hearing, to be known as a “ground rules hearing”, which will be used to prepare for the taking of evidence by a commissioner (e.g. by deciding on the form of questions to be asked).

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<sup>1</sup> Special measures are intended to assist vulnerable witnesses in giving evidence in criminal cases.

<sup>2</sup> Such as murder, human trafficking, rape and other certain sexual offences.

7. The Bill also seeks to streamline the process for arranging the use of standard special measures.<sup>3</sup>

### **Justice Committee consideration**

8. The Bill was referred to the Justice Committee for Stage 1 scrutiny and the Committee issued a [call for evidence](#) on 4 July 2018. 30 responses were received and can be accessed [here](#).
9. At its meeting on 20 November the Committee took evidence from the Scottish Government Bill Team – the officials responsible for assisting the Cabinet Secretary for justice in formulating the policy and drafting of the Bill.
10. At its meeting on 27 November the Committee took evidence from two panels of witnesses. The first panel comprised representatives from Barnardo's Scotland, Children 1st and the Scottish Children's Reporter Administration. The second panel comprised representatives from Action on Elder Abuse, ASSIST, the Mental Welfare Commission for Scotland and Victim Support Scotland.
11. At its meeting on 4 December the Committee will take evidence from two panels of witnesses. The first panel will comprise representatives from the Crown Office and Procurator Fiscal Service, the Faculty of Advocates, the Law Society of Scotland and the Miscarriages of Justice Organisation. The second panel will comprise representatives from Police Scotland and Social Work Scotland.
12. At future meetings in December and January the Committee plans to take evidence from the judiciary and courts service, as well as the Cabinet Secretary for Justice.

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<sup>3</sup> Children and adult deemed vulnerable witnesses (i.e. witnesses who are complainers in cases involving a sexual offence, human trafficking, domestic abuse or stalking) are automatically entitled to standard special measures: a screen to stop the witness from seeing the accused; giving evidence using a live television video link; and a supporter who can sit with the witness when giving evidence.

**Justice Committee**

**32<sup>nd</sup> Meeting, 2018 (Session 5), Tuesday 4 December 2018**

**European Union (Withdrawal) Act 2018 – Consent to UK Statutory Instruments**

**Note by the clerk**

**Introduction**

1. Members will be aware that the UK Parliament has recently passed the European Union (Withdrawal) Act 2018, which has now received Royal Assent. The Act paves the way for the UK and Scottish parliaments to begin the process of considering regulations to convert non-domestic EU law into UK law, which will need to be implemented speedily and flexibly.
2. Members will recall that the process by which the UK leaves the EU requires consideration to be given as to whether the current body of law within the UK needs to be amended to reflect the fact that the UK will no longer be a member of the EU after exit day. At present, there are many references in regulations, for example, to EU bodies and the EU itself that will no longer be applicable after the UK has left the EU.
3. 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 based on the recommendation of the Scottish Government (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.

**SI Notifications**

4. At today's meeting, Members will consider three SI notifications from the Scottish Government:
  - The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2018
  - The Civil Jurisdiction and Judgments (Amendment etc.) (EU Exit) Regulations 2018
  - The European Institutions and Consular Protection (Amendment etc.) (EU Exit) Regulations 2018
5. The proposed Regulations are necessary to address the deficiencies in these arrangements when the UK ceases to be a member of the EU whereby reciprocity between the UK and remaining Member States will not be possible, or to amend references in existing legislation to EU obligations and enforceable EU obligations.

6. The proposed Regulations are due to be laid in the UK Parliament on the 10 December.

*The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2018*

7. The civil judicial cooperation framework within the EU includes two Regulations in the area of family law:

*Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark. (This is known as the "Maintenance Regulation").*

The Maintenance Regulation provides rules on jurisdiction and for the recognition and enforcement of family maintenance decisions between EU Member States.

*Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000. (This Regulation is known as "Brussels IIa").*

Brussels IIa provides rules (i) to determine which Member State's courts have jurisdiction in proceedings with a connection to more than one Member State which relate to matrimonial matters (divorce) or parental responsibility matters (including child residence and contact); and (ii) on recognition and enforcement of judgments relating to these matters between Member States. It also provides rules on the return of children abducted to, or wrongfully retained in, other Member States. These rules supplement the international 1980 Hague Child Abduction Convention.

