

MINISTERIAL ENGAGEMENT BRIEFING: MICHAEL RUSSELL

Engagement title	Meeting with the Faculty of Advocates	
Engagement timings	Time: 13:00 – 13.45 Date: Wednesday 15 March 2017	
Organisation	Faculty of Advocates	
Venue and full address	T4.43 Scottish Parliament Post code: EH99 1SP	
MACCS reference		
Purpose	Faculty expressed an interest in meeting with Mr Russell following the Justice Summit and in the context of the UK's decision to leave the EU.	
Background and Attendees	Annex A	
Scottish Parliament/Justice Summit: Faculty comments	Annex B	
Key Issues potentially of interest to the Faculty Lines to Take	Annex C	
Readout of the Faculty of Advocates <i>Summit on Scotland's Brexit Options</i> held on Friday 10 March 2017	Annex D	
Official Support	Jan Marshall (Ext: 42698)	

Background

On 29 November Carole Ferguson-Walker, the solicitor to the Faculty of Advocates, wrote to Mr Russell. Ms Ferguson-Walker noted the interest of the Dean and Vice Dean of Faculty in arranging a meeting with the Minister to discuss a number of legal issues arising from the EU referendum result.

On 9 December you met with the Law Society President and Chief Executive, Eilidh Wiseman, and Lorna Jack, following a similar approach.

Gordon Jackson, QC, Dean of the Faculty of Advocates



Gordon Jackson is the Dean of the Faculty of Advocates. Gordon is regularly instructed as defence counsel across the full gamut of criminal practice, including trials and appeals. He is held in high respect for his no-nonsense practical approach coupled with his eloquent oratory and dexterity in interpreting the key relevant facts of a case. Together these skills ensure Gordon's reputation as a well instructed and feared opponent at the Criminal Bar.

Angela Grahame QC, Vice Dean of Faculty



Angela has considerable Court of Session experience, her expertise in personal injury actions encompasses claims relating to road traffic accidents, employers' liability, occupiers' liability, industrial diseases, fatal claims and catastrophic injuries. She has a particular interest in the Protection from Harassment Act 1995. Angela has acted for both pursuers and defenders and was also instructed by Greater Glasgow Health Board in the high profile Vale of Leven Hospital Inquiry and the Lord Advocate in The Fingerprint Inquiry. As well as running a varied civil practice, Angela prosecuted as an Advocate Depute in the High Court, Appeal Court and Supreme Court (JCPC). She has experience in litigations involving disputes over heritable property, including reduction of standard securities and surveyors' negligence. She acted in the long-running litigations arising out of the Braer Disaster. She was appointed as a Legal Member of the Police Appeals Tribunal (April 2013).

James Mure QC



In Chambers UK, James is ranked as a Band 1 silk for Public Procurement and Band 2 for Commercial Dispute Resolution, Planning and Environment, and Administrative and Public Law. James has been described as "an exceptional public lawyer" and in Chambers 2015 he is listed as "a very effective and efficient advocate", "exceptionally thorough, and very bright"; "His written work and oral submissions are both superb." James read history at Clare College, Cambridge, before joining the Diplomatic Service. After serving in London and Rome, he studied law at Edinburgh University. A specialist in judicial review, before taking silk James was First Standing Junior Counsel to the Scottish Government. He has often appeared before the House of Lords/Privy Council/Supreme Court and has drafted the UK's submissions in a number of cases before the ECtHR. James is regularly instructed in commercial litigation, public procurement, commercial property, and planning and environmental law matters.

Annex B

The Faculty of Advocates submitted written evidence to the Scottish Parliament's European and External Relations Committee on Brexit implications for Scots law. Link [here](#)¹.

In short, the Faculty considers that:

- much domestic law derived from Europe will have to remain in force in Scotland after Brexit; and
- a complete inspection exercise in the run-up to leaving the EU is “inconceivable”.

Gordon Jackson is quoted as follows:

“It appears to us to be inconceivable that it will be possible to review all that law, and determine what to keep and what to remove, in time for the last day of the UK’s membership of the EU”

“Some kind of transitional legislation, providing that European law in force at the date of Brexit remains in force until repealed or replaced, appears inevitable.”

