



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

5th Meeting, 2019 (Session 5)

Tuesday 5 February 2019

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

1. **Decisions on taking business in private:** The Committee will decide whether to take item 7 in private. The Committee will also decide whether its consideration of a draft report on post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012 should be taken in private today and at future meetings.
2. **Subordinate legislation:** The Committee will consider the following negative instrument—

Licensing (Amendment) (EU Exit) (Scotland) Regulations 2019 (SSI 2019/6).
3. **European Union (Withdrawal) Act 2018:** The Committee will consider whether the following instrument has been laid under the appropriate procedure—

Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft].
4. **Public petitions:** The Committee will consider the following petitions—

PE1458 by Peter Cherbi on a register of interests for members of Scotland's judiciary;

PE1633 by Bill Alexander on private criminal prosecution in Scotland.
5. **Justice Sub-Committee on Policing:** The Committee will consider a report back from the Sub-Committee meeting held on 31 January 2019.
6. **Post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012:** The Committee will consider a draft report.

7. **Work programme:** The Committee will consider its work programme.

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The papers for this meeting are as follows—

**Agenda item 2**

Paper by the clerk - SSI 2019-6 J/S5/19/5/1

**Agenda item 3**

Paper by the clerk - Draft SSI J/S5/19/5/2

Private paper - Draft SSI J/S5/19/5/3 (P)

**Agenda item 4**

Paper by the clerk - Petitions J/S5/19/5/4

Private paper - Petitions J/S5/19/5/5 (P)

**Agenda item 5**

Paper by the clerk - Justice Sub-Committee on Policing J/S5/19/5/6

**Agenda item 6**

Private paper - Police and Fire Reform (Scotland) Act 2012 J/S5/19/5/7 (P)

**Agenda item 7**

Private paper - Work Programme J/S5/19/5/8 (P)

Private paper - Elder Abuse J/S5/19/5/9 (P)

Private paper - Drug Driving (Specified Limits) (Scotland) Regulations 2019 J/S5/19/5/10 (P)

**Justice Committee****5<sup>th</sup> Meeting, 2019 (Session 5), Tuesday 5 February 2019****Subordinate legislation****Note by the clerk****Purpose**

1. This paper invites the Committee to consider the following negative instrument:
  - [Licensing \(Amendment\) \(EU Exit\) \(Scotland\) Regulations 2019 \(SSI 2019/6\)](#)  
*[see page 3]*
2. This instrument has been made under the powers conferred on devolved authorities in the European Union (Withdrawal) Act 2018 to deal with deficiencies arising from EU withdrawal. A [protocol](#) has been agreed between the Scottish Government and Scottish Parliament which sets out the process for committees dealing with such instruments.
3. The protocol also sets out three categories of SSIs – high, medium or low – to assist committees’ prioritisation in terms of scrutiny. The Scottish Government has categorised the Licensing (Amendment) (EU Exit) (Scotland) Regulations 2019 as medium.
4. Under the protocol, the lead committee has the opportunity, in advance of its policy scrutiny, to recommend to the Scottish Government that the parliamentary procedure attached to the instrument should be changed. This is known as “sifting”. At its meeting on [29 January 2019](#), the Committee agreed that the Licensing (Amendment) (EU Exit) (Scotland) Regulations 2019 had been laid under the appropriate procedure (negative procedure).
5. At its meeting on 5 February 2019, the Committee will consider the policy content of the instrument, in accordance with the usual procedure for negative instruments. If the Committee agrees to report to the Parliament on the instrument it is required to do so by 4 March 2019.

**Procedure for negative instruments**

6. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
7. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
8. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a

whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.

9. Each negative instrument appears on the Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.

10. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

### **Guidance on subordinate legislation**

11. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

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

### **Recommendation**

12. **The Committee is invited to consider the instrument.**

## **LICENSING (AMENDMENT) (EU EXIT) (SCOTLAND) REGULATIONS 2019 (SSI 2019/6)**

### **Introduction**

13. The instrument is made under paragraphs 1 and 3 of schedule 2 and paragraph 21 of schedule 7 of the European Union (Withdrawal) Act 2018. The Regulations address deficiencies in licensing legislation arising from the withdrawal of the United Kingdom from the European Union.

14. Further details on the purpose of the instrument can be found in the policy note (see below).

15. The instrument comes into force, in accordance with regulation 1, on EU Exit day.

### **DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION**

16. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 29 January 2019. In relation to the sifting and categorisation of the instrument under the protocol, the DPLR Committee agreed that the negative procedure is the appropriate scrutiny procedure. It recommended that the instrument be categorised as “low”, as the changes are minor and technical and there is no significant policy decision for Scottish Ministers to make. In relation to its standard technical scrutiny of the instrument, the DPLR Committee agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

### **JUSTICE COMMITTEE CONSIDERATION**

14. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 4 March 2019.

### **Policy Note: Licensing (Amendment) (EU Exit) (Scotland) Regulations 2019 (SSI 2019/6)**

#### **Policy Objectives**

1. The policy objective is to ensure that the relevant licensing legislation continues to operate effectively following the UK’s exit from the EU on 29 March 2019 in the event of no deal.

#### **Explanation of the law being amended by the regulations**

2. The Licensing Scotland Act 2005 is the main piece of legislation that controls the sale of alcohol. It provides for offences relating to the sale of alcohol to a child or young person and to the delivery of alcohol by or to a child or young person.
3. The Crossbows Act 1987 and the Criminal Justice Act 1988, provide for offences in relation to the sale and letting or hire of crossbows and knives.
4. Each of these Acts provide for a defence where the person can show that they believed that the child or young person was aged 18 or over and that they had taken reasonable steps to establish that person’s age. Acceptable proof of age

currently includes "a European Union photocard driving licence". These regulations add a "UK driving licence" as proof of age to the relevant licensing legislation to ensure both driving licences issued in the UK as well as those issued in EU member States are recognised as proof of age when the UK withdraws from the EU.

5. The licensing regime for sex shops within the Civic Government (Scotland) Act 1982 currently prevents the granting of a licence to a person who is not resident in a member state of the EU or was not resident throughout the 6 month period prior to the application being made. It also prevents the granting of a licence to a body corporate not incorporated in a member state of the EU.
6. The extension of the residency qualification to EU member states was required to meet the UK's obligations under the Service Directive 2006/123/EC which was implemented in the UK by the Provision of Services Regulations 2009/2999. As the UK will no longer be a member state of the EU following EU exit these restrictions for obtaining a licence will prevent the legislation working effectively. The relevant provisions in the Civic Government (Scotland) Act 1982 have therefore been amended so that the residence conditions are within the UK. The approach adopted in making this amendment is to revert to an earlier version of this legislation. This falls within the parameters of the enabling powers in the EU (Withdrawal) Act 2018 and takes account of the Scottish Government's position in relation to the EU Services Directive and Provision of Services Regulations 2009. Provision is made in relation to these in the Provision of Services (Amendment) (EU Exit) Regulations 2018 which were laid in the UK Parliament on 12 December 2018. Scottish Ministers consented to the inclusion of devolved matters in these Regulations which were notified to the Scottish Parliament on 29 October, considered and the consent approved by the Economy, Energy and Fair Work Committee on 29 November.
7. The Sale of Alcohol to Children and Young Persons (Scotland) Regulations 2007, as amended by the Sale of Alcohol to Children and Young Persons (Scotland) Amendment Regulations 2013, prescribe acceptable proof of age documentation in addition to that provided for in the primary Legislation. Regulation 2(2)(c) prescribes a national identity card issued by an EU state (other than the UK)". As the UK will no longer be a member state of the EU following EU Exit the words "other than the United Kingdom" are no longer necessary and have been removed.

