

Deputy First Minister's briefing for James Wolffe meeting on 3 March 2016:**Meeting with James Wolffe QC, Dean of Faculty of Advocates****14:30, 3 March 2016**

<b>Key message</b>	Support efforts to improve the societal contribution made by the courts. In particular the contribution to growing the economy
<b>Who</b>	James Wolffe QC, Dean of Faculty of Advocates
<b>What</b>	Informal meeting, principally to listen to the Dean's views and suggestions
<b>Where</b>	Parliament
<b>When</b>	<i>Date</i> Thursday 3 March 2016 <i>Time</i> 14:30 pm
<b>Supporting officials</b>	Private Office indicated no officials required
<b>Briefing and agenda</b>	<b>No formal agenda</b> <b>Annex A: Background on Faculty and biography of Mr Wolffe</b> <b>Annex B: Key lines</b> <b>Annex C: Background issues</b>

**Copy to:** Cabinet Secretary for Justice  
Minister for Community Safety and Legal Affairs  
DG Learning and Justice  
DG Enterprise, Environment and Innovation  
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John McFarlane, Special Adviser  
Communications Safer & Stronger

### Background

The Faculty of Advocates is an independent body of lawyers who have been admitted to practise as Advocates before the Courts of Scotland.

The Faculty has been in existence since 1532 when the College of Justice was set up by Act of the Scots Parliament, but its origins are believed to predate that event. It is self-regulating, and the Court delegates to the Faculty the task of preparing Intrants for admission as Advocates. This task involves a process of examination and practical instruction known as devilling, during which Intrants benefit from intensive structured training in the special skills of advocacy. No-one can be presented to the Court as suitable to be a practising Advocate without satisfying these training requirements. The Faculty also provides for its Members an ongoing programme of talks, seminars and conferences covering a wide range of topics. The Faculty's training courses are regarded as among the best in the English speaking world.

The Faculty is led by its Dean, who is elected by the whole membership, supported by the Vice-Dean, Treasurer, Clerk, Keeper of the Library and Chairman of Faculty Services Ltd, all of whom are also elected.

The Faculty includes practising and non-practising members. The current practising Bar includes an increasing proportion of women. Women make up approximately one quarter of the practising membership. Total numbers now stand at just over 460, of whom approximately one fifth are Queen's Counsel. The taking of Silk, as assumption of the title of Queen's Counsel is commonly known, depends upon the prerogative of Her Majesty. This is exercised through the First Minister upon the recommendation of the Lord Justice-General. The Dean of Faculty is consulted in the course of this process. As a general rule, Silk is awarded to experienced Counsel, who are considered to have achieved distinction in full-time practice.

### Biography

James Wolffe QC is the Dean of the Faculty of Advocates. Mr Wolffe was called to the Bar in 1992 and took silk in 2007. He was First Standing Junior Counsel to the Scottish Ministers from 2002-2007 and was a High Court prosecutor between 2007 and 2010.

Mr Wolffe has extensive experience in commercial and public law, including judicial review and human rights cases and has appeared in the House of Lords, Judicial Committee of the Privy Council, the UK Supreme Court and the European Court of Human Rights.

He has given evidence to the Scottish Parliament on behalf of the Faculty on law reform issues and recently appeared before a sub-committee of the House of Lords Select Committee on the European Union to voice concerns over a UK opt out from the European Arrest Warrant.

**Lines**

- The Scottish Government supports efforts by the Court system to make itself a more attractive place to litigate. In particular, a more attractive forum for commercial litigants who often have chosen to litigate in other jurisdictions.
- The development of specialist courts is a welcome one. In January 2015, Lord Gill, the then Lord President, announced a feasibility study into an Energy and Natural Resources Court which would operate as part of the Court of Session. This is a matter for Lord Carloway, who has recently taken up appointment as Lord President. The Scottish Government hopes it is something that can be progressed.
- Court Reform is progressing as planned and we are seeing business diverted away from the Court of Session. For example, the first three months of the new Sheriff Personal Injury Court has seen large numbers of cases go to that court, which would otherwise have gone to the Court of Session. In addition, the raising of the exclusive competence in the sheriff court to £100,000 has also resulted in civil court business which would previously have been heard in the Court of Session being transferred to the sheriff courts. This reform process will relieve pressure on the higher court and therefore release capacity for other business.

