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To:

The Stakeholders listed in Annex A.

Our ref: A 211666476
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Dear Colleague

FAMILY AND CIVIL LAW AND BREXIT

Introduction

1. This letter seeks your views on what approach the Scottish Government should take to EU family and civil law measures in the context of Brexit.
2. The Scottish Government values membership of the EU and, in the context of Brexit, would like the closest possible co-operation on civil judicial matters with the EU and its Member States. We are working to influence the UK Government to achieve this outcome which we consider is in the best interests of Scotland. However, the outcome of the current negotiations between the UK Government and the European Commission is uncertain. As a result, the Scottish Government has to prepare for all potential scenarios.

Responding to this letter

3. If you wish to comment, please reply to this letter. You are welcome to reply to some or all of the questions. For convenience, all of the questions are in the attached word document. It would be helpful to have responses by 16 August 2018 but we would consider points made after then. Please reply to Simon Stockwell, Family and Property Law, GW15, St Andrew's House, Regent Road, Edinburgh, EH1 3DG (phone: 0131 244 3322) or by email to family.law@gov.scot When replying, it would be helpful if you could use "Family and civil law and Brexit" as the heading in your email and letter.
4. In the interests of transparency, the Scottish Government would intend to publish this letter and the responses to it. If you do not wish your response to be published, please let us know and we will treat your response as confidential. However, the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 (FOISA) and might need to release information under FOISA.

5. Please feel free to pass this letter to any other person who may have an interest and may wish to respond.

Ministerial Statement to Parliament

6. The then Minister for UK Negotiations on Scotland's Place in Europe, Mike Russell made a statement to the Scottish Parliament on 19 June 2018. This statement is available at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11610&mode=pdf> [columns 12 to 17]. In particular, Mr Russell outlined a number of points on the broader negotiations for EU withdrawal at columns 15 and 16.

The EU Family and Civil Law Instruments

7. A list of family and civil law instruments is at Annex B.

8. Round tables on family and civil law and Brexit took place in the Justice Committee of the Scottish Parliament on 30 January 2018. Written evidence and the *Official Report* are at <http://www.parlamaid.scot/parliamentarybusiness/CurrentCommittees/107398.aspx>

The Scottish Government's preferred approach to family law after Brexit

9. The Scottish Government believes that the best approach to family law would be continued membership of the EU. However, in the context of Brexit we consider there should be the closest possible civil justice co-operation with the EU after Brexit.

10. On 19 June 2018, there was a joint statement by the EU negotiators and the UK Government on the withdrawal of the UK from the EU. This statement can be found at https://ec.europa.eu/commission/sites/beta-political/files/joint_statement.pdf. It confirmed that agreement has been reached on ongoing judicial cooperation in civil and commercial matters during the proposed transition period (which is scheduled to be in place from 29 March 2019 to 31 December 2020).

11. The Scottish Government welcomes this approach and considers in principle that it should continue after the proposed transition period. This would involve the EU and UK/Scotland agreeing that:

- EU family and civil law provisions¹ would continue to apply to UK/Scotland after the proposed transition period; and
- the EU would treat UK/Scotland in the same way as an EU Member State after the proposed transition period in relation to family law provisions.

12. One potential issue is that EU provisions will change (Brussels IIA, for example, is being recast at the moment) and there could be further family and civil law provisions in future. After the UK leaves the EU, it is unclear at present how UK/Scotland will be able to influence future EU policy in this area.

13. A further potential issue might be more limited access after Brexit to flows of information from the EU and to EU databases. For example, EU Regulation 2016/1191 on simplifying the requirements for presenting certain public documents in the EU is currently

¹ Other than those where the UK opted out such as the Succession Regulation and provisions on matrimonial property.

being implemented². Under Article 14 of this Regulation, a Member State of the EU can, in certain circumstances, send a query about a public document to another Member State through the EU's Internal Market Information System (IMI). There is no guarantee Scotland will be able to retain access to IMI after the UK leaves the EU.

14. The UK Government's White Paper on the Future Relationship between the United Kingdom and the European Union, published on 12 July 2018 discusses civil judicial co-operation at section 1.7.7. The relevant extract is attached at Annex C³. In particular, paragraph 148 of the White Paper says:

“ The UK is therefore keen to explore a new bilateral agreement with the EU, which would cover a coherent package of rules on jurisdiction, choice of jurisdiction, applicable law and recognition and enforcement of judgments in civil, commercial, insolvency and family matters.”

