Creature feature:
why animal law matters
P.16

Boilerplate binned:
rethinking contract terms
P.20

Show us the money:
immigration for the well off
P.22

Journal

Journal of the Law Society of Scotland

Volume 68 Number 6 – June 2023

AI working well?

Artificial intelligence increasingly features in the workplace, but if not well monitored can deliver unexpected results – comparable to this cover

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The cover image for this issue was created using DALL-E, the AI platform created by OpenAI, which can create images and graphics from text prompts. Here we requested an image to illustrate "Artificial intelligence in the workplace".

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Editor

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Half baked

It seems that the more one studies the Regulation of Legal Services (Scotland) Bill from a legal professional standpoint, the more flawed it appears.

That was the impression gained from attending the Society's webinar last month on the bill, on which we report on p 41. Not only from the headline concerns about the proposed ministerial powers to intervene directly in the regulator, and even in individual practices, which are indeed alarming – and it is believed unprecedented in a western democracy, whatever the circumstances in which they might actually be invoked. Not even from the provision that practice rules would need ministerial approval, from which one could say that having allowed the professional bodies to remain as regulators, the Government appears to be recognising professional independence on the one hand while taking it away with the other.

In fact there is much more. The Society believes that by extending to solicitor-owned firms the narrow definition of "legal services" in the alternative business structures regime, traditional practices would be unable to provide estate agency or incidental financial business services without the expense of separate regulation. The operation of the waiver regime would be hamstrung by a prohibition on it applying to any rule relating to conduct. Some of the flaws in the complaints system are left untouched. Most startlingly, big firms would be unable to operate in Scotland at all, due to lack of provision for their registered foreign lawyers.

That last matter is said by the Government to be an oversight, but the overall impression is that the drafters of the bill, and/or those instructing them, have not got to grips with the way the profession currently operates and is regulated, which is very worrying given the length of time it has taken to get to this stage and the time we would likely have to wait for any further amending legislation.

Meanwhile, the Holyrood committee inviting submissions ahead of its stage 1 report is asking why the Government hasn't followed the Roberton approach of an independent regulator. Not that it is likely to bring about such a change to the bill – though MSPs on the committee have to decide whether to approve its general principles – but the profession will have to make its voice heard on a number of fronts if it wants to emerge with a workable regime.

Honoured

I leave to others any comment on my award of honorary membership by the Law Society of Scotland, beyond saying that the news came out of the blue, and I cannot but wonder at finding myself in the company of the distinguished list who have previously been given such a rare honour, but I am deeply touched and grateful in equal measure. It has been a privilege to edit this Journal for close on 20 years now, and other respected titles before that, and if people appreciate the results of my labours, I am content. Thank you.

Contributors

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

Sarah Leslie is an associate, and **Morgan McSherry** a trainee solicitor, at Shepherd and Wedderburn

Hannah Gardner is a legal counsel with The Royal Bank of Scotland, part of the NatWest Group

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Amna Ashraf is an immigration practitioner and a senior associate at Burness Paull

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.68 NO.6 – JUNE 2023

Perspectives

Regulars

Features

Briefings

In practice

Contract terms: you really can make them simpler: Page 20

ONLINE INSIGHT

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

The potential risks of using ChatGPT at work
Even without close regulation of artificial intelligence in the UK, employers should manage risks associated with its misuse, Jamie Watt believes, writing with particular reference to ChatGPT.

AI in healthcare: how could liability arise?
Ahmed Khogali discusses the scope for claims in clinical negligence, and product liability, from the use of artificial intelligence in healthcare, and some policy options to achieve a balanced system.

Green leases are here to stay
"Green leases" – setting out obligations to maintain or enhance a building's environmental credentials – have arrived, raising questions that must be addressed in landlord-tenant negotiations. Graeme Imrie, Michael McQuade and Gareth Hale set the scene.

Managing long-term sickness absence
Long-term absence from work due to health problems can be managed with proper strategies in place, and it is possible for an employee to be fairly dismissed, Deborah Rookes advises.

Civil actions: raising the IP address curtain
Martin Kotsev's account of a recent court action which raised a number of legal issues, particularly around obtaining IP address information and its regulation as a route to proving identity.

OPINION

Jen Ang

Digital developments can provide practical legal help to disadvantaged and vulnerable groups, but advisers and others interested need to remain engaged in order to avoid potential issues and realise their potential

What key questions lie at the intersection of tech, the law and social justice? How can digital solutions help to increase access to legal services for marginalised communities? What are the hidden barriers and risks?

These issues were recently discussed on a Digishift event hosted by SCVO and Third Sector Lab, featuring Aaliya Seyal, CEO of the Legal Services Agency; Danae Shell, CEO and co-founder of Valla; and me, director of JustRight Scotland and our digital learning social enterprise, JRS Knowhow.

The Covid-19 pandemic posed both a challenge and an opportunity for law centres like the Legal Services Agency to digitise their working practices, and also embrace tech as a tool for reaching clients. The pressing need to continue to deliver legal services to disadvantaged communities – isolated by the pandemic and even harder hit by discrimination and poverty – meant this transformation had to be tackled rapidly. But adopting new approaches also always comes with a raft of questions. Are we still reaching the right people? Have we chosen the right tools? Who are we leaving out, and how can we address those gaps?

Three different approaches to leveraging digital tech for social good, explored at the event, show its potential.

Amnesty Scotland's free online guide, *Your Right to Protest in Scotland*, was written and produced by JRS Knowhow, ahead of the COP26 Conference held in Glasgow. These charities knew that Scotland would be hosting tens of thousands of delegates, journalists and climate justice activists, as well as thousands of police officers from across the UK, and that arrests were likely. But there were no clear, accessible resources on the right to protest in Scotland. The online guide explains Scots law through FAQs (frequently asked questions) in simple terms, also focusing on rights information for specific groups more likely to suffer increased discrimination or disadvantage – like children, migrants, visitors, and disabled people.

The Scottish Women's Rights Centre's FollowIt App mobile app was designed with media co-op, a design agency, to help victim-survivors of stalking record what is happening to them. The FollowIt App aims to keep women safer and also increase chances of a successful prosecution for the crime of stalking under Scots law by helping to capture real-time evidence of stalking behaviour, using geo-location, time-stamping, and text, audio and video inputs. The app is free to access for women over 18 in Scotland, and also supports victim-survivors to contact support agencies for further information and advocacy support.

Valla's online platform is designed to empower employees to stand up to employers and get justice – and can be used to raise a complaint, settle with employers or even prepare for an employment tribunal. The app supports users to document key events, digitise and organise evidence, and even to generate appeal letters, witness statements and the ET1 particulars of claim. The app offers a tiered payment structure, with core features available free of charge, and a pay-as-you-go scheme for additional features, including the option of personalised coaching and feedback on preparing for tribunal or settlement.

Key learnings that we shared include:

• Legal advice and information can be complex, and the law is rapidly evolving. Risks arise when an explanation of the law is oversimplified, and also when legal resources become outdated. The cost of updating materials must be taken into account at the outset, as well as clear agreement on who bears responsibility for doing so.

Image © Andy Catlin

• Tech solutions to accessing justice will work well for some audiences – and not at all for other people, or for entire communities. This is not a reason for charities to stop exploring the uses of tech, but it is important to recognise that tech will only ever be a partial solution, and will work best alongside alternative pathways for accessing legal advice, either in person or with additional support.

• Generative AI, like Chat GPT, is set to transform legal services and how people access information about their rights. AI could be part of a solution that empowers people and communities, and increases access to justice – but this solution is no more than the sum of its parts. And at its worst, new tech can replicate and amplify existing inequality and discrimination.

It is crucial, therefore, that legal experts and social justice-minded people stay in the mix and engaged with new developments in tech – to bring a constructive and critical perspective that aims to head off those pitfalls, and help us all capitalise on the promise of tech as a driver for social good.

Jen Ang, director, JustRight Scotland and JRS Knowhow

VIEWPOINTS

Spotting financial abuse

In the UK, one in five women and one in seven men experience financial domestic abuse. The introduction of the Domestic Abuse (Scotland) Act 2018 criminalised any course of behaviour which causes specific relevant effects on the victim, but its interpretation in relation to financial abuse can still leave victims without the intended protection.

Domestic abuse is about an imbalance of power. Whether physical, mental or financial, the abuser seeks to exploit the imbalance to their advantage and ensure it remains in place.

Financial domestic abuse may be seen as one party directly controlling their victim's finances, for example making them ask for their own money for food or clothing. This would clearly be criminal under the Act. However, a more indirect way of achieving a financial imbalance is to simply stop paying a joint debt.

Let's say both parties earn £1,500 per month and take a mortgage of £1,000 per month. When one party refuses to contribute to that debt, a victim who wants or needs to stay in the property reduces their free monthly income, after mortgage, from £1,000 to £500 at the same time as the abuser increases their free monthly income by £500. The abuser achieves the same result as taking £500 per month from the victim's bank account for their own use, which would be illegal.

Is the victim now subordinate to the abuser? Have their day-to-day activities been controlled or regulated? Has their freedom of action been restricted? Is this new financial state frightening, humiliating, degrading or punishing? If any of these effects result, the deliberate non-payment of this joint mortgage is abusive behaviour criminalised by the 2018 Act.

But it appears the procurator fiscal does not recognise deliberate non-payment of a joint loan as domestic financial abuse.

Non-payment abuse often happens as a result of a relationship breakdown. At this point the abuser may also embark on expensive legal action which the victim is in effect financing by freeing up their abuser's capital.

There are difficulties for a victim of financial abuse in fighting back. Their mental state is often weakened by years of coercive control and they lack the self-confidence to fight. They often have no financial resources left to finance a legal fight but still earn too much to qualify for legal aid.

The legal profession must recognise the difficulties victims face and find solutions. In a recent case I know of, a victim of years of horrific financial abuse had to go to arbitration to defeat a claim by her abuser. In order to obtain the judgment she won, she had to find more money to pay the arbitrator's fees which were due on the basis of joint and several liability.

In any case where there is a suspicion of domestic financial abuse, care must be taken to protect the victim from any further unnecessary expenses. Joint and several liability is a gift to an abuser who refuses to pay, and a further burden on the victim.

The 2018 Act is well written and already has the power to halt financial domestic abuse. The Act was hailed as groundbreaking when it came into force. The rest of the UK has followed Scotland in introducing similar legislation. However, without recognising these forms of financial abuse as criminal behaviour and applying the law to protect the victims, we stand to render the Act worthless as far as they are concerned.

Kevin McGillivray (non-lawyer)

BLOG OF THE MONTH

judiciary.uk

What regard do judges have for academic writing when reaching their decisions? Lady Justice Carr considered the subject in depth in the Harris Society annual lecture (news, 17 May 2023).

After weighing opposing criticisms of academics as "delicate plants" and "loose cannons", she suggests four reasons why judges cite academic literature, perhaps most fundamentally that "academics help judges think more critically about their decisions. Through reform proposals and critiques, academics help judges think about their decisions more closely, and consider alternative perspectives" – leading to a "constructive dialogue" between academics and judges.

BOOK REVIEWS

Contentious Executries: Commissary and Executry Litigation in Scotland

R A S MACLEOD
PUBLISHER: W GREEN
ISBN: 978-0414030947; £85

The nuances of the law in the areas of executry administration and wills and succession in a litigation context are many. Those dealing with contentious cases require a proper understanding of the underlying law and practice when advising clients, drafting proceedings and conducting advocacy. Roddy MacLeod has produced a comprehensive, concise, easy to navigate textbook, providing a one-stop shop for litigators and private client lawyers alike when advising clients in executry litigation situations.

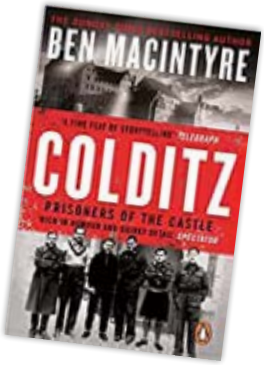
The seven chapters follow a logical sequence. The first deals with the general principles in executry administration and litigation, such as issues of title to sue, interests of parties, and the timing of litigation. Subsequent chapters deal with issues surrounding the interpretation of wills and their effect, revocation of wills, formal validity of wills, relevant remedies in disputes arising, and finally expenses and interest – issues of utmost importance to parties to an action.

MacLeod's experience in dealing with executry litigation is evident from the detail in this book, and the fluency with which he writes.

It often seems that "where there's a will, there's a war". This book, with all its strengths, is likely to become a leading authority, and will go a long way to assisting practitioners in finding such wars easier to deal with.

Stephanie Carr, partner, dispute resolution, Thorntons. For a fuller review see bit.ly/3P3FBKK

Colditz: Prisoners of the Castle

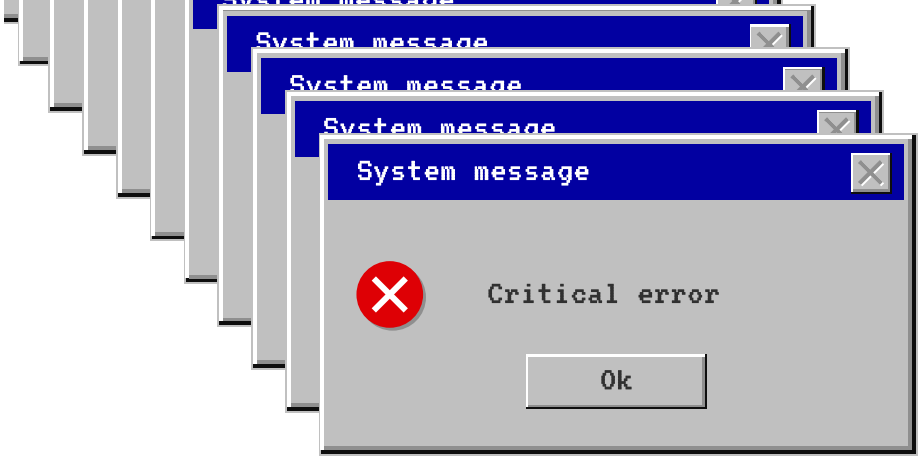


BEN MACINTYRE (VIKING: £25; E-BOOK £7.99)

"Macintyre wears his research lightly, presenting a huge mass of information in a cogent and enjoyable way."

This month's leisure selection is at bit.ly/3P3FBKK

The book review editor is David J Dickson



Artificial intelligence, human stupidity

"I simply had no idea that ChatGPT was capable of fabricating entire case citations or judicial opinions, especially in a manner that appeared authentic."

Imagine having to make that declaration to a judge in explanation of your conduct of a case. Such was the fate of Steven A Schwartz, New York attorney and law firm partner, who landed both himself and colleague Peter LoDuca in the hottest water after attempting to use the AI chatbot for legal research on the Montreal Convention.

In 37 paragraphs of grovelling apology, Schwartz further deponed that each time he asked for the actual case being cited, ChatGPT provided a purported "brief excerpt" complete with case caption, legal analysis and internal citations. "I recognise I should have been more skeptical when ChatGPT did not provide the *full* case I requested... This matter has been an eye-opening experience for me and I can assure the Court that I will never commit an error like this again."

Oh, and in copying a form of affidavit, he neglected to fully revise the date. More grovelling.

At going to press, we await whether the court will show mercy and refrain from sanctions.

PROFILE

Paul Gostelow

Paul Gostelow is Council member for Airdrie, Hamilton and Lanark and was recently appointed convener of the Society's new Sustainability Committee

1 Tell us about your career so far?

I started in Edinburgh, mainly Court of Session defender in personal injury, followed by a stint in criminal defence, but my heart was in law centres and I relocated west in the late 90s. From there, I became a Jack of all high street legal services. Since 2008, my practice with my wife Gillian has mainly been family law and guardianship.

2 What will the Sustainability Committee mean for the profession?

There's no way of living our lives or doing society as we do, without recognising that it comes with a cost that can't be borne by the planet any more. The committee offers our members the opportunity to engage, participate, influence, contribute and articulate what we must do to tackle climate change. Our work will equip members with the help, information and resources to adopt the necessary sustainable changes to our lives and businesses.

3 Tackling sustainability may seem more accessible to larger firms. What would you say to high street solicitors like yourself?

My gut is that this dichotomy is more apparent than real.
A changing climate will impact us all, and individuals in every sector of the profession are likely to experience concerns and anxiety about the impacts. Every individual or organisation can make their contribution to becoming more sustainable. The committee will help all our members to do so and we expect more engagement with smaller practices.

4 Could you give an idea of the committee's aims over the next year?

The committee is currently involved in drafting a climate change resolution; working towards a resources hub to help members access information about becoming more sustainable, and CPD focused on developing a sustainability agenda; working with the Society to help develop sustainability goals as a key operating measure.

Go to bit.ly/3P3FBKK for the full interview

WORLD WIDE WEIRD

1 No ducking about

Apple has confirmed it will no longer autocorrect one of the most common swear words to "ducking" – a feature which has long encouraged users to utter fresh expletives.
bit.ly/30Yg1GQ

2 A crazy night

Veteran rocker and Kiss frontman Gene Simmons described Deputy Prime Minister's Questions in the House of Commons as "insane" after visiting – but was still mobbed by MPs looking for selfies.
bit.ly/42nOVff

3 Mirror, mirror...

Black Mirror creator Charlie Brooker won't be using AI to help him write the hit dystopian C4 series. After asking ChatGPT to come up with a new episode, he described its efforts as "s**t"!
bit.ly/42vqpsN

TECH OF THE MONTH

Podcast: Talk Media

99p (plus VAT) per week
www.thebiglight.com/talkmedia

Hosted by Stuart Cosgrove and Professor Eamonn O'Neill, with weekly guest commentators from the worlds of journalism, entertainment and politics, Talk Media provides forensic analysis of the big stories from a Scottish perspective.

PRESIDENT

Sheila Webster

My first column as President covers my pride in our profession; my Highland connections and my interest in rural practice; and a little musical diversion I intend to compile!

Blank page before me, as I prepare my first column as President of the Law Society of Scotland. I've spent a fair bit of time over the last few days considering what you wanted to hear from me.

First and foremost, I said in my presentation to Council, seeking election to this role, that I was hugely proud to be a Scottish solicitor. That was and is true, and as I sit in Helsinki, attending the IBA Bar Leaders' Conference, I'm reminded of the strength of that pride. In Scotland, in our legal profession, and in all that it does. I am very much making the most of this early opportunity in my presidency to talk about our profession and to promote it at every opportunity to bar associations from around the world. It truly is the honour and privilege of my life to represent us all.

Heart in the Highlands

My very first role as President – within 12 hours of accepting the Presidential "gong" (that's what it says on the box it lives in, so it must be official!) – was to attend the Highland Chamber of Commerce Dinner in Inverness, hosting a table along with Council members Sheekha Saha and Serena Sutherland. That was an absolute pleasure, allowing me to meet members practising in the north of Scotland and to hear about the challenges facing them in their practices.

One speaker at the dinner spoke of the feeling of decisions affecting businesses in the north being made too often in the central belt (the lack of dualling of the A9 featured heavily), and I want to do whatever I can to ensure that that is not the feeling of our members about our Law Society. I fully intend to continue Murray's in-person constituency visits across Scotland, and I hope to meet as many of you as possible in the coming months.

I grew up a little less north than Inverness, in Aberdeen, but my heart has always been drawn to the Highlands, making this event all the more special as my first as the Society's President. I married a Highlander, and my middle name is Gaelic (courtesy of a native Gaelic speaking godfather and parental interest in Gaelic culture). Holidays spent in the far north west mean that places such as Gairloch will always feature highly on my favourite places on earth.

Those connections mean that I have a real interest in understanding (and hopefully, to whatever extent I can, helping with) the challenges of practising in the more remote areas in Scotland, notwithstanding my own experience as a solicitor. Our Law Society may be based in Edinburgh, but it is there for everyone wherever you practise. That is important to me; it is what I want the Law Society of Scotland to be, and what I will work continuously to achieve.

So, in addition to working on our concerns as a profession with the Regulation of Legal Services Bill and the bill relating to our criminal justice system, to working to improve the equality, diversity and inclusivity of our profession, and on wellbeing issues facing us all, I will be working on being as accessible as possible. I want to hear from you. I cannot promise to fix all the problems you face, but I can and will listen, and will endeavour to do what I can to promote all our interests.

Keeping in tune

Finally, and hopefully to keep you reading these articles, I plan to start a playlist so I can remember this year. I will add one or two songs each month which bring back memories for me, and perhaps make you laugh at my eclectic musical taste (and feel free to share your own playlist recommendations!). This month's entries (an extra one this first month) are:

Simply the Best, Tina Turner – predictable perhaps, but a classic and an iconic song for an iconic woman.

Watermelon Sugar, Harry Styles – that one is especially for the Society's chief executive, Diane McGiffen.

The Story, Runrig – a favourite band, whose music always takes me to the Highlands.

My generation, I recognise, but it's my playlist!

Sheila Webster is President of the Law Society of Scotland – President@lawscot.org.uk

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People on the move

ANDERSONBAIN LLP, Aberdeen are pleased to announce the strengthening of their Private Client department with the recent appointments of **Catherine McKay**, who joined the firm in May as an associate solicitor, and **Cara Seivwright**, who joined in March as a solicitor.

BALFOUR+MANSON, Edinburgh and Aberdeen, has appointed trainee solicitor **Dhana McIver** as its first disability officer. She is also taking part in a Law Society of Scotland project to improve disability inclusion in the legal profession.


Dhana McIver

BLACKADDERS LLP, Dundee and elsewhere, has appointed **Sylvia McCullagh** as a legal director in its Property team. Based in the firm's Edinburgh office, she joins from BALFOUR+MANSON.


Sylvia McCullagh

BRODIES MIDDLE EAST LLP, the first international arm of BRODIES LLP, has opened an office in Abu Dhabi. The office will be led by **Greg May** and **Bryan Wilson**, energy specialists in Brodies' UK practice.

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has added a six-person team to its Rural Business practice, led by **Linda Tinson**, who becomes a partner and head of the practice, along with **Jim Drysdale** (legal consultant), **Lorna McKay** (senior associate), **Sarah Taylor** and **Jason Rust** (both associates), and **Sarah Strathdee** (paralegal). All join from LEDINGHAM CHALMERS.


Mark Kirke

Burness Paull has also appointed **Mark Kirke**, dual qualified in English and Scots law and accredited by the Law Society of Scotland as a specialist in construction law, as a partner in its Construction & Projects team. He joins from CMS.

CLYDE & CO, Edinburgh, Glasgow, Aberdeen and internationally, has announced the promotion to partner of **Ann Bonomy** (Safety, Health & Environmental Regulatory, Glasgow), and **Siobhan Kahmann** (Competition & Regulatory, Brussels, and Council member of the Law Society of Scotland), among its 2023 promotions round.


Siobhan Kahmann

DAC BEACHCROFT, Edinburgh, Glasgow and internationally, has promoted four lawyers to associate in the Claims Solutions Group in its Scottish offices, among 36 promotions across the firm: **Katie Anderson** (Casualty Injury), **Alasdair Irvine** (Strategic, Regulatory (Safety, Health & Environment)), **Kelly Sutherland** (Vehicle Hire & Damage), and **Megan Walsh** (Motor Injury).

DAVIDSON CHALMERS STEWART, Edinburgh and Glasgow, has announced the appointment of dispute resolution solicitor **Ewan McIntyre** as a partner based in Glasgow. He joins from PINSENT MASONS' Vario team.


Ewan McIntyre

GILLESPIE MACANDREW, Edinburgh, Glasgow and Perth, announces the appointment of private client specialist **David Mowlem** to its partnership. Dual qualified in Scots and English law and a chartered tax adviser, he joins from TURCAN CONNELL.


David Mowlem

Gillespie Macandrew is retaining seven of its trainees who qualify as solicitors in August 2023: **Beth Hancock, Miles McKay, Fiona Reid, Rachael Burke, Alasdair Forsyth, Alexandra Foulkes** and **Harry Donnelly**.