**To Note:** The Faculty were generally in favour of the Court Reform Act. However, they opposed the increase in exclusive competence to £100,000 which they thought was too high. They were concerned that an increase of this magnitude would remove almost all Personal Injury cases from the Court of Session.

## ***Courts reform (Scotland) Act 2014***

### *Judicial specialisation*

The policy delivered by the 2014 Act is that there should be greater specialisation in the sheriff courts. In recent years many commentators have advocated the introduction of greater specialisation, particularly in the sheriff court. They have argued that specialisation improves the quality of civil justice and that judges who have no specialist knowledge in particular areas have to be taken through a greater number of legal authorities in the course of a hearing and take longer to issue their decisions. This does not help the parties to get appropriate decisions from the court or indeed the efficiency of the court. Specialisation brings decision-making of higher quality and greater consistency.

The arguments in favour of greater specialisation are as follows.

- The law is becoming more complex and it is unreasonable to expect judges to be able to be expert in all its facets.
- There is greater specialisation among members of the legal profession from whom judges are drawn and it is increasingly difficult for lawyers to offer the same level of expertise across the board – if legal practitioners are no longer generalists, it is unreasonable and impractical to expect judges to have a full breadth of knowledge and experience.
- Specialist judges are more likely to identify key issues in particular cases more quickly so that time is saved in court and a greater level of understanding of the background to the dispute will facilitate an improved quality of justice.
- Greater specialisation will give an opportunity to enhance the reputation of Scotland's civil courts.

The policy is, therefore, to permit the Lord President to designate categories of specialisation. It is more appropriate for the Lord President to do this than Ministers since the Lord President will be able to judge, in consultation with the sheriffs principal, which cases will benefit from specialist judiciary and the demand in the various categories of cases. It is anticipated that the categories of designation may include personal injury, family and commercial. Other areas of specialisation may be desirable depending on the specific circumstances and requirements of particular sheriffdoms.

The Act permits both sheriffs and summary sheriffs to be designated as specialist judiciary. Although it will be some time before there are very many summary sheriffs in post, it is envisaged that eventually summary sheriffs will also be capable of being designated in specialist categories, particularly as they will be recruited from the ranks of practitioners with experience and expertise in the kinds of casework which will form the competence of summary sheriffs.

It will be for the sheriffs principal to allocate casework between the sheriffs and the summary sheriffs within their sheriffdom. The designated judiciary may specialise in more than one category of specialisation. It will, however, still be possible for cases within the designated categories to be dealt with by non-specialist sheriffs as it is inevitable that sometimes a specialist sheriff will not be available in certain locations. Sheriffs who have been designated to deal with one or other of the specialist categories will also still be able to deal with other casework. Specialisation among sheriffs will have specific practical and financial

implications for the SCTS. Specialist courts will have to be accommodated in the timetabling of the courts in a sheriffdom and judicial posts may have to be relocated.

## ***Scottish Co-ordination Group***

### Plan for Growth – UK Legal Services on the International Stage

A joint plan was published by the UK Trade and Industry and Ministry of Justice in March 2012 which set out ways in which the UK Government could provide opportunities to promote the legal profession internationally with a view to stimulate growth and stability. The plan is being taken forward in Scotland through a Scottish Co-ordination Group which meets around 3 times per year.

The Group brings together representatives of the legal profession, the alternative dispute resolution sector, government, business organisations and the international agencies. The following bodies are currently represented on the group:

- Faculty of Advocates
- Law Society of Scotland
- Office of the Advocate General (UK Government)
- Scottish Arbitration Centre
- Scottish Council for Development & Industry (SCDI)
- Scottish Development International (SDI)
- Scottish Financial Enterprise (SFE)
- Scottish Government Justice Department
- UK Ministry of Justice
- UK Trade & Investment (UKTI)
- VisitScotland

The remit of the group focuses on sharing promotional opportunities such as trade fairs and ensuring that those who attend these events are able to represent and share information on the legal profession in Scotland, and not just their individual interests. A core script is regularly reviewed by the Group and this is used by colleagues in the UK Trade and Industry Department.

