



Margaret Mitchell MSP
Convenor, Justice Committee
c/o Justice Committee Clerks
Room T2.60
The Scottish Parliament
Edinburgh EH99 1SP

23 January 2018

Dear Margaret,

JUSTICE COMMITTEE

Thank you for your letter of 12 December and for informing me of your Committee's intention to take evidence in relation to EU exit and aspects of the Scottish justice system. It was a pleasure to welcome you and members of your Committee to Dover House on 27 November. During our meeting I undertook to write to you with further details on a number of policy issues raised during our discussion.

Family law

We discussed future UK-EU co-operation in family law matters and how disputes would be resolved. A close and comprehensive civil judicial cooperation agreement between the UK and EU, such as the UK Government set out in its Future Partnership Paper (<https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>), would provide a range of rules and mechanisms for parents to seek to settle disputes around parental responsibility, residence and contact. These rules would minimise the potential for parallel proceedings, establishing clearly which courts should hear a case and allow judgments and court orders from one country to be recognised and enforced in another. Current EU rules also cover the return of children abducted to or wrongfully retained in other Member States which supplement the international 1980 Hague Child Abduction Convention.

In terms of interpretation of EU law, the Court of Justice of the European Union (CJEU) will continue to interpret EU law and to be the ultimate arbiter of EU law for the European Union, just as our domestic courts will interpret UK law and the UK Supreme Court will be the highest court in the UK. Like all of the other areas where we are seeking an agreement with the EU, any civil judicial co-operation agreement will be consistent with our position on ending the jurisdiction of the CJEU, and enable us to have control about how the UK engages in civil judicial co-operation on the international stage. The details on how we achieve this are a matter for the negotiations.

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Online behaviour

A number of members of your Committee share the growing public concern about online safety. This covers a diverse range of issues including online abuse, hate speech and sharing of personal, sexualised photographs (or 'revenge porn'). It is vital that these issues are addressed in a collective manner, so that the UK's digital revolution continues to have the support of the public, and that Britain can remain a world-leading digital economy.

Through the Digital Charter, DCMS is working to develop policies and actions that make the UK the safest place in the world to be online. The Internet Safety Strategy is an early strand of work under the Charter to address online harms.

The Strategy, which was launched in October, aims to look at how we can support online users so that everyone can access the benefits of the internet safely. The Strategy is guided by three overarching principles:

- what is unacceptable offline should be unacceptable online;
- all users should be empowered to manage online risks and stay safe; and
- technology companies have a responsibility to their users to develop safe online communities.

Through the Strategy, the UK Government will bring together different groups, such as the voluntary sector, technology firms and schools, to establish a co-ordinated approach to online safety. In particular, we believe that government and the technology sector need to work together to find solutions to address online harms. The online consultation which accompanied the Strategy green paper closed on 7 December. We are currently considering responses and will publish our response in due course.

Defamation

At our meeting, we also touched on the issue of defamation and whether work could be better co-ordinated across jurisdictions. The purpose of the Defamation Act 2013, which came into force on 1 January 2014, was to rebalance the law on defamation to provide more effective protection for freedom of speech while at the same time ensuring that people who have been defamed are able to protect their reputation. In accordance with this aim, Section 5 of the Act created (in England and Wales) a new defence to an action for defamation brought against the operator of a website hosting user-generated content where the action is brought in respect of a statement posted on the website.

Section 5 only relates to the operators of websites hosting user-generated content, and does not affect other internet services such as search engines, services that simply transmit information or services that provide access to a communications network. The Section 5 defence applies if the operator can show that the operator did not post the statement on the website. However, the defence is defeated if the person bringing the claim (the claimant) can show:

- that it was not possible for the claimant to identify the person who posted the statement (that is, the claimant did not have sufficient information to bring legal proceedings against the person);

- that the claimant gave the operator a notice of complaint in relation to the statement; and
- that the operator failed to respond to that notice in accordance with the procedure set out in the Defamation (Operators of Websites) Regulations 2013.

The 2013 Regulations set out detailed provisions on the contents of notices of complaint, the actions required of the operator on receipt, and the time periods within which that action must be taken. Broadly speaking, on receipt of a notice of complaint the operator must engage with the person who has posted the material and seek contact details from him or her to enable the complainant to pursue a defamation action against the person responsible for posting the material if he or she wishes to do so.

The Section 5 defence will also be defeated if the claimant can show that the operator acted with malice in relation to the posting of the statement, but is not defeated just because the operator moderates statements posted on the website.