HARPER MACLEOD, Glasgow, Edinburgh, Inverness, Elgin, Lerwick and Thurso, has announced a total of 36 promotions, including four new partners: **Andrew Ronald** (Banking & Finance), **Ewan Stafford** (Employment & Immigration), **Amy Dickson** (Personal Injury & Reparation) and **Brian Carton** (partner equivalent in the IT team).

There are six new senior associates: **Fiona Strang** (Corporate, Commercial & Regulatory), **Jennifer Grosvenor** (Dispute Resolution), **Nicola Ker, Annabelle Gow** and **Lauren Farquhar** (all Private Client – Asset Protection & Tax), and **Nicola Stephen** (Residential Property).

Eight promoted to associate are: **Rebecca Scott** (Banking); **Clare McGeough** (Dispute Resolution); **Deborah Rookes** and **Andrew Maxwell** (both Employment & Immigration); **Craig McKellar, Laura Ann Sheridan** and **Osman Khan** (all PI & Reparation), and **David White** (Private Client – Asset Protection & Tax).

There are 14 promoted to senior solicitor: **Kirsty Watson** (Banking); **Euan Bowie** (Commercial Property); **Rachel Miele, Andy Pirie** and **Ross Hampsey** (all Corporate, Commercial & Regulatory); **Ellen Francksen** and **Stephen Nicolson** (both Dispute Resolution); **Laura Brennen** (Employment & Immigration); **Brittany Thomas** (Family); **Richard Steell** (PI & Reparation); **Laura Kerr** (Private Client – Asset Protection & Tax); **Richard Gallen** (Public Sector Real Estate, RSLs & Infrastructure); **Rebecca Campbell** (Residential Property, Housebuilder & Estate Agency) and **Hannah McIntosh** (Rural Property, Forestry,

From left: Sarah Strathdee, Jim Drysdale, Linda Tinson, Jason Rust, Lorna McKay and Sarah Taylor, Burness Paull.

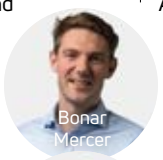
Community Land & Crofting).
Four newly-qualified solicitors have been offered positions on completion of their traineeships: **Ewan Forsyth** (Private Client – Asset Protection & Tax), **Claire Fowler** (Employment & Immigration), **Frances Lombardi** (Dispute Resolution), and **Alex Merton** (Private Client – Asset Protection & Tax).
Partner and solicitor promotions took effect on 1 April 2023, and all other promotions on 1 May.

KELLAS, Inverurie have appointed **Victoria Burnett** as a senior associate in the firm's Conveyancing department. She joins from BURNETT & REID SOLICITORS.

LINDSAYS LLP, Edinburgh, Dundee and Glasgow, announces that, following its merger with MILLER HENDRY, Perth, Dundee and Crieff with effect from 30 May 2023, all seven Miller Hendry partners will become partners of the firm. **John G Thom, James Andrew, Amanda Frenz** and **Richard Frenz** will remain at their current location at 10 Blackfriars Street, Perth, while **Ernest Boath**, **Alistair Duncan** and **Alison Fitzgerald** will move to Seabraes House, 18 Greenmarket, Dundee. The enlarged firm will be branded as LINDSAYS.

DM MACKINNON, Oban, is pleased to announce the appointment of **Thomas Jordan**, senior solicitor, Residential & Commercial Conveyancing, and **Lucy Henderson**, solicitor, Private Client, Wills & Executries.

MACROBERTS LLP, Glasgow and Edinburgh, has promoted to partner **Bonar Mercer** (Corporate Finance) and accredited specialist **Kenny Scott** (Employment Law).


Bonar Mercer


Kenny Scott

MORTON FRASER, Edinburgh and Glasgow, has appointed four new partners: **Nicola Edgar** (Personal


From left:Sarah Gilzean, Nicola Edgar, Alan Delaney and Emma Wood. Morton Fraser.

Injury Litigation), **Emma Wood** (Succession & Tax), and accredited specialists **Sarah Gilzean** and **Alan Delaney** (both Employment Law).
A further 11 promotions are: **Hayley Johnson**, legal director, Litigation (Employment); **Hannah Lawrence**, senior associate, Real Estate; **Elizabeth Sparks**, senior associate, Private Client; **Nicole Moscardini**, associate, Litigation (Employment); **Steph Tinney**, associate, Real Estate; **John Callender**, senior solicitor, Litigation; **Anthea Chan**, senior solicitor, Real Estate; **Rowena Claxton**, senior solicitor, Agricultural & Rural Property; **David Forrester** and **Douglas Harvey**, both senior solicitors, Litigation; and **Beth Holehouse**, senior solicitor, Private Client.
All take effect from 1 June 2023.

Sarah Prentice has been promoted to senior solicitor at the SCOTTISH SOCIAL SERVICES COUNCIL.

Jonathan Rennie, employment partner at TLT, has been appointed by the International Council of Arbitration for Sport as an arbitrator at the Court of Arbitration for Sport, based in Lausanne, Switzerland.

SHAKESPEARE MARTINEAU, Edinburgh and UK wide, has appointed banking partner **Grant Docherty** as head of its Edinburgh office hub.


Grant Docherty

SHEPHERD AND WEDDERBURN LLP, Edinburgh, Glasgow, Aberdeen and London, has promoted seven of its lawyers to partner: **Neil Cowan** and **Lucy Hall** (both Banking & Finance), **Emma Guthrie** and **George McKinlay** (both Property & Infrastructure), **Magda MacLean** (Planning & Environment), **Keith McLaren** (Private Wealth & Tax), and **Emma Robertson** (Rural).
There are also 10 promotions to legal director: **Heather Bird** (Private Wealth & Tax), **Kirsty Headden** (Pensions), **Suzanne Knowles** (Restructuring & Business Advisory), **Ashley McLean** (Media & Technology), **Laura McMillan** (Commercial Disputes), **Stephanie Mill** and **Emma Paton** (both Planning & Environment), **Gillian Moore** (Employment), **John Vassiliou** (Immigration) and **Sarah Walker** (Commercial Disputes).
All the promotions took effect on 1 May 2023.

STRONACHS, Aberdeen and Inverness, has announced the promotion to partner of **Callum Armstrong** (Corporate) and **Kirsten Anderson** (Private Client), and to legal director of **Lindsay Dron** (Residential Property) and **Karen Oliver** (Private Client).

THOMPSONS, Glasgow, Edinburgh, Dundee and Galashiels, has made four promotions to partner: **Alan Calderwood** (Accident team, Edinburgh), **David Adams** (RTA team, Glasgow), **Jonathan Howat** (Medical Negligence team, Glasgow), and **Paul Deans** (Employment Law). Also, **Craig Snee** (Dundee) and **Cat McGarrell** (Glasgow) have been promoted to associate.

THORNTONS LAW, Dundee and elsewhere, has appointed **Joanne Grimmond** as a partner in its Residential Property team based in Perth. She joins from BLACKADDERS, where she was a partner and head of Perth.


Joanne Grimmond

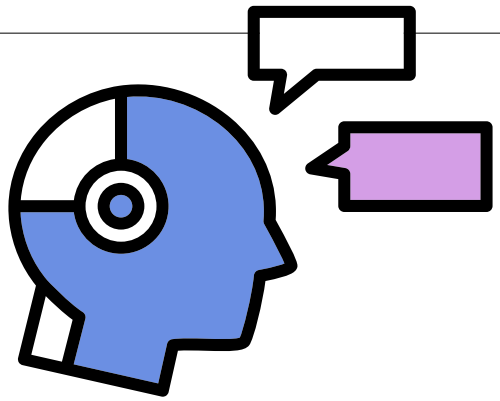
Thorntons has appointed accredited insolvency law specialist **Stephanie Carr** as a partner in its Glasgow office. She joins from BLACKADDERS, where she was a partner and office head in Glasgow.


Stephanie Carr

WORKNEST, Glasgow, Edinburgh, Aberdeen and UK wide, the employment law, HR and health and safety adviser, has promoted **Gerard O'Hare** to legal director for Scotland, leading WorkNest's Legal and HR teams across its Scottish offices.


Gerard O'Hare

WRIGHT, JOHNSTON & MACKENZIE LLP, Glasgow, Edinburgh, Inverness, Dunblane and Dunfermline, has announced the following promotions and appointments: **Alan Munro**, who joins from TLT, becomes a partner in the Conflict Resolution team, working in insolvency law, liquidation and asset recovery; **John Grant**, employment and insolvency law specialist, is promoted from senior associate to partner; and in the Inverness office, **Yasmin Myles** joins the Commercial Property team as an associate from MACLEOD & MACCALLUM, and **Lorraine Sloggie** and **Krysty Steele** join as a trainee paralegal and paralegal respectively.



Artificial intelligence in the workplace is here to stay, but the different contexts in which it is used each bring potential legal pitfalls for employers. Sarah Leslie and Morgan McSherry highlight some issues

AI and the workplace of the future

Over recent months, ChatGPT has hit the news – and many of our phone and laptop screens – as we come to terms with the rapid advances in artificial intelligence ("AI") technology.

In the workplace, there has been a gradual shift towards AI in recent years, expanding its use in areas such as recruitment, management, and performance review.

This article explores the current uses of AI and considers what legal pitfalls employers should be aware of to ensure their use of the technology complies with all relevant legislation.

A comprehensive framework?

Although there is no overarching legislation or regulatory body for AI, and none immediately anticipated to be put into place, employers should be aware of the following laws which can impact on the use of AI in the workplace:

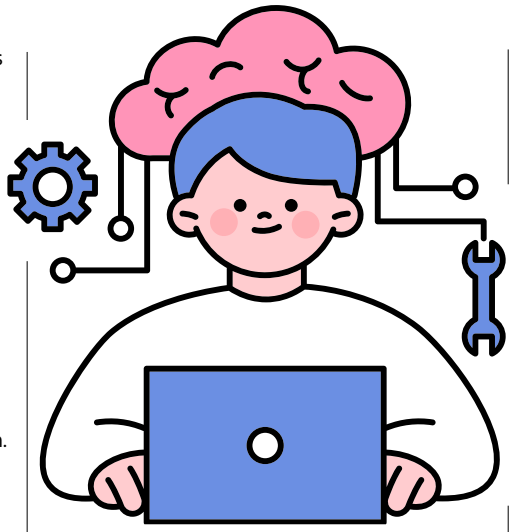
- The Human Rights Act 1998 – covers the right not to be discriminated against as well as rights of autonomy, privacy, and transparency.
- The Employment Rights Act 1996 – deals with the need for fair procedures for grievances and dismissals.
- The Equality Act 2010 – provides further protection against discrimination.
- The General Data Protection Regulation (GDPR) – provides that individuals have a "right to object to automated individual decision making", as well as "the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her".

When introducing any AI-driven processes for personal data, employee or applicant GDPR privacy notices must be adequately updated to inform those whose data is being processed that this is being done by AI.

Current workplace uses and potential pitfalls

Recruitment

The main, and most prevalent way of using AI in the recruitment process is "CV screening". AI is also used to advertise jobs, using online databases to display vacancies, and, through algorithms, process information and direct a particular job to certain people. The use of AI to sort through job applications and create a shortlist for interviews can save time and expense in disregarding applicants with unlikely prospects of success.



As businesses become more familiar with AI, some have expanded its use to conduct psychometric testing or assessments before the interview stage. The results of these tests can be used to further whittle down applications for consideration, before there is any human engagement. As a final step, AI can even conduct interviews with applicants, potentially as an initial further screening procedure before proceeding with face-to-face interviews.

The obvious benefit of this for employers is the impact on efficiency and cost saving. Although there is an initial cost for purchasing and implementing the technology, once it is in place there are usually minimal further costs. For example, Unilever estimates that it has cut its average recruitment time by 75% by using automated screening, with projected cost saving of around £250,000 in the first year of using the technology.

There is also an argument that this way of recruiting new staff will reduce discrimination, as removing the human element should remove any ingrained bias. In practice, however, this is rarely the case. The algorithm used to screen candidates is only as smart as it is taught or has learnt from its analysis of historic data. This means that any bias that may be ingrained in a company's recruitment process is likely to be replicated by the AI.

As an example, Amazon had built an automated algorithm to streamline its recruitment process. It programmed the AI using its own historic recruitment data in order to teach the program what the company valued in its recruits. In doing this, Amazon taught the algorithm to favour male candidates over female candidates. Partly in consequence of this, Amazon later abandoned the project.

New technology has also emerged in recent years, allowing AI to conduct video interviews, recording the applicants' responses and analysing their answers, vocal and facial cues. This can open employers to potential indirect discrimination, as there is the possibility that these algorithms will discriminate against candidates with autism or other conditions which may impact their facial expressions. Facial recognition technology has also been widely criticised for failing to recognise non-white faces, so there is the potential for an indirect race discrimination claim.

Management

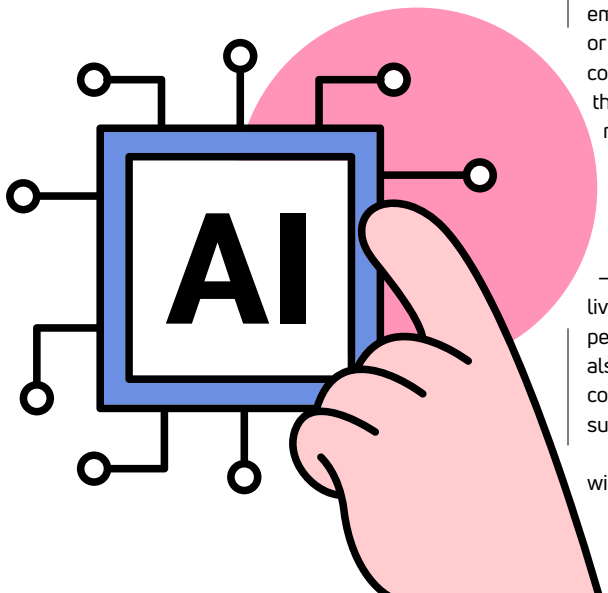
The potential use of AI in the workplace does not end after the recruitment process. Those applicants who are successful may still be subject to decisions made by AI. AI is being used more prevalently in the management of employees, particularly in shift and work allocation, potentially dramatically reducing management time used for these types of tasks.

Technology has been developed that will analyse customer footfall, workloads, orders, and deadlines to determine how many members of staff will be required to meet the needs of the business accurately that particular day. A good example of this is the Thorpe Park tourist attraction, where AI analyses the number of tickets sold on a similar day and allocates an appropriate level of staff. These programs facilitate shift swaps, remove favouritism and can even analyse the skills of employees and allocate them to the best-suited shift.

However, one glaring issue with removing the human element of shift allocation is just that: removing the human element. Although the algorithm will not play favourites, it will also not show any compassion to employees who may require flexibility. In some cases, this could also lead to discrimination claims of indirect sex discrimination due to a lack of flexibility for caring commitments, or potential failure to make reasonable adjustments for employees with disabilities.

These same algorithms can also allocate tasks to certain workers, using the same technology to analyse workloads, skills and availability. Delivery drivers, for example, will be allocated their delivery destinations, the route they should take and the timeframe in which they should complete their work. Although this will save time and is possibly more efficient, it runs the risk of creating a high pressure system in which employees are trying to meet their targets to impress the algorithm.

Using another example from Amazon, workers in their warehouses are now provided with a "wearable haptic feedback device" which tells them which items to pick, where they will find these items and the number of seconds in which they should be found. While improving efficiency, systems such as these seriously reduce the control and autonomy of individual workers, which may lead to a reduction in morale and pride in their work.



Performance review

Some employers are also using AI for performance analysis of their workforce, for example by monitoring employees' activities. The baseline for any such algorithm would be programming the system with how an employer felt an employee should be performing. This usage of AI can clearly leave an employer exposed to risk, not least direct and indirect sex and disability discrimination which may arise from setting an unrealistic target for all staff.

Normally in such cases, AI collects data about employees' activity from customers, colleagues and tracking/monitoring software. These technologies range from monitoring how long one employee spends on a certain task, or how long they are away from their computers, to more advanced models that include wearable devices that monitor conversations, tones of voice and engagement with others. Call centres see this type of technology used increasingly frequently.

One particular AI programme – Cogito – provides recorded and live assessments of each employee's performance to their manager. It also provides voice analysis of their conversations and provides feedback such as the speed and tone of voice.

Technology such as this comes with many challenges, particularly around consent: even allowing employees the choice of whether they wish to participate in activity monitoring can lead to pressure to agree, out of fear of suffering detriment if they do not. If introducing software like this for the first time, employers should be sure to inform their workforce appropriately, and consult with any relevant employee groups or trade unions. As a cautionary tale, the *Telegraph* newspaper recently introduced software intended to monitor, among other things, how long employees spend at their desks, but failed to inform staff that they were going to do so. Predictably, this led to backlash from the National Union of Journalists.

The human factor

As well as performance monitoring on a day-to-day basis, some companies are using this technology in performance reviews, either to completely replace the role of a manager by carrying out the review itself, or to aid a manager-led review using collected data. The use of AI in this way has many benefits: it can remove racial and gender bias, and remove "recency bias" (i.e., it will give the same amount of weight to something that happened nine months ago as to something that happened one month ago), control "contrast bias" (i.e., where one employee is compared to another), and is overall an objective review.

This being said, the consequences of this use of technology should also be taken into account. GDPR creates a robust right for an individual not to be subjected to a completely AI-driven decision-making process, meaning that employers must ensure there is at least some human involvement in the process, and preferably the final outcome should be determined by a human-decision maker.

Here to stay

It is clear that AI in the workplace is here to stay. The implications for both employer and employee are vast. When used correctly, it can potentially increase productivity and efficiency, save money, control bias, and create training and development opportunities for staff. However, when AI is used for the wrong reasons or the algorithms used are not trained well enough, an employer can open themselves up to risks such as discrimination, violation of employees' privacy, and breaches of regulations such as GDPR.

With the growing use of AI in day-to-day tasks, it is expected that many jobs once carried out by people will instead be done by AI. As some roles are replaced by AI, others will change significantly, and new roles may appear which we don't currently see the need for. It will be interesting to see in the coming years just what level of impact this will have on the job market.

Sarah Leslie is an associate, and **Morgan McSherry** a trainee solicitor, in the Employment team at Shepherd and Wedderburn LLP

How should we regulate AI?

As the risks as well as the opportunities of artificial intelligence increasingly become the subject of debate, Hannah Gardner compares and contrasts the UK's and EU's current proposed approaches to its regulation

Recent developments in artificial intelligence (AI) have had a huge global impact. There is a heightened understanding of both the risks and the opportunities the technology could have on our society. Regulators have a responsibility to balance the need to protect society against the risks associated with AI while continuing to encourage innovation. Closer to home, the developments present us with the perfect opportunity to compare the key differences between the UK's and the EU's current proposed approaches to regulating AI, and the possible challenges and benefits of each.

What are the risks?

Most governing bodies agree that there is potential for harm to society as a consequence of lack of responsible use of AI, and that such harm should be mitigated against with appropriate rules and regulations.

To help understand which areas could be impacted, the major values which AI threatens were set out in detail in the OECD, the Organisation for Economic Co-operation & Development's Recommendation of the Council on AI, approved by member countries in 2019. They include:

- human rights;
- fairness (including potential for bias and discrimination);
- safety (damage to both physical and mental health);
- privacy;
- security;
- societal wellbeing (including threat to democracy);
- prosperity.

Both the UK and EU approaches to regulating AI have these values at their core.

Two approaches

The UK Government's AI White Paper, published in March 2023, sets out guidance for existing regulators, with the aim of supporting innovation while still addressing key risks. The paper suggests that the Government may introduce a statutory footing in the future, requiring regulators to follow the principles contained in the paper, but is not currently introducing new legislation.

This is a marked contrast to the EU AI Act, which is currently under discussion in the European Parliament and aims to be the first global comprehensive AI regulatory framework, built to protect individuals and establish trust in AI systems.

Here we will explore the five most interesting differences between the two frameworks.

How should AI be regulated?

The UK Government is taking a broad, principles-based approach, covering:

1. safety and robustness in the assessment and management of risk;
2. transparency and explainability – a consumer should understand when AI is being used and how it makes decisions;
3. fairness – AI should not discriminate or create unfair market outcomes;
4. contestability and redress – there should be a mechanism to change or reverse harmful decisions made by AI; and
5. accountability and governance.

You may be familiar with these principles – they are based on the OECD Principles, which have also influenced data protection laws and are intended to ensure consistency and flexibility across the industry.

"Most governing bodies agree there is potential for harm to society as a consequence of lack of responsible use of AI, and that such harm should be mitigated against"

Many may however prefer the clarity of the EU's prescriptive framework, setting its position in legislation and covering AI throughout the life cycle of a system, from the data it is trained on to testing, validation, risk management, and supervision post-market.

Moving into the detail, the EU Act will cover four levels of risk to measure AI systems: unacceptable, high, limited, and minimal.

With a nod to our above values, "high risk" AI includes that which could harm health, safety, fundamental rights or the environment. Developers of specific high risk systems, called generative foundation AI models (like GPT), would need to disclose that AI has been used to generate content, and publish summaries of the copyrighted data used to train them.

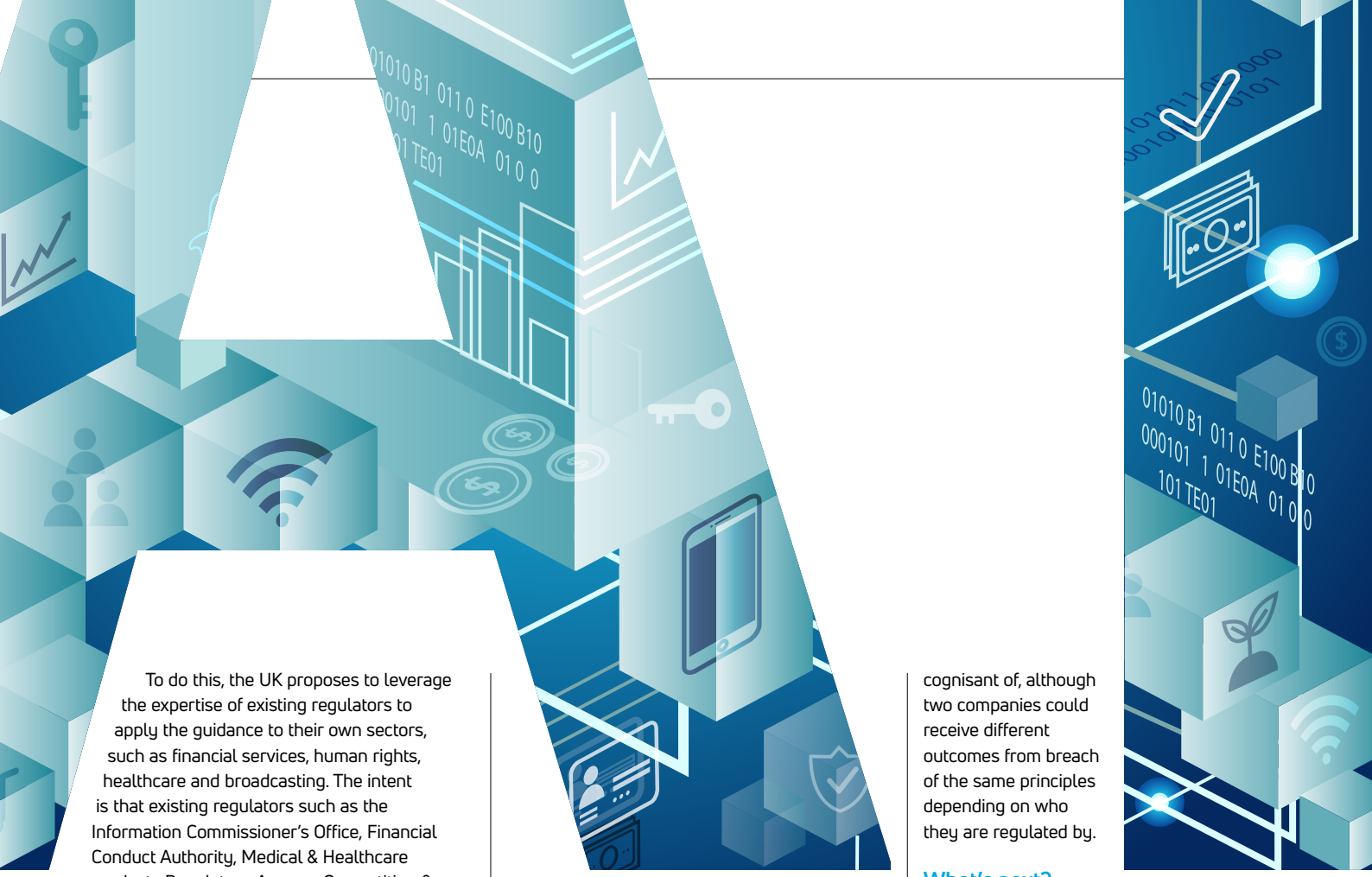
AI which poses an unacceptable level of risk to safety will be prohibited, for example predictive policing, emotion recognition, social scoring and real time public biometric identification systems.