8. On Exit Day, these EU family law instruments (and related domestic legislation) will become 'retained EU law' in UK domestic law. However, in the absence of an agreement between the EU and the UK, the retained EU law will cease to operate reciprocally between the EU Member States and the UK. Accordingly, amendments are required to address the deficiencies arising.
9. The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2018 revoke the Maintenance Regulation as retained EU law, with a series of savings for cases which are 'live' on exit day. Related domestic legislation for the Maintenance Regulation is amended accordingly. The proposal from the Scottish Government is that where there is an alternative international Convention, this will be used instead.
10. In relation to Maintenance, the UK is a member of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance by virtue of its EU membership but intends to join in its own right

and steps have been taken to do so. The UK is also a party to, in its own right, a 1973 Hague Convention and a 1956 UN Convention which some EU countries are a party to. However, the Maintenance Regulation takes precedence over these other Conventions between Member States.

11. As the UK already operates these other Conventions, either in its own right or by virtue of EU membership, the implementing legislation is mostly in place. A number of minor amendments are however made to ensure that those Conventions now operate with respect to EU Member States where currently the EU Regulation takes precedence. Where there are no other international agreements which cover areas in the Maintenance Regulation, the intention of the Scottish Government is to revert to the pre-EU rules concerning jurisdiction to decide maintenance claims.
12. It should be noted that this Statutory Instrument (SI) revokes Brussels IIa for England and Wales and Northern Ireland only. This SI does, however, make amendments for Scotland in legislation concerning international child abduction under Brussels IIa. Specifically, it repeals for Scotland the provisions within the Child Abduction and Custody Act 1985 that provide for Article 60 of Brussels IIa to take precedence over the 1980 Hague Convention on international child abduction (the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on 25th October 1980). This is known as the “child abduction override”. The override allows a court in the country of a child’s habitual residence to make an order for return which will prevail over the refusal of a court in another EU Member State to order the return of the child under the 1980 Hague Convention. This revocation means that the 1980 Hague Convention remains in force in the UK but from exit day without the Brussels IIa override for EU Member States. The override is rarely used and unilateral retention is not considered appropriate. Non-return decisions will instead be subject to appeal but not override.
13. The Scottish Government has indicated that a Scottish Statutory Instrument (SSI) will be brought forward for all other matters covered by Brussels IIa such as the rules for jurisdiction and recognition and enforcement of judgments in divorce and parental responsibility.
14. The UK SI contains saving and transitional provisions which provide for the approach to cases in which the application or the action has been commenced prior to exit day. It provides that cases which have commenced under the EU rules pre-Exit day should continue under those rules. Where new proceedings, either based upon jurisdiction, or applications for recognition and enforcement, are started after Exit, these will then rely on the law as amended by the SI. For maintenance, the transitional provisions are designed to work in unison with those in the International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018. The Committee has previously considered the notification for this SI and approved the Scottish Ministers’ consent to the instrument.

*The Civil Jurisdiction and Judgments (Amendment etc.) (EU Exit) Regulations 2018*