#### **Reasons for and effect of the proposed change or changes on retained EU law**

8. These minor technical changes to licensing legislation correct legislative deficiencies arising as a result of the UK leaving the EU. They have been made to ensure that the legislation continues to operate effectively following EU Exit on 29 March 2019.

#### **Statements required by European Union (Withdrawal) Act 2018**

#### **Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate**

The Minister for Community Safety, Ash Denham has made the following statement.

“In my view the Licensing (Amendment) (EU Exit) (Scotland) Regulations 2019 do no more than is appropriate. This is the case because they ensure that the relevant licensing legislation continues to operate effectively by including a UK Driving Licence as an additional appropriate form of identification. The regulations also revert limiting applications for a sex shop licence to an earlier version of the legislation. This falls within the parameters of the enabling powers in the EU (Withdrawal) Act 2018 and takes account of the Scottish Government’s position in relation to the EU Services Directive and Provision of Services Regulations 2009, which is described in its notification to the Scottish Parliament for the relevant UK EU exit SI.”

**Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action**

The Minister for Community Safety, Ash Denham has made the following statement.

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action as they enable the relevant licensing legislation to operate effectively following the UK’s exit from the EU. The changes made by the regulations fall within the parameters of the enabling powers in the EU (Withdrawal) Act 2018”.

**Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation**

The Minister for Community Safety, Ash Denham has made the following statement

“In my view the Licensing (Amendment) (EU Exit) (Scotland) Regulations 2019 do not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.

**Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010**

The Minister for Community Safety, Ash Denham has made the following statement

“In my view the Licensing (Amendment) (EU Exit) (Scotland) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

**Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament**

**Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare**

N/A

**Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)**

N/A

**An indication of how the regulations should be categorised in relation to the significance of the change proposed.**

Medium - These amendments are minor and technical however, if they are not made presentational difficulties and reputational risk on our ability to deliver may arise.

**Statement setting out the Scottish Ministers' reasons for their choice of procedure**

The Minister for Community Safety, Ash Denham has made the following statement regarding the use of negative procedure for the Licensing (Amendment) (EU Exit) (Scotland Regulations 2019.

“Negative procedure is considered appropriate as these minor and technical amendments to relevant licensing legislation do no more than is necessary to ensure that the legislation continues to operate effectively following the UK’s exit from the EU and they do not impose any additional financial burdens on local authorities or businesses. The Regulations do not include provision which falls within paragraph 1(2) of schedule 7 to the European Union (Withdrawal) Act 2018.”

**Further information**

**Consultation**

No consultation was carried out in relation to the Licensing Amendment (EU Exit) (Scotland) Regulations. However, The UK Government did confirm the term “UK driving licence” was appropriate. As mentioned above, these regulations are required to ensure that the legislation continues to operate effectively following EU Exit on 29 March 2019.

**Impact Assessments**

Full impact assessments have not been prepared for this instrument. The regulations are required to assist a seamless EU Exit and the impact is thought to be positive as the regulations will ensure that the relevant licensing legislation continues to operate effectively.

**Financial Effects**

The Minister for Community Safety is content that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

## Justice Committee

5th Meeting, 2019 (Session 5), Tuesday 5 February 2019

### Subordinate legislation – Brexit SSI

#### Note by the clerk

#### Introduction

1. This paper has been produced in relation to the following Scottish Statutory Instrument (SSI):

[Jurisdiction and Judgments \(Family, Civil Partnership and Marriage \(Same Sex Couples\)\) \(EU Exit\) \(Scotland\) \(Amendment etc.\) Regulations 2019 \[draft\]](#)

2. This instrument has been made under the powers conferred on devolved authorities in the European Union (Withdrawal) Act 2018 (“the Act”) to deal with deficiencies arising from EU withdrawal.
3. The purpose of the instrument is to address deficiencies in relation to some family cases if the UK leaves the EU without a negotiated settlement (i.e. without a deal). Further information on the policy objectives of the instrument is attached at **Annex A**.
4. The instrument is subject to scrutiny in **two stages**, as set out below.

#### Parliamentary procedure

5. The Scottish Ministers have discretion about whether instruments made in exercise of the powers in Schedule 2 to the Act should be subject to the affirmative or the negative procedure, unless the instrument makes provision falling within one of the categories which attracts the mandatory affirmative procedure.
6. A [protocol](#) has been agreed between the Scottish Government and Scottish Parliament which sets out the process for committees dealing with such instruments. The protocol provides for a process of “**sifting**” to apply to certain instruments made under powers conferred by Schedule 2 the Act. This is the first stage in the new process. Under this process, the lead committee for an instrument can recommend that the parliamentary scrutiny procedure attached to that instrument on laying should be changed and the Scottish Government should take steps to change the procedure accordingly.
7. This enables committees to recommend a change where they consider that the matter is of such significance that it requires active Parliamentary approval (or conversely is not so significant that it requires Parliamentary time to be allocated to its approval).
8. Where a lead committee recommends a change in the procedure it should make a report to the Parliament. Where a lead committee is content with the proposed procedure then it may simply minute that, but could still report its conclusions to the Parliament. Where a lead committee recommends a change in procedure, the Scottish Government would be expected to meet that recommendation and to do so as soon as possible.

9. In any event, a change in the procedure attached to the instrument would not normally be expected to mean a change in the content of the instrument. Accordingly, while subject to a different procedure, the instrument would normally be treated as the same instrument for the purposes of timing and the 40-day scrutiny period allowed by Standing Orders for the original instrument will normally continue to run.
10. The second stage in the process is scrutiny of the instrument itself, in accordance with the usual procedures for negative or affirmative SSIs. This second stage is likely to take place at a later Committee meeting in February 2019.