There have been notable discussions with the Lord Mayor of London, the former Advocate General Lord Wallace, Simon Hughes, former Ministry of Justice, and Paul Wheelhouse, Minister for Community Safety and Legal Affairs. More recently, the Group met with the new Advocate General, Lord Keen QC, at their meeting in December 2015.

## ***Solicitor advocates and economic issues in the legal profession***

### Solicitor advocates

#### **Background**

A number of issues in relation to solicitor advocates/advocates and QCs have been developing in recent months. Both the Faculty of Advocates and the Law Society of Scotland have raised these matters in writing to Paul Wheelhouse, Minister for Community Safety and Legal Affairs. In summary, these relate to:

- sanction for counsel in the Sheriff court and the standing of solicitor advocates;
- the payment of legal aid fees to solicitor advocates when acting as counsel; and
- instruction of solicitor advocates and issues relating to informed client choice, particularly when in-house solicitor advocates are instructed.

Scottish Ministers interests relate primarily to the way in which the structure of legal aid payments both contributes to some of the tensions, as fees differentiate between solicitor advocates and advocates, and could offer solutions by changing the feeing structure. However, there are many issues which are matters for the courts to manage and the issue around informed client choice is most pertinent at this point.

Most recently, Mr Wheelhouse was pressed to make changes to fees for the new Sheriff Appeal Court (criminal) to make changes to fees available for counsel to include solicitor advocates. Further work would be required to assess the viability of extending this to other aspects of legal aid; there are clear expectations amongst solicitor advocates that this should be done, and a very strong resistance to that from the Faculty of Advocates. Solutions will require very careful navigation around the sensitivities and it would not be helpful to move this forward to a significant degree ahead of the election.

In addition, the courts have issued draft rules on how to ensure that a client is fully informed of choices when instructing counsel to ensure that any potential conflict of interest when proposing in-house solicitor advocates is properly managed. This falls out of a case where a convicted client appealed his conviction on the basis that he considered he did not have satisfactory counsel. Consideration of this case drew out some concerns about the use of in-house solicitor advocates and how the court could be assured of the client making properly informed decisions. The Faculty has significant concerns about the use of in-house solicitor advocates in respect of the commercial advantage it provides and whether decisions are being taken in the best interests of the client. The Law Society resists the Faculty's position.

There are therefore tensions developing between the various interests, and the courts recent views on the appeal case and subsequent action contributes to that. However, the resolution of these issues does not lie primarily or solely with Scottish Government. However, several discussions on the issues have been held with both officials and Mr Wheelhouse, and between SG officials and officials from Lord President's office. Officials will meet again with the Lord President's office in January to discuss next steps as here are a complex set of issues at play. It will require a partnership approach and some compromise between all parties to reach a solution or solutions but it is highly likely to be a contentious subject.

### **Lines to take**

- Aware that representations have been made to the Minister for Community Safety and Legal Affairs, under who's portfolio these issues sit;
- Aware also that initial discussions have been held with all parties;
- Recognise that this a complex issue, and difficult for both solicitor advocates and counsel;

- It will take some time to develop and agree a satisfactory resolution.

### **Economic issues in the legal profession**

Again, the Minister for Community Safety and Legal Affairs has discussed these issues with a range of stakeholders, including with the Dean of Faculty of Advocates.

The Justice Directorate is about to engage in research into the structure of the legal services market. This will look at a range of issues facing the legal profession, including:

- the relationship between the firm size and the type or range of work carried out, including legal aid;
- the contribution of different market segments to the overall value of the legal services sector, including the use of outsourcing;
- measurement of the pressures and problems faced by legal service providers, and their expectations for the future, including growth opportunities; and
- understanding the geography of the legal services market in Scotland, segmented by firm size, area of law and type of client served.