Question 1. Should EU provisions on family law continue to apply after the proposed transition period?

Yes/no.

Please give reasons for your answer.

The Family Law measures generally

15. In general terms, the family law instruments are based on mutual recognition across the EU. UK and Scottish legislation cannot, of course, unilaterally make provision on mutual recognition across the EU. As indicated above, that depends on the results of the current negotiations between the European Commission and the United Kingdom Government and any agreement being given effect in EU Member States. However, provision can be made on the recognition of judgments etc from EU Member States.

16. The rest of this letter outlines potential approaches if the UK should leave the EU without a negotiated settlement and without a deal.

Recognition of judgments etc from EU Member States

17. The Scottish Government considers there are arguments for recognising judgments etc from Member States, even in the absence of reciprocity. There are a number of arguments for this approach:

- Part II of the Family Law Act 1986 makes provision on the recognition of the UK of overseas divorces, other than those where recognition is provided at the moment by virtue of EU Regulation 2201/2003 (Brussels IIa): <https://www.legislation.gov.uk/ukpga/1986/55/part/II> As matters stand, recognition,

² EU Regulation 2016/1191 is due to come fully into force on 16 February 2019. The Scottish Government intends to issue shortly a circular to public bodies on the requirements laid down by this Regulation.

³ The UK Government's White Paper is at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/724982/The_future_relationship_between_the_United_Kingdom_and_the_European_Union_WEB_VERSION.pdf

whether by virtue of the 1986 Act or by virtue of Brussels Ila, is wide-ranging. The Scottish Government would propose to continue with this wide recognition of overseas divorces, regardless of Brexit. The Scottish Government is not aware of any issues on the recognition of Scottish divorces outwith the EU. It seems reasonable, therefore, to assume that Scottish divorces will continue to be recognised in the EU after Brexit.

- Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents takes effect from 16 February 2019. This removes the need for legalisation of documents that fall within its scope. The UK and Scotland already accept civil status documents from other countries (in and out of the EU) at the moment without legalisation (although translations may be required in certain circumstances). There seems no reason to change that.
- Recognition by Scotland of judgments etc from Member States may increase the chances of Member States recognising judgments from Scotland.

Question 2. Should Scotland recognise family law judgments from EU Member States, even if the UK leaves the EU without a negotiated settlement?

Yes/no.

Please give reasons for your answer.

Jurisdiction

18. Issues on jurisdiction may be less straightforward.

19. Scottish Law Commission report 25, published in 1972, covered “Jurisdiction in Consistorial Causes affecting Marital Status”: <https://www.scotlawcom.gov.uk/files/6012/8014/6135/rep25.pdf> Part XII specifically discusses Conflicts of Jurisdiction. The Commission’s report was implemented by the Domicile and Matrimonial Proceedings Act 1973. Under this, the Scottish courts had jurisdiction in cases such as divorce if either of the parties to the marriage in question:

- (a) is domiciled in Scotland on the date when the action is begun; or
- (b) was habitually resident in Scotland throughout the period of one year ending with that date.

20. The 1973 Act has been amended to reflect EU provisions. Article 3 of Brussels Ila [Regulation 2201/2003] provides that:

“1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- *the spouses are habitually resident, or*
- *the spouses were last habitually resident, insofar as one of them still resides there, or*
- *the respondent is habitually resident, or*

— in the event of a joint application, either of the spouses is habitually resident, or
— the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
— the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her ‘domicile’ there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the ‘domicile’ of both spouses.

2. For the purpose of this Regulation, ‘domicile’ shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.”

21. It is generally accepted that Brussels Ila does not extend to same sex relationships. Provision has been made in domestic legislation to mirror the provisions of Brussels Ila in respect of same sex relationships. For Scotland, please see:

- Section 219 of the Civil Partnership Act 2004.
- The Civil Partnership (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2005. [SSI 2005/629]
- Schedule 1B of the Domicile and Matrimonial Proceedings Act 1973, as added by the Marriage and Civil Partnership (Scotland) Act 2014.
- The Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2014. [SSI 2014/362]

22. Brussels IIA also makes provision on *lis pendens*, which generated some debate at the round table on family law and Brexit which took place in the Justice Committee. Brussels IIA is an EU Regulation which means that it is directly applicable in EU Member States. Article 19 provides:

“ 1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court. In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.”