### **Procedure for this SSI**

11. **Scottish Ministers have chosen the affirmative procedure to apply to the scrutiny of this SSI in the Parliament.**
12. **The Committee will be asked whether it agrees that the affirmative procedure is the appropriate procedure for considering this SSI.**

### **Categorisation**

13. The protocol referred to above also sets out three different levels of prioritisation based on the significance of an SSI. These are set out at the Annex B to this paper.
14. Standard scrutiny processes would still apply to the consideration of SSIs, depending on the procedure assigned to the particular instrument. That is to say, all SSIs will be considered by the Delegated Powers and Law Reform (DPLR) Committee from a technical perspective irrespective of what category they fall into. Furthermore, all instruments will be referred to a lead committee, again irrespective of the category they fall into and they will be considered in the normal way that a laid only, negative or affirmative instrument would be considered.
15. The protocol does not prescribe a process that lead committees should apply to the scrutiny of matters falling into the different categories, but by categorising instruments it provides committees with a guide as to what they might wish to prioritise.
16. **This particular SSI has been categorised as medium.**
17. **The Committee will be asked if it has a view on the categorisation of this SSI.**

### **Next steps**

18. The clerks will make arrangements to report the views of the Committee on this SSI to the Parliament and Government. The Committee will then consider the policy content of the SSI at a later meeting and decide if it is content for the instrument to be made.

## POLICY NOTE

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

The above instrument was made by the Scottish Ministers in exercise of the powers conferred by paragraphs 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018 and all other powers enabling them to do so.

In accordance with paragraph 4(b) of schedule 2 of the 2018 Act, the Scottish Ministers have consulted with the Secretary of State.

The instrument is subject to the affirmative procedure.

#### **Purpose of the instrument**

This instrument is being made to address deficiencies in retained European Union (EU) law in relation to some family cases if the United Kingdom (the UK) leaves the European Union on 29 March 2019 without a negotiated settlement (i.e. without a deal).

#### **Policy Objectives**

This instrument relates to EU Council Regulation 2201/2003 (known as “Brussels IIa”) on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. Brussels IIa is one of the main EU provisions on family law.

This instrument makes provision on Brussels IIa in the event of the UK leaving the EU without a negotiated settlement. The Scottish Government considers that if the UK leaves the EU without a negotiated settlement, the necessary reciprocity across the EU needed to ensure that Brussels IIa operates effectively would no longer exist and domestic legislation would need to reflect that accordingly.

In addition, the general view is that Brussels IIa does not extend to same sex relationships, given the mixed views in EU Member States on the legal recognition of same sex relationships. As a result, when civil partnership and then same sex marriage were introduced in Scotland, domestic provision was made to mirror, so far as possible, the provisions of Brussels IIa. This domestic provision made specific reference to the Brussels IIa Regulation. As a result, this instrument has to make changes as well to this domestic legislation in the event of the UK leaving the EU without a negotiated settlement.

The Scottish Government’s broad intentions in relation to Brussels IIa if the UK leaves the EU without a negotiated settlement is:

- to rely where possible on international Conventions (The Hague Conventions) on matters such as international recognition of judgments;
- on matters such as the jurisdiction of the Scottish courts, to revert to the position that was in place before there was EU provision in this area and to

carry out, in the longer term (i.e. after Brexit), a review of the jurisdiction of the courts in relation to family cases;

- to treat family cases involving same sex relationships in the same way as family cases involving opposite sex relationships, so far as possible.

### **Explanation of the law being amended by the regulations**

As an EU Regulation, Brussels IIa is currently directly applicable in the UK as an EU Member State. Under the 2018 Act, Brussels IIa will become retained EU law on 29 March 2019. The matters covered by Brussels IIa are devolved. Various changes were made to domestic law to ensure that these were in line with Brussels IIa: this instrument removes these changes.

The instrument includes saving and transitional provisions in regulation 6 in relation to the amendments and revocations it makes.

Regulation 3 revokes Brussels IIa, given that the reciprocity needed to operate the EU Regulation effectively will not be in place if the UK leaves the EU without a negotiated settlement.

Schedule 1 of the Regulations amends primary legislation. More details are below.

Amendments are made to section 7 of the Domicile and Matrimonial Proceedings Act 1973 so that the Court of Session has jurisdiction to hear divorce and judicial separation<sup>1</sup> actions if either of the parties to the marriage is domiciled in Scotland on the date when the court action is begun or was habitually resident in Scotland throughout the period of one year ending on the date when the court action is begun. This brings the jurisdiction of the courts in these court actions back to the position before there was EU provision in this area<sup>2</sup>. Amendments are also made to section 8 of the 1973 Act so that the sheriff court has jurisdiction to hear these actions if either of the parties to the marriage is domiciled in Scotland on the date when the court action is begun or was habitually resident in Scotland throughout the period of one year ending on the date when the court action is begun<sup>3</sup>.

Amendments are made to section 7 of the 1973 Act so that the Court of Session has jurisdiction to hear actions for declarator of nullity of marriage or for a declarator of recognition or non-recognition of a decree of divorce, nullity of marriage or judicial separation granted outwith the UK, the Channel Islands or the Isle of Man<sup>4</sup> if either of the parties to the marriage:

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<sup>1</sup> Judicial separation is formal separation sanctioned by the court. Actions for judicial separation are rare in Scotland.

<sup>2</sup> Provisions in the 1973 Act on jurisdiction of the courts in matrimonial cases are based on a report by the Scottish Law Commission: <https://www.scotlawcom.gov.uk/files/6012/8014/6135/rep25.pdf>

<sup>3</sup> In addition, for the sheriff court to have jurisdiction either party to the marriage has to be resident in the Sheriffdom for 40 days before the court action is begun or had been resident in the Sheriffdom for not less than 40 days ending not more than 40 days before the action is begun and has no known residence in Scotland when the action is begun. These provisions on sheriff court jurisdiction are not being changed by this instrument.

<sup>4</sup> The reference to the UK, the Channel Islands or the Isle of Man reflects that section 44 of the Family Law Act 1986 provides recognition across the UK of divorces, judicial separations and annulments granted in the British Islands ("the British Islands" are defined by the Interpretation Act 1978 to mean the UK, the Channel Islands or the Isle of Man).

- is domiciled in Scotland on the date when the court action is begun; or
- was habitually resident in Scotland throughout the period of one year ending on the date when the court action is begun; or
- died before the action was begun and at death was domiciled in Scotland or had been habitually resident in Scotland throughout the period of one year.

For declarators of nullity, this again brings the jurisdiction of the courts in these court actions back to the position before there was EU provision in this area. Provisions on declarators for recognition or non-recognition of relevant foreign decrees were added to the 1973 Act by section 37 of the Family Law (Scotland) Act 2006. This instrument ensures the jurisdiction of the courts in these court actions is in line with the jurisdiction of the courts in other matrimonial actions before EU provision was in place.

The instrument removes section 11(2) and section 12(5)(b) to (d) as these are in place as a consequence of Brussels IIa.

