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Journal

Journal of the Law Society of Scotland

Volume 67 Number 12 – December 2022

UNDER PRESSURE

Better off than some, but cost of living shocks are affecting many in the legal profession: the Journal Employment Survey 2022

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T: 0141 212 9298
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Law Society of Scotland

Publishers
The Law Society of Scotland
Atria One, 144 Morrison Street,
Edinburgh EH3 8EX
t: 0131 226 7411 f: 0131 225 2934
e: lawscot@lawscot.org.uk

President: Murray Etherington
Vice President: Sheila Webster
Chief Executive: Diane McGiffen

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Editorial
Connect Publications (Scotland) Ltd

Editor: Peter Nicholson: 07785 460743
e: peter@connectcommunications.co.uk

Advertising: Elliot Whitehead: +44 7795 977708
e: journalsales@connectcommunications.co.uk

Review editor: David J Dickson

Online legal news:
e: news@connectcommunications.co.uk

Other Connect Publications contacts, telephone 0141 561 0300

Head of design: James Cargill (0141 561 3030)
james@connectcommunications.co.uk

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Editor

Email > peter@connectcommunications.co.uk
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Feeling the pinch

Some are undeniably still doing very well. Many remain comparatively well off in relation to a large proportion of the population. But from the responses to the Journal Employment Survey 2022, there is no doubt that the cost of living crisis is having a significant impact on many practising lawyers.

I am not thinking only of those who have long been struggling on legal aid rates, or trainees finding it hard to make their salary last the month. We have business owners facing huge increases in both interest rates and energy costs, and concerned at the same time about how to support their staff. We have breadwinners feeling the stress of supporting their families; parents working part time who know that extra hours will feed straight through into childcare bills; and parents at a later stage trying to support student children. We have homeowners facing hundreds of pounds extra outlay each month as mortgage deals come up for renewal. People working from home are trying hard to manage without the heating.

Some have found decent looking salary rises swallowed up, or more, by rising costs; many, especially in the public and third sectors, have already been finding their earnings declining in real terms for years.

One upshot is that financial worries are liable to add to what is often already experienced as a stressful occupation. The recent increased attention being paid to wellbeing issues has in any event been overdue, and those who now offer support can expect their facilities to be put to the test in the coming months. Any practice managers who are not yet taking such issues seriously – and on the survey responses they are out there – really need to stop and think again about what their staff might be going through.

As respects the money side, clearly for many businesses and organisations there will be no ready solutions. However a little creative thinking may provide some means of at least blunting the impact of rising costs: our November employment briefing, for example, carried some suggestions.

At times like this, it is when people feel supported that they are likely to respond positively and continue to give of their best. It seems to me that the Scottish profession does indeed retain a considerable collegiate spirit: like charity, it is something that should begin at home, with renewed efforts to encourage team bonding and mutual support within our own workplaces, whatever the type of organisation.

So we enter the festive period, when outlays typically multiply even without an economic crisis. Perhaps the best Christmas gift this year – and one that can last – is to demonstrate that supportive commitment to our colleagues as well as to those in need. I wish each of you the best of the season. J

Contributors

If you would like to contribute to Scotland's most widely read and respected legal publication please email: **peter@connectcommunications.co.uk**

Aileen McHarg and **Adam Tomkins** (co-authors) are Professors of Public Law

Colin McKay and **Jill Stavert** (co-authors) are members of the Scottish Mental Health :Law Review

Christopher Agnew is a senior solicitor in the Family Law team at Harper Macleod

Beth Rudolf (co-author with Professor **Stewart Brymer**) is a consultant to the property industry

Susie Lind is UK managing director, Bluefloat Energy and Falck Renewables

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Farewell from our criminal law briefing regular: Page 26

ONLINE INSIGHT

PUBLISHED ONLY ON **WWW.LAWSCOT.ORG.UK/MEMBERS/JOURNAL/**

Networking as a junior lawyer: all you need to know
Bilaal Shabbir writes on the best ways to build your contacts and open doors in the Scottish legal profession, from student days onwards.

Data Protection and Digital Information Bill challenges
The Data Protection and Digital Information Bill remains under consideration by the Government. If it proceeds, it will pose significant challenges for business unless significant changes are made, Wendy Lloyd-Goodwin warns.

Adoption: no going back?
Reversing an adoption order is highly unlikely in Scotland at present, but as Garry Sturrock explains, in the wake of the forced adoption scandal, revocation as permitted in some other countries may become an issue.

How can employers support carers' rights?
Sarah Gilzean highlights a private member's bill at Westminster which may succeed in bringing in carer's leave; and other means by which employees may claim, and employers provide, carer support.

Are companies' creditors taking a softer line?
Companies struggling with inflation, energy costs and tough trading conditions are in a better position to renegotiate their financial position than in other recent recessions, according to Steven Cottee.

OPINION

Jen Shipley

Showing emotion as a lawyer is a sign of strength, not weakness, and enables you to build stronger client relationships to mutual benefit

Emotion and law. I used to think that these words were mutually exclusive, but now it is abundantly clear to me that they are intrinsically linked.

I have always been a sensitive person. I wear my heart on my sleeve and I find myself tearing up, at times involuntarily, when I'm emotionally impacted by something, good or bad.

Throughout my life, but particularly when I was considering entering the legal profession, people who didn't know me made off the cuff remarks that I'm too sensitive and that I need to toughen up so that things don't affect me as much. I like to think they meant well and were coming from a good place, but over time their comments really knocked my confidence. I started to perceive my sensitivity as weakness. I found myself asking, "Am I really cut out for a career in law?"

Early in my career, a somewhat brief experience of working as a paralegal almost put me off being a lawyer entirely. To say I was thrown in the deep end is an understatement. I was working in a very challenging area of law with no proper training or guidance. I cried every day, but tried to convince myself that things would get better.

Part of my role entailed visiting clients all over the country. On one occasion the traffic was terrible, and I ended up missing a client appointment. I was so worried about having to face my boss to tell them, that it culminated in me suffering a panic attack on a busy A road and having to be taken by ambulance to hospital. I was later told that after hearing what had happened, my boss had said words to the effect that I clearly wasn't cut out to be a lawyer.

I left shortly after, my confidence shattered. I returned to my role in retail, convinced that I wouldn't be a lawyer. Thankfully, after a few months, I realised that I could not let one bad experience shape my career. I applied for a paralegal role at my current firm, which thankfully embraces and supports my emotions, and I will shortly be celebrating my 10-year anniversary.

Even after I left the previous firm, I realised that my scars remained. The comments made resonated with me, and when I started at my current firm, initially I tried to mask my emotions for fear I would appear weak. After all, lawyers shouldn't be emotional, should they? I quickly came to realise that being in touch with my emotions is not weakness; it is in fact my greatest strength and it makes me a much better lawyer.

Our clients want to be represented by humans as lawyers, not robots. The best lawyers are not only technically brilliant but have other subtler skills, including emotional awareness and empathy, that are just as important, if not more so, and set them apart from the rest.

Being an emotionally intelligent lawyer is an asset that should be celebrated. I can establish strong relationships with my clients built on a foundation of mutual respect and trust. They appreciate my ability to empathise with them and emotionally invest in their case, and in turn they open up to me which enables me to obtain very detailed witness evidence that might be missed without our developing that rapport. Defendants' solicitors have commented that the level of detail in my witness statements enabled them to really understand the nature and extent of the client's injury, which in turn facilitated settlement.

I regularly cry when taking witness statements from my clients, many of whom have suffered lifechanging injuries and are going through the most difficult time of their life. I have attended their weddings and funerals, and felt incredibly touched and privileged that they would want me there at such important and personal events.

This belies the perception that lawyers need to be cold and ruthless to be successful. Being tough does not denote strength. In my area of law, litigation, I've heard it said that those who shout the loudest and are the most aggressive are often coming from the weakest position.

Being a lawyer in touch with their emotions is not weakness; it's the definition of strength. A word of warning though: while showing our emotions should be embraced, it can take its toll on us mentally, and we need to ensure that we put boundaries in place to look after our mental health to avoid burnout. As lawyers, we need to look after ourselves to ensure that we can look after our clients and represent them to the best of our ability.

A final message to legal employers. Please don't try and suppress the emotions of your staff; instead embrace, celebrate, and support them to channel their emotions for the benefit of their clients and your business.

Jen Shipley is an associate at Irwin Mitchell's Birmingham office, and Resourcing and Development director at Grow Mentoring

VIEWPOINTS

Tracking funeral plans

It's reassuring news that the FCA has clamped down on funeral policy providers, requiring them to be regulated. Twenty-six firms have been approved (covering more than 87% of an estimated 1.85 million plans sold).

However, 23 either did not apply for authorisation or failed to meet the new rules. They include a number of companies that have gone bust in recent months. Individuals and families affected are waiting to find out if they will get any of their money back.

The problem for plan providers is the issue of keeping records up to date. It comes with huge cost and effort. More than 1.4 million policies "undrawn" (for now accredited companies), holding a value of £4 billion, will all require checks to ensure addresses are up to date.

These often forgotten, hidden assets could prove a significant headache for solicitors if they surface after an estate has been distributed.

From the perspective of probate researchers, we have major concerns about the abilities of funeral care providers to double check that each policyholder's address information is current or, most importantly, to regularly check whether or not the policyholder has passed away. As we are often the first professionals to enter properties, mostly when individuals die intestate, it's been a longstanding concern that funeral policies are forgotten about and never cashed in or reclaimed.

The issues are their values (we have seen some hold £20,000 in value), and the ensuing implication regarding tax liabilities. On this point it could also be deemed a lost asset which could otherwise help next of kin where there would otherwise seemingly be no other monies in an estate.

Furthermore, funeral plans are not part of any standard asset search. We also now have to deal with the glut of companies which failed to become accredited in July. There is no evidence they're spending money updating their records, and the concern is that many funeral policies are or will be lost in the ether.

Our experience has also shown us that individuals are more likely to update wills than details of funeral policies, which tend to be forgotten. The FCA has raised concerns about plans going unclaimed because "the consumer's family don't know about them. The time-critical nature of funeral provision increases the risk of harm as families cannot use plans if they discover them at a later date".

A solution, which would require industry cooperation from accredited and non-accredited firms, could be the creation of a central funeral plan registry. This would ensure that the existence of the plan, one of the most overlooked assets in an estate, can be found more readily in the future.

In the meantime, thousands of families are being saddled with unforeseen and unnecessary funeral expenses, that the deceased sensibly thought to cover in their lifetime.

"Doing nothing" should no longer be an option for funeral plan providers, and we hope to see thousands of families benefitting from these forgotten policies sooner rather than later.

Danny Curran, founder, Finders International and chair, International Association of Professional Probate Researchers

BLOG OF THE MONTH

ukconstitutionallaw.org

This one is a bit different. Happy 75th birthday to the *Wednesbury* case, that foundation stone of judicial review.

"The study of law is all the more enjoyable if you know something about what has happened to the place in which any case was set and... about the characters of those involved, from the parties to the counsel to the judges." Professor Simon Lee delves happily into the archives, and answers critics of Lord Greene MR, who gave the seminal judgment.

To find this blog, go to bit.ly/3FeZKYP

BOOK REVIEWS

Rights Ancillary to Servitudes

RODERICK PAISLEY
PUBLISHER: W GREEN
ISBN (PRINT AND E-BOOK): 978-0414100114; £175

Professor Roddy Paisley's contribution to the Scots law of property is of considerable significance. This two-volume work is his latest publication and is quite simply an outstanding achievement. It will form an excellent companion to Cusine and Paisley's *Servitudes and Rights of Way*.

I wondered when I would find the time to undertake the review of what is a detailed comparative analysis. I need not have worried, as this has turned out to be the shortest book review I have ever written. The book (provided in print and word-searchable electronic versions) is excellent. No property lawyer can afford not to have access to a copy.

Professor Stewart Brymer, Brymer Legal

Conveyancing Checklists (4th ed)

FRANCES SILVERMAN AND RUSSELL HEWITSON
PUBLISHER: LAW SOCIETY OF ENGLAND & WALES
ISBN: 978-1784461591; £70

"This book contains a lot of material which will be of interest to a Scottish property lawyer".

Read the full review at bit.ly/3gH6xkM

Criminal Procedure (Scotland) Act 1995 (21st ed)

SHIELS, BRADLEY, FERGUSSON AND BROWN
PUBLISHER: W GREEN
ISBN: 978-0414105225; £100 (PROVIEW E-BOOK £100)

"While £100 for an annotated statute is a considerable sum to pay, the annotations are practitioner focused... Essential."

Read the full review at bit.ly/3gH6xkM

Ghosts in the Gloaming: A Tale from Kinloch

DENZIL MEYRICK
(POLYGON: £9.99; E-BOOK £3.99)

"This is a book to take to a quiet corner amidst the bustle of the festive season".

This month's leisure selection is at bit.ly/3gH6xkM
The book review editor is David J Dickson

Christmas dimmer

Will people try and put the woes of 2022 behind them when it comes to Christmas decorations? Or will the spectre of energy bills temper the enthusiasm to brighten the dark nights? Consumer research by Go.Compare Energy suggests that 16% of households will forgo the lights this year to save on costs, up from 12% last year. A further 27% will be using fewer than last time.

If you're still game, mind how you go – in another survey, 6% said putting up Christmas lights had caused problems with their electrics, while 5% had had an accident while putting up or taking down their lights. And 85% admitted they had no idea how much their lights might cost in extra electricity.

Sometimes it's safer to stay in the dark. And Santa won't see you watching. Happy Christmas!

PS For a consumer issue, how about the Christmas tree seller who had a man complain that he wanted the roots put back on. "What he meant was, his wife had bought the wrong sort of tree."

WORLD WIDE WEIRD

① Personal finance

A lottery winner in China dressed up in a bizarre cartoon-like costume when he received his jackpot cheque in front of the media – to keep his £26 million prize secret from his family.

bit.ly/3GUPpCE

② Ich bin ein collector

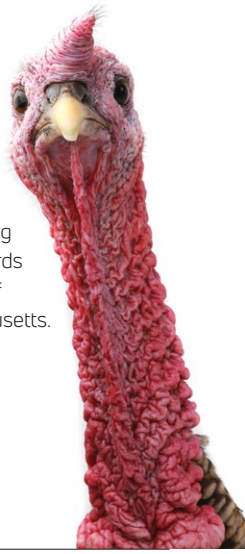
A German wheelie bin collector is looking for a purple bin only ever issued in the UK to complete his collection of more than 100 special coloured varieties.

bit.ly/3gPTihA

③ Feathered fiends

A gang of wild turkeys led by a bird nicknamed Kevin are terrorising residents as the birds roam the streets of Woburn, Massachusetts.

bit.ly/3UjDNMy



PROFILE

Kirsty Thomson

Kirsty Thomson co-founded JustRight Scotland and is Society Council representative for those working in the third sector. When she steps down next year, a vacancy will arise for her Council position

❶ Tell us about your career so far?

I graduated from the University of Strathclyde in 2001, in European law. I then completed a master's in international law and human rights, focusing on the rights of women and children, migration, and armed conflict.

For the last 18 years I have practised, initially in litigation with commercial firms before moving to the NGO sector in 2007. In 2017, I co-founded a human rights and equality NGO, JustRight Scotland. One thing I love about this sector is the ability to work alongside many different people undertaking capacity building, policy and research work.

❷ What drew you to join Council?

I was really pleased that the Society had recognised the importance of hearing views from this sector, and was very proud to be its first member to represent my colleagues in this way.

❸ Has your perception of the Society changed since you joined Council?

I genuinely had not been aware of the multiple interconnected layers of expertise, people, and structures that ensure the Society operates as it does. Furthermore, it is an incredibly friendly, supportive, and engaging team and I encourage people to consider playing a bigger role in the operation of the Society through its committees as well as on Council.

❹ What's next in your career?

This year I have also been working in Central and Eastern Europe, assisting with the civil society response to the invasion of Ukraine and drawing on all my previous academic and work experience in Scotland. I have recently taken the very difficult decision to leave Scotland in order to continue this work in Europe. I am certainly not leaving the access to justice and human rights sector!

Go to bit.ly/3gH6xkM for the full interview

TECH OF THE MONTH

Fabulous

Google Play and Apple Store: free

If you're feeling a bit lethargic, Fabulous is an app that helps you improve your energy levels, fitness, sleep, and productivity. You complete daily meditation, work, creativity, exercise, and other types of self-improvement sessions to help you change your habits in as little as 19 days.

PRESIDENT

Murray Etherington

I have already gained a lot from my faculty visits, and look forward to more opportunities to learn about your concerns. It's time also to recognise the huge contribution of our longest serving, and now retiring, Council member

When I became President in June this year, I made a commitment to getting out to meet solicitors the length and breadth of the country and to visit as many faculties as possible in person over my presidency. In recent weeks I've travelled north, south, east and west, talking to our members in Ayr, Dingwall, Elgin, Greenock, Inverness, Kilmarnock, and by the time you read this, I will have been to Aberdeen and Peterhead.

It is quite simply one of the best things about the role – meeting solicitors across the country and having the opportunity to learn more about any particular concerns they have and share more about the work we are doing at the Society. While some of the issues facing the profession are among the most critical we have ever experienced as a profession, it remains a huge pleasure to meet practitioners and to understand that so many of us have common concerns and we can work together to share ideas and look to finding practical solutions.

Shared concerns

There are a number of themes which have emerged from our discussions. Recruitment and succession planning for firms has been a recurring topic, particularly in more rural constituency areas; and gaps in legal services provision in some areas of the country, conveyancing issues, the continuing difficulties around legal aid, and how the courts operate in a post-pandemic world have all been raised at our meetings. Our discussions have also touched on wellbeing in the profession – an increasingly important focus for our members – and what the Society can do to help provide support through our Lawscot Wellbeing initiative.

It demonstrates to me that we are a united profession and remain connected despite any geographical differences or distance.

We are planning the next series of visits for early spring next year – I'm looking forward to seeing more of you over the next six months. Please do get in touch if you are keen to arrange a visit next year or have any questions for us (memberservices@lawscot.org.uk).

On the international front

There has been an international flavour to our work recently. Last month the Society's Vice President Sheila Webster signed a memorandum of understanding with the New York State Bar Association, strengthening our existing links, opening opportunities for exchanging best practice and highlighting the universality of our work as lawyers.

I recently attended the screening of a film, *Bucha – There Shall be No Forgiveness*, hosted by the Consul General of Poland in Edinburgh, the acting Consul of Ukraine in Edinburgh, and the Minister for Culture, Europe and International Development, who has special responsibility for refugees from Ukraine. While it was highly distressing to watch this documentary on the atrocities in Ukraine following the Russian invasion, it demonstrates the importance of the international community in condemning them and uniting to support the prosecution of those responsible so that they are held accountable in a court of law.

Thank you, Christine

I have done this in person, but will do so within these pages too and say thank you to Christine McLintock, who stepped down from Council after 17 years. Christine, a former Society President, has made an outstanding contribution in that time and leaves a hugely important legacy in the form of the Lawscot Foundation, the Society's charity which supports talented students from less privileged backgrounds through their legal studies at university.

We are once again holding our annual Lawscot Foundation fundraiser Baublefest to raise funds for these young people who I know will be a real asset to our profession. Please do consider buying a bauble – in person at the Society's office or online at lawscotfoundation.org.uk/donate – to contribute to the fantastic work of the Foundation and the young people it supports.

I would like to wish you all a very happy Christmas, a peaceful New Year and best wishes for 2023.

Murray Etherington is President of the Law Society of Scotland – President@lawscot.org.uk

Thinking about starting your own law firm?

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People on the move

Addleshaw Goddard: Arran Mackenzie (left) joins Aberdeen partners

ADDLESHAW GODDARD, Edinburgh, Glasgow, Aberdeen and internationally, has appointed **Arran Mackenzie** as a partner in its Corporate & Energy team. She joins from BURNESS PAULL.

BLACKADDERS, Dundee and elsewhere, has appointed **Lindsey Brown** as a partner in the Private Client team in Dundee. She joins from ROLLOS LAW.

BOYD LEGAL, Edinburgh and Kirkcaldy, has acquired the practice BAIRD & COMPANY, Glenrothes. Baird & Company partners have joined Boyd Legal, **John McAndrew** as consultant and **Carolyn Bean** as head of Private Client. Baird & Company has rebranded as BAIRD LEGAL and will practise from Boyd Legal's office at 1 Townend Place, Kirkcaldy KY1 1HB.

BTO SOLICITORS, Glasgow, Edinburgh and Helensburgh, has appointed litigator and qualified mediator **Cat (Catriona) MacLean** (right) as a partner. She joined the Dispute Resolution team in Edinburgh on 14 November 2022, from MBM COMMERCIAL.

CLYDE & CO, Edinburgh, Glasgow, Aberdeen, North Berwick and globally, has promoted **Ross Fairweather** (large loss and catastrophic injuries), **Lyndsey Combe**


DWF: Caroline Colliston with recent appointments

(clinical negligence) and **Kay Darling** (defender disease litigation, below right) to senior associate.

DWF, Edinburgh, Glasgow and globally, has moved its Edinburgh office from 2 Lochrin Square to 2 Semple Street, Edinburgh EH3 8BL. DWF has also appointed to its Edinburgh office, specialist construction lawyer and former DWF director, **Jonathan Gaskell**, who rejoined the business as a partner from MACROBERTS; solicitor advocate **Lauren Rae**, who joined as a director in Dispute Resolution from

Inksters: Alan Stewart (left) with Brian Inkster

THORNTONS; **Liana Di Ciacca**, who joined as a director in Finance & Restructuring from SHOOSMITHS; and **Michael Gilmartin**, who joined as a director in Public Sector/Commercial.

FAMILY LAW MATTERS SCOTLAND LLP intimate that **Janie Law**, one of the firm's founding partners, resigned from the partnership on 30 September 2022. Janie has continued to be involved with the firm as a consultant and family law mediator from 1 October 2022.

Susan Ferguson-Snedden, formerly head of Legal at HISTORIC ENVIRONMENT SCOTLAND, has been appointed head of Legal and company secretary at ST ANDREWS LINKS TRUST.

GILSON GRAY, Glasgow, Edinburgh, Dundee, Aberdeen and North Berwick, has appointed **Stephen Dick** as a partner in the Real Estate team. He joins from DLA PIPER.

HARPER MACLEOD, Glasgow, Edinburgh, Inverness, Elgin and Lerwick, has appointed **Nadia Cook** as a business development solicitor. She joins from UK GOVERNMENT SCOTLAND.