“Once Brexit has taken place, the extent to which courts should make reference to such directives and, especially, continuing case law of the European Court of Justice, as an aid to interpretation, will be less certain, especially as one moves further in time from the passing of the implementing legislation”.

“On any view, the status of the decisions of the CJEU will become only persuasive rather than binding.”

“There are also areas where the domestic law represents the UK’s implementation of European directives but does not now specifically refer to those directives...There is no reason why, following Brexit, such legislation should not remain in force unless and until the relevant parliament considers that it should be repealed or amended.”

In the press release accompanying the evidence, the Faculty highlights that, after Brexit, the possibility of a reference from a UK court to the CJEU for an authoritative ruling would disappear. Authoritative interpretation would then be for domestic courts and, ultimately, for the Supreme Court.

According to the Faculty, in areas which have been strongly influenced by the EU, such as equal opportunities and consumer rights, but which are reserved under the devolution arrangements, the legislative supremacy of Westminster is likely to assume greater importance to determining the content of Scots law.

¹ <http://www.advocates.org.uk/media/2212/brexitwrittenevidence2.pdf>

Justice summit

Faculty of Advocates

The Faculty was represented by Garry Borland, QC.

Garry Borland QC specialises in commercial law, including disputes relating to commercial contracts, commercial property, company law and insolvency, construction and engineering, and energy.

Garry is rated by Chambers UK Bar directory as a Band 1 silk for commercial litigation; for construction; and also for restructuring and insolvency work. He is recommended by The Legal 500 for company and insolvency work, and also in construction. The 2017 edition of Chambers describes him as "Super bright"; "One of the most technically gifted advocates around"; "His eye for detail and clarity of delivery are superb"; "a standout advocate"; "he has a speed and accuracy of analysis that few can match"; "an excellent strategist"; "unrivalled in his ability to immerse himself in the complexity of cases".

Companies Garry has acted for include: ABB, Aker, AMEC, Andritz, Balfour Beatty, Bilfinger Berger, BP, Bouygues, Cairn Energy, Carillion, Carlsberg/Heineken, ConocoPhillips, Galliford Try, Grant Thornton, Iberdrola, Kier, Laing O'Rourke, Lend Lease, Martin Currie, Sir Robert McAlpine, Morgan Sindall, Ryder System, Ryder Cup Europe, Scottish Power, SSE, Scottish Widows, Shepherd Construction, Spie Matthew Hall, Stora Enso, Tesco and Va Tech Wabag.

Comments related to the issue of the body of law embedded as part of the domestic system and the risk of it not being maintained post Brexit. An example was data transfer in the context of implementation of the recently agreed Data Protection Regulation, due to come into force in 2018. Mr Borland queried whether that same architecture is maintained post-Brexit.

Points were raised about the scope for alternative arrangements, and whether there is to be an overarching interpretation of EU law (i.e. how will EU law be treated in the UK post-Brexit)?

The Faculty reiterated that what's important is the proper functioning of the Scottish legal system now, in the interim, and in the future.

At the end of the session, the Faculty representative asked what the SG wanted out of participants. It was said that this was to:

- Ventilate issues, and produce some sort of agreed paper for Scotland
- Inform the options presented for negotiations
- Establish the requirements of a Great Reform Bill for Scotland

Mr Matheson called for direct engagement and encouraged those present not to wait to be asked, but to help shape the process as it happens.

This meeting takes place in that context.

Issues

1. Ensuring stability in the law

Although the Faculty doesn't mention this in terms (unlike, for example, the Law Society of Scotland) the Faculty view that "much domestic law derived from Europe will have to remain in force post-Brexit" speaks to its consideration of stability in the law.

Lines to take:

<TEXT HAS BEEN REDACTED UNDER SECTION 30(b)(ii) FREE AND FRANK EXCHANGE OF VIEWS FOR THE PURPOSES OF DELIBERATION>

2. Protecting legal professional privilege for the clients of Scottish Lawyers working in the EU or advising on EU Law

[Faculty makes no explicit mention of this aspect]

The Law Society of Scotland has highlighted that legal professional privilege should be protected for the clients of Scottish lawyers working in the EU or advising on EU.

As another provider of legal services and advice, the Faculty may well share that interest.