Paragraph 1(7) of schedule 1 of the instrument makes amendments to domestic provisions put in place in relation to same sex marriage. Paragraph 4 of schedule 1 makes similar provision in respect of civil partnership<sup>5</sup> (this also covers overseas relationships recognised as civil partnerships in Scotland by virtue of the provisions in Chapter 2 of Part 5 of the Civil Partnership Act 2004). These provisions refer to the Brussels IIa regulation and so need to be amended. As outlined above, the general view is that Brussels IIa does not extend to same sex relationships, given the mixed views in EU Member States on the legal recognition of same sex relationships. As a result, when civil partnership and then same sex marriage were introduced in Scotland, domestic provision was made to mirror, so far as possible, the provisions of Brussels IIa.

Under the amendments made by this instrument:

- The power for the Scottish Ministers to make provision by regulations for same sex marriage and civil partnership which corresponds to Brussels IIa are removed. Paragraphs 2 and 4 of schedule 2 of this instrument revoke the existing regulations (SSI 2005/629 and 2014/362) made under these powers.
- Provision is made so that the Scottish courts have jurisdiction<sup>6</sup> to hear actions for divorce and judicial separation in relation to same sex marriage and dissolution and separation of civil partnership if either of the parties is domiciled in Scotland on the date when court proceedings are begun or was habitually resident in Scotland throughout the period of one year ending on the date when the court proceedings are begun<sup>7</sup>.
- Provision is made so that the Scottish courts have jurisdiction to hear declarator of nullity actions in relation to both same sex marriage and civil partnership if

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<sup>5</sup> The Scottish Government has consulted on potential changes to civil partnership: <https://consult.gov.scot/family-law/the-future-of-civil-partnership-in-scotland/> This consultation closed on 21 December 2018 and the Scottish Government is considering next steps in the light of the consultation responses. At the moment, however, civil partnership is only available to same sex couples.

<sup>6</sup> For the sheriff court, additional provision is retained on residence in the Sheriffdom for 40 days.

<sup>7</sup> For both divorce and judicial separation of same sex marriage and dissolution and separation of civil partners, a “jurisdiction of last resort” is maintained if the parties married or entered their civil partnership in Scotland; no court has, or is recognised as having, jurisdiction and it appears to the Scottish court to be in the interests of justice to assume jurisdiction.

either of the parties is domiciled in Scotland on the date when court proceedings are begun or was habitually resident in Scotland throughout the period of one year ending on the date when the court proceedings are begun or died before that date and at death was either domiciled in Scotland or had been habitually resident in Scotland for a year<sup>8</sup>.

- Provision is made so that the Scottish courts have jurisdiction to hear actions for declarator of recognition, or non-recognition, of decrees of divorce, separation or nullity granted outwith the UK, the Channel Islands and the Isle of Man in relation to same sex marriage if either of the parties is domiciled in Scotland on the date when court proceedings are begun or was habitually resident in Scotland throughout the period of one year ending on the date when the court proceedings are begun or died before that date and at death was either domiciled in Scotland or had been habitually resident in Scotland for a year.
- A reference in paragraph 7(2) of schedule 1B of the 1973 Act to regulations on same sex marriage made under paragraph 2 of schedule 1B is removed.

Paragraphs 2 and 3 of schedule 1 makes amendments to the Family Law Act 1986 and to the Children (Scotland) Act 1995 to remove references to Brussels IIa.

Paragraph 4(4) and (5) of schedule 1 remove references in section 227 and 234 of the Civil Partnership Act 2004 to regulations made under section 219 of the 2004 Act. Section 219 and regulations made under it are being removed by this instrument.

Schedule 2 of the instrument revokes and amends secondary legislation.

The European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005 (SSI 2005/42), which made changes to domestic law to help implement Brussels IIa, is revoked. The Regulations made under section 219 of the Civil Partnership Act 2004 and under schedule 1B of the Domicile and Matrimonial Proceedings Act 1973 are also revoked.

References to Brussels IIa have been removed from the Parental Responsibility and Measures for the Protection of Children (International Obligations) (Scotland) Regulations 2010 (SSI 2010/213).

Regulation 6 of the Instrument makes saving and transitional provisions. The broad effect is to make provision so that cases started before “exit day” under Brussels IIa or under the equivalent domestic provisions in respect of same sex marriage and civil partnership can continue. “Exit day” is defined under section 20(2) of the European Union (Withdrawal) Act 2018 and means 29 March 2019 at 11 pm. In drawing up the transitional provisions, the Scottish Government has taken account of a notice to stakeholders issued by the European Commission on 18 January 2019. This notice relates to the withdrawal of the UK from the EU and EU rules in the field of civil justice and private international law. It has been issued by the Commission to remind interested parties about legal repercussions which need to be considered when the UK becomes a third country (i.e. not a member of the EU)<sup>9</sup>.

## **Reasons for and effect of the proposed change or changes on retained EU law**

<sup>8</sup> Again, a “jurisdiction of last resort” is maintained.

<sup>9</sup> The notice to stakeholders issued by the European Commission on 18 January 2019 is at [https://ec.europa.eu/info/sites/info/files/notice\\_to\\_stakeholders\\_brexit\\_civil\\_justice\\_rev1\\_final.pdf](https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_civil_justice_rev1_final.pdf)

Under the 2018 Act, Brussels IIa would become UK domestic retained law on 29 March 2019. If there should be a no-deal Brexit, the arrangements which currently exist in terms of this EU Regulation between EU Member States and the UK in relation to areas such as which courts should have jurisdiction in family cases and mutual recognition of family judgments would no longer be appropriate as they require reciprocity to operate effectively.

The Scottish Government have considered what changes to legislation are needed as a result, if the UK should leave the EU without a deal. In broad terms, the approach taken by the Scottish Government is to:

- Make use of international (The Hague) Conventions where possible.
- Make provision so that the jurisdiction of the courts in matrimonial cases (eg divorce) reverts to the position before there was any EU provision in this area. This reflects the approach taken by a Scottish Law Commission report in 1972. In the longer term, the Scottish Government intends to review jurisdiction in matrimonial cases but this review will take some time and cannot be completed in time for 29 March 2019.
- To treat same sex relationships, such as same sex marriage and civil partnership, in the same way as opposite sex relationships, so far as possible. This is in line with the Scottish Government's commitment to equality.

In practical terms, this means:

- Recognition in Scotland of overseas divorces will be based on the existing provision in part II of the Family Law Act 1986. (The instrument makes some minor amendments to the 1986 Act, to remove references to Brussels IIa). The 1986 Act provides wide recognition in Scotland of overseas divorces (whether from the EU or from elsewhere)<sup>10</sup>. These provisions are based on a Hague Convention on divorce<sup>11</sup>.
- Recognition in Scotland of overseas dissolutions of civil partnership will be based on the existing provision in sections 234 to 238 of the Civil Partnership Act 2004. The instrument makes some minor amendments to relevant provisions of the 2004 Act to remove references to regulations made under section 219 of the 2004 Act. Section 219 and regulations made under it are being removed by this instrument. The 2004 Act provides wide recognition in Scotland of overseas dissolutions (whether from the EU or from elsewhere).
- Recognition in Scotland of overseas judgments on parental responsibility will be based on a Hague Convention Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children<sup>12</sup>. As a result, there would no longer be any reliance on Brussels IIa and the instrument revokes Brussels IIa.