HASTINGS LEGAL, Kelso, Duns, Eyemouth, Jedburgh and Selkirk, has promoted associate **Tim Taylor** (left) to director with effect from 1 September 2022. Having initially joined the Duns office as a trainee solicitor in 2016, he will now be based at the Kelso office.

Greig Honeyman, formerly partner at SHEPHERD & WEDDERBURN, has joined DOUGLAS HOME & CO, chartered accountants, Edinburgh and elsewhere, as a consultant to the board.

INKSTERS, Glasgow and elsewhere, announces that **Alan Stewart** has joined as a consultant solicitor from 1 November 2022. Co-founder and latterly sole principal of

Intimations for the People section should be sent to peter@connectcommunications.co.uk

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Elliot Whitehead on +44 7795 977708;
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McCARTNEY STEWART in Renfrew, he will be based in Inksters' new office at Suite 2/16, Merlin Business Centre, 20 Mossland Road, Hillington Park, Glasgow G52 4XZ (DX GW28 Glasgow; t: 0141 885 1858; f: 0141 229 0550; e: renfrew@inksters.com).

LEDINGHAM CHALMERS LLP, Aberdeen, Inverness, Stirling and Edinburgh, has announced its merger with ANDERSON SHAW & GILBERT ("ASG"), Inverness and Ullapool, from 1 November 2022. All 19 ASG personnel have joined Ledingham Chalmers. ASG's Commercial Property, Corporate, Rural, and Private Client teams will trade under the Ledingham Chalmers brand, with **Joe Duncan** joining as commercial property partner. ASG's estate agency practice will retain its name, with **Findlay Boyd** as conveyancing partner, along with **Iain McDonald** as director.

McEWAN FRASER LEGAL, Edinburgh, has appointed experienced director **James Milne** as managing director.

Tom Marshall, retired solicitor advocate, has been appointed chair of FIFE LAW CENTRE.

MBM COMMERCIAL, Edinburgh and London, has appointed **Alison Scott** as partner and head of its Commercial Property practice. Joining from DLA PIPER SCOTLAND, she takes over the department on the retirement of **Jane Ramsay**.

MELLICKS, Glasgow, has promoted senior associate, **J Scotland Dickson** to partner with effect from 1 December 2022.

MITCHELLS ROBERTON, Glasgow, has merged with property conveyancing practice WISHARTS LAW, Glasgow, from 1 November 2022. Founders and owners of Wisharts Law, husband and wife team **Frances** and **Robbie Wishart**, have become consultants in Mitchells Roberton.

Ledingham Chalmers and Anderson Shaw & Gilbert merge

PUBLIC DEFENCE SOLICITORS' OFFICE, Dundee, has moved its office to 1 Courthouse Square, Dundee DD1 1NT.

SHAKESPEARE MARTINEAU, Edinburgh and UK wide, has appointed **Grant Docherty** (left) to lead its Banking practice in Scotland. He joins from ROONEY NIMMO.

SHEPHERD AND WEDDERBURN, Edinburgh, Glasgow, Aberdeen and London, announces that **Andrew Blain** has been re-elected by the partners of the firm to serve a second term as managing partner from 1 May 2023. He was first elected managing partner in 2019.

Andrew Blain

THORNTONS LAW, Dundee and elsewhere, has appointed **Corah Franco** as a solicitor in its Private Client team in Dundee. She joins from BLACKADDERS.

WALLACE QUINN, Glasgow and Livingston, announces the following promotions from 1 November 2022: **Richard Murray** to senior associate; **Maureen Jackson** to associate; **Pamela Murdoch** to associate; and **James Higgins** to associate.

WILSON McKENDRICK, Glasgow announces that **David Beattie Watson** has been appointed a director and that **Donna Smith** and **Heather Fraser** have been promoted to senior solicitor.

Mitchells Roberton welcomes Frances and Robbie Wishart

Feeling the squeeze

2022: has not been much of a feelgood year. War in Ukraine, political turbulence in the UK, climate extremes almost everywhere, and now a downward economy and a cost of living crisis – it is not surprising that many business owners and leaders feel anxious for the future. How that is reflected in the Scottish legal profession is among the matters this year's Journal Employment Survey attempted to find out.

With events during 2022 causing the public mood to turn sharply downwards, our report on the Journal Employment Survey 2022 attempts to assess how that is reflected among Scottish solicitors and their workplaces

Well paid, but...

With a succession of cost of living issues having hit the headlines, the 2022 survey asked readers which particular costs concerned them most. More than 92% of respondents to the survey helped build this picture:

While some recognise that they are relatively well off, or are more concerned for junior colleagues, others say that even on what should be a good salary they are finding things difficult. Salary increases are cancelled out (or exceeded) by inflation; some, especially in the public and third sectors, have already seen their earnings falling behind for years. Mortgage, childcare and/or student support costs are major concerns for some, while people working from home are trying to resist using the heating.

Comments include:

Which costs concerned people the most

	%
Gas and electricty bills	84.0
Food prices	63.4
Petrol or other travel	55.2
Mortgage costs	47.1
Childcare costs	12.3
Loan repayments	10.7
Rent costs	6.4
Other costs (those cited included costs of dependants, business costs, pension, tax)	6.8
None	6.4

- "It is having a negative effect on my mental health. Within three days of being paid I have no money left and spend the rest of my month robbing Peter to pay Paul."
- "It's causing me anxiety – I live alone and feel very exposed to the additional costs, and if I were to lose my job."
- "I'm waiting for pay day, putting routine spending onto my credit card and prioritising like never before... Home improvements are relegated to unaffordable. The thermostat is turned down as I experiment with how low is comfortable. I'm aware that loads of people can't pay for basic essentials and we are still better off than very many."
- "Causing high anxiety/depression for which I take medication and am seeing a counsellor."
- "Coming from a working class background has put me at a disadvantage to my peers in terms of financial stability and savings. I feel sometimes that others in the legal sector don't understand or appreciate this."
- "In real terms I am earning far less now than when I was only a few years' qualified. I truly despair about what I am going to do, or how I am going to cope."
- "So who ever said there's no such thing as a poor lawyer!"

Negative sentiment

Unsurprisingly, the business outlook has turned sharply downwards since this time last year. Then, 23.3% said the outlook had improved for

their organisation over the previous 12 months, 1.6% higher than the "Got worse" response. Now, only 6.3% claim a recent improvement compared with 47.8% who have seen a decline; equally, for the coming year, the pessimists outweigh the optimists by 49.6% to 6.6% – last year the optimists (26%) had a nine point lead.

Notably, even those who claim to have had good times recently, worry for the future. "The firm has done well – concern is looking forward not back", one such partner reports. Difficulties in recruiting are perhaps the most commonly cited issue. For example:

- "We are a small firm and struggling to compete with the salaries offered by larger firms, particularly now that hybrid/remote working means that people can look further afield for employment."
- "We have had one of the busiest years ever but with the difficulty in recruiting qualified staff there are now fewer people trying to do greater amounts of work thus leading to ever increasing workloads, backlogs, stress and unhappy clients." (Sole principal)

More generally,

- "Our firm is doing *really* well at the moment but there is concern about what the coming years will bring in terms of instability." (Partner, 2-5 principals)

As has been the pattern in previous surveys, those in the public sector (national or local, but especially local) look worse off, however. "The financial outlook for local authorities is grim", one respondent comments. "Our local authority is reducing the budget across most services, including legal services, by 20%."

Others report:

- "We are now hearing on the news that there is no more money for public sector rises; also I am at the top of my pay scale, so I anticipate no pay rise in this time of huge inflation. Terrifying."
- "Basically all are trying to dodge cuts, but the mantra of 'doing more with less' is quite insulting when we are already flat out."
- "Long term staff sickness linked to stress, ever increasing workload, salary remains same or increase well below inflation for last 10 years."
- "Lawyers in local government are very much falling behind in terms of salary levels in private practice, which is accepted up to a point, but the gap is widening and that can cause doubt and concern about vocation. It doesn't always feel like anyone champions local government solicitors or is fully aware of the professional pay gap that exists in many places."
- "I feel this is a call centre model at times if I'm honest! I think there is a trend to de-professionalise the legal sector, as is happening in some other professions too."

... and the stress

We may be seeing these issues reflected in people's stress levels. Asked how these have changed over the past 12 months, 43% reported increased stress (that follows a figure of 50% last year), with 46% saying their stress has stayed about the same (last year 38%) and only 11% (unchanged) that their stress has decreased. Nearly 49% report stress at problem levels, with about one in five either choosing not to discuss it with anyone or not knowing who to turn to.

Respondents who provided comments mention contributing factors including short staffing/recruitment difficulties, unsympathetic management and an expectation that long hours will be worked. For example:

- "The problem is that we are struggling to recruit additional staff so trying to get help to spread the workload is difficult."
- "Other than working even longer hours to get through the work there is little that can be done without changing careers."
- "Most stress is taken home and managed without issue, but current affairs and cost of living are adding new stress on top of existing stress."
- "I left my role this year at a large international law firm due to the stress and working hours."

One respondent suggested that people working remotely more than one or two days a week results in detachment from colleagues, causing stress when they fail to ask questions or seek help.

Lawyers behaving badly

Were there any brighter spots in the survey? The responses to "Have you experienced or witnessed discrimination or harassment at work in the past 12 months?" may be regarded as containing both good and bad news. While seven out of eight (87.4%) answered "no", there remains an element of poor behaviour that

Which benefits do you currently receive?

Rank	Benefit (last year's position in brackets)	Percentage
1	More than 25 days' holiday per year (excluding public holidays) (1)	49.6
2	Pension (defined benefit) (4)	42.4
3	Cycle to work scheme (2)	39.6
4	Smartphone/tablet (3)	37.2
5	Training support (work related) (5)	34.5
6	Ability to buy/sell annual leave (7)	32.5
7	Private healthcare (8)	31.7
8	Life or health insurance, including critical illness cover (6)	29.7
9	Employee assistance (9)	28.9
10	Cash bonus (individual performance) (10)	24.5
11	Cash bonus (firm performance) (11)	22.3
12	Pension (money purchase) (12)	16.7
13	Gym membership (-)	12.8
14	Other assistance with transport including season ticket loan or parking permit (13)	15.7
15	Pension (other) (15=)	11.2
16	Pension (stakeholder) (15=)	10.4
	No benefits	9.0

allows no room for complacency. Sex or gender discrimination was much the most common form, accounting for 35 out of 79 positive responses, but most other protected characteristics also featured, including age.

A number of people mentioned general bullying or harassing behaviour not based on protected characteristics, which in some cases was directed at a particular individual; or negative remarks about others as opposed to overt behaviour. Some also have to take such behaviour from clients: "It's a regular feature of a criminal defence agent's life", was one comment.

And when we say no room for complacency, what steps is your organisation taking to avoid this label being applied to it: "My firm is generally a horrendous place to work, despite public facing presentation to the contrary"?

Legal aid pressures

Sadly, but predictably, the generally negative responses are magnified in the case of those who work wholly or partly in legal aid. Of these solicitors, 61.4% report increased stress levels over the past 12 months (compared with 43.3% across the whole survey), and 33.3% no change (whole survey: 45.8%). For 58.9% the business outlook has got worse in the past 12 months, while 39.3% say it is unchanged (whole survey: 47.8% and 46.0% respectively). Precisely no one expects an improvement in the next 12 months, while 64.9% predict things getting worse again. And although 51.7% have more than 20 years' PQE, and a further 32.8% have 10-20 years, almost 60% are earning less than £50,000 a year, and more than 70% less than £60,000 – with more than two thirds (68.4%) having seen no change or a decrease since last year.

The response

Thank you to all 555 respondents who took part in the survey. They break down as 37% male and 61% female, with a few answering otherwise or choosing not to say, and somewhat weighted towards those with more years' PQE. More than one third (36%) work in-house, above the figure for the profession as a whole, while 11% do at least some legal aid work (a further 7% find it no longer viable).

Comparing the responses of men and women, we have picked out some illustrations in the "Gender divide" table. The employment and earning patterns as well as the experiences of stress may all be of interest.

The table covering the most common employee benefits in the profession shows a similar pattern to last year, with the figures for holiday entitlement and pension provision perhaps reflecting the proportion of in-house lawyers taking part.

For the most recent comparable reports, see Journal, December 2021, 12 and Journal, December 2020, 12.

"Sadly, but predictably, the generally negative responses are magnified in the case of those who work wholly or partly in legal aid"

Across the career spectrum

On the other hand, stage of career seems less of a factor in some respects than might be supposed. Of those qualified less than 10 years, 53% claim that work-related stress is not at problem level, almost the same as the 54% of those qualified 20 years or more. (It's the group in between, 10-20 years qualified, that scores lower, at 44%.) The senior group however are more likely to work very long hours, with three in every eight saying they put in at least 10 hours every week more than they are contracted for, compared to 17.4% of those less than 10 years qualified – though about three quarters of each group work extra hours to some extent.

As might be expected, the younger group scores higher on cost of living concerns, including 89.7% worried about energy bills and 67.6% about food bills, compared with 79.7% and 56.6% respectively for the older group. However there is a notably flatter salary spread among the older group, 26% of who earn more than £100,000 but an equal number less than £50,000, so there will be many there who are just as anxious about their means. They also return a higher score of those unsatisfied or very unsatisfied with their pay (35.5%), compared with 26.5% of the younger group.

Final thoughts

What seems undeniable across the board is the pressure of trying to recruit sufficient suitable staff. Clearly, many firms will never be able to match the salaries now being offered by some large practices; at the same time, firm culture, and how staff are treated, should not be underestimated as impacting on motivation and loyalty. Could the figures recently released by the Society, showing a record number of trainees being taken on during the last practice year, indicate that firms are trying to "grow their own" when it comes to additional lawyers? For some, it may be the best bet.

The gender divide

	Men	Women
Employed: practising	62.9%	80.8%
Self employed/freelance	26.8%	10.6%
Working part time (less than 90% of full time)	6.8%	21.8%
Working in-house, public sector	18.5%	28.5%
Work average 10+ hours/week more than contract (approx. figures allowing for self employed, long hours)	40%	25%
Earning less than £60,000 per annum	33.9%	57.3%
Earning more than £100,000 per annum	30.0%	10.0%
Unsatisfied/very unsatisfied with current pay	26.8%	36.3%
Not generally stressed/I can handle my stress levels	61.2%	45.1%
Stress level increased over the past year	40.4%	45.3%
Not experienced or witnessed discrimination or harassment at work in past year	90.4%	85.7%

Note: 57% of men who responded, compared with 32.4% of women, had more than 20 years' PQE; 21.3% of men, and 35.7% of women, had 10-20 years.

Merry Christmas • Happy New Year

Thank you to all the law firms that have joined us in 2022.
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Indyref: off limits for now

Following the Supreme Court's decision on the Lord Advocate's reference concerning the Draft Independence Referendum Bill, the *Journal* invited two well-known commentators to offer their perspectives on the outcome

Aileen McHarg: The limits of legalism

On 23 November, the Supreme Court delivered an unexpectedly decisive judgment on what the Lord Advocate described as the "festering issue": whether Holyrood has the competence to legislate for an independence referendum: [2022] UKSC 31. The issue had been left unresolved by the political agreement, ahead of the 2014 vote, to *temporarily* amend the Scotland Act 1998 so as to put the lawfulness of that referendum beyond doubt. In the absence of similar agreement on the holding of another referendum post-Brexit, the Supreme Court held that the Lord Advocate was entitled to make a reference under paras 1(f) and 34 of sched 6 to the Scotland Act in order to resolve the legal question. The court also ruled that the proposed advisory referendum under the Draft Scottish Independence Referendum Bill unequivocally related to the reserved matters of the Union and the UK Parliament, and rejected the argument made by the SNP as interveners that the Scotland Act should be interpreted in light of the international law right to self-determination.

The procedural issue

The decision to accept the reference – before a bill had been introduced to Holyrood – was perhaps the most surprising aspect of the judgment. Other recent attempts to raise devolution disputes by creative routes have been firmly rejected (*Keatings v Advocate General for Scotland* [2021] CSIH 25; *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 118), and the Supreme Court had also previously refused to accept references by the Attorney General for Northern Ireland under the equivalent provision in the Northern Ireland Act 1998: [2019] UKSC 1; [2020] UKSC 2.

But the court's approach to the procedural issue was actually consistent with its approach to the substantive *vires* issue. First, applying the now firmly cemented approach of interpreting the Scotland Act in the same way as any other statute, the words in sched 6, para 1(f) ("any other question arising by virtue of this Act about reserved matters") were wide enough to cover the reference, and the court was not persuaded that any of the anomalies or potential alternative readings raised on behalf of the Advocate General for Scotland were sufficient to displace their plain meaning. Secondly, the court accepted the political importance of the question referred. In these circumstances, it would be contrary to the rule of law and the intention of the Scotland Act if the Law Officers' potentially fallible judgment about the scope of devolved competences were to stop Holyrood from considering legitimate and politically important bills.

The court's approach to the procedural issue is therefore one which endorses a strong role for legal advisers in the Scottish legislative process (see C McCorkindale and J Hiebert, "Vetting Bills in the Scottish Parliament for Legislative Competence" (2017) 21 Edin LR 319), but without allowing an excess of legal caution to inhibit the exercise of devolved legislative power.

The *vires* issue

The same approach produced a more predictable decision on the substantive question. In other words, whether a bill "'relates to" reserved matters is determined by the test of purpose and effect: Scotland Act, s 29(3). Although "relates to" requires "more than a loose or consequential connection", the court held that it was not restricted to considering only the direct or legal effects of bills. Even an advisory independence referendum would be an event of great political significance, irrespective of its outcome. The Lord Advocate could not therefore justify making the reference because of the "exceptional public importance" of the referendum question, while simultaneously downplaying its likely effect.

"The decision to accept the reference – before a bill had been introduced to Holyrood – was perhaps the most surprising aspect of the judgment."

The self-determination issue

It was also predictable that the court would not accept that the Scottish people have a right to self-determination under international law. The court applied the distinction drawn by the Supreme Court of Canada, in the *Quebec Secession Reference* [1998] 2 SCR 217, between internal and external self-determination; only those groups denied meaningful *internal* self-determination enjoy a right to secede. This did not include the people of Quebec, nor by extension Scotland.

Here, though, the limits of the highly legalistic approach to devolution questions adopted by the court become apparent. In the *Quebec* case, the Canadian court went on to consider Quebec's right to secede as a matter of *domestic* constitutional law, holding that the other provinces had a duty to negotiate if the Quebecois expressed a clear desire to become independent in response to a clear question.

The international law dimension clearly does not exhaust the constitutional discussion of self-determination in the UK context either. There is abundant *political* acceptance of Scotland's right to become independent (including the fact of the 2014 referendum itself). Yet these broader constitutional understandings played no role whatsoever in the Supreme Court's decision, and it had nothing positive to say about the process by which independence might be achieved.

Aileen McHarg is Professor of Public Law and Human Rights at Durham Law School

Constitutional pathway to independence?

The decision therefore throws the independence debate firmly back into the political arena. There is no constitutional *barrier* to Scotland becoming independent, but no legal right to do so either. (See A McHarg, "Constitutional Law and Secession in the United Kingdom", in A Pavkovic, P Radan and R Griffiths (eds), *The Routledge Handbook of Self-Determination and Secession* (forthcoming).) It is purely a matter of independence supporters exerting political pressure on the UK Parliament to agree to facilitate another referendum, or a more permanent recognition of Scotland's right to secede on the model of the Northern Ireland Act 1998, or some alternative route to independence.

But while the decision does not positively shape that political process, it may do so negatively. First, there is a risk that *political* acceptance of Scotland's right to self-determination becomes overshadowed by the court's rejection of a legal right, just as the political importance of the Sewel Convention appears to have been undermined by its refusal to give it legal weight in *Miller I* [2017] UKSC 5. Secondly, attempts to constrain the Scottish Government's expenditure on independence planning are reportedly now being considered. If these moves succeed, they will not only tip the political scales further in favour of supporters of the Union, but could have significant adverse effects on the workability of the devolution arrangements in Scotland and beyond.

Adam Tomkins: Now it's for political judgment

I confess to being doubly surprised by the Supreme Court's ruling on the Lord Advocate's reference. Not only did I think the court would rule that the reference had been made prematurely, but I also thought there was more room than the Justices found to accommodate an argument that a bill authorising a second independence referendum could be brought within Holyrood's legislative competence.

Evidently, I was wrong on both counts. Perhaps one day I will learn that seeking to predict Supreme Court rulings is a mug's game!

Process ruling: untidy

Having reflected on the judgment, I still find the court's rulings unpersuasive. This is particularly so on the process point. The Lord Advocate referred the matter under sched 6, para 34 to the Scotland Act. This provides that the Law Officers may refer a devolution issue (as defined) to the Supreme Court. The Advocate General for Scotland was of the view that this procedure could not be used to check the *vires* of legislation, for the reason that the Scotland Act has a different, well established process for doing exactly that.

Section 33 makes it plain that the Law Officers may refer legislation to the Supreme Court for a ruling on its competence after that legislation has been enacted by the Scottish Parliament (albeit before it has come into force). Here, the reference was made before legislation had even been introduced, never mind debated, amended, or passed. The Lord Advocate's reference short-circuited the s 33 procedure and cut the Parliament out of the loop entirely.

That the court accepted the reference leaves the law "untidy" (as the court acknowledged: para 41). The sched 6, para 34 route can be used by Law Officers to challenge the *vires* of proposed bills, but not of actual bills which have been introduced into the Parliament (para 22). That's the first untidiness. The second is that this route may be used to challenge proposed bills on the ground that they would relate to reserved matters, but not on the other grounds which delimit Holyrood's legislative competence (for example, incompatibility with Convention rights).

Substance ruling: short shrift

So be it. As to the substance, when the question whether the Scottish Parliament could legislate for an independence referendum first emerged in 2012, I was certain it could not. Others, including my friend Professor McHarg, took a different view, more generous towards competence. In recent years I had come to reconsider my more hardline position, as I thought the Supreme Court's rulings on aspects of the law of devolution undermined it. For example, in both *Imperial Tobacco* [2012] UKSC 61 and the *Continuity Bill Reference* [2018] UKSC 64, the court went out of its way to interpret reserved powers narrowly, maximising Holyrood's room for legislative manoeuvre. Moreover, in *Miller I* [2017] UKSC 5 the court noted that the legal effect of the Brexit referendum was nil: it did not change the law.

"One day I will learn that seeking to predict Supreme Court rulings is a mug's game!"