In contrast, the UK is not currently proposing to prohibit any specific form of AI.

How centralised is the approach?

While the EU will be putting obligations on everyone, both users and developers of AI, the UK is placing the responsibility to follow its guidance on our regulators, recognising that certain kinds of AI technology can be used in different ways with varying levels of risk. The UK therefore looks to monitor the specific uses of AI, rather than the technology itself.

To understand this in practice, let's consider facial recognition, which as a population we are generally comfortable with in the context of securely logging into our iPhones. However, we would have concern for our privacy should such AI be used for broad public surveillance purposes. Regulation of facial recognition in the context of broad surveillance therefore is the UK's outcome-based approach.



To do this, the UK proposes to leverage the expertise of existing regulators to apply the guidance to their own sectors, such as financial services, human rights, healthcare and broadcasting. The intent is that existing regulators such as the Information Commissioner's Office, Financial Conduct Authority, Medical & Healthcare products Regulatory Agency, Competition & Markets Authority, Equality & Human Rights Commission, and Ofcom, are best placed to take a "proportionate approach" to regulating AI.

The UK does recognise that there is a risk of diverging approaches, and so proposes that guidance for regulators on how best to collaborate shall be provided for in an AI Regulation Roadmap to monitor and coordinate the implementation of the UK's principles.

The EU is not taking the sector specific approach, and instead intends to create a prescriptive horizontal regulatory framework around AI to capture all use cases. The newly developed European AI Board will oversee member states, who will nominate their own regulatory bodies to ensure laws are enforced. This arguably gives more clarity for industries assessing whether or not they are following the rules, but could lack the nuance needed to measure proportionally the damage an AI system can do in a specific context.

How is it to be overseen?

The EU proposes a new European AI Board to oversee the implementation of the AI Act and ensure it is applied consistently across the EU.

The UK Government has not ruled out the creation of an independent body long term, but is not currently establishing a new AI regulator, instead relying on governmental central support functions and expertise from the industry. The white paper argues that a new regulator could stifle innovation, whereas many will seek comfort in the EU's unified board to guide them.

How to define AI?

This is no easy task. The EU has taken the approach of drafting an overarching definition. Recent AI developments, however, have meant that proposals are already being made to amend the definition to ensure that some new models (such as those underpinning ChatGPT) are captured, which suggests that it could already be too narrow and lacks the adaptability to stand the test of time.

In contrast, the UK's white paper presents a non-statutory definition of AI, which is to be measured on its adaptability (how it is trained and learned) and its autonomy (how much human control is involved). Separate regulators will be relied upon to interpret the definition, which risks inconsistency, and its broadness could allow other types of technology to be captured. However, like the principles, it is designed to be high level and flexible to adapt to future technological advancements.

How to deal with liability?

What has drawn the attention of many is the EU AI Act's proposal of fines of up to €30 million, or 6% of annual turnover, higher than those imposed on GDPR breaches. The EU AI Liability Directive (non-contractual, civil liability mechanism) and the EU Product Liability Directive (rules for redressing harm caused by defects in products which integrate AI systems) will be built to underpin the Act.

The UK's view is that it is too early to say how liability should be managed. Instead, penalties will be dealt with at a sectoral level. This avoids an additional overarching liability regime for industries to be cognisant of, although two companies could receive different outcomes from breach of the same principles depending on who they are regulated by.

What's next?

The UK AI White Paper consultation is open until 21 June 2023, following which the Government intends to issue its response and AI Regulation Roadmap. There are many risks which the white paper has not covered (such as ownership of IP and control of data), so we can expect to see more white papers on these issues. The UK has acknowledged that it may need to adapt its regulatory approach as the technology evolves, so we could even see something closer to the EU framework here in the future.

Meanwhile, the EU AI Act faces its plenary vote this summer, with final approval expected by early 2024. The Act's implementation will be significant, and impacted organisations shall have a grace period of two years to ensure compliance with the rules. Any services used in the EU which rely on the output of an AI system will be caught by the EU Act, so not only is the EU's framework potentially setting a global precedent, it will also have an extraterritorial impact as many (including UK) companies will need to follow the EU rules.

Many businesses are leaning towards the UK's flexible approach, which gives more breathing space for innovation, while others prefer the clarity and security the EU approach will provide the industry. There is likely no one perfect approach as elements of both work well, and we will continue to watch as both frameworks move to their next stages and beyond. It will be fascinating to see how future AI developments impact these approaches, and how the industry reacts.

Hannah Gardner is a legal counsel (Outsourcing, Technology & IP) with The Royal Bank of Scotland, part of the NatWest Group

Animals, ESG and climate change: the solicitor's role

Charlotte Edgar explains why animal law has captured her interest, its connections to climate change, and how solicitors can advise their clients in this exciting and developing area of law

What is one of the big issues keeping animal lawyers awake at night? The answer might surprise you. It is the contribution of intensive animal agriculture to climate change. The big question is: how can the law address the animal welfare, environmental and climate change impacts of our food system while benefitting humans, animals, and the environment?

Animal laws can be categorised as those which have non-human animals as their central focus, such as anti-cruelty offences. But animal law can impact, and is relevant to, almost any other area of law. This is what makes it such an interesting topic to study, and practise. For example:

- your client might be getting divorced or separated, and there is a dispute over who keeps the family pet;
- you might be advising on planning laws or a property purchase and have to explain to clients the implications of finding an active badger sett on their property;
- you may have a tenant who wants to live with an emotional support animal, or a pet, but keeping animals is prohibited by the tenancy agreement;
- a client could be accused of an animal cruelty offence;
- another client could be marketing a new food product, and they require advice on whether the claims they make about their animal welfare policies stand up to scrutiny, or whether they could be criticised as "humanewashing";
- it may be necessary to respond to some shareholder activists on a client's board, who wish to raise animal welfare issues to increased prominence in decision-making;
- if your client is exporting their produce overseas, you might need to be familiar with the World Trade Organisation's GATT rules and exceptions;
- your client could be developing a new cosmetic, medicine or vaccine and needs to understand the circumstances when animals can and cannot be used in research...

The possibilities are almost endless.

Challenges of intensive animal agriculture

The increasing global demand for meat consumption and an expanding human population has led to the industrialisation and intensification of the processes of raising animals for food. With 70 billion animals raised and slaughtered for food every year across the world, the existing methods of production are coming under increasing scrutiny. Close confinement of farmed animals can lead to disease, and overuse of antibiotics increases antimicrobial resistance, which poses a threat to all of us.

Animal lawyers are particularly interested in how farmed animals are raised. Each country is different, but the law may govern how much space each animal is permitted, whether it can be housed with companions or individually, whether it can be given antibiotics to treat diseases or promote growth, and the ways in which it can be killed (among other things). The impact of animal laws extends beyond the individual animals themselves, as this discussion seeks to emphasise.

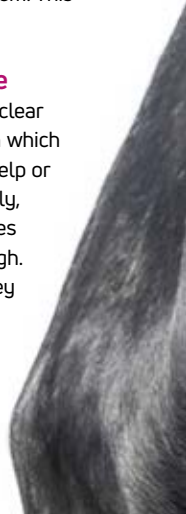
Intensive animal agriculture also poses a challenge for the environment. International Aid for the Protection & Welfare of Animals ("IAPWA"), an animal welfare charity, references recent studies which show that animal agriculture is responsible for 18% of global greenhouse gas emissions, compared with 13% for the transport sector. According to a 2021 study, emissions can arise from the production of animals for food, the production of feed for livestock, deforestation, and the release of methane by livestock.

Large numbers of animals produce copious amounts of waste, which must be managed appropriately, with protection of human health and watercourses in mind. Animal lawyers work at the intersection between animal and environmental law to address the impacts of intensive agriculture and tackle social justice issues such as air and water pollution in communities, nuisance claims, and workers' rights. The environmental, social and governance ("ESG") implications are obvious and far-reaching.

The interests of human health, animal welfare, prevention of future pandemics, and mitigation of climate change underscore the need to transition to a more just and sustainable food system. This is one of our most pressing challenges.

Client advice and climate change

In an increasingly globalised world, it is clear that solicitors must consider the ways in which their daily work in advising clients can help or hinder climate change efforts. Fortunately, awareness of, and interest in, these issues within the Scottish legal profession is high. In a 2020 Law Society of Scotland survey of its members, 57% of 145 respondents agreed that climate change is important to them in their professional capacity. The recent guidance published by the



Law Society of England & Wales on the impact of climate change on solicitors makes interesting reading. The guidance discusses solicitors' duties to warn clients and disclose climate legal risks, and acknowledges that solicitors may need to consider whether to withdraw from acting if a client makes misleading claims about the climate impacts of their business. It recognises that changing expectations could lead to an evolution in the standards of a reasonably competent solicitor to include an awareness of the impact of climate change.

This new guidance has wide implications, and solicitors should consider the impacts this may have on their practice and any additional knowledge they may require (even those who are not regulated in England & Wales).

Recent animal law litigation

Animal law litigation is clearly on the rise. You only have to look to the Non-human Rights Project's work in the US to see that such issues are coming to the attention of judges on a more regular basis.

In the UK, issues such as how we raise farmed animals, and the management of wildlife, are increasingly coming under scrutiny. For example, in 2020 the charity Compassion in World Farming raised judicial review proceedings against the Scottish Government concerning the export of live calves from Scotland. It was argued that in permitting the export of unweaned calves for journeys longer than eight hours, without water and rest, the Scottish Government breached Council Regulation EC No 1/2005 (the "Transport Regulation") which forms part of retained EU law. Compassion in World Farming reported that while the Scottish Government initially defended the case, it later accepted that the trade in unweaned calves from Scotland was in breach of the Transport Regulation as maximum permitted journey times were exceeded. The proceedings were subsequently dropped. This case is an interesting example of steps being taken by charities to enforce EU law on farmed animal welfare.

Another recent case concerned conservation, rewilding and the protection of natural habitats. In 2021, the judicial review launched by Scottish rewilding charity Trees for Life was heard by Lady Carmichael in the Court of Session: [2021] CSOH 108. Trees for Life is interested in the protection of beavers, given the benefits they can bring to ecosystems, as well as increased biodiversity, and flood reduction. The judicial review was raised against NatureScot, Scotland's natural heritage public body, and centred on the licences granted by NatureScot allowing lethal control of beavers. Licences can be granted where farmland is deemed to be at risk of damage by beavers, or there are human health and safety concerns. Lady Carmichael refused to uphold the majority of the challenges raised by the charity; however her Ladyship held that NatureScot was in breach of the duty to give reasons when issuing its licence decisions and a number of licences were reduced by the court as a result.

Returning to farmed animal welfare, The Humane League recently challenged the Secretary of State's code of practice providing welfare guidance for the rearing of broiler (meat) chickens (*R (on the Application of The Humane League UK) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin)). The evidence in the case was that 95% of fast-growing broiler chickens are raised conventionally in large, closed buildings with a maximum stocking density (weight of birds per square metre) of 39kg, the maximum permitted by the EU "Broilers Directive" (2007/43/EC). The Humane League argued that because these birds are subject to welfare problems, such as leg disorders, cardiovascular disease, bone problems and higher mortality rates (often as a consequence of genetic selection), the Secretary of State had acted unlawfully in promulgating the industry code of practice and policies regarding their welfare. EU law (Directive 98/58/EC) provides that an animal must not be kept for farming purposes "unless it can reasonably be expected, on the basis of its genotype or phenotype, that it can be kept without detrimental effect on its health or welfare."

Significantly, reference was made in the case to the Animal and Plant Health Agency's 2022 review of the scientific literature, which noted that slower-growing chicken breeds are more able to cope with higher temperatures. This is relevant to the future of farming given hotter global temperatures because of climate change.

Sir Ross Cranston in the High Court rejected The Humane League's arguments, finding that the Secretary of State's judgment call based on the scientific evidence was not a breach of her duties under public law. The Secretary of State had acknowledged the welfare problems with fast-growing chickens, but determined there was no scientific consensus that they could not be kept without detriment to their welfare, as environmental conditions such as stocking densities and enrichment are also relevant considerations. The judicial review was dismissed. It was announced on 7 June 2023 that The Humane League is seeking to appeal the decision.

In other news, selective breeding of chickens was debated at the European Parliament on 28 May 2023, with the issue to form part of a forthcoming review of EU animal welfare legislation later this year.

Time to step up

The pace of development of animal law is accelerating, in tandem with a growing interest in the topic. As climate-conscious professional advisers, solicitors will play an essential role in supporting their clients to make some of the changes needed to address the climate crisis. It is time to step up to the plate.

Charlotte Edgar is a commercial litigation solicitor, qualified in Scots and English law, and the first Scots lawyer to graduate from the Animal Law LLM programme at Lewis & Clark Law School in Portland, Oregon. Any views expressed are her own, not those of her employer.

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True love story of legal software providers and clients:
how the integration with Property Searches Scotland came to be...

Today, we're going to embark on a journey into the delightful world of legal software providers and our beloved clients. Buckle up, because we're about to discover why this relationship simply has to be good! Trust me, this is a tale filled with love, a bit of fun, and a whole lot of gigabytes.

Picture this: a conveyancing lawyer seated at their desk, post-it notes everywhere, jumping between different software platforms, on multiple screens, looking more frazzled than a software developer who's lost their wifi password. Enter the legal software provider, swooping in like a superhero in a snazzy branded gilet, ready to save the day! But wait, why is it so important for their relationship to be strong? Let's find out!

1. It's a match made in (Tech) Heaven – Legal software providers, like us, are like the fairy godmothers of the legal world, equipped with magical technology wands. Our clients, the hardworking lawyers, rely on us to simplify their lives, streamline their work, and transform their offices into tech-savvy wonderlands. Without a strong relationship, this enchanting synergy might fall flat, leading to missed deadlines, misplaced files, and an office more chaotic than a game of Twister.

2. Compatibility is key – Just like in any relationship, compatibility is essential for legal software providers and their clients. When the software seamlessly integrates into the lawyer's workflow, it's like a match made on a dating app where both parties share a love for puns, takeout pizza, and late-night binge-watching sessions. They need to be in sync, so the lawyer can focus on the law and let the software handle the technicalities.

3. Support: more than just a shoulder to cry on – When technology goes awry, lawyers need their legal software providers to be their rock, offering support that goes beyond the average IT helpdesk. Whether it's a software glitch, frustration around using multiple platforms, or a pesky bug that needs squashing, a reliable support system is a must. It's like having a partner who can fix a flat tyre in the rain, simultaneously telling cheesy jokes to lift your spirits. That's true support right there!

4. Innovation and futureproofing – Legal software providers and their clients are on a constant quest for innovation. They are like pioneers, venturing into uncharted technological territories. By nurturing a strong relationship and spending time with clients in person, legal software providers can gain valuable insights into the needs and desires of their clients, and in turn, develop cutting-edge features, integrations and upgrades that keep the lawyers happy and ahead of the game. It's a win-win!

It's a tale as old as time with regard to how we at Denovo approach the relationships we have with our clients. It's also the reason we fast-tracked our integration with Property Searches Scotland.

Back office blues

One day, as our Head of Marketing swooped into an office on the edge of Glasgow city centre for a quick catchup with a long term client, he was met by a frustrated lawyer. As they made their way into the back office area, he rested his snazzy gilet on the chair, and looked across at the table at a lawyer stricken with tech fatigue. He had seen this look many times before. It was time to suit up! He confidently stated: "I'm here! What's the problem and how can I help?" A statement befitting a Marvel movie script.

Long story short, the frustration was built out of one key issue, about duplicate data entry when using multiple software platforms for conveyancing transactions. "They don't talk to one another", was the main bugbear. The use of Property Searches Scotland entered the conversation, and when the concept of integration was thrown on the table it was like music to her ears.

Suite sensation

The result – a quick call to the PSS team, who were immediately on board to develop the most powerful and seamless property search integration available in Scotland. Within a matter of a few months, we had created a new way of ordering your full suite of reports with Property Searches Scotland without ever leaving your case management system. There is now no duplication of data entry.

The last email we received from that client said the following: "The turnaround time to develop the integration was so quick. It really makes it simple for our conveyancers to access our full suite of reports without ever leaving CaseLoad. This integration is a significant step forward in making our lives a whole lot easier."

So, dear readers, the relationship between legal software providers and their clients isn't just about codes and algorithms; it's about building a connection founded on trust, compatibility, humour, and support. Together, we can conquer the legal world one witty line of code at a time.

Until next time, stay tech-savvy and keep those legal puns coming!

Start a partnership with us by visiting denovobi.com Email info@denovobi.com
Or if you prefer to talk to us you can call us on 0141 331 5290.

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Rethinking those ts and cs

Can contract terms be made simpler? There is more scope than you might think, especially with "boilerplate" clauses. The Journal found out more from two lawyers leading separate projects with a common aim

WORDS: PETER NICHOLSON

When it comes to contract drafting, are you a boilerplate welder? Do you include numerous clauses because you always do, without considering whether they serve a purpose, or even make much sense? If so, you may find that the world is starting to move on.

Two separate work streams pursuing a different approach came together recently at a Law Society of Scotland round table. One involves a project by English firm Browne Jacobson, which for several years has worked with linguistics experts at the University of Nottingham to identify issues with traditionally complex insurance documents and devise ways to improve them. In the other, the Outsourcing, Technology & IP in-house legal team at NatWest is taking a fresh look at its business-to-business outsourcing contracts, including reviewing them from a neurodiversity angle. With these different drivers, they have found much common ground about what works best.

It was a connection made through the O Shaped programme – designed to develop lawyers who are human-centric as well as technically capable (see Journal, October 2022, 36) – that brought the two together. Browne Jacobson's Claire Stripp, a member of the programme's steering board, heard of work being done by Leigh Kirkpatrick, managing legal counsel in the NatWest team, and introduced her colleague Tim Johnson, who leads the firm's insurance policy drafting and distribution team.

Only with a degree?

Browne Jacobson's work with the linguistics specialists was revealing. "We found that on average insurance policies needed an undergraduate level of education to understand them", Johnson recalls. "Some of them required doctorate levels. Comprehension was poor for real customers given questions with real life scenarios related to the product they were buying, about whether they were covered and so on.

"On the plus side, working with the linguistics professors we were able to identify very specific drafting techniques to improve readability and comprehension, and by deploying these we were able to reduce the reading age in some cases by 10 years, to wording that could be understood by a typically literate year 7 student. The impact of this in real terms is huge – it's the difference between 13% of the UK adult population being able to understand a wording and approximately 85%, which is an improvement of over 40 million people."

While the study focused on policy wordings for small businesses, the findings are very similar in policies designed for individuals, as well as those for larger businesses.

"A contract is a contract and there's not really a huge difference in the insurance market between the complexity of consumer facing contracts and business to business contracts", Johnson observes. "They generally follow a similar form and format, maybe a few more colours and images on the consumer facing ones, but the language is still complex in most cases."

Kirkpatrick highlights both a professional and a consumer benefit from contract simplification. "One angle is making contracts more accessible or 'readable' for users, but the other angle is making them more accessible for lawyers, and in turn making the legal profession more accessible for people who are neurodiverse. Taking out unnecessary complexity in legal documents is a win-win."

Subtle changes

Turning to what the linguistics team recommended, the perhaps obvious points like bulleted lists and numbered subparagraphs are only the start. "It's about only having one idea per sentence – not dealing with multiple concepts", Johnson explains. "It's also about giving the reader agency: instead of talking about the insurer and the policyholder, talking about 'we' and 'you'. It's about how you word certain obligations – you can either say, we won't make a payment unless you do x, y, z, or you can say, you must do x, y, z, or we won't pay a claim. The second version led to considerably better comprehension, and better results on eye tracking tests. The first one people had to read

Some practical MS Word tips

• To check whether any adjustments should be made to your template/document, you should run the accessibility checker. This can be found under Review → Check Accessibility. The result should identify any changes you could make to create a more accessible document.

• Make sure that any headings in your document are not just emboldened but are specifically categorised as headings. You can do this via highlighting the text you want as a heading and going to Home → Styles → select the heading you wish to use.

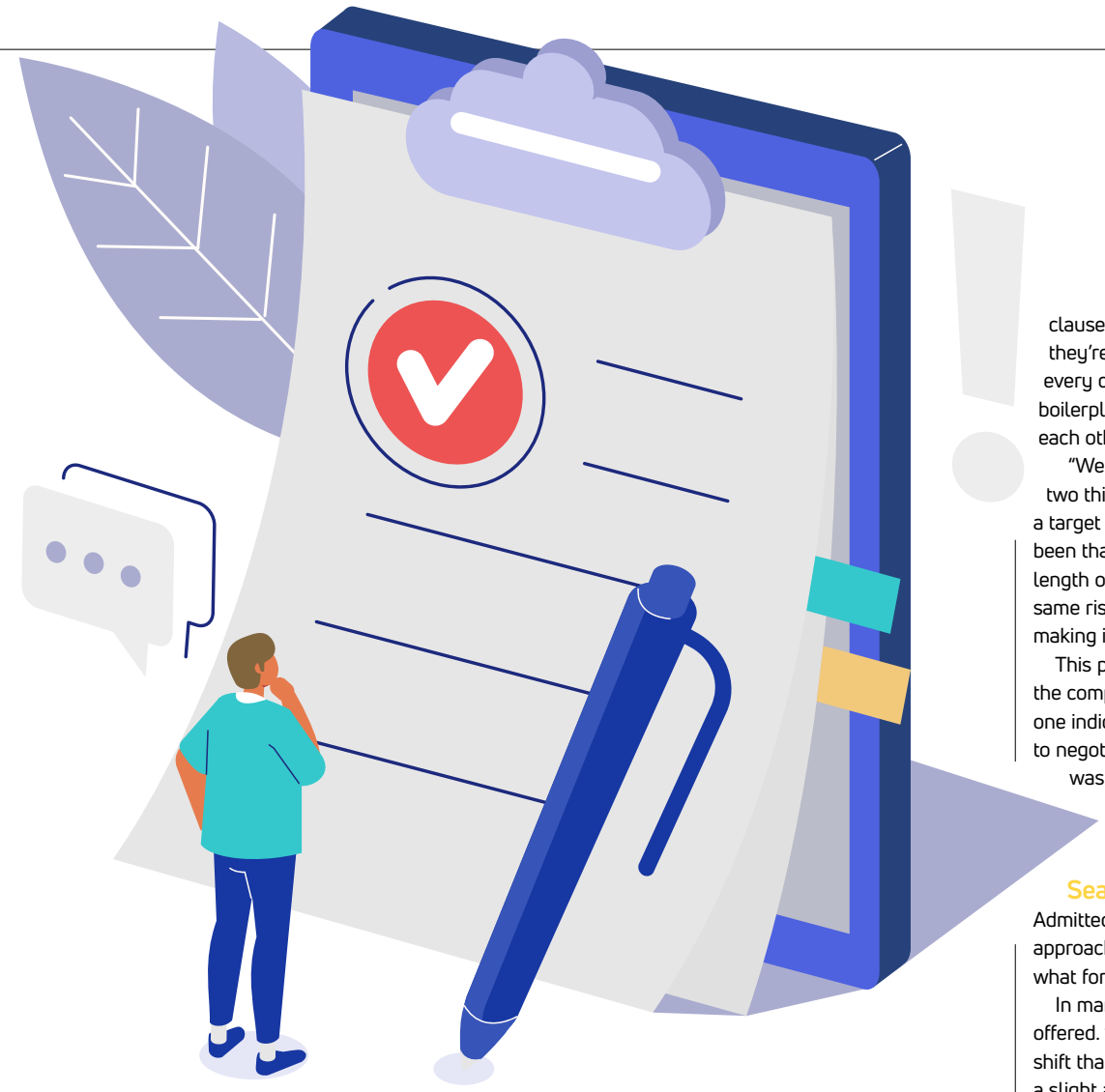
• The Flesch-Kincaid reading grade is a standard measure of the complexity of a written document which rates it against the level of education required to understand it. Check the readability age of your document by following these steps:

• Select the **Home** tab.