15. The “Brussels regime” comprises a series of EU legislative instruments and treaties that deal with:
- the allocation of jurisdiction between courts of EU Member States and EFTA States in civil and commercial matters; and
  - the recognition and enforcement of judgments emanating from those courts in such matters.
16. The principal instrument in this regime is Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (referred to as “Brussels IA”). Brussels IA governs the allocation of jurisdiction in civil and commercial matters between EU Member courts (except Denmark which has opted out of EU measures in Justice and Home Affairs) as well as recognition and enforcement of their judgments.
17. Brussels IA was preceded by, and is a recast of, Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters dated 22 December 2000 (referred to as “Brussels I”). Brussels I included orders for maintenance. Brussels IA does not cover maintenance matters within the EU which are now governed by the Maintenance Regulation (Council Regulation (EC) No. 4/2009 of 18 December 2008). A separate SI addressing the legislative regime in relation to maintenance is being prepared and will be notified to the Committee.
18. There are a number of international agreements relevant to the Brussels regime. The principal one is the Lugano Convention of 2007 (the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30th October 2007). This applies the substance of the Brussels I rules on jurisdiction and recognition and enforcement to matters involving the EFTA States of Switzerland, Iceland and Norway as well as Denmark. Its subject matter scope (being similar to Brussels I) includes maintenance.
19. The principal EU legislative instruments and treaties are supplemented by a number of tertiary EU instruments relating to the Brussels regime such as Council Decision establishing the European Judicial Network in civil and commercial matters (2201/470/EC) and Decisions relating to the conclusion of the various Agreements comprising the regime.
20. Domestically, the Civil Jurisdiction and Judgments Act 1982 is the principal legislative vehicle for implementation of the Brussels regime. There are also references to the various EU instruments in other domestic legislation.
21. On Exit Day, these EU law instruments, the rights etc. deriving from the international agreements and the related implementing primary and secondary

legislation will become 'retained EU law' in UK domestic law. However, in the absence of an agreement between the EU and the UK, the retained EU law will cease to operate reciprocally between the EU Member States and the UK. The UK alone is not able to legislate to restore that reciprocity and in addition the retained law will contain numerous EU exit related deficiencies meaning that it will cease to operate effectively.

22. The policy proposal out forward by the Scottish Government is to revert to the rules for jurisdiction, recognition and enforcement pre-existing the Brussels regime which is applicable for cases involving countries not part of that regime.

23. The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2018:

- Revokes Brussels IA (and the two EU Regulations that amend Brussels IA), Brussels I and the related tertiary EU instruments;
- Extinguishes the rights, powers, liabilities, obligations, restrictions, remedies and procedures that are derived from the international agreements related to the Brussels regime (the principal one being the Lugano Convention of 2007). These are retained in domestic law by section 4 of the 2018 Act and so any such retentions are removed by the SI for the avoidance of doubt;
- Amends domestic legislation to remove references to the Brussels regime and, where appropriate, replace these with references to domestic legislation so that legislation will work effectively post exit;
- Preserves aspects of the Brussels regime and the domestic implementing legislation for transitional purposes so they continue to apply to determine jurisdiction for proceedings instituted in the UK before exit day and in relation to the recognition or enforcement of a judgment given, court settlement concluded or authentic instrument registered in a EU or EFTA State before exit day;
- Preserves, in restated form, elements of the Brussels IA Regulation in two areas: (1) consumer and employment litigation; and (2) interpretative provision for determining whether a company or association is domiciled in the UK.
- Broadly, the effect of the above will be to remove the Brussels regime rules from domestic law. In its place, jurisdiction and the recognition and enforcement of judgments will be determined by a combination of the common law; statutory provisions on (1) cross-border civil and commercial claims involving UK domiciled consumers and employees and (2) domicile of companies; and the Hague 2005 Convention on Choice of Court Agreements to which the UK is acceding as an independent Contracting State post exit (which is being taken forward in a separate statutory instrument to which the Scottish Ministers have consented, with agreement of the Committee ).

24. The Scottish Government argue that, post EU-exit, as a third country, the United Kingdom cannot participate in the civil judicial cooperation framework, and

consequently post EU-exit these reciprocal EU Regulations will cease to have effect in relation to the UK. The Scottish Government notes that the UK cannot legislate to restore the necessary reciprocity.

25. The Scottish Government state that, in the absence of existing EU frameworks, the legal rules need to be certain which this SI does for the jurisdiction of the courts and recognition and enforcement of judgments in civil and commercial matters. In absence of these EU frameworks, the fall-back position of the Scottish Government will be returning to the pre-existing rules and the application of the 2005 Hague Convention on Choice of Court Agreements. The Scottish Ministers, with the agreement of the Scottish Parliament, have consented to a UK SI extending to Scotland to join this Convention as an independent member.
26. The Scottish Government note that Brussels IIa and the Maintenance Regulation are part of the civil judicial co-operation framework between EU Member States. Post EU-exit, as a third country, the Scottish Government note that the United Kingdom cannot participate in the civil judicial cooperation framework, and consequently post EU-exit these reciprocal EU Regulations will cease to have effect in relation to the UK. The UK cannot legislate to restore the necessary reciprocity.
27. The Scottish Government has responsibility for civil law and procedure which relates to devolved matters. In the absence of these EU frameworks, its view is that the legal rules need to be certain which this SI does for international maintenance and child abduction. The Scottish Government therefore intends to bring forward an SSI for Brussels IIa (jurisdiction and the recognition and enforcement of judgments in divorce and matters of parental responsibility) and related domestic legislation.