Whether an Act of the Scottish Parliament relates to a reserved matter is to be determined by reference to its purpose, having regard to its effect in all the circumstances (Scotland Act, s 29(3)). Taking *Imperial Tobacco*, the *Continuity Bill Reference* and *Miller I* together, I thought it had become at least possible – indeed, plausible – to contend that, if the purpose of a referendum was simply to discover and record the opinion of the people of Scotland, and its effect was not to change the law in any way, then it could be ruled to be within the competence of the Scottish Parliament to legislate for such a referendum.

But in its judgment in *Lord Advocate's Reference* the Supreme Court was having none of it. These arguments were given the shortest of shrift, with barely even a nod to what the court has said in past cases about purpose and effect.

Over to the politics

So where are we now? In one sense, nothing has changed. Everyone recognises and no one challenges that the ultimate decision-maker here is the people of Scotland. Since at least the time of Margaret Thatcher's premiership, UK leaders have acknowledged and accepted that, if it is the settled will of the Scottish people to leave the United Kingdom, the UK state will not stand in their way.

What has changed, I suppose, is the mechanism by which we may test that "settled will". Now it will be a political judgment, not a referendum, which assesses it. That is as it would have been in Thatcher's day, and it is a reminder that, even after this judgment, it is in the political constitution and not in the courts of law that the final decision will rest.

Adam Tomkins is Professor of Public Law at the University of Glasgow and was a Scottish Conservative MSP from 2016-21.

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An open letter to our team... Thank you!

I know as lawyers you're probably going to read this and think it's a little bit odd that a company like ours is using advertorial space in the Journal to say thanks to its team, but, after the year we've had here at Denovo, I honestly couldn't think of a better use of this space. So here goes...

Dear Team Denovo,

I would like to express my sincere admiration for your outstanding efforts throughout 2022. I appreciate everything that you have done over the past year. The endless hours you have spent working to make our service better, our product more innovative, keep our partnerships strong, clients supported and make new team members feel welcome. The professionalism and laser focus you have shown every single day has motivated me to be the best I can be.

I know you all pride yourselves on your hard work and dedication to make every critical project a great success. Your passion and enthusiasm to drive our business forward and support the Scottish legal community, in my view, is unmatched.

Every one of you deserve this token of appreciation for offering so much of your time to keep the Denovo machine churning and ensure all our law firm partners get the exceptional service they deserve. We've all had our plates full, managing our fantastic clients and onboarding lots of new firms, who have joined us this year. You should be extremely proud; I know I am.

I'm a firm believer that it's hard work that makes things happen. It's hard work that creates change. Our job is to work hard to help change the way law firms in Scotland work, to make their lives easier. Nobody can do this alone and great things can't be achieved by one person. The strength of our team is in each individual member, and by God have I got some incredible teammates!

It's been an honour and privilege to work with all of you this year, watching our business and team grow. I help play a small part in Denovo's success, but it's you guys who elevate us to another level. No matter the pressures of the job you have met, matched, and then exceeded all my expectations.

Thank you so much for all your contributions.

Steven

Steven Hill, Operations Director, Denovo Business Intelligence

Mental health: a blueprint for reform

Professors Colin McKay and Jill Stavert, members of the Executive Team for the Scottish Mental Health Law Review, discuss the potential impact of the Review for practitioners, following publication of its final report

The Scottish Mental Health Law Review ("SMHLR") issued its final report on 30 September. Established by Scottish ministers in March 2019, the SMHLR was chaired by John Scott KC (now Lord Scott). We supported him in the executive team alongside Graham Morgan, Karen Martin and Alison Rankin, who brought lived experience of mental illness and a background in campaigning and advocacy. Karen Martin is also a member of the Mental Health Tribunal for Scotland.

The Review's terms of reference set out that its principal aim was "to improve the rights and protections of persons who may be subject to the existing provisions of mental health, incapacity or adult support and protection legislation as a consequence of having a mental disorder, and remove barriers to those caring for their health and welfare".

It was asked to consider what reforms might be needed to ensure mental health and capacity law gives full effect to the human rights of people affected by it.

Background

The Adults with Incapacity (Scotland) Act 2000 ("AWI") and the Mental Health (Care and Treatment) (Scotland) Act 2003 were world leading when introduced, but there have been significant developments since then.

Some of the safeguards in the law have become less effective as a result of resource constraints and the rising number of people subject to mental health detention and guardianship. There is concern that the process for authorising moves into care homes for people who cannot consent breaches the European Convention on Human Rights. The Scottish Government has committed to incorporating a series of human rights instruments into domestic law, including the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the UN Convention on the Rights of Persons with Disabilities ("CRPD"). The CRPD in particular presents a radical challenge to the current model of mental health and capacity law.

Key themes of the Review

The final report from the Review runs to almost 1,000 pages, with more than 200 recommendations. These can be grouped into the following broad themes:

- strengthening the voice of people who use services and of those who care for them;
- reducing the need for coercion in the system;
- securing rights to the help and support needed to live a good life.

Stronger voice

The CRPD affirms that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life", and that "States parties shall take appropriate measures to provide access by persons with disabilities to the

support they may require in exercising their legal capacity".

The implications of this for mental health and capacity law remain controversial, but the Review is clear that much more must be done to ensure that people with mental and intellectual disabilities are able to exercise meaningful control over their own lives.

It recommends that the Scottish Government should develop a comprehensive scheme of supported decision making, including better access to individual advocacy. It also recommends the development of advance choices, to allow people to set out their wishes should they be unable in future to make decisions for themselves. (The Law Society of Scotland has also made proposals in this area: *Advance choices, and medical decision-making in intensive care situations*.) The Review proposes replacing the tests of incapacity and "significant impairment of decision-making" in the AWI and Mental Health Acts respectively with a new test of autonomous decision-making.

Alongside strengthening the voice of the individual, the Review calls for the development of collective advocacy: organisations of and for people with mental and intellectual disabilities who can have a strong voice in the development of services, and the ability to challenge failures to live up to a human rights approach.

Reduced coercion

The Review accepts that it is sometimes essential to detain someone or require them to accept treatment they do not want, but argues that much more can be done to reduce coercion. Its recommendations include greater safeguards for measures such as restraint or seclusion, alongside practical steps such as improved training and the development of new crisis services to reduce the need for emergency detention.

The 2003 Act provides that patients in high and medium secure hospitals can appeal to the Mental Health Tribunal if the level of security they are subject to is not justified. The Review proposes that this be widened so that any detained patient can appeal against the level of restriction they experience.

Many practitioners will already be familiar with the concerns around deprivation of liberty. The UK Supreme Court made clear in *P v Cheshire West* [2014] UKSC 19 at para 49 that anyone who is "under continuous supervision and control and not free to leave", and who cannot consent to this, has been deprived of their liberty under article 5 ECHR and is therefore entitled to article 5 safeguards. This applies to thousands of people in hospitals, care homes and other settings.

Article 5 jurisprudence has stated that there must be practical and effective means available to enable persons with mental and intellectual disabilities to challenge the lawfulness of a deprivation of liberty. It is by no means clear that this is the case where a deprivation of liberty has been authorised by a welfare guardian, although the Scottish courts have accepted guardianship as sufficient authority to place someone who cannot consent in a care home.

In any event, welfare guardianship can take several months, and the Society has criticised long delays in obtaining the necessary social work reports. This can lead to people being kept in hospital for long periods. Attempts by some health and social care authorities to find ways round this have also been criticised as ignoring the rights of adults with incapacity, including one case where the Equality & Human Rights Commission judicially reviewed an NHS board.

Welfare powers of attorney are also used to authorise care home placements, but there is even more debate as to whether this process has sufficient safeguards to meet the requirements of article 5. And, of course, they cannot be used if the adult has already lost capacity before the power can be granted.

The Review proposes a number of ways to address this, including:

- the development of supported decision making, which should enable more people to give a clear indication of their wishes in relation to care;
- clarification that a power of attorney can be used to consent to a deprivation of liberty, subject to a right of review and independent oversight;
- a new "standard order for deprivation of liberty", which could be made by a court or tribunal, with, where necessary, an urgent order to avoid serious harm to the individual.

Stronger rights

One of the fundamental recommendations is that there should be a new purpose for mental health and capacity law. Currently, the law largely regulates "negative" human rights – like the right not to be detained without a lawful process, and the right to bodily autonomy and to refuse medical treatment.

The Review argues that the law should ensure that *all* the human rights of people with mental or intellectual disabilities are protected and fulfilled. This includes positive human rights, such as the right to the highest attainable standard of physical and mental health (ICESCR, article 12) and the right to independent living (CRPD, article 19).

It proposes that decisions about the care and support a person receives should be informed by a full appreciation of that person's human rights. It calls this process "human rights enablement". This is intended as a framework which will encompass existing assessment processes.

This would be linked to the development by the Scottish Government of "minimum core obligations" in relation to human rights, alongside a commitment to "progressive realisation", which ensures that realisation of rights improves over time. The Review proposes that there should be legal remedies where minimum core obligations are not met. This would include a strengthening of the "recorded matters" provisions in the Mental Health Act. There would also be the possibility of legal action by the Mental Welfare Commission in the event of a systemic failure to secure the human rights of a particular group.

What next?

The Review is being considered by ministers. Some reform, particularly in relation to deprivation of liberty, is urgent, and may need to proceed in advance of comprehensive implementation of the Review. The Court of Session has also recently held that the Mental Health Act breaches ECHR, because the Mental Health Tribunal cannot make a recorded matter in respect of a patient subject to a compulsion order (a forensic mental health disposal following a criminal conviction) in the way it can for a civil patient: *X v Mental Health Tribunal for Scotland* [2022] CSOH 78. This will require remedial action.

There are technical recommendations which could be implemented quickly, including improvements to the named person and curator *ad litem*, and a recommendation that intermediaries should be available in the criminal courts to support accused persons with mental and intellectual disabilities.

Other measures will take longer, and require further engagement. The Review wants to see greater alignment between mental health and capacity law. It supports the Society's view that the judicial forum for both Acts should be a tribunal, but recognises that this will take time to achieve.

In many ways, the debate about reform has just begun.

Professors **Colin McKay** and **Jill Stavert**, from the Centre for Mental Health & Capacity Law, Edinburgh Napier University, were members of the executive team for the Review

PRRs: when to declare the end?

Apart from adoption, decisions extinguishing parental responsibilities and rights are quite unusual, says Christopher Agnew, who sets out to draw some guidance from the limited case law

Outwith the context of adoption or permanence cases, where a natural parent's parental responsibilities and rights ("PRRs") are removed or restricted, it is fairly uncommon for litigation regarding extinction or restriction of PRRs to come before the court. The only other way to extinguish or to limit a person having PRRs is by application to the court for an order under s 11(2)(a) of the Children (Scotland) Act 1995. I have received a number of instructions on this topic recently, and in light of the limited case law, I decided to set out my thoughts on the law and summarise some relevant decisions from the courts.

The 1995 Act

PRRs are set out in ss 1 and 2 of the Act. In addition, s 3 covers those who may obtain PRRs. By s 3(1):

"(a) a child's mother has parental responsibilities and parental rights in relation to him whether or not she is or has been married to, or in a civil partnership with, his father;

"(b) ...his father has such responsibilities and rights in relation to him only if (i) married to, or in a civil partnership with, the mother at the time of the child's conception or subsequently, or (ii) where not married to, or in a civil partnership with, the mother at that time or subsequently, the father is registered as the child's father under any of the enactments mentioned in subsection (1A)".

By s 11(7), in considering any decision regarding PRRs, the court must:

(1) have regard to the welfare of the child as its paramount consideration;

(2) consider whether it would be better for the child that the order be made than none made at all;

(3) give the child an opportunity to indicate whether he or she wishes to express their views and if so to give an opportunity to express them.

Case law

***M v M* [2021] SC GLW 012; [2018] 4 WLUK 730**

The court made an order under s 11(2)(a) of the Act depriving a father, who had been convicted of rape, of his PRRs in respect of his nine year old son (D). The order was made having regard to the child's best interests and his views, and not on the sole basis of the father's criminal conviction.

During the parties' relationship, the father had been verbally and physically abusive towards the mother. They had separated in 2011. The children remained with their mother. The father had PRRs in respect of D but not his daughter (S), and he was not named as her father on her birth certificate. In 2013, more than two years after he had last had contact with the children, the father applied for a contact order. In 2014, he was granted an interim order for contact at a contact centre. No contact with S took place, but he had two contact visits with D. Direct contact was subsequently stopped after D became upset during visits. The initial contact proceedings concluded in 2014 with a final order for letterbox contact. In 2015, the father, who had a number of previous convictions, pled guilty to the rape of a former partner and was sentenced to three and a half years' imprisonment.

By minute raised in 2016, the mother sought deprivation of the father's PRRs. The first time the father had attempted to exercise letterbox contact was on receipt of court papers. D was angry and upset on receiving cards from his father. S displayed no emotional reaction to them and put them in the bin. D expressed his views clearly to an appointed child welfare reporter. He was frightened of his father. He worried about him coming to his home. He did not want to see him again.

Given D's distress following letterbox contact, and having regard to his views, it was in D's best interests for the contact to be terminated. Conversely, there was no apparent detrimental effect to S. The court was therefore unable to conclude that recalling the order for letterbox contact would be in her best interests.

Deprivation of PRRs did not automatically follow a criminal conviction, even where it related to harmful conduct towards a child. The welfare of the child remained the paramount consideration. The views of the child are relevant, as are any prior convictions of a party, or their alleged conduct.

The father lacked motivation and commitment to maintaining contact with D, and D had expressed clear views about his aversion to his father's role in his life. In light of

this, the court granted an order suspending a number of the father's specific PRRs in relation to D.

_S v J_ [2012] CSOH 49

The parties were unmarried. The father (F) sought orders in respect of his daughter C, aged one at proof, for PRRs, contact, and interdict against C's removal from the United Kingdom. The mother (M) opposed these orders and sought a residence order and interdict against C's removal from the United Kingdom.

M was Scottish and F Iranian with British citizenship. M and F moved to Scotland from England to stay with M's family during the latter stages of her pregnancy. Following C's birth in Scotland, they returned to England. M returned with C to Scotland following the termination of her relationship to F. F was not registered as the father on C's birth certificate, and had had no direct contact since C was approximately six weeks old.

The court considered the provisions of s 11(7A)-(7E) on account of findings in fact that before meeting M, F had physically assaulted the child (H) of his wife (W), had thrown a pan containing hot cooking oil while H and W had been in the room, and had struck out at various inanimate objects during the marriage, all in temper. F's behaviour towards M could be considered controlling.

In relation to PRRs, the court determined:
(1) F was an important source of information about, and a bridge to, C's cultural background and heritage. Expert evidence from a psychologist found that C would benefit from direct contact with F. Notwithstanding their serious nature, incidents concerning F's volatile and abusive behaviour were historic. There was no suggestion of violence towards M or C.
(2) It was in C's best interests that F be awarded the specific parental responsibility and right of contact only. Direct supervised contact should be allowed to develop for a significant period without interruption. M's wish to move abroad had to yield to the importance of C establishing a relationship with F.
(3) F had had no active involvement in C's upbringing since she was around six weeks old; made no real effort to support M; and there was little prospect of F and M being able to co-operate over matters affecting C. Accordingly, additional PRRs should not be granted in favour of F.

Christopher Agnew is a senior solicitor in the Family Law team at Harper Macleod

_T v T_ [2000] ScotCS 283; 2000 SLT 1442

The sheriff's decision to remove all of F, the natural father's PRRs was one element of his decision that was considered on appeal to the Inner House. The other element was the contact order sought by F in respect of his daughter E.

A critical element of the sheriff's decision related to evidence from a police officer regarding answers given by E at an interview shortly after her fourth birthday. E disclosed that she had been sexually abused by F during a contact visit at F's mother's house. E was called to give evidence. The sheriff found her to be a credible witness. F appealed on the ground that the order depriving him of all PRRs was unnecessarily sweeping.

The Inner House was critical of the sheriff's approach to the assessment of the evidence and his conclusions. This can be seen from the comments of Lord President Rodger at paras 58-68 of the opinion. In particular:
(1) the sheriff had approached the central issue, the alleged sexual abuse, with a completely unjustified preconception, amounting to a fatal flaw; and
(2) the sheriff had failed to assess witness credibility or reliability, including F and M, the mother; had failed to explain why he accepted M's evidence rather than F's expert witness; and had discounted a report by the latter which in fact did not exist.

As the court was in no position to determine the matters in dispute, the case was remitted to a different sheriff.

Lessons from the cases

While there may be instances where it is proportionate to extinguish all PRRs held by a party, the court does not approach the task lightly. Clear pleadings setting out the specific PRRs which the court is invited to extinguish, and the reasons for their extinction, are to be encouraged.

The child's best interests will be the court's paramount consideration. The court will apply the facts and circumstances of the case to each child individually, rather than making a collective decision for all of the children. A sweeping approach from the court of first instance will not suffice. The treatment of the facts and circumstances of a case is of significant importance in allowing the court to assess fully what is in the child's best interests. Failure to set out the court's reasoning adequately may be fatal to its decision standing.

The recent case law shows the courts being more willing to suspend particular PRRs, as a more proportionate measure which in some circumstances can achieve the same legitimate outcome.

There is a place for actions to extinguish PRRs in the courts, but clients should be fully advised of the risks and rewards of instructing such a course of action. It is not a step which should be taken lightly, or simply included into an action where other s 11 orders – such as residence orders or specific issue orders – are sought.

ECS
Eadie Corporate Solutions

When tracing really matters

Alan Eadie, former deputy police commander, and owner of Eadie Corporate Solutions, highlights the human side and positive effect his firm's beneficiary tracing investigations can have on people. Spoiler alert: this case history has a happy ending

Genealogist and former senior police officer Alan Eadie knows from experience how the transition of policing skills to genealogy investigation not only bears positive results for his legal clients, but sometimes can be life-changing for the people he actually finds.

"As a CID officer I was used to tracing people who had committed serious crimes, people who really didn't want to be found," he observes. "In our genealogy investigations the opposite is the case: the people we are seeking usually do want to be found; they sometimes just don't know it. Also, in human terms, the results can often be uplifting, if not life-changing."

Eadie's company is now established as one of the leading Scottish genealogy tracing firms, working on behalf of the legal industry for some time now.

The company's process is to thoroughly research each family's history, then to investigate and trace living family beneficiaries. But the process does not stop there, as the preference is to interview family members or other key persons, not only to corroborate research, but to assist in finding others. It is a tried and tested method that has shown results which never fall below 97%.

Eadie explains further: "Research can only take us so far at times. We are police-trained interviewers, and talking to people, sometimes allied to field work, gets the best results."

Case of the fostered grandchild

An example was an instruction from a firm of solicitors. An elderly lady had died and left a will. She was estranged from her grandson when he was a young child, and lost all contact, due to no fault of hers. She left a considerable legacy in her will to him. However, no one knew his whereabouts.

The deceased woman's son (the grandson's father) had died a young man. The grandson's mother was a drug and alcohol abuser, and the grandchild was deemed at risk by social services, being raised with various foster parents.

Eadie's firm were instructed to find him. The grandson was 19 years old by this time, and it was believed he might even have changed his name.

Following initial research at Register House in Edinburgh, the firm also conducted field investigations. After much hard work, the grandchild's mother was traced, through social media and her associates. She was living rough. When interviewed, she was able to provide some details as to the grandson's possible last known whereabouts, and confirmed he was in foster care.

Contact was also made through social services with previous foster parents, who came forward with vital information. All of that work resulted in the grandson being traced. Eadie's firm wrote to him and he agreed to be interviewed.

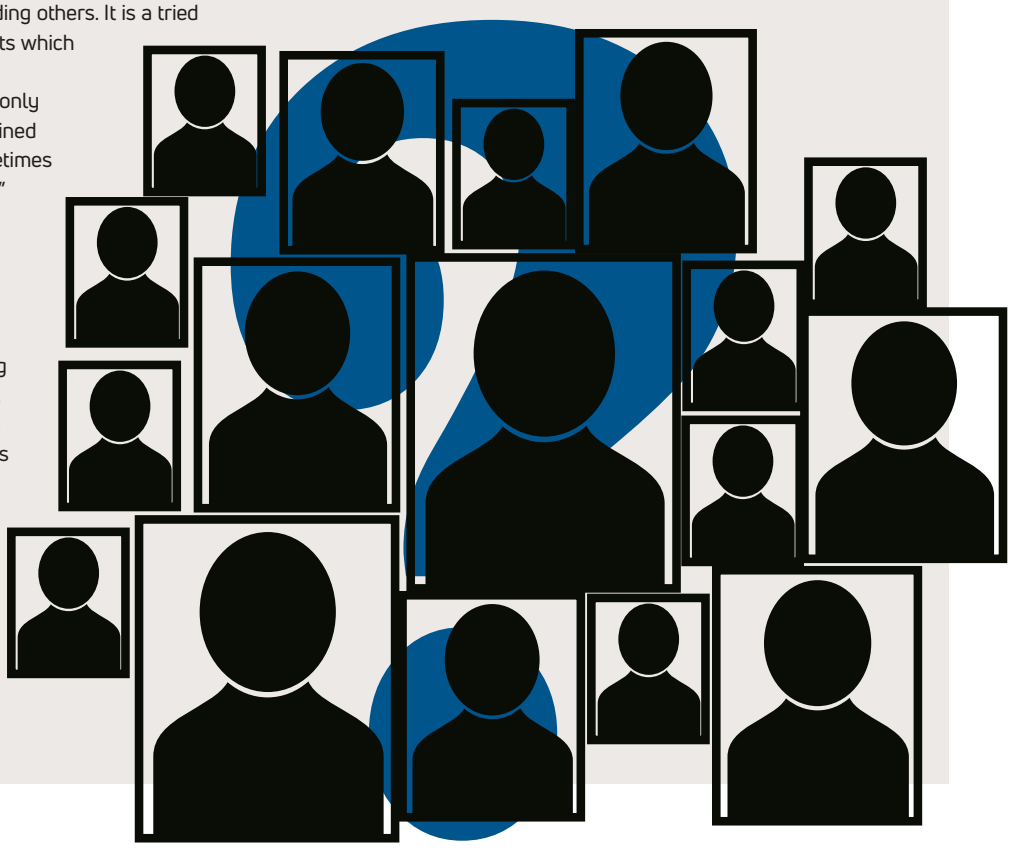
A sensitively conducted interview then took place with the grandson.

"The interview," Eadie recalls, "was very emotional for the young man. Despite obstacles, he had made a go at life and was applying for university. He was living frugally and holding down two low paid jobs. The legacy was life-changing for him, and he broke down crying when speaking about his past. He had never forgotten his grandmother and was grateful that she had, in turn, never forgotten him."