23. The Scottish Government’s initial view is that if the UK leaves the EU without a negotiated settlement, it may be difficult to retain EU jurisdictional rules in Scotland unilaterally. The difficulty is that there is no guarantee that EU jurisdictional rules would be followed by Member States in respect of Scotland after Brexit.

24. As a result, courts in Scotland, if they continued to follow the EU rules unilaterally, might be barred from hearing cases but courts in the EU would not. This could lead to conflicting cases (if a court in the EU decided to hear a case which the Scottish courts were already hearing) or to cases being heard in the EU (if a Scottish court declined to take

jurisdiction because a case had already started in the EU) even if the best jurisdiction to hear them would be Scotland.

25. The Scottish Government considers, therefore, that if the UK leaves the EU without a negotiated settlement, the best approach in relation to jurisdiction in family cases may be to revert to the position before EU provision was introduced in this area. Cases involving same sex relationships would be treated in the same way as cases involving mixed sex relationships.

26. Reverting to the jurisdictional position before EU provision was introduced could be a short term solution. In the longer term, there could be more detailed analysis of how best to determine jurisdiction in this area.

Question 3. If the UK leaves the EU without a negotiated settlement, should jurisdiction of the courts in family cases revert to the position before EU provision was introduced in this area?

Yes/no.

Please give reasons for your answer.

Hague and Lugano Conventions

27. If the UK leaves the EU without agreement to continued UK participation in the provisions in Brussels IIA and the Maintenance Regulation, consideration needs to be given to the rules for the following areas of family law: parental child abduction; parental access (contact) arrangement and child and spousal maintenance arrangement enforcement. The Hague Conventions, which currently cover UK arrangements with non-EU countries for each of these areas, could provide default reciprocal arrangements.

28. Likewise, in relation to Brussels IA, the Taking of Evidence Regulation and the Service of Documents Regulation which apply to civil international law and family law, the Hague Conventions and the Lugano Convention could be the default options for reciprocal inter-country arrangements.

29. The UK is a member of some Hague Conventions in its own right. For other Hague Conventions, UK membership is as an EU member: these are the 2005 Convention on Choice of Court Agreements and the 2007 Convention on Family Maintenance. That is also the position in relation to the Lugano Convention, which covers jurisdiction and the enforcement of judgments in civil and commercial matters between the EU and some European Free Trade Association countries. If the UK leaves the EU without a negotiated settlement, there may potentially be a gap during which there is no provision for international arrangements while the UK re-joins Conventions in its own right.

Question 4. Would the Hague Conventions and the Lugano Convention adequately replace the European instruments discussed in paragraphs 27-28 for family and civil international law?

Yes/no.

Please give reasons for your answer.

Question 5. If there was a time lag between the Maintenance Regulation and Brussels 1A ceasing to apply and the UK rejoining the 2007 and 2005 Hague Conventions and the Lugano Convention, what would the impact of this time lag be for families?

Other points

30. There are other points about the impact on Scots family and civil law of Brexit which colleagues may wish to make.

Question 6. Are there any other points about the impact on Scots family law of Brexit which you wish to make?

Yes/no.

If yes, please outline your points.

Question 7. Are there any other points about the impact on civil law of Brexit which you wish to make?

Yes/no.

If yes, please outline your points.

Conclusion

31. The Scottish Government is very grateful to colleagues for reading this letter and responding to it.

Yours faithfully

SIMON STOCKWELL
Family and Property Law

ANNEX A: LIST OF STAKEHOLDERS SENT THIS LETTER

Organisations

Children and Young People's Commissioner Scotland
Children 1st
Children in Scotland
ClanChildLaw
Convention of Scottish Local Authorities
Equality Network
Faculty of Advocates
Families need Fathers
Family Law Association
Humanist Society Scotland
Law Society of Scotland
Reunite
Scottish Child Law Centre
Scottish Churches Parliamentary Office
Scottish Council of Jewish Communities
Scottish Courts and Tribunals Service
Scottish Law Commission
Scottish Parliament Information Centre
Scottish Women's Aid
Scottish Youth Parliament

