18 April 2019

Dear Clare

THE ELECTRONIC COMMERCE DIRECTIVE (ADOPTION AND CHILDREN) (AMENDMENT etc.) (EU EXIT) REGULATIONS 2019

I write in relation to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a no-deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our responsibility to ensure that devolved law continues to function on and after EU withdrawal.

In that light I am writing to inform you that the UK Government is proposing to make the above named regulations relating to online offences. The Committee will be aware that Regulations relating to other online offences, the Electronic Commerce (Amendment etc.) (EU Exit) Regulations 2019 have already been made. Both regulations aim to ensure the continued effective functioning of retained EU law by omitting regulations which give effect to the ‘country of origin’ principle. This principle was a reciprocal arrangement between EU countries which meant that an ISP which was conducting illegal online activities could be prosecuted only in the country where the service was set up, not in the country where the service was operating.

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire
Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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As regards the 2005 Regulations, which relate to adoption offences, the proposed SI removes the reciprocal arrangement so that:

- any UK established ISP operating a service out with the UK would be prosecuted according to the laws of the country in which it is operating.
- Any non-UK ISP operating a service within Scotland would be prosecuted in accordance with the law applicable in Scotland.

The result is that prosecution of activities within Scotland will be governed by the Adoption and Children Act 2002 and the Adoption and Children (Scotland) Act 2007 only.

This area is a complex mix of reserved and devolved material and as with the main directive the Scottish Government and the UK Government do not agree whether the specific regulations engage devolved interests. We do agree with the policy rationale. As such, Scottish Ministers would be content to consent to the Regulations should our consent be sought.

However, the UK Government has not written to request the consent of Scottish Ministers to the Regulations and we are therefore not in a position to notify the Scottish Parliament under the agreed protocol.

I therefore simply write to draw the regulations to the attention of committee. I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

MAREE TODD