Persistence pays

Every case has its challenges, and Eadie explains his firm's persistence when trying to trace people.

"We are always very determined in these investigations. Not only do we want to bring successful results to our legal clients, we are so aware that sometimes beneficiaries like that young man may badly need their legacy."



"We continue to provide our valued legal clients with the highest level of research and investigation in genealogy, tracing and litigation cases, for the best value. I should personally like to thank our clients for their continued support in utilising these services. During this particularly challenging time, be assured that our competitive and transparent hourly rates will remain the same throughout 2023. It only remains for me to wish everyone a very Happy Christmas and a healthy and prosperous New Year."

– *Alan Eadie, Managing Director, Eadie Corporate Solutions Ltd.*

Testimonials

Over the last 10 years, Alan Eadie and Eadie Corporate Solutions have provided an invaluable service for my firm. We engage ECS regularly to investigate family trees and find missing beneficiaries. ECS continually provide a high level of service with professionalism and care towards sensitive matters and superb attention to detail within their reports. They make the whole process very easy by keeping me updated on progress and ensuring complete transparency with regards to their charges. I always feel confident engaging ECS as no case is ever too small or big for their expertise.

Nicola Gibson. Partner. Sturrock Armstrong and Thomson Solicitors.

"I have worked with Eadie Corporate Solutions on a number of occasions and have always found them to be professional, efficient and reliable. I would have no hesitation in recommending their services to others."

Kirsty Preston. Associate. Lindsays Solicitors.

"I have worked with Alan and his team at ECS for a number of years now, and cannot recommend them highly enough. They offer an efficient and reliable service at a very reasonable cost, and handle even the most challenging cases with the utmost professionalism. Alan is always willing to go above and beyond to support us at Harper Macleod, and has consistently delivered positive outcomes for our clients".

Leigh Berne. Partner. Harper MacLeod LLP.

"Instructing ECS was straightforward with a prompt return, great customer service and structured pricing in order that our clients knew the proposed costs upfront".

Aileen Gilholm. Paralegal . Murray Beith Murray Solicitors.

I have instructed Alan Eadie and his team several times over recent years, to assist me with identifying and tracing missing beneficiaries of executry estates and also long lost family members who living clients want to find. Eadie Corporate Solutions Ltd is consistently effective and efficient, providing a professional report once they have concluded their investigations. I find their charging basis fair and reasonable, with transparent hourly rates depending on the type of engagement agreed. I would have no hesitation in recommending ECS to solicitors, who can be assured that their own excellent client service is matched by Alan's.

Gillian Campbell, Head of Private Wealth & Tax for the North of Scotland, Shepherd & Wedderburn

Alan Eadie does not just find people; he gets information which other genealogists cannot obtain from records alone. Alan is prepared to interview people, ask questions, providing leads which we would not have otherwise. I would recommend Alan and his firm to any solicitor looking to trace beneficiaries.

David Campbell, Partner, Anderson Strathern.

91 New Street,
Musselburgh,
EH21 6DG

Visit our website for more details about our services
www.eadiecs.co.uk

TEL: 0131 653 2716
MOB: 0791 3060908
Email: info@eadiecs.co.uk

Farewell retrospective

In his final criminal court briefing, Sheriff Crowe offers some "then and now" comparisons over his career, as well as his comments on matters of current interest

Criminal Court

FRANK CROWE,
SHERIFF AT EDINBURGH

Farewell

It has been my privilege to produce this article every other month for the last 10 years and follow in the footsteps of the late, great wordsmith Petronius, aka Sheriff Andrew Lothian, and the former sheriff and academic Dr Charles Stoddart, who is still active updating Renton & Brown. That is my favoured book when on the bench if a legal problem on procedure, or indeed evidence (chapter 24), arises which I can't deal with off the top of my head, or wish to give crisp, coherent reasons.

I am not sure if I matched up to my distinguished predecessors, but ably assisted by the excellent editorial support of Peter Nicholson, my wild drafts were tidied up into readable form for busy practitioners.

Rather than simply summarise recent cases and legislation, I have tried to include some comments drawn from my 45+ years of experience. I started out when the Criminal Procedure (Scotland) Act 1975 was brand new. A consolidation of its much amended 1995 successor is alas still some way off.

Most accused were young men aged 14 to 25, so called juvenile delinquents/young offenders, whereas nowadays the peak age of offending is 29 for men and 31 for women – those who have been left behind by their peers and struggle to get a roof over their heads, to bring drug and/or alcohol problems under control and perhaps re-engage with friends and family and even see their children again.

I leave you in the good hands of my Edinburgh colleague Sheriff Adrian Fraser. He has been my "go to" for recent tutorials in COVID law and practice, and has an encyclopaedic knowledge (as I once had) of Scottish criminal cases. I have told him to be bold and impart his knowledge and experience to you.

I am going to wind down a bit next year but may pop up now and again, as I care about our system and want it to be the envy of other legal systems as it was when I set out on my vocation in 1975.

Recent cases

There are not many cases to report this time. Have the appeal courts frightened potential litigants away, or does the recent case clearup mean more work will be forthcoming? In some cases I suspect that when accused are convicted and receive an immediate release from custody they just want to forget the whole mess.

The only decision I offer you is *JH v HM Advocate* [2022] HCJAC 39 (26 October 2022). The appellant was convicted of three charges of lewd, indecent and libidinous practices and behaviour. The first two involved sisters and took place at a time or times between January 1972 and April 1980/July 1981 respectively. A third charge libelled conduct between January 2000 and March 2003. On conviction the sheriff imposed 12 months' imprisonment to cover the first two charges and 18 months consecutive on the third.

The complainers described a similar modus; the offences arose when they were aged seven, between eight and 12, and five or six years of age respectively. The appeal was taken because of the long time gap of 19 years before the third charge.

Reference was made to *Duthie v HM Advocate* 2021 JC 207 at para 28 where it states: "It is not the case that, as a matter of law, in a lengthy time gap case, there require to be special, compelling or extraordinary circumstances before the appropriate [*Moorov*] inference can be drawn." The jury will "normally" be directed that the time, character and circumstances of the individual incidents are component parts of a course of conduct persistently pursued by the accused. It was argued this was a case where a particular direction had to be given.

The appeal was refused. The word "normally" had to be seen in the context of para 27 of *Duthie*. The Crown had argued that the conduct libelled had been particularly idiosyncratic and there had been evidence of a lack of opportunity.

I must say, when it was conceded there had been sufficient evidence to convict, the appeal was doomed standing the attitude of the Appeal Court in *BL v HM Advocate* [2022] HCJAC 15 – see the briefing at Journal, June 2022, 28 at 29.

When I started out, the period of time allowed between *Moorov* type incidents was less than three years: *HM Advocate v AE* 1937 JC 96; *Ogg v HM Advocate* 1938 JC 152. I remember my dismay as a young depute fiscal when the judge threw out a case at preliminary stage where a farmer had abused each of his three daughters between the ages of eight and puberty before moving on to the next one. There was a four year age difference between each girl.

While long time gaps seem to conflict with pursuing a course of conduct, clearly if DNA emerges linking an accused to two murders committed 20 years apart it should be a matter for the jury to decide on the evidence.

Death by driving

I trust that some of you practitioners have commented on the Scottish Sentencing Council's draft guideline. I took part in an interesting and well attended webinar discussing the issues raised in these distressing and difficult cases.

While the draft follows recent Appeal Court jurisprudence rather than the English guidelines, I realised that the draft is not perfect in some areas. To my mind there is a significant difference between ignoring a STOP sign and failing to give way. Death by dangerous driving will almost inevitably result in a custodial sentence, whereas death by careless driving may not. The maximum penalty for the latter is however five years' imprisonment.

It will be interesting to see the court's disposal in a recent case of multiple deaths including the accused's young child.

Restorative justice as reimagined by the Scottish Government is sadly still some years off, but the Sentencing Council's Principles and Purposes of Sentencing, approved in November 2018, includes: "Giving the offender the opportunity to make amends. Sentencing acknowledges the harm caused to victims and communities. Sentencing may also aim to recognise and meet the needs of victims and communities by requiring the offender to repair at least some of the harm caused."

I use this provision to require accused persons at sentencing stage to produce in their own words a statement of the incident that may be compared to any victim impact statement produced on behalf of the deceased, so that it may be offered to the family and perhaps answer some of the questions the criminal process rarely addresses.

That process enables me as a sentencer to examine in detail the extent of any remorse that is expressed on the accused's behalf.

Drug deaths

I couldn't leave you without an update on this

"In recent years I had noticed a change, with addicts being moved on by dealers from heroin to crack cocaine"

topic, which I last covered at Journal, August 2022, 28. I managed many drug treatment and testing orders from 2002 to 2019 and believed in the system. When COVID came along and face-to-face interviews and regular testing became impossible, many addicts struggled even further.

In recent years I had noticed a change, with addicts being moved on by dealers from heroin to the even more problematic crack cocaine, and the growth of street Valium which could be acquired in vast quantities online and contained all sorts of chemicals. To this mix can be added strong medications such as OxyContin, Fentanyl and Gabapentin, which are illegally dealt and consumed, often with drastic results.

Recent figures from the delayed Drug Deaths Task Force suggest small gains, but a better world is not promised until 2026 when there will be capacity "for at least 1,000 people to be publicly funded to go to rehab every year". This is out of an estimated 60,000 addicts in Scotland.

In 2021, 1,330 people lost their lives to illicit drugs, 1% lower than the 2020 high. Police figures for 2022 suggest a greater reduction, but these fatalities vary from area to area. The peak age for mortality is between 35 and 54, and 70% of those deaths are men. From my parochial perspective at Edinburgh, drug deaths rose from 92 to 109 last year, which is an indicator of what can happen when support suddenly stops. No new drug treatment and testing orders can be made at Edinburgh Sheriff Court as the service does not have a doctor.

Those with problems are left to access a few drop-in centres and charitable initiatives which in turn are subject to uncertain funding.

It is worth looking at the *Blueprint to Save Lives* report of advocacy group The Faces and Voices of Recovery ("FAVOR") for another perspective, which suggests almost no progress towards reducing mortality rates. A Right to Addiction Recovery (Scotland) Bill was proposed by the Scottish Conservatives last year and its introduction is now awaited.

If we take the peak age of offending (see above) and the peak age of drug mortality, there are only a few years to work intensively with this group to stabilise them and provide them with decent accommodation, hoping to reintegrate them back into their families and the community. If you are unsympathetic to this, think of their children who will be left behind.

Beyond Newspeak

My draft articles could have been better written, and although an average pupil at school, I enjoyed Orwell's essays and his wish for plain English and short sentences: see *Politics and the English Language* (1946).

This is very much the judicial way nowadays, with less Latin phraseology, although you still have to tell the jury about the *res gestae* (the incident in question), *de recenti* (stuff said shortly afterwards), and *mens rea*, the guilty mind, which previously had to be inferred from actions and adminicles of evidence but nowadays can often be readily gleaned from the accused's contemporaneous social media posts.

Once we marvelled at how Lord Denning could begin a judgment with: "In summertime village cricket is a delight to everyone. In the village of Lintz in the County of Durham they have their own ground, where they have played these last 70 years" (*Miller v Jackson* [1977] QB 966 at 976). You knew in the first paragraph that the developers had lost their case. Lord Denning was of his time and said many things which would not be acceptable nowadays.

I wish to place on record some irritating phrases. George Orwell might have described them as Newspeak, but in the intervening years things have deteriorated and this selection goes beyond jargon and euphemisms.

"Flat cash settlement until April 2027." This is the most spectacular piece of non-Government I have come across. Any dictionary will tell you a settlement is "an official agreement intended to resolve a dispute or conflict". Instead this was an imposition, after which we heard nothing from the Justice Minister for a long time. He seems disinclined to discuss the reality on the ground, among frontline police officers, with lawyers working in the courts, among social workers trying to deliver community sentences and with prison staff trying to manage too many remand prisoners, who even if convicted may receive backdated sentences far shorter than the time served.

I remember the court strikes of 1979 and 1981, each lasting about three months. In Glasgow thousands of cases were abandoned. To my amazement I realised being a prosecutor was not as crucial a role as I had thought – for a short time anyway. The English have had a 15% settlement on a much higher baseline than Scotland ever had. All criminal justice agencies have said the Scottish "settlement" is unsustainable. Those in the system have worked hard to clear cases, but the longer this facade goes on, the lack of defence agents will stall plans to clear things up in time for the next Scottish elections in 2026. Surely something will have to be done in the Scottish Government's December statement. We are told there is £50 million to clear up the jury backlog, but there is unlikely to be the capacity to process these cases.

After years of neglect and little in the way of planning after the "Early Years" and "Getting It Right for Every Child" primary school initiatives, we had the complete failure of the "looked after" system for those brought up in care. They were later abandoned to an unsupervised tenancy at 16, which they lost soon afterwards due to lack of support and training and ended up homeless. Such persons are now blithely described as having "care experience", which glosses over the abuse and deprivation many suffered and the complete lack of care they received.

It is very difficult to try to get it right for an accused in court facing minor criminal charges when they represent the tip of an iceberg of years of neglect and abuse.

I pass no comment on the Gender Recognition Reform (Scotland) Bill which is wending its way through the Scottish Parliament, but I would be concerned about men who apply for gender recognition so as to gain access to women in prison and other vulnerable situations. I hope consideration will be given to the concept hitherto dismissed as a "few bad faith actors".

The Journal is in turn very grateful to Sheriff Crowe for sharing his experience and insight over the years he has been contributing this briefing. – Editor

Briefings

Agriculture

ADÈLE NICOL, PARTNER, ANDERSON STRATHERN LLP

My last article (Journal, September 2022, 30) reported on the Scottish Government consultation *Land Reform in a Net Zero Nation*, which covers a broad range of issues including proposals for reform of the agricultural tenanted sector.

On 29 August, the Scottish Government published *Delivering our vision for Scottish Agriculture. Proposals for a New Agriculture Bill*, which is concerned with the whole agricultural sector. Its six parts cover the headings that follow.

Future payment framework

The bill would provide an agriculture support regime to be implemented flexibly from 2025. There should be security of income for farmers, and mechanisms in place to enable activities to be rewarded, for feeding the nation and ensuring a sustainable and regenerative stewardship of the land.

The consultation proposes a tiered system of payments. Tier 1 is a base level direct payment to support farmers engaged in food production and land management; tier 2 would bring an enhanced level of direct payment to deliver outcomes relating to efficiency, reducing greenhouse gas emissions and nature restoration; tier 3, an elective payment, would focus on targeted measures for nature restoration, innovation support, and supply chain support; and tier 4 would be complementary support.

Delivery of key outcomes

The Government wishes to ensure Scotland will have a support framework that delivers high quality food production, climate mitigation and adaptation, nature protection and restoration, and the wider management of Scotland's natural assets. Targeted mechanisms are proposed to deliver these key outcomes.

Respondents are asked whether they agree with payments to support climate change mitigation objectives, and with a mechanism to enable payments that are conditional on outcomes that deliver climate change mitigation and/or adaptation measures. Should the bill include mechanisms to protect and restore biodiversity, support clean and healthy air, water and soils, and contribute to reducing flood risks? Should it enable payments that are conditional on outcomes that support nature maintenance and restoration?

Similar questions cover support for high quality food production, and grants to support industry in the agri-food supply chain, to encourage sustainability, efficiency, co-operation, development, education, processing and marketing. Also, should the bill enable support for improvements in animal health, welfare and biosecurity beyond legal minimum standards?

Skills and innovation

It is proposed that the bill continues to provide a full panoply of support for knowledge transfer, innovations and skills within the agricultural sector.

Payment framework data

Ministers propose to take power to create an integrated administration and control database to collect specified information relating to applications, and commitments by beneficiaries of support, and to share this information subject to complying with GDPR.

Modernising tenancies

The *Net Zero* consultation proposed a new land use tenancy, which would allow diverse land management activities to deliver climate and environmental objectives.

The present consultation considers whether the rights to diversify of 1991 Act and long/modern limited duration tenants require review. It states that a tenant requires the landlord's agreement before undertaking diversification (although the landlord's failure to agree and relatively limited right to object can be overruled by the Scottish Land Court). It asks whether the Government should have a mechanism to amend the list of permissible diversifications. There is no list at present: it is currently the Land Court's remit to determine whether a refusal is reasonable. The consultation asks whether ministers should have power to determine what are acceptable diversifications. If so, should the Tenant Farming Commissioner be able to issue guidance to assist tenants and landlords?

Waygo and compensation at waygoing are considered. It is proposed to amend sched 5 to the 1991 Act to enable tenant farmers to support biodiversity and undertake climate change mitigation and adaptation activity on their tenanted farms, which activities would be included as factors in calculating waygo. One might query how this would be valued based on value to an incoming tenant.

Is a definitive timescale needed for waygo payments by the landlord on termination of a tenancy? The consultation suggests that tenants can experience delays in receiving payments.

Rent reviews are under discussion (again), ministers having now conceded that the proposed revisals to s 13 of the 1991 Act and s 9 of the 2003 Agricultural Holdings (Scotland) Act in the Land Reform (Scotland) Act 2016 do not work. Alternative methods to calculate rent are needed: the 1991 Act focused on open market rent, which is no longer achievable given the lack of an open market for secure tenancies, and the 2016 Act tied the rent to the economic potential of the holding, which has the potential to distort the rent calculation.

Respondents are asked whether a new approach is necessary, taking account of three elements:

1. comparable rents for secure or fixed duration tenancies;
2. assessment of earning potential by means of a farm budget;
3. consideration of economic outlook for the next three years with a balancing of the three core elements.

Finally, respondents are asked to consider whether in all cases of resumption, the tenant should receive, in addition to payment for disturbance, a share in the uplift of development value.

Fair wages

Ministers propose to ensure that fair work conditions, including the real living wage, are applied to all Scottish agricultural workers. Responses to the consultation were due by 5 December 2022.

Corporate

EMMA ARCARI, SENIOR ASSOCIATE, WRIGHT JOHNSTON & MACKENZIE LLP

BTI 2014 LLC v Sequana SA [2022] UKSC 25 is an important examination of company law and, as Lord Reed stated, provides guidance

"of considerable practical importance to the management of companies".

The case is the first time the Supreme Court has determined whether company directors owe a duty to consider, or act in accordance with, the interests of the company's creditors in relation to the company becoming insolvent, or approaching or risking insolvency.

Facts of the case

The issues arose in 2009 when the directors of a UK company, AWA, approved a £135 million dividend to its sole shareholder, Sequana SA. Payment was made by set off against an intra-company debt owed to AWA by Sequana. Shortly afterwards, AWA was sold. At the time of the dividend AWA was solvent; however there existed, as its directors knew, contingent (though unquantified) liabilities from pollution in the USA. There was therefore a real risk that AWA could become insolvent in the future, although insolvency was not imminent or deemed probable.

When AWA became insolvent in 2018, BTI, who were creditors, started to question the legitimacy of the dividend payment in 2009, in particular given the knowledge of the possible future liabilities and the imminent sale of AWA.

The questions for the court were: (1) Is there a common law "creditor duty"? (2) Can a "creditor duty" apply to an otherwise lawful dividend? (3) What is the extent of a "creditor duty" and when does it arise?

The judgment

The Supreme Court unanimously dismissed BTI's appeal, stating that AWA's directors were not at the time of payment of the dividend under a duty to consider or act in accordance with the interests of the creditors (in the circumstances of this appeal). The majority judgment was provided by Lord Briggs, who used the term "creditor duty" as a "convenient label", but agreed with Lord Reed that it was "in truth an aspect (where it arises) of the director's fiduciary duty to the company, rather than a free-standing duty of its own".

"The issues arose in 2009 when the directors of a UK company, AWA, approved a £135 million dividend to its sole shareholder"

(1) Is there a common law creditor duty?

The Supreme Court determined yes, and considered that s 172(1) of the Companies Act 2006 can be modified in certain circumstances. Section 172(1) requires the directors to act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as whole. The modifications are that the company's interests are taken to include the interests of its creditors as a whole. The court considered that this was supported by a long line of case law, together with the recognition of the duty in s 172(3), and also the principled justification that although creditors always have an economic interest in a company's assets, that interest increases in importance when a company is insolvent or nearing insolvency.

It was held that the shareholder ratification principle does not prevent the existence of the creditor duty (as there cannot be ratification of a transaction entered into when a company is insolvent, or that would make the company insolvent). There is also no conflict with s 214 of the Insolvency Act 1986 in relation to wrongful trading.

(2) Can the creditor duty apply in relation to an otherwise lawful dividend?

The Supreme Court held yes, for two reasons. First, part 23 of the 2006 Act, governing the declaration and payment of dividends, was held as subject to any rule of law to the contrary. As the creditor duty is part of the common law and recognised by s 172(3), it is not excluded. Secondly, part 23 dictates that whether profits are available for distribution depends on whether there is a surplus on the company's balance sheet. However a decision to pay a dividend that is lawful under part 23 may still be in breach of duty, where a company is cash flow insolvent as opposed to balance sheet insolvent. As Lord Briggs stated, this would result in a "foolhardy risk to the long-term success of the company".

(3) What is the extent of the creditor duty and when does it kick in?

The court considered that the "creditor duty" was a balancing act. Where a company is insolvent or bordering on it (but not facing inevitable insolvency), the directors should consider creditor interests and balance them against those of the shareholders where there is conflict. In short, the greater the risk of insolvency, the more weight should be given to creditor interests. However, where a company is irretrievably insolvent, the creditors' interests take precedence as the shareholders cease to retain any valuable interest in the company. Lord Briggs noted this as consistent with s 214 of the 1986 Act.

Briefings

A majority of the court held the creditor duty applies when the directors know or ought to know that the company is insolvent or bordering on insolvency, or insolvency is probable.

Comment

The case provides helpful guidance on what can be a tricky area, and confirms that directors' liability does not extend to where there is only a risk of insolvency (as opposed to actual, bordering or probable insolvency). Questions remain unanswered as to, for example, whether it is essential that the director knows or ought to know of said insolvency status (though keeping up to date with current events is a given). In practical terms, directors will still encounter difficult decisions in ascertaining exactly when on the scale the creditor duty kicks in.

Intellectual Property

ALISON BRYCE,
PARTNER, DENTONS UK
& MIDDLE EAST LLP

Brexit always came with the premise of "taking back control of our laws", and almost two years on from the end of the transition period, the Government continues to work towards this goal. Its current attempt at this can be seen in the Retained EU Law (Revocation and Reform) Bill, through which it is "reclaiming the UK statute book". But what repercussions does this have for our existing and familiar intellectual property laws?