• Choose **Editor**, and then go to **Document stats**.

• A dialog box will appear letting you know Word is calculating your document stats. Choose **OK**.

• Word will open a window that shows you information about the statistics and reading level of your document.



twice; with the second they generally only had to read once. So there were some quite subtle things that would make a real difference.

"Then we did word frequency analysis. We would make a list of the lowest frequency words in the document [those least used in common speech] and remove as many as we could. Generally we found there might be some technical words in policies that have to be there, say in medical malpractice wording, but even in that situation at least 70-80% of low frequency words can usually be replaced with simpler, more everyday language.

"There's also quite a lot around how you present the document to the customer. You can take a block of text, and without changing a single word or piece of punctuation, you can lay it out differently on the page and achieve better engagement. Using eye-trackers, we could track how customers found their way from the contents page and moved between definitions and the main part of the wording. Much work can be done around layout and presentation, as well as the actual words."

Kirkpatrick follows up with other guidelines her team found helpful. "People often talk about drafting and legal design in the abstract, for example the benefit of using short sentences. 'Short' is quite subjective, so we set drafting design principles for our supply contracts, which among other things, set our ideal sentence as being no longer than 26 words. The same with spacing: the more white space in a document, the better, and the more subheadings, the easier a document is to navigate and digest. All of these 'invisible' legal design elements make contracts easier for anyone to engage with, but are particularly helpful for those who are neurodiverse."

Leaner and fitter

Both found themselves adopting what Kirkpatrick calls "clause clustering". For example, to find out whether an item is insured against theft, you might have to check four or five different parts of your policy. "That absolutely kills comprehension", Johnson states. "You want to be able to find the relevant page and see everything on that page." That may mean repeating the same thing in different parts of the policy, but "We have always been able to shorten wordings despite that, because the simplification process usually results in more being taken out than is added."

He continues: "But for me it's all about remembering that it isn't a document to be read from start to finish like a novel. It's there to answer a question, and usually when someone is in a position of distress because they've suffered a loss and they want to know if they're covered and what they need to do. What matters is how quickly and accurately they can find the answer they need."

All this brings us back to the boilerplate question. Kirkpatrick notes how boilerplate clauses "are all typically together because they're just general provisions we have in every contract, but when you actually read boilerplate they often bear little relationship to each other".

"We managed to cut our templates down by two thirds. Had we been asked to come up with a target figure at the beginning it wouldn't have been that ambitious. We managed to reduce the length of our contracts while maintaining the same risk profile, by simplifying the drafting and making it as concise as possible."

This produces a financial benefit for the company: the length of a contract is one indicator of how long a contract takes to negotiate, "but the bigger picture for us was trying to take out unnecessary frictions to reduce the end to end contracting time".

Sea change

Admittedly, not everyone is yet sold on the new approach. Counterparties may try to reinstate what for them are the familiar clauses.

In many cases, however, little justification is offered. "I don't think it's really a risk tolerance shift that we need in the legal profession: it's just a slight attitude shift in terms of getting away from copying and pasting", Kirkpatrick believes.

Johnson finds other practice areas within his firm are receptive to the new approach: social housing, for example, with its need for tenant-facing documents; health, involving patients at a time of need; and retail, where customers can have any level of literacy. "We're looking at those as key areas to push this out a bit further."

Both also detect a sea change due to the new FCA consumer duty, which places greater regulatory focus on financial services businesses to ensure customers understand their financial products. According to Johnson, "Some clients have maybe been teetering on the edge: those pulling the purse strings have felt it wasn't the right time to redraft their documents, but are now acknowledging that this is the way the market's going; the way the regulator wants us to go; that it makes business sense: let's do it".

Check for yourself?

For those interested in finding out more, one starting point may be on the desk in front of them. "There is a very basic readability check that you can run on Microsoft," Kirkpatrick points out, "that was really helpful to show us we were moving in the right direction. That gives you a basic sense of how complex your document might be at the moment and allows you to set a target." (See the panel for help with this.)

And look out for round table or conference events where our interviewees will be appearing – details to be confirmed at time of going to press.

Show us the money: immigration for the better off

As the latest immigration figures show, the UK continues to be an attractive destination for individuals from abroad, including those of high net worth. The rules have changed for this group, as Amna Ashraf explains

A series of unprecedented world events throughout 2022, and the lifting of restrictions following the Covid-19 pandemic, have led to record levels of international immigration to the UK.

The latest quarterly immigration statistics, published on 25 May 2023, showed total long-term immigration last year was around 1.2 million and emigration around 557,000, resulting in net immigration of around 606,000.

The increase is driven by non-EU nationals arriving in the UK for study, family, work, business, and protection reasons, accounting for around 80% of total immigration. The UK also remains an attractive option for investors and high net worth individuals looking to make it their home. The rules have changed for this latter group of individuals, and this article sets out their current options.

Shifting approach

Historically, a retired person with disposable income above £25,000 and connections to the UK could obtain residency for five years, with the option of permanent settlement. This route was revoked by the UK Government in 2008. The alternative route for people of independent means was the tier 1 (investor) visa scheme, which allowed individuals to invest £2,000,000, £5,000,000 or £10,000,000 in qualifying UK companies, and in some cases, UK Government bonds. It led to the possibility of obtaining permanent settlement in as little as two years.

Following concerns by the then Home Secretary Priti Patel that the route "facilitated the presence of persons relying on funds that have been obtained illicitly or who represent a wider security risk", it was closed with immediate effect on 17 February 2022. This was underpinned by the UK's strategy of moving away from exchanging investment for residency and citizenship, amid criticism of several countries' golden visa programmes. Those already in the UK under this route can however extend their visa before its full closure in February 2028.

So, what options do persons of independent means or those termed as high net worth individuals have now? There are still options, but rather than basing these on wealth alone, the UK Government appears to have shifted its approach to business or talent-based routes, reinforcing the mantra of attracting the best and brightest. Most routes now demand an applicant's track record as an investor in innovative businesses and their plans to engage actively in such activity in the UK.

Innovator Founder route

Replacing the previous routes of "innovator" and "start-up" categories, the Innovator Founder route was opened on 13 April 2023, with the aim of providing greater flexibility to clients while ensuring stringent evidential requirements. Although no specific financial investment is required, entrepreneurs have to show they are looking to establish an innovative, viable and scalable business in the UK. Following a business plan, approval has to be obtained from an endorsing body which will assess it against the criteria before it is assessed for a second time by the Home Office when the visa application is made. Successful applicants obtain a three year visa, with the possibility of permanent settlement at the end of this period provided certain business development criteria are met.

There are two positive changes under this improved route in comparison with its predecessor. Mandatory check-ins with the endorsing body have been reduced to two throughout the visa duration of three years, which allows applicants to concentrate on the development of their business. The applicant also has permission for secondary employment outwith their own business, which allows for financial stability, especially during the early stages of the setup.

Global Talent visa

Formerly known as the Exceptional Talent visa, this route is for talented and promising people in specific sectors such as sciences, the humanities, engineering, the arts, and technology, who wish to work in the UK. The process requires evidence of achievements and qualification as well as an endorsement by one of the approving bodies. This route requires no cash investment and leads to eligibility for permanent settlement in three years.

UK expansion worker visa

This option is for established businesses abroad looking to set up their first branch or subsidiary in the UK. It comes under the umbrella of the new Global Mobility routes designed to facilitate economic growth and trade in the UK post-Brexit.

The process is first to set up a sponsor licence, with appointed

key personnel who will be responsible for the running and management of the licence. A visa application then follows, which allows the individual to work as a sponsored employee.

This route does not lead to settlement and therefore remains less popular than the skilled worker route.

Sponsor licence and skilled worker route

There are three steps to this process. The first is to establish a UK company with a genuine business and plan for development for the next six months. All regulatory aspects must be complied with. This includes registration with HMRC, opening of a business bank account, and at least one UK based employee.

The second step is to apply for a sponsor licence for that business in order to widen the employee pool to those who require a visa. Once set up, a certificate of sponsorship is obtained for the specific foreign employee who is to be sponsored. This certificate will show that there is a genuine vacancy at an appropriate skill level from a list of eligible occupations, and salary will be in accordance with the minimum set for that role. The applicant would also need to demonstrate their English. This can be evidenced by passing an English test in speaking, listening, reading and writing at level B1, producing a degree that was taught in English, or being a citizen of a majority English speaking country.

The third and final step is to apply for a skilled worker visa, which will encompass not only the employment information but also the applicant's personal circumstances. The visa can be granted for up to five years, with eligibility to settle at the end of that period.

Partner of a British citizen

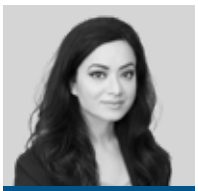
Those who have British partners who either are living with them outside the UK or are already in the UK, can avoid all business and employment focused routes. Instead, they can apply for a partner visa whereby the financial requirement shifts to the sponsoring partner. The easiest way is for the sponsoring partner to show a salary of above £18,600 gross annual income for a period of six months. In the case of high net worth individuals, savings can be used to demonstrate financial viability. A minimum of £62,500 has to be shown in a cash access account, or in some cases an investment account, for a period of six months before the date of application. The initial application is granted for 2.5 years, followed by an extension of a further 2.5 years which then leads to permanent settlement.

Unlike business or work visas, there is comforting flexibility with the spousal route. There is no requirement for the migrant spouse to work for a specific employer, giving them much greater control over their career trajectory. Periods of unemployment are not an issue, and time outside the UK of up to 540 days is permitted over the five years without posing a barrier to British citizenship.

Room for reform

While the Government's aim is to reduce net migration, a reformed new route to attract individuals with wealth from legitimate sources can only add value to the migrant pool. Where the cost of living can dissuade other visa applicants from staying in the UK long term, high net worth individuals will stay without burdening the resources and add to the economic growth of the country.

The security concerns would resurface. These could be addressed by placing a multi-layered due diligence structure to ascertain the source of wealth and subjecting applicants to robust evidential requirements. To facilitate this, a dedicated department within the Home Office could be set up with the sole purpose of conducting strict financial checks, instead of relying on the UK banks to conduct cursory checks. A win-win: security risks would be significantly lowered, and the UK would regain its attractiveness to genuine investors for years to come.



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Accounting for suspicion

Count, reckoning and payment is in some respects a privileged form of action, notes Conner McConnell, who considers its uses, and possible ways of forestalling such challenges, in the context of executries

In progressing an executry, it is not uncommon for conflict to arise between executor and beneficiary. In particular, a beneficiary who knew the deceased well may be surprised to find that the sums available for distribution are significantly lower than expected. That surprise often gives way to suspicion, and disappointment breeds questions: How do I find out what is due to the estate and, in turn, to me?

What can a beneficiary do?

The law provides a remedy to beneficiaries in the form of an action of count, reckoning and payment (commonly "an action of accounting" or simply "an accounting"). The executors are called on to account for their intromissions with the deceased's estate. If that accounting discloses missing funds, the executors are potentially liable to make good the discrepancy personally.

Why raise an action of accounting?

An accounting is a rare thing in the law. Rare because, first, it permits a fishing exercise for information and, secondly, because one need not suggest any wrongdoing on the part of the information holder to exercise it.

In an accounting, (i) the pursuer does not need to specify the amount due, and (ii) the burden lies on the defender to account and produce their vouching. That, in turn, ascertains any amount that the defender is liable to pay. That approach contrasts with most court actions, in which the onus lies on the pursuer to specify and prove what is due.

What if the executor fails to account?

If met with silence from the executors, a beneficiary can crave payment of all sums which *might* be due to the estate. Payment of that sum is the alternative if the executors fail to account. That crave is said to be *in terrorem* – "in fear". It is one of the few instances in which a threat, albeit one to encourage the executors' good behaviour, is sanctioned by law.

The process encourages uncooperative executors to engage with beneficiaries. If they fail to do so, they could be found liable for a sum greater than that which they would otherwise require to pay.

Who can raise an action of accounting?

An accounting may only be demanded in certain instances. The exact scope of its availability is uncertain, though Lord Maxwell attempted to define it, to a degree, in *Coxall v Stewart* 1976 SLT 275 at 276:

"Where assets belonging to one person come into the possession of another and where the person to whom the assets belong has, broadly speaking, a right to recover those assets or their value from the possessor, but where the nature of the property, or the rights and obligations of the possessor, or both are such that the intromissions of the possessor may affect the precise extent or value of the owner's claim against him, at least in some cases our law provides the remedy of an action of count reckoning and payment."

In broad terms, one tends to see it engaged where the relationship between

the parties is founded on a high degree of trust, particularly where that trust is expressed in the responsibility (and power) granted by one person to another to manage that person's assets. An accounting is a nuclear weapon, capable of levelling the playing field between accountee and accounter.

While there is no prescribed list, the relationships which give rise to the duty include that between executor and beneficiary. They also include the relationship between a person acting under a power of attorney and the granter of that power of attorney. It is not uncommon for an executor, stepping into the shoes of the deceased, to seek an accounting from an attorney to disclose the attorney's intromissions with the deceased's funds in life (and, accordingly, to disclose whether any sums ought to be repaid to the estate).

While a beneficiary has an interest in knowing whether an attorney is due to pay into an estate (as it may affect their share), there is no direct relationship between the attorney and beneficiary such that the beneficiary can raise proceedings against the attorney. That can give rise to complexities where, as is often the case, the same person is appointed as attorney in life and executor on death.

"An accounting is a nuclear weapon, capable of levelling the playing field between accountee and accounter"

Accounting by an attorney/executor

In *Currie v Blair* 2023 SLT 113, reversing 2023 SLT 34, the parties were siblings by adoption. They were both appointed as their father's attorney. However, only Blair had exercised her powers during their father's life. The father died in January 2015, appointing Blair as his executor. As management of the estate progressed, Currie began to suspect that the value of their father's estate was lower than it should be. She knew that Blair had, in the past, withdrawn sums from her father's bank accounts as attorney. Currie raised an action against Blair. She sought an order from the court that would require Blair, as executor, to seek a full accounting of her own intromissions as her father's attorney.

In doing so, Currie recognised that she, a beneficiary of the estate, had no direct relationship with Blair in her capacity as attorney, such that she could demand an accounting from her. A beneficiary does, however, have a right to demand an accounting from an executor. What was at issue here was whether a beneficiary can demand that the executor seek an accounting from the attorney.

At first instance, the court deemed Currie's action "artificial". It was an attempt by a beneficiary to seek an accounting from an attorney "through the back door".

That decision was reversed on appeal. While the court recognised that a beneficiary has no title to raise an action against an attorney, the present action was raised against the executor. It was raised on the basis that an executor can be called upon by a beneficiary to realise and account for an asset of the estate. At para 18 the court said: "the reclaimer is a party to a legal relation with the executor which gives her the right to require the executor to implement her fiduciary duty by ingathering assets forming part of the estate for distribution to the persons entitled thereto, including herself".

That remedy sees the executor account for any part of the deceased's estate that she has failed to realise (should any exist), including any sums that she should have repaid into the estate in her separate capacity as the deceased's attorney.

Averting suspicion

An action of accounting is a powerful tool when it is available. In most cases, the existence of the relationship that gives rise to it will be obvious. It lies between partners, executor and beneficiary, principal and attorney, and solicitor and client. However, it may not always be so obvious. Difficulties may arise when the accounting is sought from someone who acts in two or more separate capacities, as in *Currie v Blair*.

Attorneys and executors must be alive to this remedy and should keep detailed records of their dealings with the estate. Suspicion often arises where an executor has acted as attorney for the deceased in life, and as practitioners we should be alive to that possibility when advising clients on who they should appoint as their executors. One might mitigate against suspicion by appointing a second or third executor to act as well and, where a question arises in which the former attorney has an interest, the others can decide it. That breeds trust and confidence.

The existence of trustee companies might be brought to a client's attention as a potential appointment. A professional executor can be an impartial actor in an otherwise emotionally charged situation, and their presence often quells suspicion before it arises, and provides expertise, objectivity, and experience.

Conner McConnell is a senior solicitor in the Dispute Resolution team at Gillespie Macandrew

Is there a place for a law course for Scottish school students? Experience with a course piloted by UHI Argyll suggests there is, as Martin Jones explains

When law school starts earlier

Much of the debate about legal education in Scotland tends to focus on the post-school period when a student has already embarked on their university studies. While there is always something to discuss about the fitness or otherwise of university to prepare students for the legal profession, I want to focus on the school curriculum, where there is limited opportunity to engage with law and legal issues as part of formal studies.

In Scotland, the absence of a law-specific National 5 or Higher qualification lies in stark contrast to the school curriculum in England, Wales, and Northern Ireland. There, law as an A-level subject is popular, with 14,361 students sitting an examination in 2022, an increase from 11,575 in 2019 (figures collated by the Joint Council for Qualifications).

Filling a gap

The syllabus is well established and encompasses aspects of crime, contract, negligence, human rights, and the legal system. There are some who hold the view that studying law at A-level as a precursor to undergraduate legal study is in some way detrimental, but that was not my experience working in a number of law schools south of the border.

Putting those concerns aside, its existence also offers the opportunity to increase legal literacy more generally, and for those about to commit to three years of expensive English university tuition fees, it can act as a taster to a subject to which they would otherwise have no exposure. In Scotland, we have modern studies, which touches on legal issues such as looking at crime from more of a sociological perspective or the political aspects of law making, but legal education is not its core purpose.

For the past three years, the University of the Highlands & Islands ("UHI") Argyll has been delivering a legal qualification to schools in its area. As part of UHI, it operates from nine locations across Argyll, Arran and Bute. Uniquely in Scotland, UHI offers courses to schools and to learners in further and higher education from undergraduate to postgraduate level. Since our inception, we have used digital and videoconferencing tools to bring learners together across dispersed rural locations.

No limit to online learning

The National Progression Award in Legal Studies is approved by the Scottish Qualifications Authority at level 6 (the same level as Highers), and has traditionally been taught within FE colleges. UHI Argyll piloted its use at Oban High School three years ago and it is now available online to all schools in Argyll & Bute. As a niche offering, it would not be financially viable to run it in a traditional face-to-face format, and digital delivery creates an equity of opportunity. The willingness of students to engage in this type of learning is one of the positive spinoffs of the post-pandemic world.

The course comprises two units: Scots Law – An Introduction, and Crime in Society. The syllabus therefore covers aspects of civil and criminal law, sources of law and legal personnel, and is flexible enough to allow current legal issues to be incorporated to promote student engagement. A crucial element in its success is that it has been partially delivered by Billie Smith, a partner (and Scottish Legal Awards winner) at MacPhee & Partners in Oban and a former pupil of the school. This has really helped to bring the subject alive to the students. While some in the class have gone on to study law at university, the majority have not, which goes to underline the broader appeal and utility of studying law at school.

"Studying the legal system helps students better understand their rights and responsibilities as citizens", Smith comments. "Students are required to use critical thinking and problem-solving skills to analyse case law, prepare arguments and consider multiple perspectives, skills which are valuable not only in the legal field but in other disciplines. Above all else, witnessing the growth and development of students was immensely rewarding."

Expanding provision

The scheme's use in Argyll is part of an emerging trend. Clydebank High School has also delivered the qualification for the past few years, working in conjunction with a University of Glasgow project. City of Glasgow College will also offer the course in August 2023 as part of its school-college partnership.

The growing availability of law in the school curriculum is to be welcomed, but it is currently being achieved as a workaround using a qualification which was not necessarily designed with schools in mind. Despite the potential for digital delivery to join up learners, there remains a risk that its availability might be something of a postcode lottery due to funding constraints. If there is growing evidence that there is a place for legal education in schools, matched with demand, the time may have come to take a more strategic look at this to deliver something which is both fit for purpose and universally available.

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Dangerous or careless?

This month's criminal court briefing explores the boundary between dangerous and careless driving, before turning to recent decisions on offences with an element of sexual abuse

Criminal Court

ADRIAN FRASER, SUMMARY SHERIFF AT EDINBURGH

In previous articles, I have commented on procedural matters and trends in the management of cases. This month I will look back to an important authority in road traffic law, the impact of which largely went unnoticed at the time, and then consider some recent appeal cases.

Death by dangerous driving

The appellant in *ASG v HM Advocate* [2019] HCJAC 91; 2020 SCCR 112 was charged with causing death by dangerous driving, in contravention of s 1 of the Road Traffic Act 1988, having driven his car without corrective eyewear when his vision was below the required standard, and failed to observe the deceased, a slow-moving pedestrian crossing the road. He was found to be unfit for trial and dealt with at an examination of facts in terms of s 55 of the Criminal Procedure (Scotland) Act 1995.

Evidence was led that the deceased had been struck when he was about halfway across, and that there were no obstacles to prevent the appellant seeing him. Further, although there had been spectacles in the back of his car, the appellant had not been seen wearing any, none were seen elsewhere in the car or on the road, and he had made no reference to these when speaking to police at the scene. There was nothing to demonstrate loss of control of his car.

The appellant indicated to the police that he simply did not see the deceased crossing the road. He was required to take an eye test under s 96 of the 1988 Act in a nearby car park. He knew the purpose of the request, had not been wearing spectacles, did not indicate that he required to use them and did not ask to use them when taking the test. He failed and was told he would not be permitted to drive further that day. The police contacted the DVLA and were notified the following morning of revocation of the appellant's licence. When told about this, the appellant did not protest that he had been wearing spectacles at the time.

An optometrist who regularly examined the appellant confirmed that he would have been fit to drive, provided he wore the appropriate corrective eyewear.

The appellant did not give evidence, and the judge presiding at the examination was satisfied beyond reasonable doubt that he had committed the act charged. The appellant appealed to the High Court under s 62 of the 1995 Act, on the ground of insufficient evidence to allow the inference of dangerous driving. It was not disputed that he had committed the offence of causing death by careless driving.

The court was satisfied that an inference could be drawn that the appellant was not wearing the necessary corrective eyewear. That amounted to driving in a way which fell far below the standard of a competent and careful driver and this would be obvious to a competent and careful driver, all in terms of the test in s 2A of the 1988 Act.

Dangerous or careless?

However, the court went further and indicated that the conviction was not dependent on proof of driving with defective vision without corrective eyewear. At para 21 Lord Brodie said:

"The fact of a collision with a slow-moving pedestrian in the course of a car completing a turn from a major to a minor road where there is nothing to obscure the driver's vision and no reason to explain the accident other than the driver not having seen the pedestrian is, in our opinion, sufficient to lead to the conclusion that the driver was driving in a way that fell far below what would be expected of a competent and careful driver and this would be obvious to such a competent and careful driver."

The importance of that paragraph is that such driving was and still is not uncommonly prosecuted as careless driving under s 3 of the 1988 Act. However, what Lord Brodie said is consistent with a line of authorities.

In *Angus v Spiers* 2007 JC 19 the appellant failed to stop at a red light, drove onto a pedestrian crossing and struck a child crossing the road there. The Crown rejected a plea to s 3 careless driving and, after trial, the appellant was found guilty of s 2 dangerous driving. His appeal against conviction was unsuccessful. Lord Johnston, delivering the opinion of the court, noted at para 10: "The presence of vehicles already stopped at the crossing and, much more importantly, the fact that he struck the child on the crossing are all material to this consideration."