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<sup>10</sup> This includes recognition in Scotland of divorces overseas of same sex marriages. Section 4 of the Marriage and Civil Partnership (Scotland) Act 2014 makes provision so that the term "marriage" and related expression in enactments includes same sex marriage.

<sup>11</sup> The Hague Convention on divorce is at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=80>

<sup>12</sup> The Hague Convention on parental responsibility is at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>

- On child abduction we would rely on a Hague Convention on the civil aspects of international child abduction<sup>13</sup>.

This instrument does not specifically deal with child abduction as that has already been dealt with by an SI which has been laid at Westminster. The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 was notified to the Scottish Parliament on 26 November 2018.<sup>14</sup> The Justice Committee was content for the Scottish Ministers to give its consent for the UK Ministers to lay an SI at Westminster including provision within the legislative competence of the Scottish Parliament.

On child abduction, the Westminster SI repeals for Scotland the provisions within the Child Abduction and Custody Act 1985 which provide for Article 60 of Brussels IIa to take precedence over the Hague Convention on international child abduction. 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 Hague Convention. This revocation means that the Hague Convention remains in force in the UK but from exit day without the Brussels IIa override for EU Member States. Non-return decisions will instead be subject to appeal but not override.

### **The re-cast of Brussels IIa**

Brussels IIa is currently being re-cast (re-negotiated). However, the re-cast is not expected to be in force until 2022. As a result, it appears that the re-cast will not apply to Scotland unless any transitional period following the UK’s departure from the EU extends to 2022 or there is a longer-term agreement between the UK and the EU on civil justice co-operation.

### **Statements required by European Union (Withdrawal) Act 2018**

#### **Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate**

The Minister for Community Safety, Ash Denham, has made the following statement:

“In my view, the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 do no more than is appropriate. This is because the Regulations revoke Brussels IIa; remove references to Brussels IIa in domestic legislation; make changes to legislation on same sex relationships as a result of that legislation referring to Brussels IIa and make necessary provision on jurisdiction of the courts in matrimonial cases.”

#### **Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action**

The Minister for Community Safety, Ash Denham, has made the following statement:

<sup>13</sup> The Hague Convention on international child abduction is at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>

<sup>14</sup> The notification of the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 is at [http://www.parliament.scot/S5\\_Delegated\\_Powers/20181126SINotification.pdf](http://www.parliament.scot/S5_Delegated_Powers/20181126SINotification.pdf)

“In my view, there are good reasons for the provisions in the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 and I have concluded they are a reasonable course of action. If the UK leaves the EU without a deal, the Scottish Government has to ensure that appropriate devolved legislative provisions are in place. In that scenario, and in this area, the Scottish Government considers it reasonable to rely on international (the Hague) Conventions and to base jurisdiction of the courts on the position prior to Brussels IIa which was based on a report prepared by the Scottish Law Commission”.

**Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation**

The Minister for Community Safety, Ash Denham, has made the following statement:

“In my view, the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

**Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010**

The Minister for Community Safety, Ash Denham, has made the following statement:

“In my view, the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples) (Amendment etc.) (EU Exit) (Scotland) Regulations 2019, the Scottish Ministers have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

**Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament**

**Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare**

This is not applicable as these regulations have no impact on the environment or on animal welfare.

**Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)**

These regulations have no effect on the rights and duties relating to employment and health and safety and matters relating to consumer protection.

**An indication of how the regulations should be categorised in relation to the significance of the change proposed**

Medium. These amendments impact on one of the main EU provisions on family law. However, many family law court cases in Scotland are not affected by EU law because the cases are purely domestic and EU provision has not had much affect on the substance of family law: instead, it has concentrated on areas such as the mutual recognition of judgments across the EU and on jurisdiction of the courts. In a number of areas, Hague Conventions make provision in relation to international matters.

### **Statement setting out the Scottish Ministers' reasons for their choice of procedure**

Affirmative. There are significant amendments to primary legislation. However, the mandatory affirmative procedure in terms of paragraph 1(2) of Schedule 7 to the 2018 Act does not apply as the instrument is removing, rather than creating or amending, powers to make secondary legislation.

### **Further information**

#### **Consultation**

There has been no specific consultation on this SSI, other than with the Secretary of State, as required by paragraph 4(b) of schedule 2 of the 2018 Act.

However, the Scottish Government did carry out a consultation in 2018 on Brexit and Family Law and Civil Law<sup>15</sup> and has taken account of the responses to that consultation when preparing this SSI.

#### **Impact Assessments**

In relation to Impact Assessments:

- The Scottish Government has prepared for these Regulations, and is publishing on its website, a [Business and Regulatory Impact Assessment \(BRIA\)](#).
- The Scottish Government has prepared for these Regulations, and is publishing on its website, a [Child Rights and Wellbeing Impact Assessment \(CRWIA\)](#).
- The Scottish Government has prepared for these Regulations, and is publishing on its website, an [Equality Impact Assessment \(EQIA\)](#).
- Data Protection Impact Assessment (DPIA). This is not required. There is no impact on data protection as the courts will handle personal information in the same way as now.
- Strategic Environmental Assessment. This is not required. These Regulations have no impact on the environment.
- Fairer Scotland Duty Assessment. This is not required. These Regulations have no impact on low income, low wealth, and area deprivation.
- Islands Communities Impact Assessment. This is not required. These Regulations have no differential impact on the islands.

#### **Financial Effects**

There is no financial impact on business.

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<sup>15</sup> The consultation and the responses are at <https://www2.gov.scot/Topics/Justice/law/17867/brexit>

There may be some financial impact on persons raising and defending relevant court actions. Some of those responding to the 2018 consultation on Brexit and Family Law and Civil Law noted that costs of enforcement may be higher under Hague provisions than under EU provisions<sup>16</sup>.

**Scottish Government  
Family Law Unit, Civil Law Division  
Justice Directorate, January 2019**

**ANNEX B**

## **CATEGORIES OF PRIORITISATION (EXTRACT FROM PROTOCOL)**

### **Low**

It is expected that proposals for instruments falling into this category will have one or more of the following characteristics:

- Minor and technical in detail;
- Ensuring continuity of law with no policy change;
- Clear there is no significant policy decision for Ministers to make;
- Updating references which are no longer appropriate once the UK has left the EU, such as provisions which refer to “member states other than the United Kingdom” or to “other EEA states”.

This is an illustrative list and not a comprehensive view of what falls into this category. It would be expected that instruments falling into this category would be negative instruments.

### **Medium**

It is expected that proposals for instruments falling into this category will have one or more of the following characteristics:

- Instruments predominantly concerned with technical detail but which include some more significant provisions that may warrant subject committee scrutiny;
- Instruments where Ministers have a limited policy choice but with more significant implications.