The bill, which at a high level gives power to preserve, restate, amend, replace and revoke certain retained EU legislation ("REUL"), was introduced this September. It amends the European Union (Withdrawal) Act 2018, arguably the main element being that certain REUL is subject to "sunsetting" at the end of 2023 (with an ability to delay this until 23 June 2026). In practical terms, this means that any legislation not restated or amended will automatically lapse.

The bill has brought considerable consternation as to the degree of review which can be undertaken to a wide array of REUL in such a short time period. With much of EU law being immersed within our domestic legislation, it is no easy task. Scotland in particular has highlighted its concern, with Constitution Secretary Angus Robertson asking the Government to consider withdrawing the bill due to the negative impact it may have on individuals and businesses.

What does the bill mean for IP law?

Legislation

The bill's "sunsetting" scope, covering EU-derived subordinate legislation and retained direct EU legislation, remains relatively uncertain. While the Intellectual Property Office ("IPO") has published a list of 67 pieces of REUL relating to IP which *may* fall under the bill, it notes that there will be legislation yet to be identified. Nevertheless, the list includes noteworthy secondary legislation such as the Intellectual Property (Enforcement, etc) Regulations 2006, which governs damages for IP infringement, as well as disclosure requirements and the publication of such decisions in Scotland. While sunsetting does not mean that all relevant legislation will just disappear, there is a possibility that it could be revoked if that is what is decided or if a piece of relevant REUL slips through the cracks.

Initially we had no real idea what ministers would decide or which policy areas would be prioritised, leaving considerable uncertainty for businesses who own IP. However, the IPO recently published guidance on the topic. Some of the key points include the interdependency of IP with other policies such as e-commerce (and the need to liaise with others on such interdependencies when conducting the review), and the importance of stability and certainty for IP – undeniably a benefit. Nevertheless, the IPO explicitly notes that it will consider reforms which benefit innovation and growth, meaning we may see divergences on the horizon.

The courts

Another possible effect on IP law is likely to come from the updated test for applying EU case law and the new test for EU-inspired case law. The post-IP completion day test asked for divergence "when it appears right to do so", the test which the courts use when deciding to depart from their own case law. Under the bill, the courts will instead be bound to consider several factors, namely:

- any relevant changes in circumstances;
- the extent to which the proper development of domestic law is restricted by applying the case;
- in regard to retained EU case law, the fact that decisions of a foreign court are not binding; and
- in regard to retained domestic case law, the extent to which the case is determined or influenced by retained EU case law from which the court has departed or would depart.

The updated and new tests may provide greater discretion to judges to depart, which the English Court of Appeal was resistant to do in the copyright case *TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441. If passed, we will wait to see if this new test encourages greater divergence in practice.

We have seen a wealth of case law from the EU Court of Justice related to the various IP rights over many years, a more recent example being *Cofemel v G-Star Raw* (C-683/17) in the copyright sphere. With departure from case law not being constrained to certain types of REUL, and therefore covering key IP legislation such as the Trade Marks Act 1994, the potential to depart from this case law could have wide ranging implications. The IPO acknowledges the importance of EU case law in the IP sector, noting its intention to codify certain precedents into legislation "to ensure the continued functioning of the IP framework".

Conclusions

With the bill currently at committee stage in the House of Commons, there remains considerable uncertainty as to the potential changes for IP law, whether that is the scope of IP legislation potentially being amended or revoked, or the impact on our case law. We may seek *some* comfort from the IPO's recent guidance. Nevertheless, with considerable opposition to the bill, we await to see the exact impact (if any) which this bill and the powers it contains will have on the UK legal landscape for IP. Definitely a case of "watch this space".

Sport

BRUCE CALDOW, PARTNER,
AND CLAIRE FOWLER,
TRAINEE SOLICITOR,
HARPER MACLEOD

Discussion of sporting breakaway leagues has long left fans and stakeholders disgruntled. In 1985, in response to talks about a breakaway league between eight of England's top football clubs, Graham Kelly, then Football League secretary, remarked that "the emphasis now is on money... and the sooner everybody recognises that, the better".

Now, in 2022, similar comments are being canvassed in response to the creation of the LIV Golf League – a professional golf tour financed by the sovereign wealth fund of Saudi Arabia. Players in LIV Golf competitions are eligible for a share in both a multi-million dollar prize fund, and unlike the longstanding PGA Tour, a sizeable appearance fee too.

Tour sanctions

Several well known players from the PGA Tour have signed up, much to the PGA's dismay. Just 30 minutes after the opening shots of the first LIV Golf event, PGA Tour commissioner Jay Monahan

released a letter to members explaining that those players had breached Tournament Regulations and had not applied for or received the releases required to enable them to play in LIV competitions. It was stated that those players had made "financial-based" decisions and couldn't expect the same benefits as others who had not defected.

Separately, in a decision made by the chief executive alone, the DP World Tour issued £100,000 fines for members involved in that first event and initially banned their participation in three events co-sanctioned with the PGA Tour, including the Genesis Scottish Open.

In response, Ian Poulter, Justin Harding and Adrian Otaegui appealed to Sports Resolutions, an independent dispute resolution service. They sought to have their sanctions paused to allow them to compete in the upcoming competitions. Their submissions to Sports Resolutions' appeal panel covered considerable ground in relation to the merits and impact of those sanctions, for example restraint of trade and the availability of potential damages payments. However, the appeal panel made clear it was focusing on the approach to the regulations and questions of procedural fairness.

Interim relief

The regulations themselves provide that, where a "serious breach" may have occurred, a three-member disciplinary panel should be assembled. If the matter has been referred to the chief executive, the chief executive has discretion to determine that question alone, but this necessarily excludes any opportunity for the member(s) concerned to make representations in the same way as if a panel was convened.

Within the regulations there is procedural guidance in place for a disciplinary panel to follow. This includes, for example, direction that no person who has a clear vested interest or who has made strong statements on the matter, should be appointed to the panel. The appeal panel held that, by analogy, these same considerations should apply to the chief executive. Any appeals from a decision of the chief executive are required to be heard *de novo*.

Proceeding on that understanding, and considering the earlier "strong, adverse public statements on LIV" made by the chief executive, the appeal panel said "there was no process by which the chief executive came at all close to replicating the guidelines for a disciplinary hearing". Given that the decision was made by the chief executive alone, the members had been denied the opportunity to respond to the allegations against them, and would only be able to do so at the *de novo* appeal hearing, which was set for February 2023.

The judgment, made on 5 July 2022, granted the members relief from the sanctions, but was at pains to emphasise that it was a decision on procedure only – the February 2023 hearing would deal with the merits of the case and would act as the formal substantive appeal from the chief executive's decision.

Wider questions

In its judgment, the appeal panel recognised that, notwithstanding that the regulations are actually created by members (which would include Poulter, Harding and Otaegui), and that they appeared to have made a "deliberate decision" to participate in the LIV tour even though they knew they did not have the relevant permission under the regulations, procedural fairness required that they were able to participate meaningfully in any disciplinary decisions against them, and they had not been

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Community planning

The Scottish Parliament's Local Government, Housing & Planning Committee is inquiring into the impact of part 2 of the Community Empowerment (Scotland) Act 2015: in particular, how community planning partnerships can respond to significant events such as the COVID-19 pandemic and the current cost of living crisis. See www.parliament.scot/about/news/news-listing/holyrood-committee-launches-call-for-views-on-community-planning

Respond by 30 December.

Intellectual property

The UK Government's Intellectual Property Office seeks views on how to improve its services in pursuit of its "One IPO Transformation programme". The aim is to remove legal barriers to its digital transformation work. See www.gov.uk/government/consultations/potential-legislative-changes-for-ipo-digital-transformation

Respond by 6 January.

Non-jury trials in Northern Ireland

The Northern Ireland Office is consulting on whether to renew, until July 2025, the legislative provisions underpinning the use of non-jury trials in Northern Ireland. See www.gov.uk/government/consultations/consultation-launched-on-the-use-of-non-jury-trials-in-northern-ireland

Respond by 25 January.

Freedom of information

Labour MSP Katy Clark seeks views on her proposed Freedom of Information (Scotland) Bill. This is intended to extend FoI obligations to all bodies delivering public services, services of a public nature and publicly funded services, to increase the proactive publication of information, and to improve enforcement to comply with human rights norms. See www.parliament.scot/bills-and-laws/proposals-for-bills/proposed-freedom-of-information-scotland-bill

Respond by 2 February.

Education appeal committees

The Scottish Government is consulting on the implications of transferring the functions of education appeal committees to the Scottish Tribunals. Although the Tribunals (Scotland) Act 2014 envisages that this will be done, the Government seeks views on all aspects of the matter. See consult.gov.scot/learning-directorate/transfer-of-education-appeal-committees/

Respond by 6 February.

Audio-visual tax reliefs

Audio-visual tax reliefs are intended to support the production of something called "culturally British film, animation, high-end TV, children's TV and video games". HM Treasury seeks views on modernising the system. See www.gov.uk/government/consultations/audio-visual-tax-reliefs-consultation

Respond by 9 February.

... and finally

As reported last month, the Scottish Government seeks views on supporting small landholders (see consult.gov.scot/agriculture-and-rural-economy/small-landholdings-modernisation/ and respond by 14 January), and Maurice Golden MSP seeks views on his proposed Dog Theft Bill (see www.parliament.scot/bills-and-laws/proposals-for-bills/proposed-dog-abduction-scotland-bill and reply by 16 January).

afforded the opportunity to do so.

This raises an interesting point about natural justice which transcends this decision, and its relevance to golf in general. When engaging in drafting or applying a disciplinary process, the written regulation cannot be applied literally; key fundamentals must not be forgotten. A fair decision-making process is required, with meaningful participation of the individual(s) subject to that decision, whether or not it appears that the case is clean cut. How bold the appellants are prepared to be in asserting that they should be entitled to ignore rules they themselves agreed to is intriguing. The fabric of sport is interwoven with rules agreed and observed by persons with mutual interest. The forthcoming substantive appeal hearing in February 2023 is one to watch.

Succession

YVONNE EVANS,
SENIOR LECTURER,
AND DUNCAN ADAM, LECTURER,
UNIVERSITY OF DUNDEE

When the tenant of a croft dies, there is an opportunity to transfer their interest to a successor, but that opportunity is not absolute and is subject to time limits. The procedure can be found in ss 10 and 11 of the Crofters (Scotland) Act 1993 and s 16 of the Succession (Scotland) Act 1964.

In *Pattinson v Matheson* [2022] CSIH 43, a special case stated by the Land Court, the Inner House was asked to determine how s 11, which deals with transfers on intestacy, and s 16 operate and how the time limits ought to be applied.

Procedural omissions

The respondent's father, the tenant of two crofts in Shieldaig, died intestate in 2012. The respondent, Matheson, was the only person entitled to succeed to the tenancies. In 2014 he sent the applicant a purported notice confirming that he had succeeded, which he copied to the Crofting Commission. At that time, he had not been appointed executor dative; he was not so appointed until 18 September 2018. Confirmation was granted in his favour on 30 November 2018. On 4 June 2019, the respondent's solicitor sent further notices to the same purported effect as those previously sent to the applicant and to the Crofting Commission, and on 13 June 2019 a docket was signed by the executor transferring the tenancies.

The Crofting Commission was satisfied that the correct procedure had been followed and registered the respondent's tenancies in the Crofting Register. The applicant disputed that the procedure had been correctly followed and argued that, having failed to comply with the time limits, the respondent could not competently have transferred tenancies, which should be terminated. He challenged the entries in the Crofting Register by applications to the Land Court.

Section 11 of the 1993 Act requires the executor of an intestate deceased crofter to serve notice of a transfer on the landlord "as soon as may be", and to copy that notice to the Commission. This applies where the deceased's interest in the tenancy falls to be treated as intestate estate in accordance with part 1 of the 1964 Act and transferred in pursuance of s 16(2) of the 1964 Act. Part 1 determines who can succeed, and s 16 specifies the mechanics of the transfer including, for these purposes, a provision allowing the landlord to give notice to terminate the tenancy where it has not been transferred within 24 months. The Lord President confirmed that s 11 only applies after a transfer under s 16(2); however the two sections do not sit well together and perhaps require further consideration.

The question for the Land Court was whether Matheson had complied with the statutory requirements and within the time limits in the Acts. To transfer the interests in the tenancies, two stages must be gone through: transfer under s 16 of the 1964 Act and intimation on the landlord under s 11 of the 1993 Act. The difficulty faced by Matheson was that in order to transfer the interest in the tenancy effectively under s 16, he would have to be the executor; when the notice was served in 2014 he was plainly not. When the second notices were served in 2019, he was the executor, but the Land Court still found against him, holding that the intimations of transfer on 4 June were also invalid as preceding the transfer itself (the date of the docket).

Retrospective validation

It was against that decision that the special case was brought. Noting that the spirit of the crofting legislation was to enable a crofter to secure succession to the family croft, the Inner House found in Matheson's favour. While he was not the executor in 2014, the 2014 notices were retrospectively validated by the subsequent grant of confirmation. While a docket transfer would not have been possible until confirmation was granted, an assignation of the tenant's interest in the lease was a competent method of transferring the interest, and what the respondent had produced amounted to an assignation and had been intimated to the landlord. As a result, the tenancies had transferred to the respondent.

What, then, is the purpose of the 24 month period? The Lord President described the period as a protective one designed to provide ample time to allow the administration of the estate to reach a point where the interest in the tenancy could be competently transferred without the threat of termination, because it is only following the end of that period that the landlord can, but need not, serve notice to terminate the tenancy.

While 24 months sounds like a long time, in practice it may not be. The Inner House's decision suggests that all that need be done within that period is to serve on the landlord a notice (provided that the notice meets the rather basic requirements for an assignation and that it is served by the person who will end up confirmed as executor), and then to proceed at a pace that suits the administration of the rest of the estate and the application for confirmation.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Alan Conroy (s 42ZA appeal)

An appeal was made under s 42ZA(9) of the Solicitors (Scotland) Act 1980 by Alan Conroy, Conroy McInnes Ltd, Glasgow against the determination by the Council of the Law Society of Scotland to uphold a complaint of unsatisfactory professional conduct made by Rajesh Hiremath ("the second respondent"). The appeal was defended by both respondents.

An identity fraudster pretending to be the second respondent instructed the appellant to sell the second respondent's house. Following a complaint by the second respondent alleging a failure to carry out proper identity checks on the client and ensure that he was the owner of the property in question, the Society's Professional Conduct Subcommittee ("PCSC") made a finding of unsatisfactory professional conduct against the appellant.

There was an undisputed error of fact in the PCSC's determination in relation to misidentification of the purchasing company as a building society. This was a finding for which there was no evidence. This error arose during the PCSC's deliberations and parties were not able to address it. The Tribunal was not convinced that this error alone would have been sufficient for it to overturn the PCSC's decision, had the rest of the reasoning been cogent. However, the PCSC had also made findings which were contradictory of the evidence, and had taken into account manifestly irrelevant considerations.

On reviewing the evidence, the appellant's encounter with his client appeared to the Tribunal to be a perfectly normal conveyancing transaction. None of the "red flags" identified by the PCSC individually or when considered together would be particularly troubling to a competent and reputable solicitor. The appellant was taken in by a fraudster who was trying to deceive him. He could not be criticised for this in the circumstances of this case. He did not ignore or fail to do something he ought to have done. The bases for the PCSC's criticism of the appellant's conduct were not well founded. The Tribunal was not satisfied that the appellant was guilty of unsatisfactory professional conduct. It therefore quashed the determination, the accompanying censure and the direction that the appellant pay a fine and compensation.

"Of most concern to the Tribunal were his failures to return client balances promptly and his breaches of the anti-money laundering provisions"

Matthew David Cohen

A complaint was made by the Council of the Law Society of Scotland against Matthew David Cohen, solicitor, Brechin. The Tribunal found the respondent guilty of professional misconduct singly in respect of his breaches of rules B6.11.1 and B6.23, and *in cumulo* in respect of his delay in registering deeds, and his breaches of rules B6.3, B6.4.1, B6.5.1, B6.7.1 and B6.13, all of the Law Society of Scotland Practice Rules 2011.

The Tribunal censured the respondent and directed in terms of s 53(5) of the Solicitors (Scotland) Act 1980 that for an aggregate period of five years, any practising certificate held or issued to him shall be subject to such restriction as will limit him to acting as a qualified assistant to such employer or successive employers as may be approved by the Council.

Solicitors must register deeds without delay. They must communicate effectively (rule B1.9). A solicitor must retain responsibility for the records of their firm. It is essential that books and records are properly kept and that the Society can ascertain the true financial position of the firm at any time. The public must have confidence that the profession will comply with the accounts rules and can be trusted with their money. There must not be a deficit on the client account (rule 6.3). Solicitors must rectify breaches promptly (rule B6.4). They must render fees (rule B6.5.1). Failure to do so demeans the trust the public places in the profession. Fees must be fair and reasonable (rules B6.5.1 and B1.11). Solicitors must keep proper accounting records (rule B6.7). They must return client balances once the matter is concluded (rule B6.11). They must comply with the anti-money laundering provisions (rule B6.23). They must apply customer due diligence measures. They must establish and maintain appropriate and risk sensitive policies and procedures. They must regularly train staff. Cashroom managers and money laundering and risk management partners must retain responsibility for the books and records, and for compliance with AML procedures including documenting compliance. It is essential that the public can have confidence that the profession can be trusted to comply with the rules. The Money Laundering Regulations exist to protect society against criminal acts. Documentation of AML procedures allows the solicitor to demonstrate compliance with the rules.

The Tribunal was satisfied that the respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors. Deficiencies had been noted during a financial compliance inspection in 2015 and again in 2017, following the second of which he was suspended from practice. He had fallen far short of what was required of him in the management of his practice. Of most concern to the Tribunal were his failures to return client balances promptly and his breaches of the anti-money laundering provisions. Misconduct was established singly in relation to these breaches. The other failings were found to constitute misconduct *in cumulo*.

Michael McKeown

A complaint was made by the Council of the Law Society of Scotland against Michael McKeown, Callahan McKeown & Co Ltd, Renfrew. The Tribunal found the respondent guilty of professional misconduct in respect that he was, while within the confines of Glasgow Sheriff Court in a professional capacity, found in possession of a class B controlled drug in contravention of s 5(2) of the Misuse of Drugs Act 1971. The Tribunal censured the respondent.

This incident occurred at the start of the pandemic. The respondent had been on leave and was not expecting to attend court. He was called at very short notice in relation to a vulnerable young client in custody at a police station. The respondent attended court with the intention of gaining access to a computer system which would allow him to communicate with his client. He was stopped and searched by the police.

The Tribunal recognised that these were unusual and unfortunate circumstances, but considered that the respondent's conduct would be regarded by competent and reputable solicitors as serious and reprehensible. Solicitors are not expected to behave as "paragons of virtue", but they are expected to act with integrity both in their professional and private lives. The respondent was acting in a professional capacity when he entered a court building in possession of an illegal substance. The respondent was therefore guilty of professional misconduct. The Tribunal concluded that censure was appropriate in all the circumstances.

Conveyancing: the future is in our hands

The pandemic has brought great change to the conveyancing process, but more is coming and conveyancers should take the initiative in ensuring they will make practice more efficient for their own and their clients' benefit

Property

BETH RUDOLF, FREELANCE CONSULTANT TO THE PROPERTY INDUSTRY,

AND PROFESSOR STEWART BRYMER, UNIVERSITY OF DUNDEE AND SCOTTISH CONVEYANCERS FORUM

There has been much commentary recently about the "next big thing" which will revolutionise and digitise the practice of conveyancing. Such innovation in our industry is to be welcomed.

This article looks at the role which conveyancers have in shaping their own future with appropriate external input.

Where are we now?

It is widely recognised that the everyday life of a conveyancer has changed dramatically as a result of the pandemic. There has been pressure from all sides and work levels have been sky high. We have experienced significant change, much of which has been for the better. There have been major developments in digital identity, sales protocols, digital registration, secure digital signatures, and other initiatives which are designed to make the home moving process more efficient for clients and practitioners alike. Of course there are still issues to be improved, but the "change genie" is out of the bottle and will not be going back inside.

We are at a crossroads of sorts. Faced with a choice in such circumstances, it is suggested that the only decision is to go forward and embrace those initiatives which are complementary to everyday practice and help influence that change. At the same time, we have to be wary of changes which may seem to be favourable but which, on closer examination, may result in conveyancers being less involved in the home moving process.

It has to be acknowledged that our conveyancing systems have been developed over a long period of time and generally have served us and society well. Can they be improved? Absolutely.

What is coming down the line?

There are a number of developments coming down the line which will make the home moving process more efficient.

Vendor disclosure. For those selling, or contemplating the sale of, their property now, they could be completing their property information questionnaires, ordering searches and title documents, and their conveyancer could be checking them over to get everything into shipshape condition so that when a buyer is found, legal commitment could follow very quickly. It's not that any of these things take a long time to gather, but it is conflicting information during the conveyancing process and the lack of any consistency of information that generates additional costly enquiries, especially when information is gathered piecemeal over a period of time.

If all the information is available upfront, you avoid additional enquiries and also post-valuation queries, because the valuer has the right information when they are inspecting the property. English local searches are on average ordered four to eight weeks after the memorandum of sale, on average take 10 days to come back and, where they result in a post-valuation query, these on average take three weeks to be settled. However, if the information is available at the point of sale and the valuer can see the information at the point of valuation, we can eradicate a minimum of five weeks' delay.

A vendor disclosure system is operated in Denmark, Norway and certain other jurisdictions to good effect and all the information is gathered at listing. Fall-throughs are so low that in some areas they do not even record them, and where they do it's less than 2%. But it is also worth noting that in those countries, exchange of contracts can happen within as little as six working days. If only that were the case here.

But we don't just have to look to other jurisdictions to see the impact. Every year, 22,000 properties are sold at auction. The legal pack means that the contract is made instantly on the coming down of the hammer. Data from an auction pack portal indicate that for the 200,000 properties which were added to the portal, 1 million people registered to view the pack and 22 million documents were downloaded. This demonstrates that prospective purchasers want to see salient information before lodging a bid.

"A vendor disclosure system is operated in Denmark, Norway and certain other jurisdictions to good effect and all the information is gathered at listing"

Why would we not want to see a positive, proactive change to improve the home moving process in this way? Is it really an option that we just carry on as we did before?