In *Lizanec v PF Edinburgh* [2016] SAC (Crim) 33, an unsuccessful appeal to the Sheriff Appeal Court against a conviction under s 2, the appellant allowed her vehicle to cross onto the opposite carriageway, colliding with an oncoming vehicle. The sheriff found that she had failed to maintain proper concentration and this had been more than momentary. She had failed to negotiate a sweeping right hand bend. The sole cause of the accident was her failure to drive on the correct side of the carriageway as a result of allowing herself to be distracted by good weather conditions and beautiful scenery.

Disclosing sexual images

Turning now to some recent cases, "revenge porn" has recently hit the headlines in England. In *DF v PF Dundee* [2023] SAC (Crim) 1; 2023 SLT (SAC) 17 the Sheriff Appeal Court provided some guidance on s 2(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, making it clear that it was wider in scope than the relevant English legislation.

The appellant was charged with disclosing a quantity of photographs which showed or appeared to show the complainer in an intimate situation and which had not previously been disclosed by her or with her consent, in that he uploaded intimate images of her to a website, intending to cause her, or being reckless as to whether she would be caused, fear, alarm or distress. The charge was aggravated by involving abuse of his partner or ex-partner.

Section 2(1) provides that an offence is committed if a person (A) discloses such images (not previously disclosed by or with consent of the other person (B)), "and A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress".

The appellant and complainer had been in a relationship for around four years ending in October 2020, during which they took explicit and intimate photographs and videos of each other naked and participating in sexual acts. These were for private use. The appellant had a user profile on an adult content website designed to facilitate sexual encounters between users. Users could upload

explicit images and videos to their account profile. Users had some access to materials uploaded by other users and could gain increased access to images by being added as "friends".

Between March 2018 and June 2020, during the relationship, the appellant uploaded explicit images of himself and the complainer in intimate situations without her knowledge or consent.

The complainer's friend who had a user profile on the website received a "friend request" from the appellant's account. She accepted and was then able to view the images. She recognised the appellant and the complainer. She contacted the complainer with screenshots of the images. Four images were of the complainer's body. Her face appeared in one image, partly concealed by a black band covering her eyes. The complainer was distressed and upset. She contacted the appellant, who apologised and removed the images.

The focus of the appeal against conviction was whether the appellant had been reckless as to whether the complainer would be caused fear, alarm or distress by disclosure of the images. The appellant referred to s 33 of the Criminal Justice and Courts Act 2015, which extends to England & Wales and does not mention recklessness. It was submitted that the Scottish Parliament had intended to introduce a similar provision, to criminalise "revenge porn" involving a vengeful ex-partner distributing consensually taken photographs without the other partner's permission.

Refusing the appeal, the court found the reference to the English legislation to be neither helpful nor appropriate. At para 25 Sheriff Principal Anwar said: "An offence is committed in terms of s 2(1) of the 2016 Act if the individual who has disclosed or threatened to disclose intimate images has acted recklessly, that is, if he failed to give thought to or was indifferent as to the foreseeable effect upon the complainer of such a disclosure. Recklessness is to be inferred or deduced from the conduct of the individual at the time of the circumstances giving rise to the offence."

The court did not accept the submission that the appellant had acted "carelessly" as opposed to recklessly. Although genuinely remorseful and not motivated by a desire to embarrass or humiliate the complainer, "he was... motivated by a desire to further his own ends; to gain popularity on the website by uploading what he considered to be images which would make him more attractive and appealing to other users. In so doing, he failed to give thought to, or was indifferent as to the foreseeable effect upon the complainer of such a disclosure" (para 26).

Although he obscured the complainer's eyes in the only image which showed her face, he failed to give any thought to, or was indifferent to "jigsaw identification". The images were uploaded during the relationship. Any user who knew they had been in a relationship could have deduced that it was the complainer in the images, and the complainer's friend managed to identify her from the image where her eyes had been obscured. The appellant's evidence that he had not expected the complainer or her friends to view the images highlighted that "he readily understood that those who knew the complainer might have identified her", and the complainer was able to identify herself.

It was irrelevant that the images were only accessible by those invited by the appellant as friends: privacy was expected by the complainer, the appellant chose to disclose the images on the website, he had no control over what other users might have done with them, and he "ought to have been aware of the possibility that the images might also be shared more widely or that they might find a way back on other internet platforms or social media to the complainer or those she knew" (para 28).

This legislation can perhaps be seen as another example of protecting sexual autonomy, in that no consent had been given for the intimate images to be disclosed.

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Tax avoidance

HM Revenue & Customs is consulting on its proposals to "bring tougher consequences on promoters of tax avoidance".
See gov.uk/government/consultations/consultation-tougher-consequences-for-promoters-of-tax-avoidance
Respond by 22 June.

Women in law

The gender equality organisation Women in Law Scotland seeks views on refreshing its activities now that the disruptions of Covid restrictions are no more. The group's remit takes in all aspects of the legal profession and it offers a forum for networking and sharing ideas and best practice.
See lawscot.org.uk/news-and-events/legal-news/women-in-law-scotland-seeks-views-ahead-of-relaunch/
Respond by 30 June.

EU employment protection

The UK Department for Business & Trade seeks views on reforms to retained EU protections in relation to working time regulations, holiday pay, and the Transfer of Undertakings (Protection of Employment) Regulations.
See gov.uk/government/consultations/retained-eu-employment-law-reforms
Respond by 7 July.

Local living

The Scottish Government is consulting on its draft Local Living and 20 Minute Neighbourhood planning guidance. The idea is that in most urban areas people should have most of the amenities they need within walking distance of their homes. In the USA and elsewhere such initiatives have been identified as part of an evil government plot by some (pro-car?) lobbies. See consult.gov.scot/planning-architecture/draft-local-living-and-20-minute-neighbourhoods/
Respond by 20 July.

Bankruptcy Bill

The Scottish Parliament's Economy & Fair Work Committee wants to hear views on the Bankruptcy and Diligence Bill currently before the Parliament. The bill includes a "mental health moratorium" on enforcement action where the subject is experiencing serious mental health problems.
See yourviews.parliament.scot/efw/bankruptcy-bill/
Respond by 21 July.

... and finally

As noted last month, the UK Government is consulting on regulating artificial intelligence (see gov.uk/government/publications/ai-regulation-a-pro-innovation-approach and respond by 21 June), and the Scottish Government seeks views on giving councils additional powers to increase council tax charges on second homes (see consult.gov.scot/local-government-and-housing/council-tax-second-and-empty-homes/ and **respond by 11 July**).

Indecent communications

A further consideration of sexual autonomy was undertaken in the appeal to the High Court from the Sheriff Appeal Court in *PF Edinburgh v Aziz* [2022] HCJAC 46; 2023 JC 51, where the appeal was upheld, restoring the conviction of the respondent. The offence was "communicating indecently etc" under s 7 of the Sexual Offences (Scotland) Act 2009.

Section 7 makes it criminal to direct a "sexual verbal communication" at a person, without any reasonable belief that the person consents to the communication, for the purposes of: (a) obtaining sexual gratification; or (b) humiliating, distressing or alarming the person.

By s 49 of the Act these purposes are established if "in all the circumstances it may reasonably be inferred [that the person directing the communication] was doing the thing for the purpose in question".

The factual matrix was a private hire car driver offering his services in exchange for sex. The complainer TE was a 21 year old care worker and her friend TM an 18 year old beauty assistant. It was about 3am and the complainers had left a nightclub to return home. The complainers told the driver that they had no money. He asked them what else they could offer, and, when asked what he meant, said "sex?" The street was dark and empty. TE did not feel safe and TM felt frightened.

The sheriff held that this amounted to a communication for the purpose of "obtaining sexual gratification". The SAC held that it did not.

Giving its decision, the High Court discussed the criminalisation of "certain conduct which interferes with the sexual autonomy of others, notably, but not exclusively, females" (para 20).

At para 24 the court said that the test in terms of s 49 was objective: "The court is not directed towards determining what the accused's subjective purpose (intention) actually was, since that purpose is proved if an inference of one of the stated purposes is capable of being drawn from the accused's actings."

From the conversation with the complainers, it could be inferred that one purpose might have been to obtain sexual gratification. It did not matter "whether the expectation was for immediate, or deferred, gratification".

A defence of reasonable belief that the complainers consented "might have been open had the communication been made in a social setting and between persons known to each other". This was far from the position here.

Had the conviction under s 7 failed, the court would have held the respondent liable to be made the subject of the notification requirements of the Sexual Offences Act 2003 because the offence, had it been classified as a breach of the peace, involved "a significant sexual aspect" in terms of sched 3, para 60 to that Act. The respondent had not contested that his conduct amounted to a breach of the peace, but did contest that there was "a significant sexual aspect".

The court considered that his behaviour in the circumstances, where he was in a position of trust towards vulnerable complainers, indicated predatory conduct. J

Corporate

EMMA ARCARI,
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New laws to protect consumers, and a turbo-charged Competition & Markets Authority ("CMA") to enforce them are proposed by the Digital Markets, Competition and Consumers Bill, now making its way through Parliament. It proposes wide ranging changes to competition law, digital markets and in consumer protection – the last of which we will consider here.

CMA enforcement powers

Under the bill, the CMA will gain the power to directly impose financial penalties and enforce consumer laws as it does with competition law. The aim is to allow it to act faster and take on many more cases, providing a deterrent to businesses. The new model will allow the CMA (not the courts) to decide at first instance if consumer laws have been breached, and impose penalties. New penalties are proposed if entities frustrate investigations (e.g. by failing to comply with a CMA information request); fines will be at a level comparable to the ICO – for example a penalty of £300,000 or 10% of global turnover, whichever is higher, for engaging in commercial practices that breach consumer protection laws.

The CMA would first give a provisional infringement notice; a final notice would be appealable to the Outer House for Scottish matters and the High Court in England & Wales or Northern Ireland.

Subscriptions

The bill proposes many provisions to protect consumers from subscription traps, creating a definition of "subscription contract" (contracts such as electricity and gas are excluded). Its provisions apply to contracts with a free or reduced price trial period after which the consumer pays more.

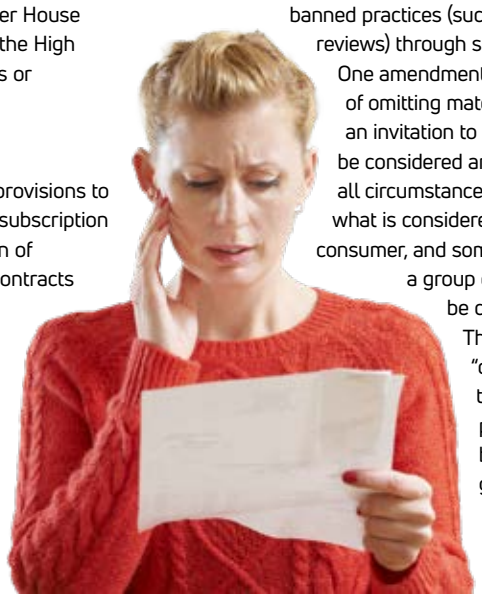
Some headline requirements include:

- **Key information.** This will have to be provided prior to contract, separately from the "full pre-contract information" (below), with no steps required to be taken by the consumer in order to read it.
- **Full pre-contract information.** Also to be provided separately prior to contract, this information is similar to that required under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("CCR").
- **Auto-renewal reminders.** An easy to use process is to be put in place to remind consumers of their rights to exit. The bill proposes set deadlines for reminders, such as for the first renewal payment due and subsequently every six months.
- **Cooling-off rights.** In addition to the existing cooling-off period, a "renewal cooling-off" period is proposed, for 14 days from the date of a "relevant renewal". This includes the route to obtain a refund (and does not include some of the CCR protections such as a requirement to return the goods before the refund is due).
- **Simple (and single) process to cancel.** Consumers are to have an easy and accessible means to end the contract, via one single communication. Consumers must not be required to take unnecessary steps to end the contract, for example if they signed up at the click of a button, they should not have to do something more onerous like going through a call centre or filling in a form. Guidance notes that an online account interface or clicking a cancel button can count as a communication. The bill does not provide that this cancellation right must be free – only that overpayments are to be refunded.

Fake reviews and the CPUTs

The bill doesn't (yet) contain a prohibition of fake reviews, but the Government is consulting on this. It repeals, but then largely recreates with amendments, the Consumer Protection from Unfair Trading Regulations 2008, and allows the Government to increase the blacklist of banned practices (such as by adding fake reviews) through secondary legislation.

One amendment includes a new offence of omitting material information from an invitation to purchase – this will be considered an unfair practice in all circumstances. The bill outlines what is considered to be an average consumer, and some of the ways in which a group of consumers could be considered vulnerable. This could result from "circumstances": under the guidance, this could potentially comprise being in mourning or going through a divorce.



Briefings

Saving schemes: insolvency protection

The bill creates requirements for schemes such as Christmas savings clubs. Traders will be legally obliged to protect payments under a scheme through trust or insurance, so the consumer can receive a full refund in the case of the trader's insolvency.

Alternative dispute resolution

The bill proposes requirements on those seeking to act as ADR providers, including submission to an accreditation scheme and a prohibition on charging fees where the provider is not permitted to do so. Businesses will already be familiar with the requirement to notify consumers of any relevant ADR; this is restated in the bill.

Comment

The Bill is at an early stage, but is not expected to face too much difficulty as it progresses. It seems likely to come into force next year. Businesses should review their marketing, terms and conditions, and customer journey, to ensure they can meet the bill's requirements and avoid the ire of the amped-up CMA.

Agriculture

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One of the functions of the Tenant Farming Commissioner ("TFC") is the right, by s 38 of the Land Reform (Scotland) Act 2016, to refer to the Land Court for its determination any question of law which may competently be determined by that court. An attempt to exercise this function resulted in the recent decision, *Reference by the Tenant Farming Commissioner* SLC/44/22 (12 January 2023). In 2022 agents acting for the TFC enquired whether the court would be willing to consider a reference on the question whether the statutory power to resume land out of the "limited" forms of agricultural tenancy under s 17 of the Agricultural Holdings (Scotland) Act 2003 excludes the operation of conventional contractual resumption provision.

The agents explained that the TFC was aware "of there being some doubt" about this provision – one view being that a resumption in conformity with s 17 is the only means by which resumption from such a tenancy could take place, and the other being that a party might include a different and effectual resumption clause in the lease. The writer has heard the latter case being put, but is unaware of the extent to which private agreement is relied on. It was suggested that the TFC could instruct a suitably experienced advocate to provide an *amicus curiae* opinion canvassing the relevant law to assist the court's consideration of the matter.

At a procedural hearing counsel for the TFC set out the preferred formulation of the questions for determination. It was explained that the TFC had become aware from more than one source that "parties were in doubt as to how to proceed" in relation to the questions of law sought to be referred. The TFC was not always at liberty to disclose names or circumstances of parties concerned, and did not wish to share this information because an apprehension of publicity might undermine parties' readiness to invoke his offices. The practical need for an answer might arise before a lease was even granted, at the stage of negotiation.

Beyond remit

The court took the view that it was explicitly being asked to operate as an advisory bureau guiding prospective lessors and lessees to a policy which they should adopt in relation to the inclusion of contractual resumption clauses, and concluded that such a role was not within its remit. It went on to say that a merely prospective landlord and tenant of any of the limited duration tenancies could not even jointly make an application asking it to determine whether s 17 excluded the operation of a non-statutory contractual clause. The court, in such circumstances, would be being asked to provide advice or guidance for the future rather than determine live and practical issues (its proper role). There was a lack of underlying jurisdiction and the court had to decline to accept the questions. In the court's view, the mere fact that agricultural law specialists and others within the industry might be debating an as yet unsettled question of law at conferences or other forums did not render that question live and practical in the required sense, rather than merely hypothetical, premature or academic. If it did, every conference and every new agricultural law article in legal journals would throw up a new crop of questions of law that the TFC in theory might ask the court to determine.

Sometimes significant issues remain unlitigated – the risk of losing is perceived to outweigh the potential benefits of success. A landlord with a lease containing a non-statutory contractual resumption may simply decide to wait out the tenancy, or possibly reach agreement with the tenant which might be less beneficial than the contractual resumption but more palatable from the landlord's point of view than the statutory resumption, and probably more palatable from everyone's point of view than seeking to litigate. However the court disagreed with the suggestion that one of the obvious purposes of s 38 is to prevent private litigants from having to litigate the question privately.

It commented that while it might be suggested that the uncertainty as to the validity of non-statutory contractual resumption clauses operated as a disincentive to tenants to take a limited duration tenancy, such disincentive may be more theoretical than real. Anecdotally the court has heard that some landlords are insisting that any new limited duration tenancies include such a clause, so the choice for the tenant is either to accept the lease in these terms or be passed over for the tenancy. It would not be to the tenant's benefit if the court were to uphold the efficacy of such clauses; on the other hand, if the decision were to go the other way it might create a further disincentive for landlords to grant such tenancies at all.

There was no formal application by the TFC under s 38: the court simply declined to accept such a referral as it considered the application would be incompetent.

Intellectual property

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For those advising on intellectual property law, there are several legal concerns arising out of AI generative models, such as copyright infringement and misuse of personal data. However, it is the opportunity for obtaining

copyright out of AI generative models, and who that copyright belongs to under UK law, that is the focus of this article.

Current copyright law

Section 9(3) of the Copyright, Designs and Patents Act 1988 ("CDPA 1988") creates a special category of "computer generated" works that is afforded copyright protection. This provides copyright protection to work defined as "generated by a computer in circumstances such that there is no human author of the work" (s 178), and in these special circumstances the author "shall be the person by whom the arrangements necessary for the creation of the work are undertaken".

Who is that person?

The answer as to who makes the "necessary arrangements" and therefore obtains the copyright protection remains uncertain; however it is widely considered to be either the programmer or the user of the AI generative model, given their imperative involvement in the creation of such works.

Existing case law seems to favour the programmer, as Judge Wills in *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99 held that it was inconceivable that an individual who did all the work to create an artistic creation could be excluded from authorship. Additionally, in *Nova Productions v Mazooma Games* [2007] EWCA Civ 219 the input by the user was not considered artistic enough to qualify for its own copyright protection and accordingly it was the programmer that received authorship of the work.

The positions adopted by the courts in these cases show the extent to which the courts are willing to consider the level of contribution from each party to the creation of the work when determining authorship. When these principles are applied to AI generative models, it can be easy to see how the courts may determine that the programmer is the ultimate author of the work produced, given their level of investment and knowledge in the AI software in comparison to the user's simple input of text.

Does the law need modernising?

An alternative answer in identifying the person who makes the "necessary arrangements" is that the law is outdated and that providing a conclusive answer may be unachievable without a modernisation of copyright laws relating to AI. When the CDPA passed into law in 1988, the landscape of what AI would look like and how it would operate was almost non-existent. Therefore, drafting statutory provisions to govern the complex copyright issues of work produced by AI without understanding how AI would work in practice was inevitably going to require modernisation at some stage.

It is potentially the horizon of AI generative models which highlights the shortfalls of the current provisions. An example of these inadequacies can be seen in s 9(3) of the CDPA, with its reference to "the person by whom the arrangements necessary for the creation of the work are undertaken". Such wording anticipates there will be an obvious natural or legal person responsible for the creation of works. However, the rise of AI generative models in which input from both the programmer and user are "necessary arrangements" for the output to be generated, challenges the applicability of current UK copyright laws in relation to AI.

An additional tension exists between the current copyright provisions and the fundamental principle in copyright law of "originality". Copyright subsists in "original artistic works", with case law defining originality as the author's "own intellectual creation" (*Infopaq International A/S v Danske Dagblades Forening* (C-5/08) EU:C:2009:465). Even where the programmer or the user of the AI generative model is identified as the author of the work, it is difficult to categorise the work as either party's "own intellectual creation", given that AI is ultimately responsible for analysing the datasets and producing the piece of work. Accordingly, even where the person who makes the "necessary arrangements" for the creation of the work is identified under the current provisions, such identification of an individual would create tensions with existing provisions under copyright law.

In summary, certainty as to the authorship of the output from AI generative models is far from clear, and even where existing case law may provide further clarity to this question of authorship, that may create conflicts with pre-existing legal principles in copyright law. Therefore, it does seem that a revision of copyright laws to address the current challenges that have arisen because of the surge of AI generative models may be required.

Succession

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The Adults with Incapacity (Scotland) Act 2000 provides "general principles" governing how interventions under the Act, such as a decision by a continuing (and welfare) attorney on behalf of an adult, ought to be made. They require, among other things, that any intervention should be for the adult's benefit, should be the least restrictive option available, and that certain people are consulted as part of the process.These principles were discussed by Lord Sandison in *Johnstone v Johnstone* [2023] CSOH 30. The case raises a considerable number of questions, only some of which are discussed below.

In 2010, Elizabeth Kaye granted a continuing and welfare power of attorney in favour of her husband and Gordon Johnstone, either of whom failing Susan Foster. Her will appointed Johnstone and Foster as her executors and left the residue of her estate to her husband, whom failing her nieces and nephews.

Her husband's will appointed the same executors and left the residue of his estate to Mrs Kaye, whom failing The Scar Free Foundation, a charity. He died in 2017, by which time Mrs Kaye had been diagnosed with dementia. She died in 2019.

Shortly before her death, having taken counsel's opinion, her attorneys executed a deed of variation of Mr Kaye's will, redirecting the bulk of his estate to the charity, Blind Veterans UK. They averred that they did so because Mrs Kaye did not wish the residue of Mr Kaye's estate (some £2.45 million) to be subject to inheritance tax. For her nieces and nephews, the residue in which they were entitled to share was thereby reduced considerably in value.

Width of powers

The power of attorney was in relatively standard form. A wide, general power entitled the attorneys to do "everything regarding my estate which I could do for myself and that without limitation by reason of anything contained in this Power of Attorney or otherwise", followed by, "without prejudice to these general powers", specific powers including to "sign a deed of variation of any testamentary provision... in my favour", for the benefit of persons including "any... charity... to whom I have been in the habit of making gifts". Mrs Kaye had made donations totalling around £500 to Blind Veterans UK during the last 20 years of her life.

The pursuers, in reality the nieces and nephews, argued that the attorneys had to rely on the specific power, and in determining what was a "habit", what mattered was the circumstances at the time the power of attorney was granted.

Lord Sandison decided that the general power allowed for deeds of variation in circumstances beyond those contemplated by the specific power. However he expressed the view, *obiter*, that Mrs Kaye's past behaviour did constitute a habit for these purposes.

That point is not without difficulty. Mandates seem to be construed strictly and general mandates allow only ordinary acts of administration. If so, the general power, when coupled with the presumption against donation, would not appear to allow the attorneys to go so far as to implement a deed of variation.

"Benefit"; "least restrictive"

The attorneys argued that "benefit" for the purposes of the 2000 Act need not be pecuniary, and that taking steps to give effect to her averred wish benefitted Mrs Kaye. The report does not tell us what was adduced to support their position as to Mrs Kaye's wish.

To achieve their aim, the attorneys had two options: a deed of variation or to alter Mrs Kaye's will. The pursuers contended that the latter was the least restrictive option. It is not entirely clear why that might be, except perhaps that Mrs Kaye might have enjoyed Mr Kaye's estate albeit she was independently wealthy. The Lord Ordinary, however, considered "there was no material difference in relation to her freedom between on the one hand transferring that residue by way of the deed of variation and, on the other, making a codicil to her will".

There would, though, have been a procedural difference. A codicil would have required an intervention order, involving expense, which Mrs Kaye could afford, and delay, which it appears she was less able to bear. Seeking an intervention order in the first instance would have been a dangerous strategy. Further, the sheriff might well have ordered intimation to the nieces and nephews (it would not have mattered that some of them were not the "nearest relative"), allowing them perhaps to oppose the application.

It has never been clear whether someone intervening under the 2000 Act can make or alter testamentary provisions; however there is shrieval authority that it is possible in quite limited circumstances (see, for example *T, Applicant* 2005 SLT (Sh Ct) 97; *G, Applicant* 2009 SLT (Sh Ct) 122; and *Ward, Appellant* 2014 SLT (Sh Ct) 15). Lord Sandison went a step further, perhaps too far, in saying he did not see any reason, from the authorities cited, why an attorney might not, depending on their powers, sign a testamentary writing on behalf of an adult. That does not appear to be the law; however, the subject is a complex one.