This research will be taken forward in partnership with the Scottish Legal Aid Board and the Law Society of Scotland and will begin early in 2016

### ***Environmental Court***

In December 2014 the Lord Advocate advocated the creation of a specialist criminal environmental court within the present court structure.

The Dean wrote to the First Minister on 8 January 2015 outlining his thoughts on “Promoting Scotland as a Centre for Dispute Resolution in Relation to Renewable Energy and Related Matters”. The main thrust of the Dean’s letter was the proposal to establish a specialist court within the Court of Session to deal with energy and environmental issues.

On 28 January 2015, the then Lord President announced his intention to launch a feasibility study into the creation of an Energy and Natural Resources Court in the Court of Session to provide a specialist forum for litigation in these fields. The Faculty, not surprisingly, strongly supported this initiative which is a matter for the Lord President and not the Scottish Ministers.

The SNP made a manifesto commitment to publish an options paper on an environmental court as the basis for a wider engagement. We are working to publish a paper before the dissolution of the Parliament next month. We are committed to working with stakeholders to develop the paper to ensure that we receive contributions for the differing levels and types of environmental cases.

Lines to take:

- The Scottish Government is a strong supporter of environmental justice. It is wholly committed to having appropriate structures to protect our environment and which enable the best decisions to be made around activities that affect it.

- We are undertaking a significant programme of reform which is being co-ordinated across the Government. The landscape is also affected by the ongoing implementation of the amended Environmental Impact Assessment Directive, which is an important tool in supporting effective consideration of environmental issues.
- On initial consideration the Scottish Government can see merit in the Faculty's proposals and can see how this fits into our reform programme, particularly in relation to the policy intent of the Courts Reform Act 2014 to ensure that the Court of Session has the opportunity to adapt and diversify to attract high quality work.
- The Scottish Government shares the Faculty's concerns about high value cases being heard in London which was also identified by Sheriff Principal Taylor in his review on the Costs and Funding of Litigation, and others. Therefore, anything that can look to reverse this trend is of particular interest to the Scottish Government.
- The Dean will be aware of other interests in environmental cases having a specialist forum. There have been proposals from environmental groups for a specialist tribunal especially in relation to planning and building developments and recently the Lord Advocate has spoken about specialist sheriffs and procedures for cases related to environmental crime.
- Section 41 of the Courts Reform (Scotland) Act 2014 allows the Scottish Ministers, with the consent of the Lord President, to provide for all-Scotland sheriff courts for specified types of civil proceedings. This would enable an all-Scotland environmental court to be created to deal with civil environmental matters.
- Sections 34, 35, and 36 of the Courts Reform (Scotland) Act 2014 make it possible for environmental cases to be heard by specialist environmental judges provided that the Lord President designates such cases as a category that is suited to be dealt with by specialist sheriffs or summary sheriffs, and sheriffs principal designate one or more of these judicial office holders as specialists in environmental cases. The net effect is that, if the judiciary uses its powers, it is now possible for environmental cases to be heard by specialist environmental judges in the sheriff court.
- Since the Lisbon Treaty, the EU's power to legislate for the proper functioning of the internal market has led to a growth in measures adopted as part of the "justice for growth" agenda. These cross-border recognition of court judgments (Brussels I (recast)) and European payment procedures (e.g. small claims)
- Membership of the EU provides opportunities for the Scottish legal sector which are only gradually being realised. For example, until last year's ECJ reference by the Scottish Ministers, the SG had not been involved in preliminary references for 10 years. [*Preliminary reference procedure is where a domestic court refers a question of interpretation of EU law to the European Court of Justice in Luxembourg. James Wolffe QC represented the Scottish Ministers.*]
- We are working with the Law Society to consider promotion of these legal developments. Happy to continue to involve the Faculty.
- The Lord President's initiative on an "energy and natural resources court" is at the stage of a feasibility study. That is a matter for the Lord President rather than the Ministers, although in broad terms there would seem to be ministerial support for this.



- In terms of the separate manifesto commitment to publish an options paper on an environmental court, as the basis for a wider engagement a paper will be published before the end of this parliamentary session.