There is no reason why we cannot change the way in which we process conveyancing transactions. That entails us taking an objective assessment of the timetable as it applied pre-COVID-19 in light of IT and other developments, and seeing what can be improved.

Funds transfer. Another much-talked about concept is focused on how to improve the transfer of funds to all relevant parties at completion of a transaction. We have seen how this is done in Australia. There have, however, been a number of other related developments in this space in recent years and there is a choice of solutions available which should be examined. The various solutions are different, but have the same general aim of saving time and money and seeking to reduce the risk of cyber fraud. In some cases, however, we would do well to think about what the effect might be on the role

"Why would we not want to see a positive proactive change to improve the home moving process in this way? Is it really an option that we just carry on as we did before?"

of the conveyancer going forward. Do we really want to be in a situation where control of the future of the conveyancing process lies in the hands of a third party with no history or empathy with how we do business?

Digital transfer. This in many respects is related to funds transfer. The UK Land Registries have made huge progress in their digital transformation programmes. The final digital solution however will require to be developed as a result of a collaborative process with conveyancers and the broader industry. Land Registries have statutory obligations and, by necessity, they have to be careful. This is where conveyancers can be of assistance so that what is designed accords with conveyancing practice and not some external view of what it might be or what exists in another jurisdiction.

HMLR and Registers of Scotland are the *de facto* electronic lodging authorities, and they will develop their own regulatory frameworks to facilitate what is loosely called e-conveyancing in the UK as their part of the digital revolution. They are the secure platforms on which business will be transacted and to which case management systems can connect. Indeed, there is no reason why we cannot see digital identity and AML/VOI generally being incorporated therein and then shared on a trusted basis. There is no need for any other "satellite" platform to sit alongside our long-established and trusted public registries if case management systems can connect to these. Put simply, the long-established title registration process works; there is no need for anyone other than the Land Registries to take the lead on the changes required to introduce a fully automated digital process, and we should support them in their endeavours.

In Australia, change was urgently required to a system that was largely paper-based and reliant on cheques being exchanged in settlement rooms. That has not been the position in the UK for years now, so a wholesale "like for like" comparison cannot, and should not, be made with a jurisdiction which is fundamentally different from those in the UK. That is not to say that we cannot learn from the Australian and any other comparative jurisdiction, however. We just need to be selective and ensure that we are in control of our own destiny.

So what needs to happen?

In the "new normal", as referred to by our politicians following the pandemic, consumers are less likely to accept an answer from their adviser that "This is the way it has always been done." COVID-19 was a gamechanger, and society has been changed in many ways. The consumers of legal services are now data hungry and expect to be able to have access to their information and transactions in which they are involved. That is as it should be; even a digital settlement and registration system will only save time when buying a property if it is preceded by upfront information, available digitally, to the consumer and stakeholders.

It is time, however, for conveyancers to stand up and be counted and lead from the front. This is what happened in Denmark, with considerable success: see www.danskeboligadvokater.dk. As in Denmark, conveyancers in the UK can shape their own future on the journey towards an "end to end" digital basis. When looking at proposed innovative changes we just need to remember the old adage, "All that glitters is not necessarily gold."

Both authors are participants in the Home Buying & Selling Group (Beth Rudolf is co-chair) – homebuyingandsellinggroup.co.uk/

The views expressed in this article are the personal views of the authors.

With a fair wind

Someone who always says "yes" to opportunities, this month's in-house interviewee has been chosen as managing director of a renewables company, but still values her practising certificate

In-house

SUSIE LIND, UK MANAGING DIRECTOR, BLUEFLOAT ENERGY AND FALCK RENEWABLES

Tell us about your career path to date

It's been wonderfully varied. I studied in Aberdeen, and trained at D&W Edinburgh before moving to London (for love and work!). I learned my fundamentals in a great corporate team, who worked long hours, shared mistakes and had lots of fun. I loved a deal, had lots of responsibility and every week had to go digging for courage I didn't know I had. I didn't know then how instrumental these themes would be in my approach to life and work, and still think about the people in our small team and the jokes we shared so often. As Maya Angelou famously said, "People don't remember what you said, but the way you made them feel." I felt valued and included.

Despite my best efforts to sit tight, a secondment was thrust on me in a sector that felt big and boring. Well, it proved to be big... I worked across EDF's various businesses, from customers, where I supported the branding and smart meter rollout for the 2012 Olympics within the customer's business, to buying and reorganising renewable assets, to energy trading and business supply contracts. The mixed bag allowed me to recognise that our skills as lawyers are broad and adaptable to different contexts. I *always* said yes to everything and worked out how to deal with the situation afterwards.

This approach was especially true when I applied for the role of Legal Affairs Director of the EDF Renewables business while on maternity leave with my third baby. I'd had all three kids within two years (and a day), and hadn't quite worked out how logistics or the role would work. But not having a plan was familiar, and I knew I'd try everything to come up with one, so I embraced the opportunity and got to it. This role was transformational for me, as EDF Renewables was a comparatively small business, meaning I had responsibility for areas wider than legal (like HR; office locations and strategy; insurance; governance). We grew quickly and I loved the ride.

I was then encouraged to join the EDF UK generation business – the shareholder of EDF Renewables – in the same role, and despite my love of renewables and lack of experience in nuclear, went with an open mind and learned so much leading the legal function and then the nuclear decommissioning business (overseeing about 2,000 people and a multi-billion pound annual revenue stream managed by the Nuclear Liabilities Fund on behalf of Government).

By this point I was still working away every week but living in Scotland. Great opportunities in renewables had sprung up in Scotland, and my yearning to focus on offshore wind was stronger than ever, so a few months ago I left EDF and have the privilege of leading the joint venture between BlueFloat Energy and Falck Renewables, delivering floating offshore wind projects that will provide important capacity to our energy market and unlock the potential to harness energy generation in deeper waters – something that's never been possible before on utility scale anywhere in the world.

As managing director, what are your main responsibilities?

Being a good listener and creating the environment to deliver great projects.

I see this clearly in two parts. First, internally, combining the right skillsets and people, as well as providing all the enablers to success whether they are practical (in structure, governance, ways of working equipment or support), or more human, in connection and shared experiences which lead to trust and often fun. Secondly, externally, working to identify and unlock barriers to delivery, developing a platform and relationships to clearly communicate our aims and needs in order to influence change that will enable projects and our collective ambition to achieve net zero.

"There will be masses of opportunities as the renewable sector ramps up to deliver on the Scottish and UK Governments' targets"

Why would you encourage young lawyers to consider a career in energy?

Because it's a fascinating sector that's changing all the time. When I was a junior lawyer it would frustrate me to be in meetings where everyone spoke of their vast experience, inferring that those with less were less worthy to speak. In energy, things change and develop so fast that an open, inquisitive, dedicated mind is valued more than I've seen anywhere else and, most notably in renewables, every day is a school day as we continuously try to adapt and optimise ways of delivering projects to drive down cost. We learn as we go, so people are keen to take time to explain what's gone before and listen to new perspectives. From a legal point of view there are plenty of areas of law you can focus on: planning, property, construction, commercial, M&A, debt, company secretary and governance, or be a generalist as I have enjoyed being. The options are vast.

How does the future look for in-house lawyers? What are the key challenges and opportunities?

It's bright! There will be masses of opportunities as the renewable sector ramps up to deliver on the Scottish and UK Governments' stated deployment targets, so it would be a great time to get involved.

What are the current hot topics in your sector?

The key topics are focused around the current blockers to deployment of offshore projects. There are current ongoing reviews of the Grid connection arrangements and network design

to ensure there is enough infrastructure and capacity to take on the new projects that will be built.

Secondly, we as an industry are working to ensure we can provide enough certainty to allow a UK supply chain to develop in a way that will sustainably deliver projects in the long term. This requires infrastructure investment, planning and preparation in skills and training, and locking in important decisions on projects that will determine the components we will need and what can be fabricated locally – it feels like a 1000+ piece jigsaw puzzle, but using that analogy, taking each piece as it comes will slowly build a complete (and wonderful) picture. Our projects will be enormous (with turbines now projected as being 200m tall), so the sheer scale and logistics are also key considerations being worked through.

What does success look like for your team, and how do you measure this?

Earlier in the year I interviewed a lady who was very explicit about her professional goal, to the extent that she included it on her LinkedIn profile. I was so struck by her clarity of thought and I almost immediately turned my mind to my own professional goal, which is "to be part of courageous teams, energised to deliver groundbreaking projects with skill and care for each other and the planet".

I've always lacked confidence, but saw a massive turning point when I labelled what I needed as courage rather than confidence. This felt more natural and doable, and having had a mum who always encouraged me to try (even if I fail), I realised I was quite comfortable with failure, so success for me is definitely to try. And inevitably, confidence came from that courage and the "failures".

"Practically speaking, I think automating as much of my week as possible helps with stress and peaks"

Success to me also means having fun and feeling fulfilled and valued, and while hard to measure, I like to think my gut acts as a good measure of success for the team on this front.

Lawyers aren't generally seen as being particularly innovative. Would you agree?

While maybe not considered innovative, we do think differently, which is a great thing in an in-house environment. I believe in always having an open mind and being open to sharing our ideas. As lawyers we sometimes feel we need to think things through before we speak, but sparks can fly when we genuinely co-create and go with ideas or scenarios rather than the finished article or entrenched view.

What advice would you give lawyers who want to start a career in-house? What makes a good in-house lawyer?

Be a great listener, show interest in the business and the people involved, and make suggestions or speak up even if it's not your area of expertise. A variety of thoughts will make the outcome richer every time.

What are your thoughts on training in-house versus training in private practice?

I think every scenario gives you something different, and more importantly, wherever you find your opportunities, make the most of them and grab all experiences. I believe the same applies when qualified and choosing where to be, unless you know in your heart where you want to be, in which case follow that and do not compromise.

What is your most unusual work experience?

Crawling into a concrete gravity base foundation on the Blyth offshore wind project during a directors' safety tour: it blows my mind to know that foundation is now at the bottom of the North Sea and has made such an important contribution to future projects worldwide in testing that technology.

How can solicitors build good mental health, increase resilience and manage stress successfully?

By knowing it's something that takes continuous attention and talking really openly about when things are good and when they are challenging. Practically speaking, I think automating as much of my week as possible helps with stress and peaks, so having groceries delivered or exercise planned at the same time each week feel like important coping mechanisms for me. I also give up alcohol when I have particularly intense phases, so my physical and mental energy isn't sapped further.

You've held on to your solicitor status by maintaining your practising certificate despite not being in a legal role. What value do you see in doing so?

I see it as massively valuable and want to ensure I retain the development and skillset that I believe serves us all so well, regardless of our area of focus. And I would love to practise again one day...

Finally, what do you love about your role, and what do you love doing when the working day is done?

I love being part of a small team delivering big things. I always say, "The small things are the big things", and truly feel that if we care for each other and the small things that matter to each of us, the big stuff will flow.

Out of work I love to hang out with my three boys, play squash, golf or whatever sport any friends are up for, and enjoy great food.

Questions put by Rachael McLean, interim deputy director, SGLD Head of Strategy & Business Division.

Society steps up trainee and manager support

The Law Society of Scotland has committed to improved support and oversight of trainee solicitors and training managers.

The Society's Education & Training (Standard Setting) Subcommittee has endorsed a number of changes in response to surveys of trainees and training managers conducted earlier this year.

Proposed changes include:

- additional support to trainees who are facing difficulties;
- guidance and additional support to training managers;
- prioritising proposals for improved regulation of traineeships, including streamlining reporting mechanisms and considering mandatory training;
- improving communications with trainees and training managers;
- streamlining trainee processes and seeking to reduce the cost of traineeships;
- further considering remuneration levels for trainees.

The surveys – which have been published subject to privacy and welfare considerations – show that a substantial majority of trainees report a broadly positive experience, but that some feel unsupported and overburdened with inappropriately complex work.

Findings of the trainee survey, which was completed by 383 trainees, included:

- 79% agreed they were allocated work and tasks at an appropriate level;
- 82% agreed they were assigned a range of tasks covering a broad range of skills;
- 78% agreed they worked in a supportive environment.

Society President Murray Etherington commented: "Scotland's training and qualification system for solicitors is well regarded, and trainees are quite literally the future of our profession. A functional system serves trainees, their employers and the clients they serve.

"Our surveys show that traineeships in Scotland are broadly working for most participants. While we're satisfied there aren't widespread issues, we want traineeships to be the best they can be for all trainees and employers. Some of the findings are deeply concerning and all in the profession should work to ensure that trainees are supported properly.

"There's been an enormous amount of work done this year in identifying how the traineeship can be incrementally improved in various areas. It's pleasing to see the Education & Training Subcommittee is now ready to take that work forward.

"We are committed to providing more visible and accessible support for both trainees and training managers, and to making what regulatory improvements we can to support traineeships, including to reduce the administrative and financial burden on trainees and training units."

Human rights project in survey appeal

Lawyers who appear before Scottish courts and tribunals are being invited to help a research project by completing a short survey on their use of human rights treaties.

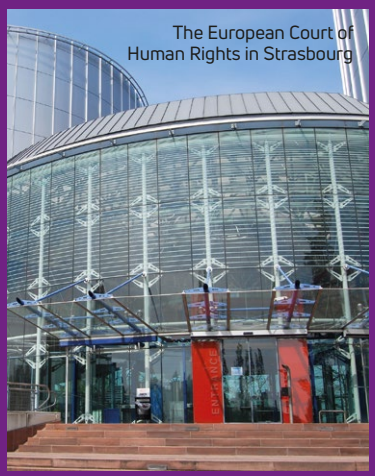
Funded by the Royal Society of Edinburgh and undertaken by Dr Samuel White and lecturer Susannah Paul at the University of the West of Scotland, the project seeks to understand more about the use of human rights treaties in Scottish courts and tribunals.

The aims of the project are to:

- understand and explain how the courts engage with unincorporated human rights treaties in their decisions;
- understand how and why legal practitioners use, or do not use, unincorporated rights instruments in their arguments in courts and tribunals; and
- translate this understanding into training aimed at equipping legal practitioners with the skills effectively and successfully to use these rights treaties in courts and tribunals.

Initial analysis of judgments has revealed that while courts and tribunals in Scotland do engage in some use of these instruments, this use is not particularly widespread and has not developed to the same extent as the European Convention on Human Rights did prior to the Human Rights Act 1998.

The team is now seeking to understand lawyers' perspectives on human rights treaties and why they use, or do not use these when making legal arguments. The survey has been designed to assist this. It can be accessed at https://t.co/TRfyHt8TZH



The European Court of Human Rights in Strasbourg

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees have had a busy month analysing and responding to proposed changes in the law. Key areas are highlighted below. For more information see www.lawscot.org.uk/research-and-policy/

Scotland Europa

The Law Society of Scotland has strengthened its links with Europe by becoming a member of Scotland Europa, a membership-based organisation that promotes Scotland's interests across European institutes and member states. The rules set by the EU will continue to influence the law and regulations in Scotland, and the Society will continue to have an interest in the work done there. Equally the EU will have significant influence over the EU-UK Trade and Cooperation Agreement.

Engagement with the EU and its institutions therefore continues to be important post-Brexit as a means to promote the Society, learn from others and represent the interests of the Society's international members. Having discussed its options with Siobhan Kahmann, the Society's international Council member, the Society has decided to join Scotland Europa to enable it to continue to have a presence in Brussels.

Aligned with Scottish Enterprise, Scotland Europa promotes Scotland's interests across the institutions of the EU and to the representatives of Europe's regions and member states. It has a permanent presence in Brussels and will provide the Society with the support needed.

Proposed Agriculture Bill

The Society's Rural Affairs Committee responded to the Scottish Government's consultation on *Delivering our Vision for Scottish Agriculture: Proposals for a new Agriculture Bill*. It noted that there is limited detail as to the proposed measures within the consultation and it is not clear how the proposals will operate in practice. The consultation suggests that the future payment regime will be introduced by a framework bill, with a number of powers to be afforded to ministers to implement the regime by regulations. The response stressed the importance of robust consultation, as well as sufficient parliamentary scrutiny of the regulations.

The need for certainty and clarity for those operating in the agriculture sector was noted, although the benefits of some flexibility were also recognised. The response supported the greater focus throughout the proposals on the environment, including for some payments to be conditional on outcomes that support climate mitigation and adaptation. However, it also highlighted the need and challenges associated with balancing these aims with other factors relevant to the sector, such as the production of high quality food, integrated land management, and food security issues. It further noted a need to ensure that those in the sector are not constrained for cross-compliance purposes by conditions in their lease that prevent them taking certain actions.

Domestic abuse

Scottish Conservative MSP Pam Gosal launched the Proposed Domestic Abuse (Prevention) (Scotland) Bill in August 2022. The proposed bill seeks to make provision for the prevention of domestic abuse and improve support for those affected.

The proposals include creating a domestic abuse register for those convicted of offences; mandatory rehabilitation measures for those convicted of offences; collation and reporting of data related to domestic abuse cases; and education in schools about domestic abuse.

The Society's Criminal Law and Mental Health & Disability Committees responded, supporting the proposed bill's aim to reduce the prevalence of domestic abuse in Scotland. The response fully supported the proposals relating to education. However it expressed concerns relating to proposed mandatory anger management, and queried how a domestic abuse register would be implemented given that Police Scotland currently manage a growing number of responsibilities with even tighter restraints on their time, capacity, and resources.

Sentencing: death by driving

The Scottish Sentencing Council launched its first offence-specific guideline relating to death by driving cases in August 2022. The Council acknowledged that death by driving cases are of particular public concern and can be among the most serious and complex cases for the courts to consider.

The Criminal Law Committee reviewed the draft guideline and considered that it provided an accessible guide for the benefit of sentencers but also the public, press and families of those whose death has been caused as a result of a driving offence.

The Society's response welcomed the Council's efforts to ensure that the guideline reflects current sentencing practice while taking account of public perceptions in sentencing. It further noted that the style, structure, and content of the guideline is logical and easy to follow, and recognised that the guideline would increase public understanding of the complex legal issues involved and could also be a useful tool for defence solicitors to advise their clients of potential sentences available.

See the website for more about the Policy team's work with its network of volunteers to influence the law and policy.

ACCREDITED SPECIALISTS

Agricultural law
Re-accredited: JOHN MICHAEL GREENE BLAIR, Gillespie Macandrew LLP (accredited 30 July 1997).

Charity law
Re-accredited: MALCOLM HAMILTON RUST, Shepherd and Wedderburn LLP (accredited 19 April 2012).

Child law
JOANNE RONNA MURRAY, Blackadders LLP (accredited 9 November 2022).

Commercial mediation
LAURA ANN McKENNA, McKee Campbell Morrison Ltd (accredited 17 November 2022).

Family law
SARAH LOUISE HELEN FEENEY, Gilson Gray LLP (accredited 9 November 2022).

Re-accredited: ELIZABETH BROWN PEDEN, Cameron Clyde Legal Ltd (accredited 22 November 2017).

Liquor licensing
Re-accredited: STEPHEN JOHN McGOWAN, TLT LLP (accredited 16 November 2017).

Personal injury
Re-accredited: GRAEME MARK KYNOCH EDWARD, Ledingham Chalmers LLP (accredited 22 November 2004);
KIM LOUISE LESLIE, Digby Brown LLP (accredited 13 June 2007);
PETER MELROSE BRASH, Grigor & Young LLP (accredited 6 November 2007).

Planning law
KAREN LESLEY HAMILTON, Brodies LLP (accredited 9 November 2022).

ACCREDITED PARALEGALS

Civil litigation – debt recovery
BEVERLEY BELL, Moray Legal Ltd.

Company secretarial
SARAH CARROL, Burness Paull LLP.

Residential conveyancing
SARAH HOLLAND, Stewart & Osborne Legal LLP; LAURA WILSON, Arthur & Carmichael LLP.

Wills and executries
KIM RIDDOCH, Stewart & Watson.

OBITUARY

AGNES MAXWELL-FERGUSON, Hamilton
On 15 December 2021, Agnes Maxwell-Ferguson, employee of the firm Dailly, Walker and Co, Glasgow.
AGE: 57
ADMITTED: 2011

In practice

Gallen elected GBA President

Michael Gallen has been elected President of the Glasgow Bar Association.

A partner at Fleming & Reid, he is an experienced criminal defence lawyer but also represents clients before the Mental Health Tribunals. He has served on the GBA's executive committee for nearly 10 years, and sits on the Society's Mental Health & Disability Committee.

Jennifer Young to chair CBI Scotland

Jennifer Young, managing partner of Ledingham Chalmers, will take over the chair of CBI Scotland in the new year. She steps up from vice chair to succeed Keith Anderson, chief executive of ScottishPower, who has held the chair since January 2021.

Working with CBI Scotland director Tracy Black, the two will form CBI Scotland's first all-woman senior leadership team.

LawCare calls for men's mental health support

Legal mental health charity LawCare has released the findings of its all male focus group to understand the needs of men in law in relation to mental health support in the workplace.

The aim of the focus group, covering diverse occupations in law from across the UK jurisdictions, was to understand the mental health experiences of men in law, the barriers to seeking support and what needs to change to encourage more men to seek support.

The report finds that despite the increased awareness and understanding of mental health in legal workplaces, there remain significant barriers to men seeking support.

"There is no doubt that more could and should be done to support men with their mental health", the report concludes.

Nick Bloy, founder of Wellbeing Republic, the report author and focus group facilitator, commented: "Men feel a palpable expectation that they should be strong, not display vulnerability, and be able to shoulder the burden of personal problems themselves without recourse to others. Working as a lawyer adds additional pressure to this sense of needing to appear perfect to the outside world."