Whose views?

In making decisions, attorneys are to take into account the views of the adult and *inter alios* the nearest relative (note the singular), but in the latter case only where it is reasonable and practicable. Section 254 of the Mental Health (Care and Treatment) (Scotland) Act 2003 provides a list of potential nearest relatives in order of priority. The judgment does not note whether any of the three pursuing nieces and nephews was the nearest relative.

Since the attorneys' obligation is only to take account of those views, acting contrary to them does not, of itself, render the attorneys liable to the nearest relative, nor render void any intervention made without consulting them. The attorneys had not sought the views of the nieces and nephews. They argued that the interests of the relatives in inheriting the combined estates were in conflict with those of Mrs Kaye such that it would have been unreasonable to consult them. Blind Veterans UK further suggested that having any regard to the relatives' views might be a breach of the attorneys' fiduciary duties.

The Lord Ordinary held that the views of relatives (note the plural) ought to have been taken into account; a factor such as clear estrangement or alienation, or incapacity or relevant vulnerability on the part of the relative, would be required to make obtaining those views unreasonable. While these are factors, they appear to relate only to the character of the nearest relative or their relationship with the adult. Reasonableness and practicability surely must also include things such as an attorney having to decide or act within a limited timescale or on a simple or day-to-day matter. Lord Sandison was not prepared to accept that any factor in this case (the tight timescale, or their "presumed antipathy") rendered seeking the views of the relatives (again, note the plural) unreasonable, and accordingly found that the attorneys had failed to fulfil their fiduciary duties in not having consulted them.

Having rejected all but the last of the pursuers' arguments, Lord Sandison, after stating that the attorneys' error amounted to "a clear but practically inconsequential failure to comply with one of the general principles of the 2000 Act", granted declarator that the deed of variation was entered into in breach of the attorneys' duty to take account of the views of the nearest relatives, but refused the further declarator that they had acted beyond their powers and the conclusion for reduction of the deed.

Sport

BRUCE CALDOW, PARTNER, HARPER MACLEOD LLP

Golf, one of many great sports given to the world by us Scots, has long had professional events operated on the basis of various "tours", allowing golfers of skill and ambition to renounce their amateur status, declare that they seek to make a living from the sport, try to obtain (and qualify for) a "tour card", and ultimately compete for prize money as independent contractors.

Leaving aside opportunity and the outlays required to achieve a life of chasing a wee white ball around various terrains in all weathers, golf has long held itself out as an example of

true sporting meritocracy: if a player was good enough and performed sufficiently well, they could earn their "card"; earn sufficient prize money; earn a spot at the grander tournaments (including the four majors); and gain the chance to achieve more sporting success – and personal reward.

To protect the opportunity for this individual pursuit of success, rules of participation, as in any sport, have become ever more important for the collective interest, securing the collective will of regulated behaviours, fairness and a platform for commercial exploitation, to generate sporting interest and commercial return for participants. The two main recognised "tours" (the PGA European Tour, branded as the DP World Tour, and the US PGA Tour) are sophisticated businesses that are in essence collective organisations existing for the benefit of their members – golfers on tour, past and present. New players qualify each year; those who earn too little lose their playing rights and leave, to play in lesser tours or not at all. As such, the European Tour is not a regulatory body for golf.

Disruptor

LIV Golf, created by virtue of the Saudi Arabian Public Investment Fund, differs. As an invitation-only organisation, golfers signed up to play a set number of events, being paid significant sums to join (reportedly up to $200 million for one golfer), with substantial prize money also on offer for all, from first to last. This alternative tour caused significant disruption when golfers joined, as some resigned their current membership of existing tours, while some maintained their membership. In the case of Ian Poulter and 15 other members of the European Tour, who did not obtain requisite permission from the Tour to participate in the first LIV Golf

BEDMINSTER, NJ-31 JULY 2022:(L-R) former President Trump, Yasir Al Rumayyan, Greg Norman, Majed Al Sorour wait on stage to greet the winning LIV players at the Trump National Golf Club in Bedminster, NJ. © L.E.MORMILE / Shutterstock

events, significant fines were imposed, leading to interim relief being sought by the players, and granted in July 2022, on appeal to Sports Resolutions, the procedural route provided in the Members' General Regulations Handbook (governed by English law).

The substantive appeal (SR/165/2022) was heard in February 2023, with the decision recently published, in favour of the European Tour, following a *de novo* hearing of the substantive matter between the parties. Such a *de novo* hearing was provided for in the regulations, allowing the Tour to, in effect, cure the asserted procedural deficiencies in the first instance decision-making. The golfers were found to have committed "serious breaches" of the Code of Behaviour and Regulations as, by playing despite their release requests having been refused, their actions were directly contrary to the express behavioural rules agreed among the members. Within the regulations, a framework for consideration of release existed; it allowed, amongst other things, the wider interests of the European Tour to be considered when weighing up a release request.

Collective good

While the case was a landmark in golf and has helped further draw divisions between those on perceived rival tours, the appeal determination is notable, as central to the golfers' defence was that they were entitled in law to participate in the rival tour, as the regulations and resultant disciplinary procedures were unlawful, unenforceable and/or void. Arguments focused on restraint of trade, UK competition law and separately breach of contract (through excessive exercise of discretionary power).

In a lengthy 87 page judgment these arguments were dismissed, primarily on finding that the regulatory framework created for the collective good of the European Tour members was not unreasonable, was justified and did not in fact stop the golfers from practising their trade. It protected the interests of the members. Interesting analysis noting LIV's competitive nature (to try to compete with the European and US PGA Tours) was reflected in rejection of the arguments further to s 2 of the Competition Act 2008: the regulations were not anti-competitive by object or effect. Arguments as to unreasonableness in sanction were quickly rejected by the appeal panel.

A widely reported indemnity is said to be in place protecting the golfers from any personal financial consequences. All but one of the players are reported to have paid their fines, with the European Tour said to be taking enforcement action, the award of Sports Resolutions being enforceable as an arbitral award.

A separate anti-trust case is due to be heard in the USA in 2024, revolving around LIV golfers and the USPGA tour.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Joseph Hann (s 42ZA appeal)

An appeal was made under s 42ZA(12) of the Solicitors (Scotland) Act 1980 by Reham El Menshawy against the direction made by the Council of the Law Society of Scotland dated 11 February 2021 in respect of the amount of compensation, £1,000, it had directed to be paid by Joseph Hann, solicitor, Annan (the second respondent) following a finding of unsatisfactory professional conduct by failing to supervise adequately the work carried out by a trainee at the firm. The appeal was defended only by the first respondents.

Having heard submissions from the appellant and the fiscal for the first respondents, the Tribunal refused the appeal and confirmed the direction of the first respondents. The Tribunal could only consider the loss, inconvenience and distress resulting from the conduct in respect of which the complaint was upheld, which was a failure to respond to the Sheriff Appeal Court for further information in relation to an application for permission to appeal to the Court of Session. The Tribunal could not hold that by the conduct of the second respondent, the appellant had been deprived of a real or substantial chance of obtaining leave to appeal to the Court of Session when counsel's advice was that no important point of principle arose. The amount of compensation awarded for inconvenience and distress was reasonable in the circumstances.

Sarah Duncan Lane or Stuart

A complaint was made by the Council of the Law Society of Scotland against Sarah Stuart, Ledingham Chalmers LLP, Aberdeen. The Tribunal found the respondent not guilty of professional misconduct and remitted the complaint to the Council in terms of s 53ZA of the Solicitors (Scotland) Act 1980.

The complainers alleged that the respondent was guilty of professional misconduct by accepting improper instruction to issue correspondence.

That correspondence contained the paragraph: "Accordingly, our clients would be grateful if you could simply confirm whether or not you are willing to agree to the Charity Proposal within 28 days of the date of this letter. The decision has to be unanimous. If it is not, our clients have indicated that their intention is to contact the relevant authorities in relation to the concerns as to certain financial irregularities raised in our letter of 2 July 2019. This will deal with the fraud issue one way or the other."

Solicitors must be trustworthy and act honestly at all times so that their personal integrity is beyond question (rule B1.2). They must not accept improper instructions (rule B1.5). They must communicate effectively with their clients and others (rule B1.9).

The Tribunal considered the matter of professional misconduct carefully. Although the email had been drafted by another, the respondent had sent it out in her name. She was therefore responsible for it.

The Tribunal was satisfied that the respondent's letter should not have included this paragraph. This was not the behaviour of a competent and reputable solicitor. The respondent is an experienced solicitor. Her decision to send the email was ill judged. She should have taken greater care. However, considering the context in which this email was sent, the Tribunal did not consider that the failing was a serious and reprehensible departure from the standards of competent and reputable solicitors.

While not condoning the respondent's behaviour, the overall culpability was not high enough for her to be guilty of professional misconduct.

The Tribunal considered that the respondent might be guilty of unsatisfactory professional conduct, which is professional conduct not of the standard which could reasonably be expected of a competent and reputable solicitor, which does not comprise merely inadequate professional service but which does not amount to professional misconduct.

Accordingly, the Tribunal found the respondent not guilty of professional misconduct and remitted the case to the Society under s 53ZA.

Meta's mega matter

The €1.2 billion fine handed out to Meta's Facebook division by the Irish data regulator has made headlines, but it is the other actions it has required that are more problematic and of wider concern

Data Protection

HELENA BROWN, PARTNER AND HEAD OF UK AND INTERNATIONAL DATA PRACTICE, AND KATIE MacCOLL, TRAINEE SOLICITOR, ADDLESHAW GODDARD

Almost five years to the day from the GDPR coming into force, the biggest ever data penalty – by some measure – of €1.2 billion was issued to Facebook on 22 May 2023. Arguably of greater impact is the formal suspension order requiring Facebook not just to halt exportation of European Union user data to the United States, but to bring any data already transferred to the US into compliance.

Even without a crystal ball, it might have been easy enough to predict back in 2018 that the biggest penalties would go to big tech, given their data use (we've seen that play out with other significant penalties to the likes of Amazon, Google and TikTok). What would have been less easy to predict, as we all completed risk radars in 2018, is that the penalty was not for intrusive profiling, or a security breach, but for sending personal data to the US. It might also have been hard to predict that the penalty would be the result of the hotly debated binding dispute resolution procedure in GDPR, which gives ultimate decision making power to the European Data Protection Board (EDPB), laying bare the political wrangling behind the decision.

While the impact is primarily felt by Facebook for now, this decision sends a clear message to all global organisations that the EDPB is a force to be reckoned with when it comes to international data transfers. It undoubtedly bolsters uncertainty surrounding liability for personal data transfers across the Atlantic – all eyes will now be on whether the new EU-US Data Privacy framework can be negotiated on time to enable a viable alternative.

Blockbuster, but no popcorn

How did we get here? A series of blockbuster data events....

The Facebook/Meta decision is the culmination of 10 years of challenge and, according to the Schrems website NYOB, €10 million of costs – so let's take a look at how we got here (warning: not a popcorn moment!).

The prequel – Panama Papers: Long before GDPR was even a glint in the eye of the European Commission, levels of US surveillance were a concern of privacy groups globally, heightened by the Panama Papers revelations.

Schrems I: First, we had *Schrems I* (predating GDPR in 2015), in which the CJEU invalidated the EU-US Safe Harbour regime following a complaint from Max Schrems about Facebook relying on Safe Harbour, which disrupted a longstanding status quo on EU-US data transfers. *Schrems I* resulted in greater reliance on Standard Contractual Clauses ("SCCs") and the introduction of a more comprehensive EU-US Privacy Shield regime in 2016.

Schrems II: In true Hollywood style, the sequel in 2020 – *Schrems II* – was a GDPR-fuelled blockbuster of a decision, following essentially the same challenge from Max Schrems against Facebook, with the CJEU invalidating the still fresh Privacy Shield. *Schrems II* introduced a new requirement to conduct "transfer impact assessments", but stopped short of saying nobody could use the SCCs any more. At roughly the same time, the Commission finalised a modernised set of SCCs aimed at addressing some of the concerns raised in *Schrems II*. Anyone practising in this area will tell you that *Schrems II* left in its wake a lot of re-papering which is still ongoing for many organisations – especially in the UK where changes were further complicated and delayed by Brexit.

What does this mean for *Meta* 2022?

The *Meta* decision is made against the backdrop of *Schrems I* and *II*, but – crucially – it is not a CJEU decision invalidating an entire regime. The decision, albeit having a significant impact, is at its simplest level enforcement by the Irish national data regulator (the DPC) against Facebook (one company within the Meta group). Schrems III will only happen if the new EU-US privacy framework does not offer "essential equivalence" for EU data going to the States – that framework has been announced but is not yet published. The already heated debate around the new framework will undoubtedly now be hotter on the heels of the *Meta* decision, however.

Before we look at the new EU-US framework, let's take a closer look at the Facebook enforcement itself.

The enforcement

1. Money: an administrative fine of €1.2 billion (payable to the DPC);
2. Suspension: suspension of any future transfer of personal data to the US by Facebook within five months of the decision; and
3. Remediation: within six months, specific measures to achieve compliant data use under Chapter V of the GDPR by ceasing unlawful processing (including storage) in the US of Facebook European users' personal data.

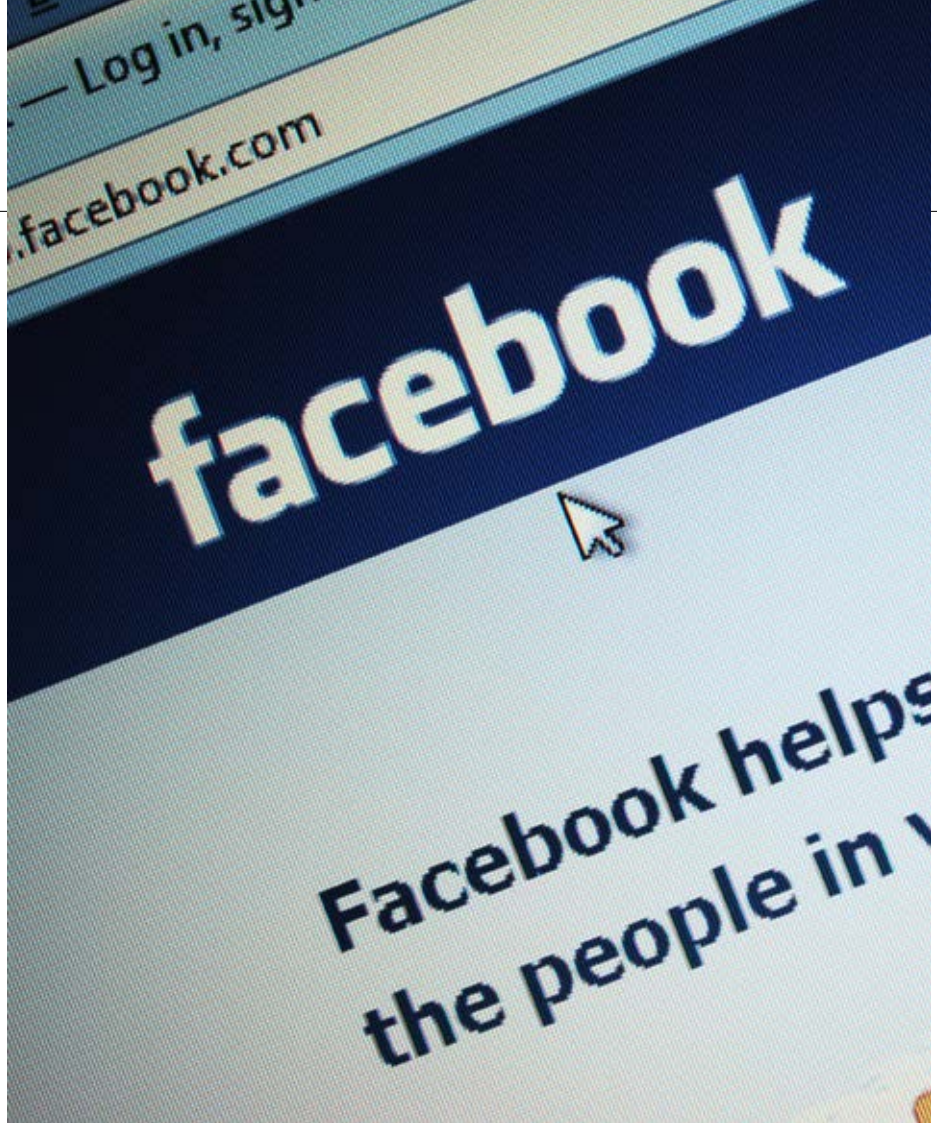
While Facebook has responded to the decision by labelling the penalties as "unjustified and unnecessary", and has indicated it will seek to appeal, the EDPB's chair Andrea Jelinek has stated that Meta's infringement is "very serious since it concerns transfers that are systematic, repetitive and continuous".

The impact

Ironically, while it is the fine which has grabbed the most headlines, it is the penalty that Facebook might be best placed to deal with. It remains to be seen how it would comply with the suspension and rectification orders. Simply stopping transfers of *some* user data may require systems to restructure. Perhaps even more impactfully, identifying and disentangling European user data from other US data (for example through encryption, anonymisation, re-localisation) could be technically impossible – like recovering a drop of ink from a swimming pool. At this stage, the associated technical and operational challenges seem insurmountable. Although the enforcement applies only to Facebook, we suspect Facebook would not be alone in having that issue, given the large, incongruous and often international nature of datasets in the age of big data.

The EDPB's role

From a legal perspective, one of the most interesting aspects of the decision is what we can see about the debate behind it. The decision



itself has taken almost a year to land, following the initial draft circulated by the Irish DPC as the lead supervisory authority to other European data regulators. Of those 27 regulators, objections were raised by only a handful (including a significantly influential group of France, Spain, Germany). The decision to impose a financial penalty was, in particular, something which the DPC had not originally proposed, having felt it would not have a deterrent effect – but this was essentially overruled.

This decision is recommended reading for anyone seeking insight into the many competing factors that DPAs will consider when imposing penalties, and what side of the fence they may fall down on. While our own ICO in the UK was not party to this decision process (and has been able to keep its powder dry), it is worth noting that the UK GDPR (at time of writing) still very closely mirrors GDPR.

The new EU-US framework: a solution?

The *Meta* decision – significantly – highlights the point that was already established in *Schrems II*, that SCCs alone are not enough to ensure that transfers to "non-adequate" territories are compliant with GDPR. In this case, all the post-*Schrems II* compliance mechanisms, including SCCs, transfer risk assessment and supplementary security measures, were in place and, Facebook argued, demonstrated. Some commentators are questioning whether the only measure left is to change US domestic law, something that is beyond the power of individual organisations, even Facebook. That is why all eyes now turn to the new EU-US privacy framework. In the three years that have passed since *Schrems II*, the UK and US have been continually negotiating an alternative data transfer mechanism, the Trans-Atlantic Data Privacy Framework.

If approved, the mechanism will provide businesses relying on international data transfers with a route to compliance with EU and UK law, putting an end to years of uncertainty created by the *Schrems II* judgment.

Doubts have been expressed about whether the proposed framework offers equivalent protection to data subjects as under EU law, notably by the European Parliament which recently urged the Commission not to adopt the current version. The Parliament expressed concerns that, as it stands, the framework still allows for bulk collection of personal data, does not make bulk data collection subject to independent prior authorisation, nor does it provide for clear rules on data retention. As we might expect, Schrems III waits in the wings: Max Schrems too has indicated that he will challenge the framework in court if it is accepted in its current form.

"The message now is organisations should continue to follow the EDPB and equivalent UK guidance on security measures"

While data subjects, organisations and regulators continue to await the new framework with bated breath, the DPC's decision is already catalysing an even bigger push at a political level to get the framework up and running. Despite the harsh criticism emanating from the EU Parliament, it is expected that a decision will be made on the adequacy of this mechanism in summer 2023. However, even if the EU Commission approves the new EU-US data transfer framework, the CJEU's blessing is far from guaranteed (and with its invalidations having retroactive effect, there are no sighs of relief quite yet).

What do we do right now?

As noted, this decision specifically applies only to data processing by Facebook. Nevertheless, the DPC has stated that, due to the way US surveillance laws operate, "the analysis in this decision exposes a situation whereby any internet platform falling within the definition of an electronic communications service provider... may equally fall foul of the [transfer rules]".

So while the focus of this decision is big tech transferring extensive and potentially sensitive datasets, the repercussions will undoubtedly be felt by the many organisations seeking clarity around how to conduct business as usual activity involving global transfers in a way that is compliant.

There is inevitable concern that the many organisations transferring data to the US (and other jurisdictions that don't offer "essential equivalence") can't just stop it overnight – even UK-only organisations often need to use suppliers overseas to meet commercial pressures. What then can we do? The message for now has to be, keep calm and carry on. With limited tools in their arsenal, organisations should continue to follow the EDPB and equivalent UK guidance on security measures, and undertake thorough risk assessments and document practices in impact assessments and SCCs. This will be the best defence if a regulator comes knocking.

A final thought to leave you with: although privacy class actions are very unwell post-*Lloyd v Google,* they are not dead. In the wake of this recent decision, Max Schrems is calling for those who have suffered emotional damage as a result of Facebook's US transfers to sign up to privacy class actions under the EU Collective Redress Directive. This is certainly an area to keep an eye on, as the law continues to evolve at pace.

Scanning wider horizons

How working in a fast-paced travel tech environment allowed this month's interviewee to spread his professional wings and build his on-the-job skillset

In-house

MARTIN NOLAN, GENERAL COUNSEL, SKYSCANNER

In-house lawyers occupy a unique position in their workplace. On the one hand, they operate as skilled advisers, able in a way that external advisers can rarely become, familiar with the wider business context. On the other, they can also be more strategic contributors, bringing to the table transferable skills such as critical thinking, innovative approaches and project management.

The ease with which this complementary role can be developed varies with the culture of a company. In a young innovative startup there can often be more scope. In established businesses it can be more difficult to make that jump to C-suite/general counsel roles. This month we focus on an in-house role that has from the start been one which blends these two elements.

Skyscanner is a global travel metasearch platform, founded in Edinburgh in 2003, with offices across the UK, Europe, North America and APAC, and around 1,400 employees. Its website regularly records on average 100 million travellers every month searching for cheap flights, hotels and car hire, and has access to a bank of 80 billion prices every day from its network of over 1,200 partners.

Here Catherine Corr, of the In-house Lawyers' Committee, speaks with Martin Nolan, to gain some insight into what it is like working within such an environment as general counsel.

Tell us about your career path to date?

I trained with Shepherd and Wedderburn, in Edinburgh and London, then, when I qualified, I moved to Dundas & Wilson in Glasgow, beginning life as a corporate finance lawyer. After a few years, I returned east to Burness Paull for a few years, before moving in-house in 2016.

I joined Skyscanner in 2017 and have been fortunate to progress within the business. I became general counsel in 2021, so now look after legal, public affairs, risk and sustainability globally, helping drive the best outcomes for the 100 million people who use our product every month. This means that I also sit on Skyscanner's executive team and help manage the overall business direction.

What was your previous role and job title?

My last role was as general counsel of a tech startup. I was the only lawyer, but also covered HR and some sales/product development issues. And regularly emptied the dishwasher...

What was your main driver for working with Skyscanner?

The opportunity was just incredible – it's such a dynamic company, but culturally, for me, it instantly felt like home. It gave me scope to build a team and diversify areas of responsibility, such as building our public affairs team. It also let me travel the world.

Does the GC role go hand in hand with the risk and compliance function, or do you wear two different hats for your organisation?

I wear both hats, but even if they're separate functions, I think they go hand in hand. It's impossible to manage risk and compliance successfully if there isn't a symbiotic relationship between them. Those functions being well connected (or all under one roof) makes it much more efficient and reduces risk.

Would you encourage young lawyers to consider a career in-house?

I'd absolutely recommend that: it's a great chance to get much closer to the commercial element of businesses. In corporate finance I loved the transactional side of things, but realised I loved understanding the key issues affecting my clients and particularly being in a consumer-facing business.