There is no obligation on the operator to follow the process set out in the Regulations. On receipt of a notice of complaint, the operator can choose to remove the posting at any point, or to allow it to remain posted. If the operator chooses not to follow the process, the Section 5 defence will not be available to the operator. However, this does not affect the availability of any other defences which may apply (for example, under the Electronic Commerce (EC Directive) Regulations 2002).

You will be aware that the Scottish Law Commission published its Report on Defamation last month making a number of recommendations, primarily to the Scottish Government although there were several recommendations for UK-wide consideration. The UK Government would be happy to examine these issues with the Scottish Government when Scottish Ministers have had the opportunity to consider their options.

British Transport Police

Your Committee raised the integration of the British Transport Police in Scotland during our meeting and requested an update on progress. As you know, the UK Government has honoured the Smith Commission Agreement, which included the devolution of railway policing in Scotland, and is delivering this through the Scotland Act 2016.

The Scotland Act transferred powers to legislate for policing of railways to the Scottish Parliament which has legislated to transfer those functions into Police Scotland. It is for the Scottish Government to decide how it wants the policing of railways to operate in practice.

However, the UK Government is engaging with the Scottish Government on the transfer arrangements and the two governments are working together with the two police forces and police authorities to deliver an orderly transfer of responsibilities in April 2019.

The need to maintain the high levels of service across the UK is at the forefront of our planning for an efficient and effective transfer of functions. So too is the fair and reasonable treatment of those BTP officers and staff who will be affected by the transfer.

Citizens' Rights and Settled Status

From the very beginning of this process, the Prime Minister was clear that safeguarding the rights of EU citizens living in the UK and giving reciprocal protections for UK nationals living in the EU was her first priority for the negotiations.

EU citizens who have made their lives in the UK have made a huge contribution to our country and we have put all our efforts into protecting their rights as soon as possible, with reciprocal guarantees for UK nationals living in the EU.

It is a commitment we have now delivered. We have secured a fair deal on citizens' rights that will respect the rights that individuals are exercising based on life choices they made before the UK's withdrawal. It will provide them certainty about their rights going forward. And it means those living here before the UK's withdrawal can stay and carry on living their lives broadly as now.

It will enable families who have built their lives together in the EU and UK stay together. It will allow the spouses, children and elderly parents of those protected by the agreement, who live in a different country when the UK leaves the EU, to reunite as a family at any time in the future.

This agreement not only gives the people affected certainty about residence, but also healthcare, pensions and other benefits. It will mean that EU citizens who have paid into the UK system – and UK nationals into the system of an EU27 country – can benefit from what they have put in and continue to benefit from existing coordination rules for future contributions. Reciprocal healthcare rights will be protected, meaning those covered by the agreement will be able to continue to receive healthcare as they do now.

And on European Health Insurance Cards (EHICs), we have agreed to protect the rights of individuals who are in a cross-border situation on the specified date, and entitled to a UK EHIC, to continue to benefit from that scheme for as long as that cross-border situation continues.

The agreement also includes reciprocal rules to protect existing decisions to recognise professional qualifications, for example for doctors and architects.

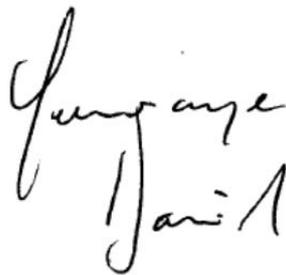
This will only cover those people as defined in the Withdrawal Agreement. Anyone arriving in the UK who does not fall in that category will be subject to the UK's future immigration regime.

For EU citizens in the UK, we will deliver a transparent, smooth and streamlined process to enable them to apply for settled status, the criteria for which will be set out in the Withdrawal Agreement, with no further discretion.

Your Committee also asked particularly about the right to appeal for applicants for settled status. I can confirm that we will establish an administrative review mechanism to quickly resolve any case working errors. Beyond this, applicants will have recourse to an independent judicial authority, as now.

EU citizens and their direct family members will have recourse to a statutory right of appeal, allowing the UK courts to examine the legality of the UK authorities' decision to refuse or revoke status, as well as the facts or circumstances on which the decision is based.

I hope that this information covers all of the issues raised when we met but please do let me know if there is anything on which I can provide further clarity.

A handwritten signature in black ink, appearing to read 'David Mundell', written in a cursive style.

**Rt Hon DAVID MUNDELL MP
SECRETARY OF STATE FOR SCOTLAND**