This is an illustrative list and not a comprehensive view of what falls into this category.

### **High**

It is expected that proposals for instruments falling into this category will have one or more of the following characteristics:

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<sup>16</sup> Please see, for example, the third page of the Faculty of Advocates’ response to the consultation: <http://www.advocates.org.uk/media/2892/final-faculty-response-16-august-2018.pdf>

- Instruments in which a more significant policy decision is being made by Scottish Ministers;
- Transfer of functions - providing for a function of an EU entity to be exercised by a public authority in the UK where there is a policy choice with significant implications about which public authority it should be e.g. a regulatory function exercisable by either SEPA or Scottish Water where Parliament may have an interest in the policy choice made by Scottish Ministers;
- Replacement, abolition, or modification of certain EU functions that have significant implications e.g. reporting (both receiving and making reports), monitoring, compliance and enforcement;
- Sub-delegation – creating or amending a power to legislate, including transferring EU legislative powers to Scottish Ministers or to another UK public authority;
- Provision which materially increases or otherwise relates to a fee in respect of a function exercisable by a UK public authority. This could include changes to the group of bodies or individuals required to pay such fees;
- Provision which creates, or widens the scope of, a criminal offence, or which increases the penalty which may be imposed in respect of a criminal offence;
- Provision which involves a significant financial impact on individuals, business, public sector or the economy;
- Provision which creates, widens the scope of, or increases the level of fine for a fixed penalty.

This is an illustrative list and not a comprehensive view of what falls into this category.

## Justice Committee

5th Meeting, 2019 (Session 5), Tuesday 5 February 2019

### Petitions

#### Note by the clerk

#### Introduction

1. At its meeting on 25 September, the Committee considered the following petitions which have been referred to it by the Public Petitions Committee:

- [PE 1458](#): Register of Interests for members of Scotland's judiciary; and
- [PE 1633](#): Private Criminal Prosecution in Scotland.

2. The Committee agreed<sup>1</sup> to keep both petitions open and seek further information in relation to issues raised in each petition.

3. This paper sets out the additional comments which have been sought on both petitions since they were last considered by the Committee. The Justice Committee webpage summarising its consideration of these petitions in this Session can be found [here](#).

4. Further general background information on the petitions process, provided by the Public Petitions Committee, can be accessed on its dedicated [webpage](#).

#### Options available to Committees considering petitions

5. Once a petition has been referred to a subject Committee it is for the Committee to decide how, or if, it wishes to take the petition forward. Among options open to the Committee are to:

- keep the petition open and write to the Scottish Government or other stakeholders seeking their views on what the petition is calling for, or views on further information to have emerged over the course of considering the petition;
- keep the petition open and take oral evidence from the petitioner, from relevant stakeholders or from the Scottish Government;
- keep the petition open and await the outcome of a specific piece of work, such as a consultation or piece of legislation before deciding what to do next;
- close the petition on the grounds that the Scottish Government has made its position clear, or that the Scottish Government has made some or all of the changes requested by the petition, or that the Committee, after due consideration, has decided it does not support the petition;

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<sup>1</sup> Justice Committee, 24th Meeting, Tuesday 25 September 2018, Minutes: [https://www.parliament.scot/S5\\_JusticeCommittee/Minutes/Minutes20180925.pdf](https://www.parliament.scot/S5_JusticeCommittee/Minutes/Minutes20180925.pdf)

- close the petition on the grounds that a current consultation, call for evidence or inquiry gives the petitioner the opportunity to contribute to the policy process.

6. When closing a petition, the Committee should write to the petitioner notifying the decision and setting out its grounds for closure. Closing a petition does not preclude the Committee taking forward matters relevant or partly relevant to the petition in another way.

## **PE 1458: Register of Interests for members of Scotland's judiciary**

### *Terms of the petition*

[PE 1458 \(lodged 7 December 2012\)](#) *Calls on the Scottish Parliament to urge the Scottish Government to create a Register of Pecuniary Interests of Judges Bill (as is currently being considered in New Zealand's Parliament) or amend present legislation to require all members of the Judiciary in Scotland to submit their interests and hospitality received to a publicly available Register of Interests.*

7. The petition was introduced to the Parliament in 2012 and has been considered by the Public Petitions Committee between 2012 and 2018. The Public Petitions Committee wrote to the [Lord President](#) and the then [Cabinet Secretary](#) for Justice and in March 2018, recommending that a register of judicial interests should be introduced. The petition was then referred to the Justice Committee on 31 May 2018. The Cabinet Secretary's response to the Public Petitions Committee simply noted the Committee's conclusions and the petition's referral to the Justice Committee. The [webpage for the petition](#) contains all information of the consideration of the petition to date, as well as all submissions received.

### *Justice Committee consideration*

8. The Justice Committee considered the petition for the first time on 25 September. In advance of the Committee consideration of the petition on 5 February 2019, clerks contacted key stakeholders<sup>2</sup> who contributed to the Public Petitions Committee's scrutiny of the petition to ask if they had anything further to add to their previous submissions.

9. A response was received from the Scottish Courts and Tribunals Service (SCTS), confirming it had nothing further to add to on the petition, over and above the [submission](#) it made to the Public Petitions Committee in 2013. This is set out in **Annex A**.

10. The Committee may wish to note that Parliamentary officials understand that (according to Renton and Brown's Criminal Procedure) the process whereby a person seeks a private prosecution requires a citizen to apply to the Lord Advocate for his/her concurrence to the prosecution. If a bill for criminal letters to authorise a private prosecution was presented without the consent of the Lord Advocate having been asked, it would be refused as premature and incompetent. The Lord Advocate does not

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<sup>2</sup> Views were sought from the Minister for Community Safety, Lord President of the Court of Session, the Crown Office and Procurator Fiscal Service, the Law Society of Scotland, the Faculty of Advocates, the Scottish Courts and Tribunals Service and the Judicial Complaints Reviewer.

have an absolute right of veto and, when she/he has refused concurrence, the citizen may then complain to the High Court. The High Court can authorise the private party to proceed if it so chooses. It should be noted that a High Court judgment of December 2016 states that the circumstances in which this occurs would be “exceptional”. More detail on this can be found in a SPICe briefing for the Public Petitions Committee - <http://external.parliament.scot/ResearchBriefingsAndFactsheets/Petitions%20briefings%20S5/PB17-1633.pdf>

**11. The Committee is asked to consider what, if any, further action it wishes to take in relation to this petition. The options available (see paragraph 5 above) include keeping the petition open, keeping it open and taking additional action such as writing to the Cabinet Secretary, or closing the petition.**

### **PE 1633: Private Criminal Prosecution in Scotland**

#### *Terms of the petition*

PE 1633 (lodged 19 January 2017): *Calls on the Scottish Parliament to urge the Scottish Government to change the law to give the people of Scotland the same legal rights as the rest of the UK by removing the requirement that the Lord Advocate must first give permission before a private criminal prosecution can be commenced in Scotland.*

12. This petition was referred to the Justice Committee on 9 November 2017 and has been previously considered the petition at its meetings on 19 December 2017, 27 March 2018 and 25 September 2018.