Moving in-house allows you to deepen that understanding, which you can then use to better advise your client because you're intimately connected to purposes and goals, strategy and risk appetite. Also, moving in-house for a while does not preclude a return to private practice.

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

For those who are already in private practice, try to find an opportunity to go on secondment and see if you like it. For me, it's really important that I see people wanting to join us because they're genuinely interested in the business and sector we work in – it's not about escaping time recording and having more regular hours. It's also not the case that certain private practice specialisms preclude a move in-house – a candidate with the right enthusiasm and attitude will still be able to make the move, regardless of background.

Our lawyers all need to demonstrate that they're able to focus on commercial outcomes, and have a strong ability to prioritise and re-prioritise, and to make risk-based decisions. I also especially look out for lawyers who take ownership of issues, who are looking round corners for problems and proactively solving them.

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

I think in-house teams will (to the extent they haven't already) really work hard to look at the impact of AI and automation, the time that can free up, and the extra value that can be

added with that time. Demonstrating value to businesses is essential for all functions, legal included. But these developments will likely bring more rewarding and diverse in-house careers.

What are the current hot topics in your sector?

There is a huge influx of regulation of the tech (and travel tech) sector, particularly on the impact and behaviours of so-called gatekeeper platforms. The use of AI and machine learning is also on everyone's minds. As a global business, geopolitical tensions are also something we are always monitoring.

How have attitudes and working practices in the legal profession changed in the law since you started out?

I think there's much more flexibility and trust now, but equally more junior lawyers are better about being vocal on their career aspirations. There is also a greater focus on wellbeing and on building a diverse team, which was not really the case when I was starting out. I qualified in 2008 and wellbeing certainly wasn't on anyone's mind at that point. While there's still lots more to do, the legal profession is now recognised as a leader in the diversity, equality and inclusion space, which I wouldn't have imagined 20 years ago when I was applying for traineeships.

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

I think the answer to that depends very much on the individual, but in most cases, talking about what's on your mind, being open and honest with yourself, and confiding in people you trust will help. It's also really important to take time out for yourself and do something you enjoy.

Having some time away from your desk and your phone/messages every day is really helpful to give some headspace. For me, a really helpful thing is to build breaks into my diary, so that I don't find myself on nine hours of consecutive Zoom meetings.

Lawyers aren't generally seen as being particularly innovative. Would you agree? What have you done in any of your roles that's been innovative or resulted in process improvements for your team or organisation?

I wouldn't say inherently that lawyers aren't innovative, but often they're not great at showcasing the innovation they have the potential to bring. Sometimes it's because they don't allow themselves enough space to take a step back and reflect on where improvements can be made, or to research what innovative changes they may be able to make.

I'd always love to do more in this area, but what we have managed to do at Skyscanner is introduce fully self-service contract creation and management. This means that where any agreement – from NDAs to employment or partner contracts – is on our templates, or not substantively amended, our lawyers never have to review them. It also places the end users in control of timing, which they prefer. That's saved lots of time for everyone and delivered much stronger governance across our contract management.

What is your most unusual/amusing work experience?

There are quite a few, but most of them can't be put into print.

We once had to advise on how a potential employee we were planning on bringing to Scotland from Spain could bring their pet pig to the UK. The pig shall remain nameless, but sadly we were unable to circumvent the rules on livestock to keep the person happy, so they didn't join us.

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

The variety of things I work across and the degree to which I can take ownership is one of the best elements. I've really enjoyed building out the public affairs function and spending time in Brussels and Washington, lobbying for the interests of our travellers. At one point I got to address the European Parliament, with my speech being live-translated into all the languages of the EU – that was possibly a career high and not something I would ever have imagined doing when I was in private practice.

Virtually everything I work on has a really clear purpose (which is why I love being in a consumer-facing business). Moving to sit on the executive team was a real change for me, as I'm less involved in the elements of the functions I'm responsible for than I was previously, with more of a focus on broader management and culture, which is challenging but really interesting.

When the working day is done, I'm ready to turn my brain off as much as possible, so it's nearly always curling up on the sofa with my dog and husband (in that order) and binge watching something on TV.

Finally, a few fun quick fire ones:

Rise and shine or lie in? Lie in, 100%.

Dinner party – host or guest? Six top guests? Host. I know it's customary to say the Dalai Lama and other icons, and I'm sure that would be interesting, but top of my list are Alan Carr, Gemma Collins, Barack Obama, Ryan Reynolds, Donald J Trump and Meghan Markle.

Best advice you have ever been given? Be yourself. Better to be disliked for who you are than disliked for who you are trying to be.

AGM to consider PC fee rise

Solicitors will be asked to approve a 25% rise in the practising certificate fee at the Law Society of Scotland's annual general meeting, to be held by phone and videoconference on Thursday 29 June at 5.30pm.

The Society's Council has recommended a £146.25 rise on the current fee of £585, bringing it to £731.25, after more than a decade of zero or below inflation increases.

President Sheila Webster explained: "At the height of the economic impact of Covid, we slashed the certificate fee to ensure we supported our members financially when they needed it most. We have shown how much we understand the importance of keeping the cost of practice as low as possible. However, it is unsustainable for us to maintain this approach indefinitely and we must now look to rebuild our finances.

"Doing anything else would require us to reduce our work at a time when we are being encouraged by our members to do more." There was also "a greater need than ever to ensure the voice of the profession is heard effectively on key issues... including justice reform, legal aid and legal services regulation".

The AGM will also be asked to approve the annual report and financial statements for the year ending 31 October 2022, and an amendment to the constitution to protect the Society's mutual tax status, as well as the reappointment of BDO as auditors.

Further details are on the Society's General meetings page. Solicitors wishing to attend should email member.registration@lawscot.org.uk by 12 noon on Wednesday 27 June.

Sheila Webster

Susan Murray

Female duo take up office

Sheila Webster has taken up the presidency of the Law Society of Scotland, pledging to fight for the independence of the legal profession from Government.

Partner and head of Dispute Resolution at Davidson Chalmers Stewart, Webster has been a member of the Society's Council since 2017 and its board since 2020. She becomes the Society's 54th President and sixth female President. NHS Scotland solicitor Susan Murray, also a board member as well as current convener of the Society's Equality & Diversity Committee, has taken up office as Vice President.

The President said she was taking up the role "at what is a critical time for the legal profession", due to legislation before the Scottish Parliament "that seriously undermines the independence of the legal profession from the state. It would give ministers sweeping and unprecedented new powers to intervene and control the work of solicitors. This kind of political interference simply cannot be right in a free and fair society that adheres to the rule of law, and I'll be fighting hard as President to get these parts of the bill removed."

She wanted the bill to bring in "the reforms and improvements to regulation which we've been championing for years", ensuring high standards across the solicitor profession and robust consumer protections.

Aspects of the Victims, Witnesses and Justice Reform Bill were also "seriously flawed, and the desire to see change must not be at the expense of a fair, just and open criminal justice system".

Other important issues for her year of office included equality and diversity, including why fewer women reach senior levels in the profession, and recruitment and succession particularly in the legal aid sector. "I also want to engage with our new members early on in their careers, and hopefully inspire some of our future leaders to get involved with the Society's work."

2023 Innovation Cup opens to entries

Have you got the next best risk management idea? The Innovation Cup is back for another year to search for the latest bright idea in risk management within the Scottish legal profession.

Run by the Society in association with insurers RSA and brokers Lockton, the competition invites Scottish solicitors, paralegals, trainees, cashroom staff, and student associates to submit their ideas for risk management products, tools, or strategies. The winning idea will be developed by Lockton and rewarded with £1,500 by Master Policy lead insurers RSA.

Entrants are asked to submit ideas to improve systems, processes or controls within private practice firms. These can range from a simple tweak to an existing process all the way to something completely new.

For how to enter, see www.lawscot.org.uk/news-and-events/law-society-news/innovation-cup-2023/. All ideas must be submitted by 12 noon on 18 July 2023.

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. Key areas from the last few weeks are highlighted below

Independent healthcare

The Health & Medical Law Subcommittee responded to the Scottish Government's consultation on amendments to the regulation of independent healthcare. This follows a previous consultation on the regulation of non-surgical cosmetic procedures, and looks at whether further reform is needed as the independent healthcare landscape in Scotland continues to change.

The response supported further regulation of independent healthcare services to address gaps with regard to services provided by pharmacists and pharmacy technicians outwith the terms of an NHS contract, and independent medical agencies including online-only services. It highlighted potential risks for patients and consumers, particularly children, and welcomed moves to minimise this risk. It agreed that regulation by Healthcare Improvement Scotland would be an appropriate way to address the regulatory gap, and called for its sufficient funding and resourcing to extend its statutory role.

It is also important to take a harmonised approach to regulation where appropriate with the other nations in the UK, to limit any regulatory divergence, "medical tourism" or pharmacy shopping across the four nations, and any consequential risks for patient and consumer safety.

Read more on the Society's Health and medical law page.

Charities Bill

The Society issued a briefing ahead of stage 1 consideration of the Charities (Regulation and Administration) (Scotland) Bill in the Scottish Parliament. It welcomed the bill and noted that the changes proposed were generally sensible and proportionate. However, it also expressed disappointment that the bill does not deliver more comprehensive reform, calling for further clarification on the scope and timescale for a promised wider review of charity law. Ahead of stage 2 consideration, the Society issued a suggested amendment seeking clarification on the timescale for the wider review.

The briefing also highlighted support for a public awareness-raising and engagement campaign prior to commencement, to ensure that charities and charity trustees are fully aware of their obligations and can manage their affairs accordingly.

A number of comments were made on the detail of the bill, including proposals relating to disqualification from being a charity trustee or senior manager, appointment of interim trustees, mergers, and connection to Scotland.

Read more on the Society's page on the bill.

LBTT: green freeports

The Society responded to the Scottish Government consultation on proposed legislative amendments to the Land and Buildings Transaction Tax (Scotland) Act 2013. The proposals include the addition of a new sched 16D, which will provide a LBTT relief for qualifying non-residential transactions within a designated green freeport tax site.

The response generally agreed in principle with the proposals. However, it raised concerns that as currently drafted, they could prejudice the availability of relief in the case of a developer who buys land to be developed through a forward funding structure, where the developer sells the land to an investor before development starts, and the investor pays for the development in stages as construction takes place. Such a deal structure is commonly used in commercial property development.

It highlighted the risk that, in such a case, relief will not be available for the purchase by the developer (or clawback could operate if a developer initially qualified for LBTT relief but then decided to proceed by way of a forward funding structure), because it is taken to be holding the land for resale without development.

In addition to recommending that the drafting clarifies these points, the response also recommended that explicit guidance is published on the interpretation and scope of "develop" in this context – in particular, that it should confirm that works carried out by the developer under the forward funding structure (while it has title to the land), including undertaking site investigations, obtaining planning permission, procuring tenants, signing agreements for lease, and tendering for construction works, constitute "development" and make it eligible for relief, even though actual construction works have not yet commenced. A lack of clarity on these points could inhibit significant development projects on green freeport tax sites, and excluding the developer from being eligible for the relief would undermine the policy aim of promoting long-term investment in underdeveloped tax sites with economic potential and providing LBTT relief for development-related activity.

Find out more at the Society's Tax law page.

ACCREDITED SPECIALISTS

Child law
REBECCA SCOTT, Clan Childlaw (accredited 16 May 2023).
Re-accredited: ELISE PEDEN, Cameron Clyde Legal (accredited 1 June 2018).

Construction law
Re-accredited: JULIET HALDANE, Brodies (accredited 19 April 2018).

Family law
Re-accredited: ROWENA McINTOSH, McIntosh Family Law (accredited 16 May 2003); JANICE JONES, Anderson Strathern (accredited 28 May 2008); AMANDA MASSON, Harper Macleod (accredited 28 May 2008).

Family mediation
Re-accredited: JENNIFER WILKIE, Burness Paull (accredited 28 March 2017).

Insolvency law
Re-accredited: CLAIRE MASSIE, Pinsent Masons (accredited 26 April 2005).

Intellectual property law
Re-accredited: COLIN HULME, Burness Paull (accredited 16 May 2008).

Medical negligence (defender only) law
NICOLA SHAND, National Health Service Scotland (accredited 12 May 2023).

Personal injury law
Re-accredited: RICHARD POOLE, Thorntons Law (accredited 21 May 2013).

Private client tax law
Re-accredited: FIONA FYFE McDONALD, Fyfe McDonald (accredited 2 May 2013); CLAIRE MACPHERSON, Burness Paull (accredited 24 May 2018).

Over 600 solicitors are accredited as specialists across 33 diverse legal areas. If you are interested in developing your career as an accredited specialist, see www.lawscot.org.uk/specialisms to find out more. To contact the Specialist Accreditation team, email specialistaccreditation@lawscot.org.uk

ACCREDITED PARALEGALS

Residential conveyancing
COLLEEN HOUSTON, Thomas Docherty Solicitors; RACHEL STEWART, Watermans Legal Ltd.

Civil litigation – reparation law
STEVEN BLACKLAWS, Allan McDougall McQueen LLP; KAREN CURRIE, Digby Brown.

Wills and executries
LYNDSAY STEELE, The McKinstry Company LLP; LYN SUTHERLAND, Drummond Miller; JUDY TOWNS, T Duncan & Co.

Trainee CPD goes O Shaped

Introducing the new Lawscot TCPD module, in partnership with O Shaped Lawyer

In today's rapidly changing legal world, the role of lawyers is evolving. While legal knowledge and technical skills remain essential, there is a growing understanding that lawyers also need to develop softer skills in order to navigate complex legal challenges. For lawyers of the future, it is particularly important to develop these skills early in order to grow in their career.

On our Lawscot TCPD programme we are continually working to develop the core competencies our trainees need to succeed in their legal career. Each of our bespoke training modules is created with trainees' developing needs in mind, focusing on areas such as communication, ethics, professionalism, and commercial awareness.

Speaking to trainees on the programme, one trend that has reappeared time and again is that they want to be well rounded experts in their areas of law, but also able to communicate clearly, listen to clients, persevere under pressure, and adapt and respond to challenges as they arise.

The O Shaped Lawyer recognises that legal issues often transcend the boundaries of a single legal field, and that we can't lose sight of the human when dealing with these issues. That is why we are pleased to announce our partnership with the O Shaped Lawyer on our newest TCPD offering, Module 5. Developed by the experts at O Shaped, this module is made up of a series of facilitated sessions that include practical activities where attendees will develop their understanding of the O Shaped mindset and attributes, and explore how they can apply them in everyday practice to achieve their personal and business goals.

This new module supports the achievement of several PEAT2 outcomes over the course of the day, including professionalism and professional communication. It counts for 10 hours of authorised TCPD, and is broken down as follows:

- Preparation: familiarisation materials (one hour)
- Training day (seven hours)
- Independent work: developing a target case study and development plan for application of O Shaped attributes (two hours).

As we continue to develop our programme, it is our hope that the modules on offer will support trainees as they complete their traineeship, and equip them with the skills and mindset they need to excel as lawyers. To learn more about our newest module, please visit the trainee CPD section of our website.

Amber Shadle is CPD projects officer at the Law Society of Scotland

Court confirms contempt finding

The Court of Session has confirmed a finding of contempt of court against a solicitor who failed to observe requirements of the Scottish Legal Complaints Commission, and subsequently the court, to produce files relating to a complaint.

The unnamed solicitor had previously admitted having put her "head in the sand" over the matter, but it was submitted on her behalf that rather than having deliberately defied or shown disrespect to the court, she had failed to obey the order "because she was in the depths of a difficult situation" due to personal and business challenges, and "was so embarrassed that she hid from her responsibilities". She was said to be "extremely sorry and deeply ashamed".

Lords Malcolm, Pentland and Tyre said that ignoring the request constituted a deliberate decision not to comply, and demonstrated wilful disrespect towards the authority of the court. Her circumstances "to an extent explained her conduct, but these were mitigating factors – they did not excuse her failure to obey a court order".

The court also found the firm liable for expenses on an agent and client, client paying basis.

Notifications

APPLICATIONS FOR ADMISSION 25 APRIL-25 MAY 2023

ANDREWS, Matthew Paul
ARACENA, Natalie Elena
ARCHIBALD, Jordan Theresa
BARRATT, Jack
BARRON, Jack William Geddes
BELL, Lauren Kathryn
BENTON, Jack Stephen Cranston
BULTER, Lori Megan
COLQUHOUN, Ross
DEVINE, Rebecca Emily
EDWARDS, Gemma Elizabeth
EL-ATRASH, Hanan
FERGUSON, Lyndsay
FERRIE, Nikia Jane
FIGUEIRA DE ABREU, Emmanuel Alejandro
FISHER, Debbie Margaret Mary
FISHER, Gabrielle Ann
FLETCHER, Charlie
GALE, Ross Gordon
GOBA, Gintis
HAGGART, Natasha Grace
HARVEY, Ian Alistair
HUGHES, Gregor
JOHNSTON, Niamh
KEDDARI, Tom Ugo Samy
LYLE, Rebecca
MACALLAN, Connor Paul
McCALLUM, Sarah Lucy Glancy
MACQUEEN, Andrew William
MORGAN, Molly Alaula
MULGREW, Sean Gerard
RONALDSON, Shannon Beatrice Patricia
ROSS, Elizabeth
SHEARER, Gemma Alison
TURNBULL, Eilidh
WATSON, Sarah Colette
WHITE, David William
WILSON, Sean Edward
WRIGHT, Eilidh Jane Elizabeth
YOUNG, Christy Alexandra

ENTRANCE CERTIFICATES ISSUED 26 APRIL-28 MAY 2023

BLACK, Heather
BROOME, Cameron Duncan
CRAINEY, Stephen
CRUICKSHANK, Jill
CULLEN, Samuel
DALY, Caitlin Meghan
DAVIDSON, Michael James
DAVIES, Ailsa Kate
DELCLOQUE-WHITE, Gwenan Isabelle
DEVANNEY, Lisa
DOVER, Euan Alastair
FARRELL, Paul Gerard
FINNIGAN, Niamh Therese
GARDNER, Kyle Hardy Menzies
GRANT, Katherine
GRIEVE, Ceri Lorimer
HARKNESS, Eilidh
HUSAN, Aqsa Rabab
JARVIE, John Gordon
KELMAN, Leon Ross
KERSHAW, Ramsay
KIERAN, Catherine Alice
LAFRENIERE, Katherine Wallace
LAMBERT, Regan Jamielea
LEYDEN, Daniel Joshua
LUMSDEN, Catherine Elizabeth
McBRIDE, Gemma Louise
McCABE, Catriona Louise
McCLUMPHA, Graeme
McGINNESS, Michael Joseph
MBISA, Lusubilo Mainet
MUTURI, Lynette Wawira
POLLOCK, Rachel Lynne
PRETORIUS, Michelle
QAZIKHEL, Ayssas
QUINN, Erin Morena
REID, Justin James
REID, Taylor Natalie
REILLY, Geena Alannah Marie
RICHMOND, Charlotte Maria
ROUSSIS, Fiona
ROWAT, Carmen Rose
RUSSELL, Karen Margaret
SCULLION-MINDORFF, Michael Christopher
SMITH, Anna Clare
SOMMERVILLE, Alana Georgina
STARKE, Hollie Rebecca
STEWART, Emma Hazel
TAIT, Lachlan Thomas
TAYLOR, Rebecca Jane
TIGLAO, Daryl De Lara
UMOH, Idara
VALDEAVELLA, Audrey Brian Sarande

Bill with a high price

A Society webinar highlighted why the new bill on regulating the profession is causing such alarm. Peter Nicholson reports

There is "still a sense of shock and unease" within the Law Society of Scotland at some of the provisions of the Regulation of Legal Services (Scotland) Bill, according to now Past President Murray Etherington.

Opening a Society webinar shortly before the end of his presidential term, Etherington pointed to the Society's record of strong regulation, which was something to be proud of but which the bill would "drastically undermine". The new ministerial powers of direct intervention were "deeply alarming"; the profession has a powerful voice and he urged all members to write to their MSPs with their concerns.

Reputational threat

Chief executive Diane McGiffen followed by underlining the Society's alarm. The bill, she said, "risks breaking something that works". Particular concerns surround s 20, which allows ministers to issue directions to a regulator, or impose unlimited fines, or change or remove some of their functions; and s 49, making provision for direct regulation by ministers of legal businesses – bringing "unprecedented levels of political control and interference over many of those who work to hold the politically powerful to account".

It was astonishing, McGiffen continued, that the Government's answer to the concerns over Roberton's proposed independent regulator was for ministers to have these powers.

Apart from the threat to its independence, this would damage the hard won international standing of the Scottish legal sector, and its competitiveness.

"What is the point of an independent regulator if you don't allow them to regulate independently?" she asked.

The bill could still be an opportunity for "real, positive, longlasting change" – but even with complaints, where substantial reform is needed, it is inadequate: the present regime often ties the Society's hands, and it was "frustrating" to see so many of the Society's ideas left out, despite much direct engagement with Government. "We can't afford to get this wrong", she concluded. "On the contrary, a lot is riding on us getting this right."

Serious flaws

Executive director of regulation Rachel Wood went into more detail on certain provisions.

She was pleased to see entity regulation, restrictions on using the title "lawyer", and strengthening of the Regulatory Committee all provided for. Entity regulation would enhance the present system, enabling regulation of a business and all its employees collectively, with a focus on wider consumer protection and confidence. It will become an offence to provide legal services for reward if a business is not authorised by the Society.

She highlighted further concerns, however. Rules for authorised legal businesses – solicitor-owned law firms – will require ministerial approval as well as that of the Lord President, "a direct interference by the state". It could not be compared with the English system, she said in answer to a question, but was "much more extreme... I'm not aware of anything similar in any modern democracy". Other difficulties include that the bill imports the "narrow, flawed definition" of legal services in the 2010 Act ABS regime – as a result, a solicitor firm would be unable to provide estate agency or incidental financial business services without these being separately regulated, a significant added cost.

The omission from the bill of registered foreign lawyers meant that the Society would be unable to authorise any of our big firms, with their cross-border operations, under the entity regulation regime – to practise in Scotland! (The Government has said this was "inadvertent", so amendment should be forthcoming.)

And new restrictions on granting waivers in relation to any rule relating to conduct – why is unclear – would effectively make it impossible for the Society to operate any waiver provision in its rules.

On complaints, there are provisions freeing the SLCC from some of its present constraints, but nothing to help the Society deal with conduct complaints more quickly and efficiently.

Make some noise

Winding up, the President referred to the press interest in the Criminal Justice Bill, in contrast to a complete lack of enquiries about this measure – though it goes to the heart of the independence of the legal sector. It's why we "need to try and create some noise on this", he concluded.

Roberton still on the radar

Holyrood's Equalities, Human Rights & Civil Justice Committee has issued a call for views as it begins its scrutiny of the Regulation of Legal Services Bill – highlighting its interest in the Government's decision not to follow the Roberton review's principal recommendation.

The MSPs want to understand what impact the bill will have on legal regulators, service providers and consumers, and whether developing the existing framework carries a risk of potential conflict of interests.

Other topics they seek views on include the level of complexity or simplicity of the current regulatory landscape; the measures open to ministers in reviewing regulator performance; the deficiencies in the complaints system and the proposed changes; the impact of the bill on alternative business structures; entity regulation; and regulation of the term "lawyer".

It is unlikely that the committee could bring about such radical amendment that it would change the Government's approach of regulation by the professional bodies; but it can decide whether or not to approve the general principles of the bill in its stage 1 report.

The call for views is on the Parliament's website. Responses are due by 9 August 2023.

Solving the trust equation

Surely automation isn't going to intrude into matters where clients value trust and reputation? Well, you might be surprised...

Following my discourse on ChatGPT and AI (artificial intelligence) – Journal, March 2023, 38 – it's worth examining elements that computers may not fully replace, such as trust and exceptional service. As solicitors, our entire careers are built on trust and reputation. These surely cannot be automated, can they?