Notifications

ENTRANCE CERTIFICATES ISSUED 7 SEPT-3 OCT 2022

(This list was omitted in error from the October issue)

AHMED, Sarah Noor
ARCHIBALD, Wendy Ann
BALABAN, Shereen
BARNETT, Aimée Catherine
BLAZNIAK, Julita
BURNETT, Dornie Alex
CAMPBELL, Hugh Van Woerden
CANTWELL, Laura Catherine
CARMICHAEL, Charis Neve
COLVILLE, Angus Fraser
COOKE, Faye
CROWE, Jordan Dalgleish
DEWAR, Kimberley Michelle
DILLON, Sam Michael
DOCHERTY, Hannah Helen
DUNSMORE, Jack Kerr
DYCHAKOVSKA, Yana
FAIRBAIRN, Thomas Matthew
FERGUSON, Matthew David
FOWLIE, Catriona Frances
FRASER, Matthew Duncan
GATER, Olivia Mary Honey
GILMOUR, Scott Allan
GREENAN, Sarah
GREIG, Sophie Caitlin
HUGHES, Niamh Linda
HUNTER, Lauren Lesley
HUSSAIN, Euan Zakir
HUSSAIN, Zahra
JAVED, Madinah Hanaa Safaa
JENKINS, Georgia Hill
KANE, Becky
KAY, Matthew Oliver
LAIRD, Holly
LIVINGSTONE, Adam Thomas
LORAN, Emma-Louise
McCREADIE, Eilidh Campbell
McCUE, Maxine Margaret
McCULLOCH, Struan John
MACDONALD, Amy Elizabeth
McDONALD, Lauren
McDOWALL, Alexandra Rose
McFARLANE, Lindsey
McGEE, Kerry Sarah
MACKENZIE, Charlotte Mary
MACQUEEN, Molly Jane
MANSON, Jess Morag
MARSHALL, Kellie Margaret Mary
MOHAMMED, Ridha Sehar
MUSTARDE, Heather Margaret
O'SULLIVAN, Abigail Mary
PARK, Michael Malcolm
PATERSON, David William
PURCELL, Jennifer Margaret
RABBANI, Haroon
RATCLIFFE, Nicholas
RATHI, Upasna
RUTHERFORD, Angus David
SIMKIN, Blythe Elizabeth
SMITH, Kirstie Ann
SNOWDEN, Gillian
SYMMS, Lorna-Anne Rennox
WALKER, Erin Anne
WALLACE, Georgia Chloe
WATERFIELD, Scott Spedding
WILSON, Michelle Mary
WISHART, Christie Anne

ENTRANCE CERTIFICATES ISSUED 3-24 NOV 2022

GORSKI, Sarah Jade
HICKEY, Tessa
KING, Rebecca Louise
LYLE, Rebecca
McINTOSH-SWORD, Elsa
McQUADE, Shelby
SHEARER, Craig McIntyre
SIMPSON, Dean Aaron Scott

APPLICATIONS FOR ADMISSION 7 SEPT-3 OCT 2022

(This list was omitted in error from the October issue)

ANCEY, Tiffany
ANDERSON, Stuart Alexander Campbell
BARCLAY, Victoria Claire
BENDLE, Louis
BLAIN, Scott Oliver
BOWIE, Lauren Ann
BRAUNHOLTZ, Lily May
BREERTON, Daniel Richard
BRUCE, Anna Elizabeth
BURKE, Rachael Theresa
CAMERON, Jordan Alice
CHALMERS, Georgia Rose
CLARK, Fiona Wyatt
CLAYTON, Chelsea
COLLINS, Kelsey James
COOK, Amy Louise
CUNNINGHAM, Julia Christine
CUNNINGHAM, Ramsay Jack Heron
DEMBELE, Macoula
DOHERTY, Erin
DONALDSON, Antonia Clare
DUNMORE, Lydia Jane
FERGUSON, Helen Louise
FOULKES, Alexandra Christina
GALA, Katarzyna Anna
GLASS, Andrew William
HARPER, Sarah Elizabeth
HARRIS, Emily Marie Helene
HORTON, Rebecca Simpson
IRVINE, Drake Andrew
JACON, Ewa Monika
KERR, Clare
KILDARE, Jonathan Jeffrey
KOCHAR, Monica
KULAGA, Emanuele
LAM, Sze Ki
LINDSAY, Jack Steven
McAULEY, Kirsty Anne
McAVOY, Rebecca Anne Amos
McBRIDE, Jade
McCORMICK, Kirsty Jessie
McDOUGALL, Robbie Cameron
McGOWAN, Jamie Connor Christopher
MACINTYRE, Connor Angus Macpherson
MACIVER COWAN, Caitlin Anne
McKAY, Rachael Holly
McKENNA, Abigail
McMAHON, Laura Isabell Margaret Cameron
McROBERTS, Dominic Thomas
MEEK, Abigail Anna Carden
MEHIGAN, Liam Peter
OSWALD, Mark
PATERSON, Morven Kathleen
REID, Fiona Alison
RICHARDSON, Alexandra Beth
ROCKLIFF, Kate Laura
SANDERSON, Holly Alice
SEMPLE, Benjamin Stephen
SHARPE, Kathleen Darcy
SMITH, Ailsa Macmillan
STEWART, Jamie Gordon
STEWART, Reece McKenzie
TRAYNOR, Joanna Jessica
URQUHART, Ross Duncan
VAN DER SCHEER, Xander
WALLACE, Regan Joseph
WARK, Alexandra Rose
WEBB, Megan Patricia
WHITE, Connor Michael Cummings

APPLICATIONS FOR ADMISSION 3-17 NOV 2022

ALLAN, Holly Marie
ASHRAF, Mahreen
BLACK, Anna Louise
BROWN, Rebecca Evelyn
BUCHAN, Abigail Joy
BURNS, Raegan Janice
BUZUK, Sarah
CAIRNS, Matteo Giuseppe
CAMPBELL GUION, Kirsten Mary
CHALMERS, David James Robertson
CHALMERS, Kerry-Anne
CUNNINGHAM, Gemma Louise
DUFF, Ronan Alexander
ELLIOT, Michael David
ESSON, Rebecca Charlotte
FITZPATRICK, Courtney
FRAZER, Karin
HACCIUS, Justin Charles
HADDOW, Mark James Robert
HENDERSON, Kate Louise
HOFFORD, Oliver Cameron Paterson
JORDAN, Sinéad Anne
KEDDIE, Larissa Jacqueline
LENAGHAN, Chiara Shona
LOGAN, Humera Shah
LOGAN, Jenny Anne
MACDONALD, Ellie Keira
McEWAN, Morag Katherine Lydia
MACINNES, Garry James Boyd
McKAY, Miles Lewis
McKENDRICK, Julie Kathryn
McKILLOP, Ruairidh
McNEIL, Ritchie Jordan
McWILLIAM, Kirsty Anne
MAGRATH, Hannah Leslie
MARSHALL, Rebecca Alice
MARTIN, Natasha Carly
MAYALL, Iona Christina
MOFFAT, Thomas Forbes
MOHAMMED, Jena Karen
MOON, Philip John
MURDOCH, Cameron Matthew
MURRAY, Anne Clare
POLATAJKO, Debbie Catherine
PRICE, Jacob
RAE, Joanna Christine
RAEBURN, Stephanie
REILLY, Rebecca Florence
ROBERTSON, Euan Craig
ROBERTSON, Sean James
RUDNIKOWSKA, Gabriela Zuzanna
RUSSELL, Alannah Beth
SMART, Sam
SPOWART, Kayleigh Frances
STODDART DURNING, Samuel George
SUNASSEE-MACKEY, Marie Rose Jessica
SWEENEY, Andrew
THOMSON, Aaron James
THOMSON, Ross McIntosh
TURNBULL, Megan Jane
WARD, Rachael Nicole
WATT, Sean Alexander
WEBSTER, Heather Elizabeth
WILSON, Ginny
YOUNG, Megan

Make great client experiences your differentiator in 2023

Building better client relationships will be the key to growth going forward

What is your firm doing to find – and retain – clients in 2023? Client expectations have evolved, and now more than ever before, clients expect a high level of service from their lawyer. Couple that with a more challenging economic environment, and client care becomes more important than ever before.

If you're not meeting client expectations, you could be missing out on vital opportunities for your firm.

With more than 11,500 practising lawyers in Scotland (and more than 180,000 in the UK overall), your competition is stiff, which means that every contact with a potential client counts. How clients interact with lawyers has changed too. In the modern legal landscape, clients are no longer willing to play phone tag with a solicitor or to spend time chasing a firm that's hard to reach.

In an industry so dependent on referrals and reputation management, building better client relationships is the differentiator that will earn you lifelong clients and continue to help your business grow in 2023 and beyond. Adopting the right legal client intake and relationship management software is key to this aim.

Take Clio Grow, Clio's legal client intake and relationship management software, as an example. It's designed to make it easier for lawyers to connect with clients. With it, you can:

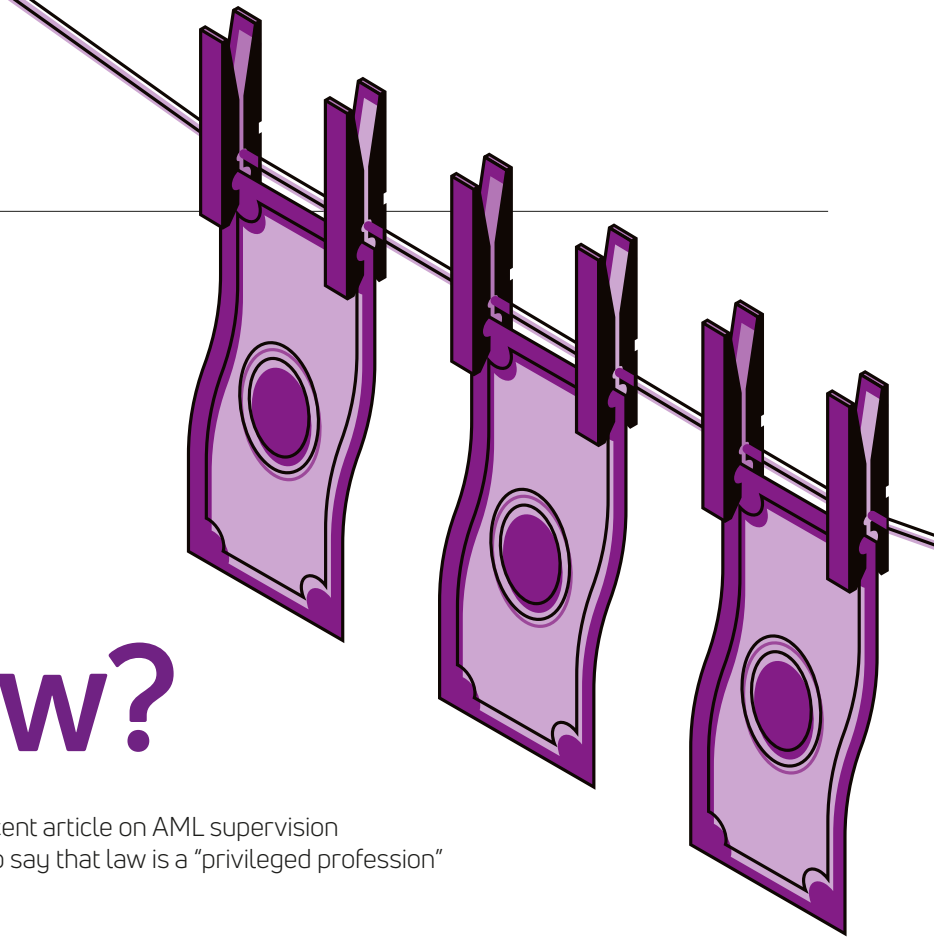
- Use quick intake forms, scheduling, and e-signature tools to engage and retain new clients in moments, not days.
- Nurture relationships by keeping clients updated with automated follow-up emails and reminders.
- Get a bird's eye view of your client pipeline using analytics and reporting tools so you never miss a single opportunity to connect.

Available as part of Clio Suite, with Clio Grow you can watch your client base, billable hours, and reputation thrive.

See how Clio, an approved supplier of the Law Society of Scotland, helps Scottish law firms to succeed at clio.com/uk/lawscot-journal.

MONEY LAUNDERING

AML: privilege for the law?



Fraser Sinclair looks at Spotlight on Corruption's recent article on AML supervision in the legal sector, and considers whether it is true to say that law is a "privileged profession"

"From setting up complex company structures for clients to helping purchase luxury real estate and negotiate mortgages, lawyers play a critical role in facilitating and legitimising money flows." Thus begins Spotlight on Corruption's recent article on lawyers and AML (spotlightcorruption.org/reports/), immediately setting out both the tone and agenda for the piece.

Notable by its absence is the lack of any quantitative data suggesting that the work detailed in that opening gambit makes up much of the work of UK solicitors. On complex entity structuring, for example, recent Law Society of Scotland analysis of AML certificates noted that there were only 19 practices who reported having conducted *any* trust or company service provision with privacy jurisdictions; that is 19 out of more than 700 supervised firms. I know that's not the be-all-and-end-all of apples with apples comparisons, but it's interesting to see what starts to happen when you bother trying to involve two fruits at all.

The 88-page article is actually centred on the success *or otherwise* of the AML supervisory regimes implemented by the SRA, Law Society of Scotland *et al*, but I only get 800 words for this article, so I will stick to their eyecatching introductory sections on so-called "unique protections" afforded to lawyers.

Tropes about scope

The first such "unique protection" is that not all legal work is within scope of the AML Regulations. The article rightly notes that: "The dividing line between legal services that fall within the scope of the MLRs and those that fall outside their scope is not clear-cut", and highlights that solicitors are left to decide for themselves on a case-by-case basis whether the due diligence requirements in the regulations are to apply. As noted in the article, the point of this is that certain services are at material risk of purposeful attempts to abuse them in the course of financial crime, and others are not.

This is the entire spirit of the oft-mentioned risk-based approach. To label this as a unique protection mischaracterises the situation, and solicitors who are left scratching their heads as they try to do the right thing by implementing an approach in line with the above will attest to the fact that it is *not* a protection: you may be pinning your hopes on the fact that your supervisor will one day inspect you and agree with the decisions you made, and the risk of being wrong may be large, however unfair that is. For those asking why we don't just treat everything as "in scope", the fact is that this would represent a step backwards and a blow to the pragmatism envisioned in a truly risk-based approach.

Defence open to all

The article also draws attention to "adequate consideration", as provided in s 329(2)(c) of the Proceeds of Crime Act. The essence of the law here is that where *any person* acquires criminal property for adequate consideration, they do not commit an offence. There are nuances and technicalities here, but for the purposes of legal services it is classically read as "where you deliver a service and charge the commensurate fee, the money you charge is not criminal property".

What should be noted here, though, is that this so-called "unique protection" is no such thing. It applies to all persons, from solicitors charging fees to Joe Bloggs buying a secondhand car. I was actually in a clothing shop the other day when the cashier (unaware of my profession) said they sometimes have people paying hundreds and hundreds of pounds in cash while texting on an old Nokia 3210 phone. I look forward to Spotlight on Corruption's character assassination of the clothing retail industry.

Privilege: a headache

Last in line for demonstrating the wonderfully privileged position solicitors are in is the existence of privilege itself. I have more sympathy with the view that legal privilege is open for abuse. However, from my own experience and from speaking to colleagues in similar roles at legal firms, the reality is that assessments of privilege are almost invariably another serious headache to go through while considering the drafting of suspicious activity reports. Lawyers, understandably, do not take the breaching of fundamental rights to privilege lightly, quite aside from any civil liability risks which are envisioned (even if wrongly perceived). The label of "unique protection", if technically correct, does not tell the full story.

The crux of the Spotlight on Corruption article is ostensibly not solicitors but their regulators, and in fact there are some great talking points throughout and I recommend giving it a read. It is a shame, then, that these sections referenced above perpetuate a nefarious, pinstripe mafia myth which seems at odds with the reality of the Scottish legal sector.

Fraser Sinclair is head of AML for MacRoberts LLP and runs the AML consultancy brand AMLify

Charging for complaints: a bad idea

Charging clients for dealing with complaints, setting procedural hurdles or pressuring them not to complain, is improper and unenforceable, as Susan Williams of the Scottish Legal Complaints Commission explains

Our latest edition of *Snapshot* looked at why the SLCC doesn't charge a fee for considering complaints. We emphasised that the aim of the Legal Profession and Legal Aid (Scotland) Act 2007 – and one of the universally accepted hallmarks of a good complaints process – is that consumers have the right to complain through an accessible process.

We've recently seen several terms of business or letters that indicate an intention to charge a "levy", a flat fee or time charge for dealing with any complaints which are not upheld. Other firms may not go quite this far but include other hurdles that can deter complainers. Some examples that we've seen include:

- clauses in draft agreements that no complaints about handling of the matter can be made to the firm;
- a solicitor refusing to release a payment due to the third-party complainer under a negotiated settlement, unless the complainer withdrew their complaint about the solicitor's actions in the lead-up to the settlement;
- incorrectly telling a third party complainer that they could only complain via another solicitor;
- strong letters urging a client to "think very carefully" before lodging a complaint, as the firm might decide to report the client to another authority;
- firms insisting that complainers must go through several burdensome hoops, in terms of procedures, timescales, or formats for their complaint, before they will consider the issues;
- firms withdrawing at a crucial time, in response to a negative review or complaint, without being prepared to discuss the issues raised.

Consumer rights

Why do we suggest that none of these examples is good practice?

First, the spirit of the Act and the Law Society of Scotland's Guidance on Fees make it clear that consumers – just as they would with any other service – have a right to question the actions taken by a solicitor. Secondly, about half of clients who see open and genuine attempts to resolve their concerns, irrespective of whether they receive compensation, will return to the firm. The way the complaint is handled is more important than the fact that they felt they had to raise a concern in the first place. Thirdly, the Society's article at Journal, May 2022, 49 confirms that any threats or attempts to penalise a client if they complain would be both improper and unenforceable.

This article followed a few complaints upheld by the Society or the Scottish Solicitors' Discipline Tribunal; others have since been decided along similar lines. Some CRMs (client relations managers) who persisted in their demands, despite the SLCC suggesting that this put them at risk of complaints, have ended up paying fines and compensation to the clients whose complaints were upheld by the Society. In one case, the Society decided that additional fees described as "post-completion work", that were only charged once a complaint was received, were in fact a charge for the complaint. The Discipline Tribunal decided that a solicitor putting pressure on a complainer to withdraw their complaint had caused a conflict between firm and complainer. The Society's subcommittees have stated clearly that the perceived merits of a complaint do not alter every complainer's right, without fear or pressure, to use the legitimate complaints process provided for in the Act.

Taking clients seriously

It's worth thinking about your terms of business as another tool in risk management. We're currently engaged in a project doing random checks of terms of business, to find out whether firms are in fact including what rule B4 (information to be provided to client) asks, how they're notifying clients of their complaints process, and how easy it is for clients to understand the terms. We'll be reporting on our findings early next year. But in the meantime, it's worth thinking about the time, effort and cost that you have probably put into your marketing and client onboarding, in order to assure your client that you take them seriously and will act in their best interest, and considering whether your terms are in fact matching up to your assurances.

Some CRMs say that restrictive clauses in their terms of business are merely intended to deter vexatious complainers, but nobody can find a complaint vexatious if it's never allowed to be expressed. Even if a complaint arises from a misunderstanding, it's often still telling you something valuable about how effectively you managed expectations.

Susan Williams is Best Practice adviser with the Scottish Legal Complaints Commission

RISK MANAGEMENT

Stress, workplace culture and risk factors

Jo Kelbrick and Emma Newlands, on behalf of Master Policy brokers Lockton, explore how a healthier workplace culture can be of benefit to staff, firm and clients, and reduce the risk of claims or complaints

A time for reflection

The benefits of achieving that sometimes elusive work-life balance are well known. But it forms only a small part of the wider subject of health and wellbeing, topics very much in vogue, having received mass attention during the pandemic when many of us struggled with multiple lockdowns and all that entailed. No one could have envisaged the impact of the pandemic on our lives and wellbeing, and there is growing evidence that many have since experienced a decline in their mental and physical health and their ability to cope with everyday challenges.

The collective knowledge we have developed around this subject is vast, but of limited help unless it is implemented well. In that respect, the legal profession has typically been thought to have trailed behind other industries in furnishing its workforce with the tools to help achieve and maintain good physical and mental health while meeting client demands. Perhaps in recognition of this, the Law Society of Scotland's new five-year strategy identifies a key priority as supporting its members to thrive by focusing on wellbeing resources to sustain positive mental health. Whether the profession's governing body, an organisation's managing partner or a newly qualified solicitor, we all share a responsibility to explore this issue and to do our part to encourage change.

As we emerge from the pandemic, we should take the time to reflect on what we have learned about health and wellbeing, and implement strategies which place it centre stage within our home and work lives.

Challenges facing the profession

The traditional model in which the legal profession operates is not necessarily conducive to our health and wellbeing and has, in many respects, acted as a barrier to the implementation of working practices and initiatives that may promote it effectively.

Generally speaking, legal professionals must account for their working day and maintain a certain level of billable hours or income targets in order to achieve "success" within their firm. We have heavy workloads and tight deadlines. Clients can be demanding, and the competition to secure and retain them is fierce. More and more frequently, we deal with clients, and colleagues, who are international, operating from different continents and time zones. Conducting business digitally and remotely (even from an office environment) can create expectations that are increasingly difficult to manage.

Is it any wonder that *Life In The Law*, a study conducted by LawCare in 2020-21, found that 69% of legal professionals have experienced mental ill health? The study also found that burnout ranks high among the challenges faced by the profession, and this has perhaps never been more so than post-pandemic.

From an employee's perspective, these types of challenge can lead to stress and anxiety. With that, comes a tendency to be more prone to making errors, both technical and in judgment. Without protecting our wellbeing, we can suffer from poor motivation and low morale. Such factors are often one of the underlying causes for behaviours such as excessive alcohol consumption and poor diet. These are just some of the many factors which can contribute to burnout, both physical and mental.

From a business perspective, there is constant pressure to maximise fee earning time, but performance is likely to dip when a workforce is not supported and motivated. Absenteeism and employee turnover may increase, stretching the capacity of others taking on the work. This has a knock-on effect, for example, in not ensuring there is time for deep-thinking or the training and supervision of junior members of the profession. A stretched workforce and pressures to generate further income from fewer individuals increase the risk of solicitors "dabbling" in areas outwith their expertise.