#### *Justice Committee consideration*

13. In March 2018, the Committee wrote to the Scottish Government for its views on the written submissions received relating to the petition. That [response](#) is available on the Committee website. The Scottish Government indicated that, as it previously set out in a letter to the [Public Petitions Committee](#), it does not plan to act on the petition as it is their view that there is no requirement to have the permission of the Lord Advocate before a private criminal prosecution can take place. It also highlights the reserved nature of matters relating to the Health and Safety Executive.

14. The petitioner made a subsequent [submission](#) to the Justice Committee on 18 September 2018, in advance of the Committee’s last consideration of the petition.

15. In advance of the Committee’s consideration at its meeting on 5 February 2019, the clerks sought any views from the petitioner (Mr Bill Alexander), and the Lord Advocate. Both responded to the request for views, and these responses are set out in **Annex B**.

16. In his response, the Lord Advocate stated that the points raised by Mr Alexander in his letter of 18 September now appear to focus on a different issue from that which was the focus of his original petition. The Lord Advocate stated that the submission of 18 September questions the capacity organisations and individuals to report a case to the Crown Office and Procurator Fiscals Service (COPFS), in order for COPFS to make a decision on whether a prosecution should commence. Whereas the focus of the original petition was the authority of an individual to instigate a private prosecution.

17. The Lord Advocate goes on to state that “it is entirely appropriate that the power to investigate and/or enforce the law is restricted to certain organisations, as set out in legislation and that the existence of those powers then informs which organisations can report a case to COPFS”.

18. In his latest submission, Mr Alexander set out further views on the ability of a person to take a private prosecution in Scotland.

**19. The Committee is asked to consider the submissions from the Lord Advocate and the petitioner, and decide what further action, if any, it wishes to take in relation to the petition. The options available (see paragraph 5 above) include keeping the petition open, keeping it open and taking additional action (Members may wish to note that the Committee already has views from the Scottish Government and, most recently, the Lord Advocate), or closing the petition.**

**Committee clerks  
31 January 2019**

**PE1458: Register of Interests for members of Scotland's judiciary**

**Submission from the Scottish Courts and Tribunal Service**

Thank you for being given the opportunity to respond to the above call for written views. This response is submitted by the Scottish Courts and Tribunals Service ("the SCTS") acting in its role to provide efficient and effective administration to the courts and tribunals in Scotland and does not include the views of the Judiciary.

The SCTS submitted a response to the Public Petitions Committee in 2013, a copy of which can be found at:

[http://www.parliament.scot/S4\\_PublicPetitionsCommittee/General%20Documents/PE1458\\_Q\\_Scottish\\_Court\\_Service\\_23.10.13.pdf](http://www.parliament.scot/S4_PublicPetitionsCommittee/General%20Documents/PE1458_Q_Scottish_Court_Service_23.10.13.pdf)

I can confirm that we have nothing further to add to that response.

If you require any further information, please let me know.

Yours faithfully

Nicola Anderson  
Legislation Implementation Team  
29 January 2019

**PE1633: Private Criminal Prosecution in Scotland**

**Submission from the Lord Advocate**



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29 January 2019

*Dr Cameron*

I refer to a request received on the 21 January 2019 asking for a response to the submission made by Mr Bill Alexander on the 21 September 2018 and the points made by Rona MacKay MSP on the 25 September 2018 in relation to the Public Petition from Mr Alexander on Private Criminal Prosecutions (PE 1633).

The points raised by Mr Alexander in his submission, supplemented by Rona MacKay MSP, appear to focus on a different issue to that raised in the initial petition. The submission questions the capacity of organisations and individuals to report a case directly to the Crown Office and Procurator Fiscal Service (COPFS) in order for COPFS to make a decision on whether a prosecution should commence. This is a distinct issue to the authority of an individual to instigate a private prosecution, which was the focus of the original petition.

Organisations, designed as Specialist Reporting Agencies, are authorised to report cases to COPFS on the basis that there are legislative provisions that designate them as an appropriate enforcement, investigative or regulatory body or where Ministers have appointed the organisation to investigate or enforce legislation. Any such organisation must also meet certain technical requirements in order to submit cases to COPFS.

It is the role of a Specialist Reporting Agency to investigate any initial report made to them and decide whether or not to report a case to COPFS.

Mr Alexander appears to suggest that individuals should be able to report cases directly to COPFS and suggests that there is a gap in the law. It is entirely appropriate that the power to investigate and/or enforce the law is restricted to certain organisations, as set out in legislation and that the existence of those powers then informs which organisations can report a case to COPFS. It would not be appropriate for individuals to be given powers of investigation or enforcement or to report cases directly to COPFS.



Specialist bodies which are given regulatory responsibilities in relation to a particular field of activity, such as the HSE, typically have a discretion in relation to the use of their powers with a view to effective regulation. If there are issues identified in terms of the use of powers by a specific organisation then those should be addressed directly with that organisation.

A handwritten signature in blue ink, appearing to read 'W. James Wolffe'.

**W. JAMES WOLFFE QC**



INVESTOR IN PEOPLE  
**The Scottish Government**

## PE1633: Private Criminal Prosecution in Scotland

### Submission from the petitioner

In simple terms, this petition is about access to justice for victims of crime who have been left with no remedy as a result of the reporting agency procedure that underpins our criminal justice system.

As matters currently stand, if a reporting agency decides not to produce a report to the Crown Office Procurator Fiscal Service, then effectively there can be no prosecution unless a private criminal prosecution takes place.

On this basis, when the Health and Safety Executive makes a policy decision that sports workers are to be given less protection than other workers, then effectively no one in Scotland can challenge it. Equally in other areas such as animal welfare, if the relevant reporting agency for this aspect decides not to investigate an incident due to a lack of resources, or perhaps a misunderstanding of the law, then again nothing will happen. It does seem to indicate that part of the problem may be that the Crown Office Procurator Fiscal Service reliance on reporting agencies system is disjointed and no longer fit for purpose.

At the last committee meeting comments were made about what the position is in England and Wales. In their system there is no monopoly reliance on reporting agencies to underpin criminal prosecutions in the manner that operates in Scotland. They also have clear guidelines and procedures, with safeguards against abuse, for alternative private criminal prosecutions. If a reporting agency in England decides not to prosecute, then there are not the same expensive barriers to an alternative remedy as there are in Scotland.

Ultimately this is about control. The Crown Office Procurator Fiscal Service does not want to relinquish control of prosecutions, and if it means that someone is denied access to justice then it appears that this is acceptable. This committee will be well aware of the institutionalised resistance by government agencies to any form of change that has not been put forward by the department itself, or in even getting any form of admission that there might be a valid argument worthy of consideration. All that happens is deflection and delay.