Lines to take:

<TEXT HAS BEEN REDACTED UNDER SECTION 30(b)(ii) FREE AND FRANK EXCHANGE OF VIEWS FOR THE PURPOSES OF DELIBERATION>

3. EU civil judicial cooperation (also known as EU private international law)

[Faculty makes no explicit mention of this aspect]

Study of private international law is not compulsory for entry to the legal profession as a solicitor but it is compulsory to become an advocate. This is therefore an areas of advice in which the Faculty has a monopoly. Private international law is the law of which country's laws apply. There is necessarily a cross-border element to it. The EU has been building up a body of private international law to facilitate the operation of the single market. The rationale is

that if people and goods travel, the legal systems of the respective countries should not conflict and thus pose a barrier to this use of the single market. An example is the use of EU cross-border rules about which legal system's rules apply to a child support case where one parent is in, say, France, and the other is in, say, Scotland.

EU civil judicial cooperation was reviewed by the previous UK Government as part of the "Balance of Competences" review:

<https://www.gov.uk/government/consultations/balance-of-competences-review-call-for-evidence-on-civil-judicial-cooperation>

The Faculty of Advocates contributed:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279268/faculty-of-advocates-evidence.pdf

In particular, the Faculty noted the following issues:

- (i) the multi-jurisdictional nature of the UK (i.e. the various legal systems within the state);
- (ii) the distinctive feature of the common law systems (i.e. England and Wales and Northern Ireland; and
- (iii) the distinctiveness from those systems of Scots law.

The Faculty response set out:

"Although it may be tempting to use convenient shorthand, there is, technically, no such thing as the 'UK Legal System' or 'UK Law'. When considering cross-border judicial cooperation among the UK jurisdictions in criminal matters, the House of Lords, in 1999, recalled that, although Scotland and England are politically united, for jurisdiction purposes, the two legal systems are to be considered as 'independent foreign countries'. The same principle applies in civil matters. It is accordingly essential, when an EU measure is in contemplation, that consideration is given not only to how it will fit onto each of the UK's legal systems, but also to whether or not, and if so how, the measure should be transposed for application as between the UK's legal systems."

When an EU measure is therefore in contemplation in respect of repeal or revocation, consideration ought to be given to the impact on – and among - each UK legal system.

Annex D

The faculty hosted a 'Brexit' Conference on 'Scotland's options' on Friday 10 March, which Mr Russell attended.

Mr Russell was one of a number of informed and impressive speakers, including the Lord President; Scottish, UK and international academics; the Advocate General of the Court of Justice of the European Union; a former UK Permanent representative to NATO; former UK Diplomat; and an Irish constitutional expert.

The speakers provided a compelling description of the EU context and the specific challenges and opportunities for Scotland arising from Brexit and other possible constitutional changes. A number of the speakers, in particular during the afternoon session, challenged the basis of the UK Government's approach to the Brexit negotiations and whether these took sufficient account of the likely views of other EU member states. One noted that the timing of the Brexit negotiations immediately ahead of elections to the European Parliament would raise additional challenges.

The audience of advocates, academics and others raised relevant technical and wider questions.

In particular that Brexit raised issues about the status of existing references and existing case law. <TEXT HAS BEEN REDACTED UNDER SECTION 38(1)(b)(ii) PERSONAL INFORMATION> noted that EU law in the UK and EU law in the EU would from exit run in parallel but at a distance and how this is done is a policy matter but must not just be left to the courts. <TEXT HAS BEEN REDACTED UNDER SECTION 38(1)(b)(ii) PERSONAL INFORMATION> also noted that "EU law has become so closely intertwined with our domestic law over a period of 40 years that separation, if that is what is to be done, will be a task of mammoth proportions."

Speakers highlighted the breadth of powers required in the Great Repeal Bill and the scale of this task. Some speakers thought that the idea of regional work permits and visas was feasible.

<TEXT HAS BEEN REDACTED UNDER SECTION 38(1)(b)(ii) PERSONAL INFORMATION> considered that presentation was important and that eg Scotland should not approach matters by saying that it was asking for a special deal. It should be about Scotland asking to retain rights that it has. Especially relevant given the loss of good will experienced by the UK.

It was acknowledged that Scotland has already developed a distinctive Scottish external relations role, from before devolution.

The Cabinet Secretary for Justice has indicated that he would be keen to hear from the Faculty on any issues arising from the event or more generally on Brexit matters.