Increasing risk

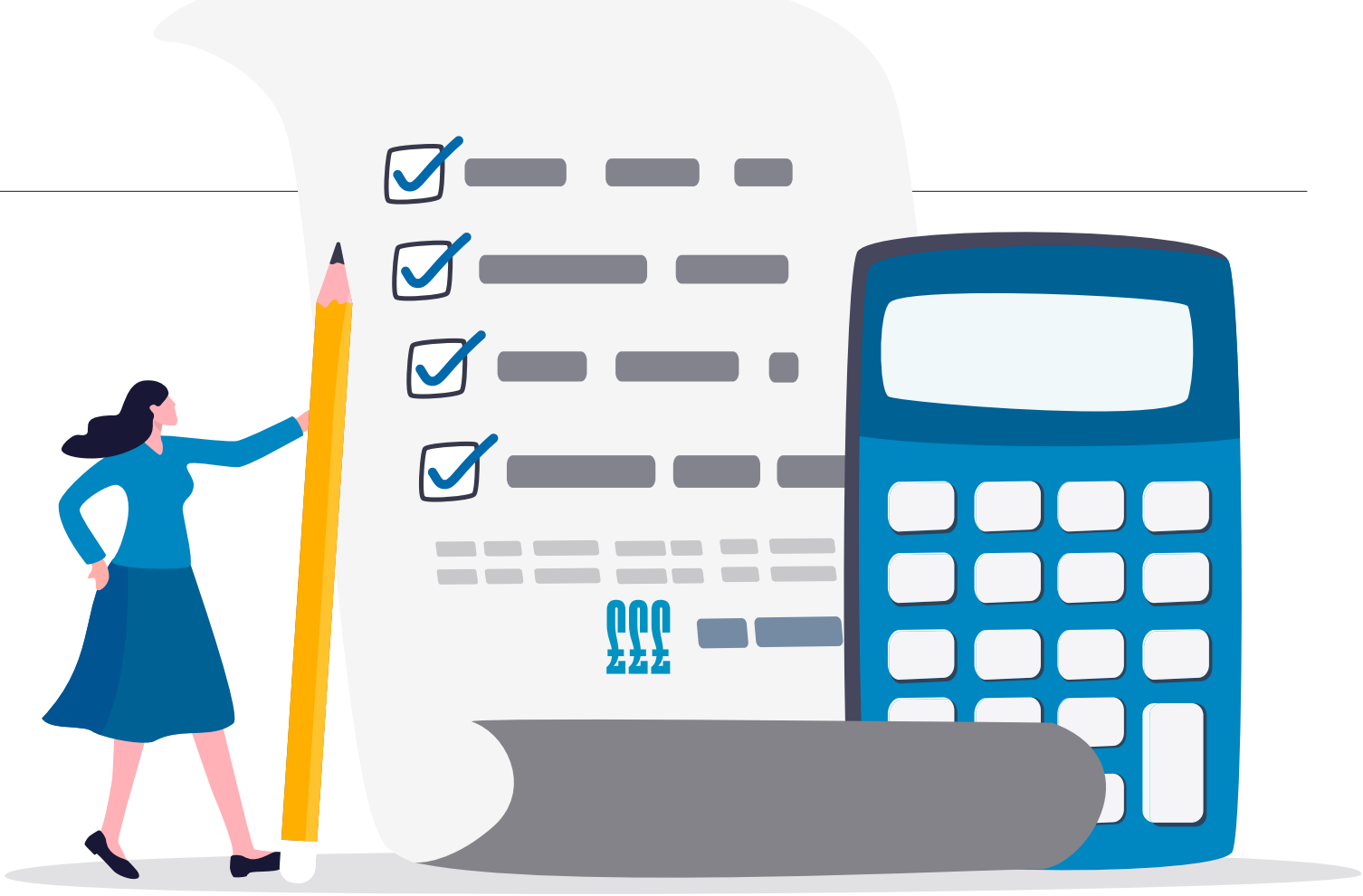
As one of the Master Policy panel solicitors, these are all red flags for us. Claims have always materialised as a result of technical errors, but the circumstances discussed above increase the risk exponentially. We have seen them lead to claims arising from solicitors inheriting a file from a colleague but failing to recognise and meet essential deadlines. Similarly, we have experience of claims arising from simple errors such as failing to register a standard security or to intimate notice of an assignation of rights, serving defective notices to quit, or missing key clauses from commercial contracts.

A common factor among many such claims is a solicitor stretched under the pressures of work and meeting client expectations. Worth mentioning too is that commonly, the leading source of complaints to the Scottish Legal Complaints Commission is poor communication, often a sign that a solicitor is not coping. This is not to suggest that improving the health and wellbeing of the workforce is the solution, or only solution, but it certainly plays its part in helping to minimise the factors which create an ideal breeding ground for claims and complaints. It is not much of a stretch to view health and wellbeing as a risk management issue.

Bear in mind also the younger generation entering the profession and their expectations. Today's graduates are less attracted to the linear structure common in law and the notion that the prospects of promotion are heavily dependent on time served in the office. They are increasingly attracted to the culture of an organisation and its commitment to positive working practices. That extends beyond graduates too, with the desire to find better flexibility and job fulfilment being one of the key drivers of The Great Resignation which began in 2021. Attracting and retaining talent continues to be a difficult (and expensive) issue for employers in the legal sphere, so addressing positive working practices makes good business sense.

Regroup and refocus

Many of the initiatives aimed at improving health and wellbeing focus on flexibility. Perhaps one of the few benefits of the pandemic was the necessity to become flexible, and it forced



change to management processes at a speed that was unprecedented. For example, many legal teams are now operating a hybrid way of working, with others embracing a fully remote approach. The idea of flexible working has been around for years, but it only really came to fruition in a major way in the legal profession during the last two years or so. Without the pandemic, how long would it have taken for the wider legal sector to adopt flexible and agile working as the new normal?

Increasing productivity while maintaining a healthy workforce is the Holy Grail of the modern legal team. To maximise the former, you need the latter. However, in simple terms, as legal service providers, we sell our time, and without concentrating our efforts on client instructions, income is not generated. This can leave little time to develop and implement strategies which promote positive mental health.

Recognition of the discord between maximising productivity and taking meaningful steps to achieve wellbeing is relatively straightforward. It is finding a balance between them that is the challenging part. With a return to a semblance of pre-pandemic normality, the profession is at risk of falling back into our old ways and missing an opportunity to implement some of the valuable lessons we have learned over recent years.

For those eager to promote change, the following are some key considerations:

• ***Tackle workplace culture at its roots***

If the goal is to foster a workplace culture which truly embeds openness and where everyone feels able to seek support without being stigmatised, this must come from senior management. The Workwell Model published by Business in the Community in October 2019 promotes a framework designed to help businesses create environments where individuals and organisations can take a preventative, wholesale approach to health and wellbeing.

At its heart is leadership and tackling the root causes of poor mental health. The model recommends five "enablers" to help achieve this goal: open dialogue and feedback; collaborative individual-focused approach; focus on relationships; positive physical environment; and measuring and monitoring.

The starting point is a commitment to addressing and supporting positive health and wellbeing. Even small steps such as appointing a member of staff as a wellbeing coordinator send the right message and help promote awareness.

• ***Revisit wellbeing strategies***

Alternatively, develop a strategy, should one not already exist. Making space for this in management's strategic agenda is part and parcel of a cultural shift towards a more inclusive and positive working environment.

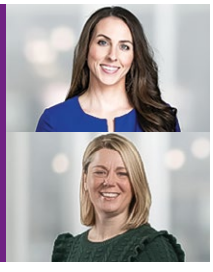
Arguably the best strategies are those that not only train their leaders but recognise the importance of supporting individuals and implementing change to accommodate their needs. There are several best practice guidelines available which have been created to help set out strategic approaches for managing and supporting wellbeing at work. For instance, the National Institute for Health & Care Excellence published its guidelines on Mental Wellbeing at Work in March 2022. There are guidelines adapted specifically for the legal profession too, such as the Law Society of Scotland's June 2020 report on *The Status of Mental Health Stigma and Discrimination in the Scottish Legal Profession*, and LawCare's *Life in The Law* report.

• ***Engaging employees***

While it might take management to devote time, and funds, to an employee engagement programme, it needs employees to embrace the programme in order for it to be effective. Engaging in a dialogue with colleagues can help identify the needs of the workforce, rather than management presuming what those needs are. Once they are identified, employees can assist in taking the small steps towards the larger, longer term policy goals. Setting up colleague networks for the more marginalised employees in any organisation is but one example. Enabling employees to contribute to the policies that are aimed at improving their health and wellbeing is surely the most likely means of guaranteeing that the policies achieve what they set out to.

Ultimately a healthier and happier profession is one that is likely both to be more productive and to provide a better and more reliable service to clients, while being less prone to claims or complaints – in turn benefitting a firm's claims profile and maintaining the sustainability of the Master Policy.

Jo Kelbrick is an associate in the Professional Indemnity Team, and **Emma Newlands** is Health & Wellbeing manager, at Brodies LLP



Tradecraft tips

Ashley Swanson offers some further practice points from his years of experience

That awful sinking feeling – 1

Even the most successful football team is not expected to win every single match they play, but solicitors have to get what they do 100% right, 100% of the time. That is the standard we are held to. In my experience it takes only a comparatively minor mistake to cast a shadow over all the other things you have done correctly. This to my mind is the downside of legal work.

It is a curious phenomenon that when you make a blunder, more often than not you realise it before anyone else does, and I have made one or two mistakes that nobody has ever twigged to. In such a case you have time to work out how to deal with the situation and do whatever research is necessary. One thing you learn in the law is how to worry economically, and not to fret or worry far beyond what the problem actually merits.

The number one priority is not to cover up the mistake or go into denial if that will prejudice the client's position. After all, we all have to subscribe to the Master Policy, which is what allows us to get to sleep at night, and unlike the medical profession our mistakes can usually be equated to a sum of money to restore the clients to the position they would have been in if the mistake had not been made in the first place.

What I call "shadowing" a mistake is a technique which it is difficult to teach other people, but what you need to do is work out what solutions are available and what the pluses and minuses are for each possible course of action. If you have to disclose the error to the client, you will need to be able to explain what can be done about it and confirm to the client that they will not have to suffer a financial loss because of it. Prior to doing this, however, you should speak to the client relations partner, first of all to get a second opinion on how to deal with the error but also because certain procedures may need to be followed if the mistake might result in a claim on the Master Policy.

What you do not do under any circumstances is tell the client that a mistake has been made and leave them without any sort of guidance as to what can be done about it and what the consequences for them may be. The client may not have the ability to assess the extent and importance of the mistake. You have to do this for them.

"It is a curious phenomenon that when you make a blunder, more often than not you realise it before anyone else does"

That awful sinking feeling – 2

Commenting on being in command of troops, the late Field Marshal Montgomery said that you will make mistakes, but if you get 51% of your decisions right you will get through. Solicitors however cannot operate on a 51%/49% basis.

A number of years ago I was reading a report from the Discipline Tribunal about a solicitor who had run into problems with a conveyancing matter. A sentence in the report just made me shudder: "She received no support from the other partners."

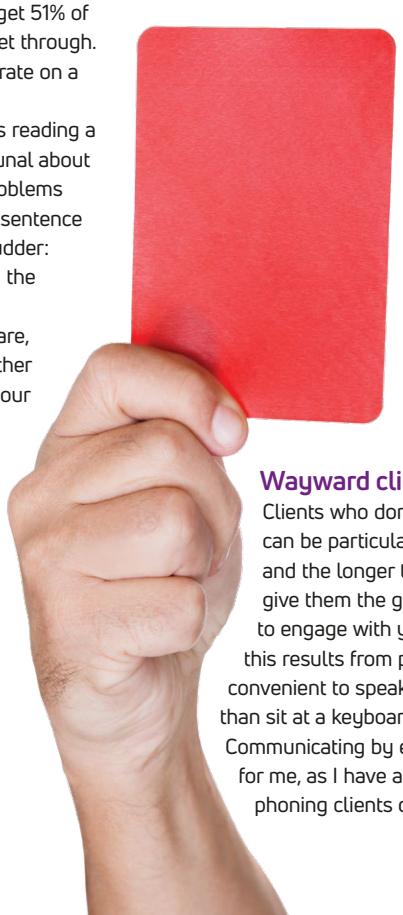
No matter how careful you are, you will make mistakes. If another solicitor in your firm asks for your assistance in dealing with a difficult situation or a mistake, do not give them the red card. Do whatever you can to help them. Who is to say that it is not going to be your turn next to make an error, and you might appreciate a bit of help and support in dealing with it.

Risky business

Some years ago clients were selling a shop. The purchaser wanted to leave part of the price outstanding and secured by a standard security. I had considerable misgivings about this proposal, but the clients were focused solely on the fact that they were getting a very good price for their shop.

My concerns were annoying the clients. They confronted me and said: "You don't want this deal to go ahead." When I explained the risks involved, they said: "But you have got insurance", meaning the Master Policy. The clients did not appreciate that this was to cover them against us making an error which would cost them money. It was not intended to cover clients taking a known risk and ending up losing out if the worst came to the worst.

The balance of the price was eventually paid, but the purchaser went bankrupt a little while later. The clients were just lucky here. In such situations where there is a higher than average chance of something going wrong, you really need to have something in writing spelling out the risks which the clients are taking, so that it is obvious to anyone looking at the file that the clients went forward with their eyes wide open and fully aware of the risks. Telephone calls or notes of meeting have a lesser value here. It really has to be an email or letter.



Wayward clients – 1

Clients who don't reply to correspondence can be particularly difficult to deal with, and the longer the list of questions you give them the greater their reluctance to engage with you. I rather suspect that this results from people finding it more convenient to speak on the telephone rather than sit at a keyboard or put pen to paper. Communicating by email is a wonderful thing for me, as I have a considerable dislike of phoning clients out of the blue, but where I

am getting no response to my emails there is no alternative to phoning them and following this up with a detailed note for the file.

The stage might also be reached where you have to say to the client in so many words that their prompt response to emails is essential for you to give them the best service. This also covers you if the file falls under review by the authorities.

Wayward clients – 2

Something which adds an unwelcome level of complication to matters is when you discover that your client is in direct touch with the client on the other side. This may put you in a position where you are reluctant to be forthcoming with your client for fear that what you say will be passed on and eventually reach the solicitor on the other side. I do not consider that I can go as far as telling my clients not to communicate with the parties on the other side, but anything sensitive which I say to them has to be prefaced by saying "Strictly between ourselves..."

On the other hand, if your clients are in touch direct with the other parties it can sometimes be to your advantage. In one of my cases the other solicitor was threatening to raise a court action at the very same moment that his clients were emailing my clients virtually conceding the point at issue. I simply did not have the heart to tell the other solicitor what had happened.

Solicitors or spectators

It irritates me when I detect laziness or a lack of imagination in the solicitor on the other side of

"The stage might also be reached where you have to say to the client in so many words that their prompt response to emails is essential"

a transaction. I think to myself: "If I was on your side of this matter I would be applying more resources to make sure that the client ended up with something positive rather than a deal which falls apart." I get the impression that they are simply watching what is happening rather than trying to make something happen, and they are more of a spectator in parts of the legal process rather than someone who should be *acting* on behalf of their client.

We have to take our clients' instructions, but we do have a bit of leeway nevertheless. I would never compose a two page draft qualified acceptance and then email it to the client for their comments. Their eyes would probably glaze over after reading the first few sentences. My job is to pick out what is important and present it to the client in plain English and ask them either to provide the information needed or to make the necessary decisions. Presenting missives to the clients in their pure form might prompt the response "Why are you sending this stuff to me? I am paying you to deal with the legalities."

By all means send the clients copies of offers or qualified acceptances, but summarise the salient points in a letter or email so that they can respond on the basis of your summary alone and not have to plough through clause after clause after clause in the missives if they don't particularly want to.

Striking the right balance here is a skill which has to be acquired if you want to give your client the best possible service.

Superficial solicitors

Another solicitor in Aberdeen once said: "Mr Swanson just makes things more difficult." What he meant was: "Mr Swanson just highlights the complications which were there right from day one and which I find quite tiresome to deal with." In our line of work you simply cannot avoid detail and complication, and if you try to rise above this you either have to be very lucky or you have to have someone working for you who is prepared to get right down to the nuts and bolts of the matter in hand. Attention to detail may for some people be an acquired taste, but it is unavoidable if you want to minimise the chances of making a blunder.

Ashley Swanson is a solicitor in Aberdeen. The views expressed are personal. We invite other solicitors to contribute from their experience.

THE ETERNAL OPTIMIST

It's good to talk

Sometimes there is no substitute for meeting in person for effective communication

There is a joke in my family that if my mother met a man in the park with an axe and a severed head she would comment on how nice his axe was and then invite him home for dinner. Perhaps that's how she met dad? The ability, though, to engage with clients, colleagues and the occasional stranger is one that we shouldn't underestimate.

As most of you know, I spend part of my week meeting with legal firms throughout Scotland in my role with HM Connect. During COVID we all adopted online communications, and for many forms of meeting these have proven very successful. Procedural and administrative matters can be completed quickly, eliminating the need to travel, but the more meaningful or creative meetings just don't seem to work as well. The complexities of human communication create something special when we meet in person, which doesn't translate well to the more sterile online environment. For some though, and not just in the legal profession, there seems to be a reluctance to return to in-person meetings.

Why meet up?

I've reached that age and stage where I don't love the commute. Travelling is frustrating, and I see my life ticking away when stuck on a train or in traffic. It is, though, invariably worth the effort to meet in person and the results seldom disappoint, with opportunities regularly arising that were never anticipated.

There are a number of reasons for this. We are at our core sociable creatures: the simple act of breaking bread (or these days, sharing a coffee and a bun) connects us as it has always done. It is an important routine celebrated the world over, and has been at the core of relationship building since we lived in caves. In new relationships in particular, taking the time to share a cuppa and chat for a few minutes about anything other than the business in hand creates a sense of connection that will serve well, particularly through some of the more tense moments that transactional work can encompass.

While a sweeping generalisation, our profession is not always great with numbers. What is more challenging is that we may not be as good with words as we think. To put that in context, communication is an extremely complex matter, and words alone, particularly written words, cannot express either the depth or nuance of many of the challenging and emotive issues that we handle. We may pride ourselves on the quality of our penmanship, but when it comes to the acid test – will the recipient fully understand it? – the answer is often no. The old adage remains true: "I know what I wrote, not what you read."

Face to face meetings, however, allow us to use many other tools to convey our message and ensure that it is both correctly delivered and, more importantly, understood. Our appearance sets the tone (yes, you should still be business smart); our tone sets the mood (being busy or harassed is not a good look); and our mood (remember to smile) is a great start to any relationship (no one likes a grump). Likewise, the bilateral nature of conversation allows us to gauge whether the message is hitting the mark, and to check with the other party before we leave that they have understood and agree the key points.

Non-verbal messages

Words themselves are often the least important part of the communication process. How we say something can be more important than what we say ("Aye, right", I hear you say). Physical signals, eye contact or the lack, the handshake and how engaged each party is in the conversation are all essential elements, and yet almost impossible to gauge online. The ability to adapt or clarify our message and/or delivery depending on the reactions, all those subtle little signals that we are receiving, is also invaluable. A myriad little responses that we pick up during a conversation allow us to tailor it to ensure that at the end all parties can leave feeling heard and understood. Again all this helps to build that sense of connection that is so important when creating lasting, meaningful relationships.

Ultimately, it's about the magic of human interaction. It builds trust and encourages clients or colleagues to share information important to their case or opportunities to widen the relationship. Similarly, creative solutions to challenges seem to flow more easily when ideas can be exchanged and considered in real time, with the whole team adding and refining "on the fly". Once the groundwork has been done, Zoom and Teams are then ideal places to keep in touch and to update. Just remember their limitations.

Talking of meeting up...

For those looking to meet with other practitioners to chat through topical issues for you or your firm, why not come along to the Legal Entrepreneurs' Club, a collection of legal business owners from high street firms across Scotland? It meets on the second Tuesday of every month, both in person and online. Feel free to drop me an email at **stephen.vallance@harpermacleod.co.uk** to learn more.

Stephen Vallance works with HM Connect, the referral and support network operated by Harper Macleod

ASK ASH

When work loses its appeal

Am I falling out of love with the law?

Dear Ash,

I've increasingly become disillusioned by my work. During the pandemic I was able to reflect on my work-life balance and was fortunate to spend some quality time at home with my children rather than just rushing around taking them from school to clubs and then doing bedtime routines. However, now that life is back to "normal" I'm finding the fast pace of life again quite challenging.

Our department is under pressure to make efficiency savings, and I'm tempted to apply for voluntary redundancy, but I'm just not sure if I would want to do law again.

Ash replies:

It has been a challenge for us all, adjusting back to the humdrum of life after such a surreal time. You are not alone in feeling the way you do, and there may in years to come be some form of medical diagnosis for this post-COVID adjustment period!

However, before embarking on any serious lifechanging decisions, I suggest you review all your options. For example, have you considered asking to go part-time instead? This would allow you to have more free time but also provide you with an income while you consider your future options.

Also think about what it is you are disillusioned about in your current role. Do you perhaps need a change of scene, or new challenges in law, or is it the idea of law that is not appealing? Having a law degree allows you to consider a variety of career options: you may want to pursue an academic route or perhaps teach.

Give yourself a little time to review your options, but whatever you decide, I wish you all the best!

Send your queries to Ash

"Ash" is a solicitor who is willing to answer work-related queries from solicitors and other legal professionals, which can be put to her via the editor: **peter@connectmedia.cc**. Confidence will be respected and any advice published will be anonymised.

Please note that letters to Ash are not received at the Law Society of Scotland. The Society offers a support service for trainees through its Education, Training & Qualifications team. Email **legaleduc@lawscot.org.uk** or phone **0131 226 7411** (select option 3).

FROM THE ARCHIVES

50 years ago

From "Administration of Justice (Scotland) Act, 1972", December 1972: "The Scottish clause [that became s 3 of the Act] was believed to suffer from a curious defect which was frankly admitted by the Lord Advocate while the Bill was in Committee... That such an admission should be made by the promoter of a Parliamentary Bill is astonishing; that the Government Minister in charge of its passage should admit that it had no teeth is amazing; but that the senior Law Officer of the Crown must be necessarily wrong is truly astounding. It is the purpose of this article to demonstrate just this."

25 years ago

From "Legal Expenses Insurance", December 1997: "Solicitors have the reputation in the industry of sales prevention officers of such products. With legal aid on the wane... [w]hy do we not have our own scheme badged up for clients of the profession and handled by a good service provider backed by a reputable insurer? Insuring against expenses for the defenders... is part of the equation of the new conditional fee system. Why do we not go the extra yard or two and be proactive in offering decent cover to families and individuals whose private wealth can be affected by a rapacious claim?"

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Would anyone holding or having knowledge of a Will by Gavin Douglas Moore MacNeish late of 36/2 Bryson Road, Edinburgh, EH11 1DX and previously 20 Violet Bank, Peebles, EH45 8HA who died on 14 October 2022 please contact Karen Valentine, Blackwood & Smith LLP, 39 High Street, Peebles, EH45 8AN Tel. 01721 720131, email karen@blackwoodsmith.com

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Season's Greetings

As the year draws to a close, we'd like to take this opportunity of thanking all of our clients and candidates for choosing to work with us...we've enjoyed every minute of it, and we look forward to working with you again in 2023. We wish you a happy, healthy and prosperous New Year.

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