If you look at what was the core reason for the petition, there is a growing body of independent medical evidence that sporting event workers are being harmed with incidents such as concussion and resultant dementia, and life-threatening falls, yet the historical and ongoing failure to carry out the most basic obligations under health and safety law, namely the statutory requirement to carry out risk assessments and to report serious injuries, are being ignored by the reporting agencies. The three relevant reporting agencies in this instance would be the Health and Safety Executive, Local Authority Health and Safety Departments in Scotland, and Police Scotland. For clarity, the committee should be aware that Local Authority Health and Safety Departments in Scotland have been given guidance by the Health and Safety Executive not to investigate sporting event workers injuries so whilst they could, in theory, produce a report, they have been controlled by the Health and Safety Executive not to.

The Health and Safety Executive have, thus far, simply treated this committee with contempt and refused to even recognise its role. Police Scotland have advised that they have a policy of not investigating any health and safety incident, but so far, they will not explain how they have arrived at it. Realistically there are no other reporting agencies who can produce a report for the Crown Office Procurator Fiscal Service on health and safety matters.

Perhaps if the following questions could be asked, then it might help to bring about a greater understanding of whether the remedy that the petition is seeking is actually necessary.

- 1 If the Health and Safety Executive will not be accountable to the Scottish parliament, then can the relevant committee at the Westminster Parliament be asked to enquire from the Health and Safety Executive why they have adopted a different policy in regard to risk assessments and reporting injuries for sporting event workers from all other workers, and what evidence they have to support their decision.
- 2 Can the Crown Office Procurator Fiscal Service demonstrate what affordable access to justice alternatives are in place when a reporting agency refuses to investigate a potential criminal act?
- 3 Does the Crown Office Procurator Fiscal Service agree with the policy decisions of the Health and Safety Executive in regard to risk assessments for sporting event workers and reporting of serious injuries?
- 4 Can the Lord Advocate clarify whether or not the policies of the Health and Safety Executive in regard to sports workers being considered in a different manner to all other workers is compatible with Article 2 of the Human Rights Act
- 5 Has the Crown Office Procurator Fiscal Service carried out a review of the effectiveness of the current system of relying on reporting agencies in order to instigate a prosecution?
- 6 What is the extent of injuries in sporting events and how are they monitored if there is no need to comply with the statutory reporting obligations?

Every person and animal in Scotland should have protection from being subject to a criminal offence. Constantly deflecting the issues is not acceptable in a fair and just society. If it means making it less difficult to bring a private criminal prosecution in situations where the responsible agencies have failed to produce a report, then providing safeguards to prevent abuse, similar to those that have been effective elsewhere in the United Kingdom are put in place, why is this a bad thing.

Article 6 of the Human Rights Act states that you have a right to a fair hearing when prosecuted. Should victims of crime not also have the same right to a fair hearing and have their day in court as well? Under the current system this appears not to be the case. Again, is there an Article 2 issue to be considered. The Equality and Human Rights Commission in Scotland also might be helpful to the committee in these aspects.

Bill Alexander  
30 January 2019

**Justice Committee**

**5<sup>th</sup> Meeting, 2019 (Session 5), Tuesday 5 February 2019**

**Feedback from the Justice Sub-Committee on Policing**

**Note by the clerk**

1. On 31 January the Justice Sub-Committee on Policing took evidence from the Chief Constable of Police Scotland, Iain Livingstone QPM, on Police Scotland's draft budget for 2019/20 and his priorities for the coming year.
2. The Chief Constable set out the planning he is undertaking to prepare Police Scotland for Brexit. This includes delaying the reduction of 300 police officers, which will have an impact on Police Scotland's ability to meet its expected efficiency savings. This deferment, alongside the Chief Constable's decision to accelerate the recruitment of about 100 new police officers, will allow for 400 police officers to be available to support Police Scotland's response to all Brexit scenarios.
3. The Chief Constable stated the biggest short-term Brexit challenge facing the force is uncertainty around the demands Brexit will place on it.
4. The longer term policing risk to Scotland from Brexit will be the loss of access to EU-wide legal mechanisms, such as [Europol](#), [Eurojust](#) and the European Arrest Warrant mechanism. As a result, Police Scotland will need to develop bilateral replacement mechanisms with each of the remaining 27 EU Member States. Owing to unique elements of policing in Scotland (such as the Scottish legal system), Police Scotland has already undertaken some work liaising with countries with which they have almost daily contact through EU-wide legal mechanisms, such as Spain, Portugal and Poland.
5. The Chief Constable set out his approach to the delivery of Police Scotland's digital, data and ICT Strategy, including the introduction of digital device triage systems (cyber-kiosks). The Chief Constable acknowledged that Police Scotland had failed to fully assess and communicate its planned roll-out of cyber kiosks, in terms of protecting vulnerable victims of crime. The Chief Constable explained that the police can come into possession of a huge volume of mobile devices as a result of day-to-day police work. The Chief Constable told the Sub-Committee that Police Scotland had now received advice on the legal basis of the use of cyber kiosks from the Crown Office and would share that advice with the Sub-Committee and the stakeholder groups. He confirmed that cyber kiosks would not be rolled-out until the legal basis, and confidence of the community in their use and operation, are assured.
6. Addressing issues around the capital budget, and fleet and estate management, the Chief Constable stated that the police are not able to realise the full revenue and operational benefits from their ICT strategy, as the capital budget falls short of what is required. Some of the key capital challenges are the overhaul of back office functions from the legacy forces (such as eight HR and pay systems) into a single system for Police Scotland. These priorities need to be addressed in order to ensure the force is properly equipped to deal with crime in the 21<sup>st</sup> century.

7. There is currently a £6 m deficit in the capital allocation for Police Scotland. The Chief Constable told the Committee that the current capital settlement for 2019/20 only equates to about 40%-45% of what a force the size of Police Scotland requires in order to move the service forward. Without additional capital investment, the fleet and estate challenges facing Police Scotland will become more acute.

8. The Chief Constable confirmed VAT returns are now mainstreamed into Police Scotland's budget. Any discussion around recovering VAT for the period before 2018 is a matter for the Scottish Police Authority and the Scottish Government to take forward with the UK Government.

9. Responding to questions on the funding of Community Police Officers by local authorities, the Chief Constable stated that Police Scotland inherited the funding mechanism from the eight legacy forces. There are about 145 community-based officers directly funded by local authorities. The Chief Constable stated that he has an ethical duty to ensure they continue to undertake the community policing functions those local authorities fund them for. However, this presents a challenge to him if he requires those officers to be involved in operational matters. The funding mechanism should be addressed.

10. The Chief Constable agreed that accelerating the employment of about 100 officers, recruiting 300 additional officers and, the possibility that Police Scotland would be asked to fund community police officers, would leave it with a revenue estimate of approximately £18 m.