*The European Institutions and Consular Protection (Amendment etc.) (EU Exit) Regulations 2018*

28. The Treaty on the Functioning of the European Union (“TFEU”) includes various Protocols which set out rules governing institutions and bodies of the EU. Specifically, provision is made regarding privileges and immunities for persons involved with the Court of Justice of the European Union (“CJEU”) and the European Union itself. This includes privileges and immunities for Members of the European Parliament (MEPs) and officials and other servants of the European Union. This instrument relates to a mixture of reserved and devolved matters, the latter of which are described below.
29. The relevant provisions relate to immunity from legal proceedings in respect of acts performed in an official capacity and are set out in:
  - Protocol (No 3) of the TFEU on the statute of the Court of Justice of the European Union. Protocol (No 3) makes provision for the roles of judges and Advocates-General; and
  - Protocol (No 7) of the TFEU on the privileges and immunities of the European Union. Protocol (No 7) sets out the privileges and immunities granted to the EU and to a range of other EU institutions and officials.

30. The privileges and immunities granted to the EU are uniform across Member States. The EU and other institutions are granted such privileges and immunities as are necessary for the performance of their tasks. Privileges and immunities are a standard feature of international law, and are considered necessary for the proper functioning of international organisations. The privileges and immunities that the UK grants to the EU are similar to the privileges and immunities afforded to international organisations in the UK. This is consistent with UK policy to afford such privileges and immunities as are necessary for international organisations to perform their functions.
31. The effect of the European Union (Withdrawal) Act 2018 is that direct EU law is converted into domestic law (known as “retained direct EU law”) and therefore continues to have effect in the UK post exit day. After the UK’s withdrawal from the EU, the abovementioned provisions will become deficient. Specifically, the UK will no longer be party to the institutions and bodies of the EU in a no deal scenario.
32. The proposed Regulations are being brought forward by the UK Government under powers in the EU (Withdrawal) Act 2018. The purpose of the proposed Regulations is to provide technical fixes to legislation in order to deliver a functioning statute book on exit. The Regulations revoke or amend relevant directly applicable EU legislation. The Regulations relate to a mixture of reserved and devolved matters, the latter of which are described below.
33. The proposal is to remove the relevant provisions in Protocol (No 3) and Protocol (No 7) relating to immunity from legal proceedings in the UK after exit day because they will no longer be relevant for the UK. However, the instrument does save the privileges and immunities in respect of acts performed by individuals in their official capacity before exit day.
34. The UK will no longer be part of the EU and so, according to the UK Government, arrangements of this kind are no longer appropriate. These privileges and immunities are being removed for persons such as Members of the European Parliament, because it would be inappropriate for those individuals to continue receiving those privileges and immunities once the UK has left the EU and its institutions.
35. Privileges and immunities apply across the UK and across devolved and reserved legislation. Criminal law and policing are within devolved competence. The impact of the removal of these immunities in respect of devolved areas will, according to the Scottish Government, be limited to in the activities of relevant individuals in those devolved areas for which they will no longer enjoy immunity, namely immunity from legal proceedings as described above.

**Views from officials and external bodies**

36. The clerks approached other parliamentary officials to seek their views, if any, on the proposals. This is in addition to the notification being placed on the Committee's website for public awareness.

37. No issues have been raised.

**Action**

**38. Members are asked to consider the three Brexit SI notifications covered by this note and consider whether to agree with the view of the Scottish Government that it should consent to the relevant changes being made by the UK Government.**