Academics

Lesley-Anne Barnes Macfarlane
Paul Beaumont
Gillian Black
Michele Burman
Janeen Carruthers
Elizabeth Crawford
Andressa Gadda
Lorna Gillies
Claire Houghton
Lynn Jamieson
Lesley Kelly
Jane Mair
Kirsteen MacKay
Frankie McCarthy
Fiona Morrison
Kenneth Norrie
Elaine Sutherland
Kay Tisdall
Fran Wasoff
Richard Whitecross

ANNEX B: LIST OF EU FAMILY LAW AND CIVIL INTERNATIONAL LAW INSTRUMENTS

EU Measures

The Brussels IIa Regulation (2201/2003)

Mutual recognition across the EU of divorce and parental responsibility judgments; jurisdiction in these cases; child abduction. [Scotland and the UK made some parallel provision in domestic law to cover same sex relationships].

The Brussels Ia Regulation (1215/2012)

Regulates jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between EU Member States.

The Maintenance Regulation (4/2009)

Jurisdictional rules for maintenance claims and recognising and enforcing maintenance orders and binding maintenance agreements

Regulation on mutual recognition of protection measures in civil matters (606/2013)

Measures to protect those at risk of domestic abuse.

EU Service Regulation (2007/1393/EC)

Serving documents between EU member states

Taking of Evidence Regulation (2001/1206)

Taking or collecting evidence between EU member states

Legal Aid Directive (2002/8)

Provision of common minimum standards for granting legal aid in cross-border Disputes

Mediation Directive (2008/52)

To facilitate access to alternative dispute resolution and encouraging use of Mediation

European Judicial Network in Civil and Commercial Matter (2001/470/EC)

To improve cooperation at an official level between judicial and legal authorities

European Enforcement Order (805/2004)

Provides a streamlined procedure for enforcing uncontested judgments e.g. out of court settlements.

Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents – this will take effect from 16 February 2019

Simplifying requirements for presenting certain public documents in the EU e.g. birth, marriage or death certificates. The Scottish Government intends to issue a circular to public bodies on steps being taken to implement this Regulation.

Hague Conventions

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction **(UK is member)**

Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children **(UK is member)**

Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance **(Member as EU Member State)**

Convention of 30 June 2005 on Choice of Court Agreements **(Member as EU Member State)**

Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters **(UK is member)**

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters **(UK is member)**

Lugano II Convention

Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. It governs issues of jurisdiction and enforcement of judgments between the European Union member states and the European Free Trade Association countries other than Liechtenstein (namely Iceland, Switzerland and Norway). **(Member as EU Member State)**

Annex C: Extract from UK White Paper

1.7.7 Civil judicial cooperation

145. Civil judicial cooperation is mutually beneficial to both the UK and the EU. Businesses benefit from legal certainty in the event of disputes and are more confident trading across borders. Consumers and employees benefit from protections for weaker parties. Cross-border families benefit from clear rules to resolve disputes in sensitive matters quickly and efficiently. The future relationship between the UK and the EU should protect these advantages.

146. The EU has already shown that a deeper level of civil judicial cooperation with third countries is both legally viable and operationally achievable, including through the Lugano Convention, which provides for cooperation between EU and European Free Trade Association (EFTA) countries. Under this Convention, EU Member States and third countries apply the same rules on civil and commercial judicial cooperation, and commit to pay due regard to how each other's courts interpret those rules. This architecture provides a clear precedent for close cooperation between the EU and a third country.

147. To ensure cooperation can continue in these areas at least, the UK will therefore seek to participate in the Lugano Convention after exit. However, while the UK values the Lugano Convention, some of its provisions have been overtaken, and it is limited in scope. In addition, the European Council's Guidelines have suggested the possibility of going beyond existing precedent.

148. The UK is therefore keen to explore a new bilateral agreement with the EU, which would cover a coherent package of rules on jurisdiction, choice of jurisdiction, applicable law, and recognition and enforcement of judgments in civil, commercial, insolvency and family matters. This would seek to build on the principles established in the Lugano Convention and subsequent developments at EU level in civil judicial cooperation between the UK and Member States. This would also reflect the long history of cooperation in this field based on mutual trust in each other's legal systems. The Government will also continue to work closely with the devolved administrations to ensure that the future arrangements for cooperation with the EU take into account the separate and distinct legal systems in Scotland and Northern Ireland.