Years ago, I watched a talk about the "trust equation" used by Airbnb (the unique business where you might let a complete stranger sleep next door). Since then, I've become a believer, noticing how businesses globally incorporate it into their marketing strategies. So, the question arises: can trust truly be automated?

In our profession, it's common knowledge that we're not mathematicians. Formulae may drive many to the door, or at least to skip swiftly to the next article. However, for the trust equation (see the diagram), we aim to maximise trust. For this, we need to display high credibility, reliability and intimacy, while keeping self-interest as low as possible. Sounds straightforward, but what does it entail and why does it matter?

$$\text{Trustworthiness} = \frac{\text{Credibility} + \text{Reliability} + \text{Intimacy}}{\text{Self-Orientation}}$$

What the formula means

Credibility is key. How do we demonstrate our individual or business credibility? Most already do it, showcasing their accolades and publishing insightful blogs and articles. This is why we invest substantial time in preparing submissions for awards and for the Legal 500, and strive for certifications in our fields. When deciding who to trust, clients weigh recognition and evidence of expertise heavily. Even those of us who consider ourselves less proficient can build credibility by writing and blogging. On a personal note, my fascination with ChatGPT has provided me with considerable insights and, I believe, some credibility in the area, despite my not being a programmer or an IP lawyer.

Reliability is a trait all solicitors should possess, but how do we validate that? Testimonials and platforms like TrustPilot are excellent ways to reassure existing and potential clients. How often do you consult Amazon reviews before committing to a purchase? Do you scrutinise LinkedIn profiles to gauge connections or recommendations? Most of us trust individuals or companies more readily if they come recommended by a trusted source. Does a bad review spell disaster? Not necessarily. A perfect review record to me may appear suspicious, but responding thoughtfully to less-than-stellar feedback can provide context, and demonstrate your commitment to improvement and that you take clients' views seriously.

Let's discuss intimacy next. A broad interpretation works best here. It's about sharing something personal or interesting about yourself or your business. Corporate social responsibility, especially when aligned with charities or causes resonating with our target markets, can boost this factor significantly. Revealing a bit about ourselves on blogs or social media can make us more "interesting", thus deepening the connection with potential clients. Becoming involved with our local communities, as so many of us do, adds huge value. As I was once told, it's far more important to volunteer and help at the local barbeque than it is simply to donate a cheque to local groups. One small word of warning: beware of overdoing the intimacy thing. Too much sharing can at times backfire.

Lastly, we need to minimise self-interest. It's challenging in a profession that charges by the hour (or part thereof), but there are ways. Providing advice in plain English on our websites is a good start, as is guiding clients to cheaper alternatives or even free resources. Ultimately clients may choose to pay us to resolve a matter even where it is less cost effective for them, just as most of us will pay a mechanic to change the oil in our car. Showing clients that we're here to help them, even when it doesn't directly benefit us, further enhances trust.

Where does AI come in?

You may be asking what this has to do with AI, trust and service. Once we understand the actions necessary to build trust, they can be automated, and AI is perfectly equipped to do this, often at little or no cost. Automation opportunities are becoming limitless, and often without compromising the client experience. Simple tasks like client feedback forms can be sent automatically at the end of a transaction (or during it?), and likewise automatically updated on your website. AI will provide regular summaries and insights into the feedback, with some suggestions as to improvements, as it will with almost every area of your business. Tailored legal pieces can be automatically sent to clients based on their specific needs and interests. Future research and even writing can be delegated. All of these if implemented well will continue to add trust to your brand.

Changes often take longer than we imagine, but when they arrive they can happen so much faster than we expect. Changes in the field of AI are now weekly, and new iterations are springing up faster than we can follow. Should all of this make us scared, or excited? It doesn't really matter; the jack is out of the box and the only question now is, do we embrace these opportunities or do we leave it to others?

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

MITIGO CYBERSECURITY

Cyber risk: are you properly tested?

Six reasons why you need independent assurance over your cyber risk management

Cyber breaches are not acts of God. They are preventable, provided you have taken the right steps to protect your firm from attack. The central theme of this article is that the only way to prove to yourself and your senior leadership team that you have put the right defences in place, is to obtain independent assurance.

What is assurance?

Assurance is the process by which you require an independent expert to give a professional opinion on a subject – in this case your cybersecurity measures. Because information that is business critical needs to be reliable.

There are two key aspects.

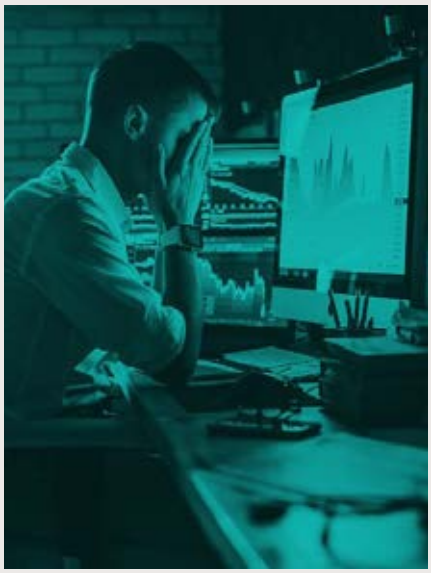
• Independence. The more independent the review, the more confidence you can have in it. Having your IT providers mark their own homework is simply a non-starter in terms of good risk management.

• Expertise. Cybersecurity is complex and ever-changing. Whoever you instruct must be a cybersecurity specialist (not an IT generalist), who understands your firm's business structure and the legal market in which you operate, and is acutely aware of the current methods of attack, as well as your legal and regulatory obligations.

It is important to be clear that we are not talking here about certifications such as CE and CE+. They cover no more than five of what the ICO describe as "basic" technical requirements and do not provide proper security, nor does either satisfy legal obligations for the security of personal data.

What does it look like?

Your assurance should be in writing and intelligible to those who are not experts in cyber risk management, including those responsible at board level for managing the big risks in your business. The work should be carried out carefully using a high quality, reliable process, designed for your sector. Doing some defined scope penetration testing is not good enough. The assurance should provide you with a proper cyber risk assessment, clear visibility on your cyber



vulnerabilities and risks, and specify the means to control them. This includes all necessary measures as regards technology configurations, people competence, and policies and governance. It should also address the process for regularly reviewing and testing the effectiveness of these measures.

Why do you need it?

• *Peace of mind that you are protected.* The process will identify gaps and allow you to close them – and enable you to build trust in your regime for controlling cyber risks.

• *Keep your proprietary and client data safe and become operationally resilient to attack.* The disastrous consequences of a ransomware or other cyber breach are well known.

• *Satisfy your legal and regulatory obligations.* Cyber risk assessments, technology configurations, governance, staff training, ongoing reviews (all of which need to be documented) are just some of your legal obligations under UK GDPR which the ICO would look at in the event of a breach. Law Society of Scotland regulatory obligations as regards confidentiality, good practice information issued by ICO, safeguarding client monies and cashroom management, and cashroom supervision of staff and systems etc, add another layer. And bear in mind that the ICO has made it clear that it will have regard to "relevant industry standards of good practice" such as the ISO 27001 series, the National Institutes of Standards and Technology, and the various guidance from the ICO itself, from the National Cyber Security Centre and from the Law Society of Scotland.

• *Better management decisions.* Spending ever more money on technology is rarely the way to get protection. We see lots of firms being given poor advice and wasting money after being persuaded to buy technology solutions which they do not actually need, which are incorrectly configured, and which do not give them the protection they expected.

• *Shows your clients and other parties that you have cyber risks under control.* Clients, colleagues and other third parties are increasingly aware of the risks of cyberattacks and the serious damage they can inflict on their own affairs or businesses. Your security matters to them.

• *Insurance.* Evidence of good assurance in this area will help characterise your business as well managed and a better risk in the eyes of professional indemnity (and cyber) underwriters.

Questions to ask before you appoint someone to undertake your assurance

• Are they genuinely independent from your IT providers?

• Are they cybersecurity specialists with a high quality process for assessing and testing cybersecurity risks?

• Do they operate within the legal sector and are they up to date with the latest methods of attack?

• Do they know your legal and regulatory obligations and related guidance?

• Do they also sell any security technology which could give them a conflicting financial interest in their recommendations?

Conclusion

A serious cyber breach is hard to recover from and can result in irreparable business damage. With the stakes this high, surely it is time to stop hoping you are secure and start *proving* you are secure?

This article was produced by the Law Society of Scotland's strategic partner Mitigo. Take a look at their full cybersecurity service offer. For more information, contact Mitigo on 0131 564 1884 or email lawscot@mitigogroup.com

RISK MANAGEMENT

Top tips for trainers and trainees

Alan Eadie and Emelia Conner, on behalf of Master Policy brokers Lockton, share risk management tips for trainers and trainees respectively

The Covid-19 pandemic brought normal working life to a grinding halt. If even the most cool-headed and experienced of solicitors were disorientated by the sudden changes, they were at least able to use their existing skills and experience, their knowledge of office systems and the support of their work colleagues to adapt quickly to new ways of working, some aspects of which now seem to be here to stay.

Spare a thought, though, for the trainees just starting out in the profession at that time. It is difficult enough embarking on a new career – getting to know the job, the firm, the people, the protocols and the politics – even where there is the opportunity to become immersed in it right from the outset. What must it have been like to be stepping onto that first rung only to be blindsided by the most profound and isolating change to working life as we had known it?

Yet one of the positives to be taken from that time is that it magnified and revealed for all to see the challenges, in particular the risk management issues, faced by trainees and those responsible for their supervision; challenges that had probably existed all along but which had never before been as starkly exposed.

In this article, we look at these issues and offer some thoughts on how best to address them, from the perspective of both trainees themselves and those supervising them – "from both sides", like Joni Mitchell, although we can't promise anything quite as lyrical or profound as she did. But then, she was looking at clouds and love and life, not trainee risk management.

A trainer's take

Alan Eadie

When it comes to assessing the standard of skill and care against which a solicitor's performance is to be judged, the relevant standard is neither wholly subjective (measured against an individual's assumed capabilities based on their specific qualifications and experience), nor wholly objective (measured purely by reference to a notional member of the profession). Instead, it's a bit of both, being measured according to the degree of skill and care ordinarily exercised by reasonably competent members of the profession of the same grade and specialisation.

So where does that leave trainees? Can it be said that anyone carrying the designation of trainee solicitor is under a less onerous duty of skill and care merely due to the lack of experience and specialist skill that inevitably comes with their trainee status? Sadly, it's not that straightforward. Where a firm of solicitors has both senior and junior staff offering a range of skills, specialist or generalist, at various grades charged at various fee rates, that firm is expected to deploy its skills as necessary and appropriate.

In other words, a firm is judged by the standard of skill and care appropriate to the professional staff who ought to have been undertaking – or at least supervising – the work in question. So not, for example, by the standard of skill and care actually exhibited by an exhausted trainee left to tidy up the loose ends of a late night completion meeting, but by the standards expected of those other members of the legal team who have by then swanned off for last orders and a pizza.

Be clear

When setting tasks for trainees, explain the background and the reasons for what the trainee is being asked to do, and where it fits into the wider project, case or transaction. This makes for a better learning experience for the trainee,

usually produces a better result, and minimises the risk of any balls being dropped. It will give the trainee some idea of the importance, sequencing and urgency of the task, although it is also important to be specific about these things – set clear deadlines and make it clear if being able to start another step is dependent on the trainee completing the task they have been assigned.

Awareness and inclusion

It's important to be alive to whatever offers trainees the most valuable opportunities to learn from seeing their qualified colleagues in action. Remember to include them wherever possible and to remind colleagues to do likewise to make sure you are capturing all those opportunities.

Of course, there are the obvious things like involving trainees in court or tribunal hearings, client meetings, or negotiation meetings with the other side in a transaction or litigation. However, remember to involve trainees in internal meetings, tenders or pitches for new work and business development events where appropriate, so that they gain experience and knowledge of all the components of what it takes to operate competently and effectively as a solicitor.

Whatever policy you may have adopted in terms of flexible working, be aware that a large

part of the learning experience for trainees comes from the informal training of working alongside colleagues. This can include being able to ask for styles or pointers in the right direction, to ask "daft" questions, or to have the chance to listen in on how to handle difficult questions from clients; or to buy time and avoid being put on the spot to give advice or commit to something when it might be unsafe to do so.

For supervisors, overhearing a trainee conducting a call or being on hand to offer guidance is usually the best way to prevent, catch or correct a mistake before any serious harm is caused. The value of that two-way process of training and being trained "by osmosis" was perhaps not fully appreciated until the pandemic took it away, but it's something we now recognise as a vital part of the process of nurturing, managing and supervising trainees.

Working from home gave (and gives) experienced fee earners the chance to concentrate and get on with work uninterrupted, but for trainees forced into that situation during the pandemic it could have been an isolating and uncomfortable experience, especially when they were still unsure of things. Now that we're back to normal(ish), it is better to encourage trainees to spend as much time in the office, working in close proximity to colleagues. It was again Joni Mitchell who mused: "you don't know what you got 'til it's gone". But now that it's back, appreciate it and take full advantage.

Be available

Particularly in the latter stages of their traineeships, it is a healthy thing for trainees to be given more responsibility and autonomy. Any drivers among you will know that the real learning only starts when you lose the "L" plates, so it is important to make sure that trainees experience fending for themselves when preparing them to be a safe pair of hands when they qualify. But it's also then that there is the greatest risk of things going awry, so the important thing for supervisors is to continue to be on hand, even if only from a distance, to provide guidance or to step in if need be.

This was illustrated in the English case of *Dunhill v W Brook & Co (A Firm)* [2018] EWCA Civ 505, in which the Court of Appeal upheld a decision dismissing a professional negligence claim against solicitors and counsel regarding settlement of a personal injury claim just before trial. There, a trainee solicitor alone had accompanied counsel, yet it was acknowledged that it fulfilled the firm's duty of care to permit a trainee to accompany properly instructed counsel to the trial, provided they could rely on a qualified solicitor (preferably the solicitor having the conduct of the case) being available if the need arose.

Provide feedback

It goes without saying that giving trainees feedback on tasks they have undertaken is often the best way of guiding them on how they might improve. That applies equally to risk management issues; one of the most valuable aspects of the learning experience is identifying the "near misses" and equipping trainees with techniques for avoiding similar traps in the future.

In practice

RISK MANAGEMENT

A trainee's take

Emelia Conner

As a trainee solicitor myself, working in my firm's Professional Indemnity team and often assisting in the defence of claims against Scottish solicitors, I have been surprised by the level of responsibility and accountability which comes with the role. At the same time, I have become aware of the challenges and risks solicitors at all stages of qualification face in their daily professional lives. I have seen how those risks are magnified where legal work is entrusted to those who, often through no fault of their own, find themselves out of their depth. Drawing from that, I have compiled a list of my top five risk management tips for both aspiring and current trainees:

1. Be curious

Dare to ask questions even if they may seem trivial. Every trainee has found themselves contemplating how to seek clarification without seeming ignorant. Rest assured, in my experience such concerns are rarely justified. In fact, posing questions often leads to the most valuable learning experiences. Cultivating curiosity and seeking clarification will undoubtedly help you to tackle work in a careful and considered way, minimising potential risks.

2. Know your limits

Building upon the previous point, it is crucial to recognise that your traineeship is more than just a two-year job interview. While it is natural to strive to impress, it is equally important to strike a balance between showing initiative and making dangerous assumptions. At the start of any task, take the time to understand your role and the expectations placed upon you. By doing so you will effectively avoid overstepping your boundaries and minimise the possibility of undertaking tasks that may expose you to unnecessary risks. Above all, never offer advice unless you are absolutely certain of its accuracy.

3. Maintain open communication

Regular and effective communication with your line manager or colleagues handling a matter is paramount for trainees. Consistently checking in with your line manager ensures that nothing is overlooked, while also letting them know that you are on top of things and demonstrating your eagerness to contribute to the progress of a matter. Actively seeking feedback from your colleagues will further enhance your competence and help you avoid potential mistakes.

4. Keep comprehensive attendance notes

Trainees often bear the responsibility for drafting attendance notes during meetings or hearings. The significance of these notes may only come to light when a colleague asks, "What exactly did they say?" in reference to a meeting. Therefore, it is essential to take clear and concise notes. Not everything needs to be transcribed verbatim, but it is good practice to record each person's statements and be clear when summarising or paraphrasing certain parts of the conversation.

5. Verify and reverify

Finally, adopt a meticulous approach by double or even triple-checking your work. Whether it involves reviewing advice notes before submitting them to your supervisor or seeking input from multiple sources when faced with complex issues, exercising extra vigilance is crucial. Your traineeship marks the beginning of your journey in understanding the law and you will continue to grow and mitigate risks by maintaining a heightened sense of scrutiny.

By thinking about what works best for everyone and adhering to these risk management tips, you will not only bolster your professional development; you will also safeguard yourself against potential pitfalls and feel all the more up to the task when the "T" plates finally come off.

Alan Eadie is a partner, and Emelia Conner a trainee solicitor, with BTO Solicitors

OPG update

Certificates of registration

For some time now OPG has issued two versions of certificates of registration: an electronically produced certificate containing a crest watermark, and a manually produced certificate containing a red seal. We have found that there has been some uncertainty within organisations by having two versions of the registration certificates, which is resulting in those who act on behalf of others experiencing difficulties when exercising their legal authority.

Therefore, from **1 July 2023**, OPG will only issue certificates of registration with the crest watermark.

- This means that the certificate with the red seal will not be issued after 1 July 2023.
- Certificates with the red seal already in circulation and presented after 1 July 2023 should continue to be accepted, as they remain valid forms of legal authority.
- Special measures implemented from March 2020 to manage critical business during the coronavirus pandemic have now been implemented as regular business-as-usual processes. Certificates issued under special measures continue to be valid forms of legal authority and should continue to be accepted after 1 July 2023.

A summary of the changes to the certificates is available from OPG's website. Communications are underway to bring this information to the attention of key financial organisations and institutions.

Online EPOAR service review

OPG is reviewing the EPOAR online power of attorney submission service. If you are a firm of solicitors and not currently using EPOAR, OPG is keen to hear from you. If you are willing to assist with user research please email: opgtransformation@scotcourts.gov.uk

PoA amendment policy review

With a wealth of knowledge and experience to draw from, OPG is currently reviewing its PoA amendment policy. The review will allow OPG, amongst other things, to provide better protection to the granter, once they have become an adult with incapacity, as was the intention of the Act and the policy. Background information is available from the news page of OPG's website.

OPG would like to thank all who took part and shared their views in the recent consultation exercise. The outcome of the review will be published in due course.

Tradecraft tips

Ashley Swanson offers some further practice points, drawn from experience

Face value – 1

A man was on a motoring holiday in France when his car broke down. The garage there told him he would need a new engine, but he was very sceptical about this and had his car put on a trailer and towed back to the UK. His local garage fixed the car for £49. What was that about a new engine?

Clients wanted to start a business and were looking for premises. The council had converted a redundant school into units for small businesses, but the clients said it was only open from 9 to 5 and they would be working longer hours. I was very sceptical about this; we contacted the council and they replied: "You must be joking. Some of the tenants practically live in the place; they are working there at 2am."

The wonderful thing about the council business centre was that you could get a monthly tenancy, so if things did not work out the tenant only had to give a month's notice and they were completely clear. If they took on normal commercial premises, say for a two-year term, and after nine months they ceased trading they would still be liable for 15 months' rent unless they could assign or sublet.

If you are the least bit doubtful about what you are being told, look into it further. In legal work, as in life in general, do not take everything you see or hear at face value.

When I failed my 11 plus I was told I was not good enough to be educated beyond the age of 16. Thank goodness I questioned that judgement.

Face value – 2

A client was selling a former council house. The surveyor who prepared the home report said that it was a Tee Beam type house and therefore not mortgageable. This was based on a list prepared by the council of all houses of non-traditional construction in Aberdeen. Considering the position, I remembered the words of the Duke of Wellington: "Being born in a stable does not make one a horse." Inclusion in the list was not in itself conclusive evidence of the status of the house. The task here was to gather evidence to prove that the list was wrong. The City Archives had a copy of the building warrant plans for the house from the early 1950s, and the two universities here in Aberdeen each had books showing the specification and internal layout of a Tee Beam type house. Studying these proved beyond doubt that the list was wrong. There was an audible sigh of relief from the client and her sale could proceed. The surveyors waived their fee for the home report, so that was a little bonus for the considerable research I had done for the client.

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

Face value – 3

An interesting spinoff from that tale was that another firm of solicitors was selling a house round the corner which also appeared to be on the list by mistake. It was advertised at a substantially reduced asking price as being unsuitable for mortgage purposes. I could not inform them about this fundamental misunderstanding, as removing the apparent impediment would have put their house into direct competition with my client's house and I regarded that as acting against my client's interests, so I remained silent. The house sold for about £42,000 less than its true value. What really intrigued me about this case was that the wording of the single survey seemed to indicate a measure of doubt in the surveyor's mind about the type of construction, but obviously no further investigation was made. If I had been the surveyor I would have investigated further. The information to decide the matter was readily available without having to cut a hole in the wall of the house to see what it was made of.

Going into business

My experience of clients who want to start up a business is limited, but some of them seem to want to do it at 200mph. They are like a dog straining at the leash with its front paws up off the ground. Trying to restrain clients in circumstances like this is difficult to say the least, but bearing in mind the potentially catastrophic consequences of a business failure you have no option. Careful preparation in unhurried circumstances would give the clients the best chance of success.

If I wanted to climb Mount Everest I would not turn up at the foot of the mountain, with no prior mountaineering experience, dressed in jeans, a T shirt, and training shoes, look up at the summit and say "Here goes". Why is it that starting a business is one of the things in life that you can do with no prior training or qualifications at all? If the clients appear to be resentful of what you know to be sound advice, you really have to give serious consideration to resigning agency. If you keep acting for them and they simply go ahead regardless and come to grief in the process, embarrassment alone might prevent them coming back to you for advice about the mess they are in.

MONEY LAUNDERING

Source of funds: have we moved forward?

Fraser Sinclair considers the published guidance covering source of funds checks, and whether it yet provides sufficient clarity

Under the UK Money Laundering Regulations, firms are required during the ordinary course of business to undertake "scrutiny of transactions... throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are consistent with the relevant person's knowledge of the customer, the customer's business and risk profile" (reg 28(11)).

Source of funds ("SoF") is not defined in the regulations, so supervisors have been left to opine on what exactly that check means. The legal sector AML guidance tells us that SoF refers to the specific funds that are being used to fund a transaction in hand. It is not enough to know the money came from a UK bank account – instead, we are rightly tasked with having a reasonable understanding of the background of the funds, such that we are comfortable with their legitimacy.

Risk-based approach

It is perhaps interesting to first pick at what the regulations mean by "where necessary". The Solicitors Regulation Authority notes that this is not defined in regulations, but its view is that, outside of certain mandated higher risk instances not covered in this article, it requires a risk-based approach. This means that your firm, client and matter risk assessments need to be considered when deciding whether it is necessary. As an aside, the SRA further details that the requirement to do SoF checks might apply even if no money is coming through your client account, but that's a completely different circle of Dante's inferno which we won't cover here.

Another area worth thinking about is how the risk-based approach applies. Obviously, for the most part, it would be fair to consider that in order to meet the regulatory requirements noted in the first paragraph above, we actually have to know something about the client in the first place, in order to assess whether the transaction and funds are consistent with that client. Asking the client for their SoF narrative may therefore often be a key piece of the puzzle, but it is interesting to consider the extent to which repeated questioning is required for recurring clients across new matters, and to what level we must collect evidence to account for every penny.

Law Societies' guidance

The Law Society of England & Wales SoF page notes that: "If an explanation is consistent with the client's risk profile, is consistent with the type of retainer being undertaken, and you do not have other AML concerns about the transaction, you may simply note the explanation on the file and have your accounts staff check that the funds are coming from the bank accounts the client has said they would come from."

It goes on to state that "If the transaction is higher risk, you may ask for supporting evidence, possibly in the form of bank statements, accounts, gambling wins, injury awards etc. This suggests that extensive supporting evidence may be the domain of enhanced risk SoF checks. That all seems to tie in with the regulatory wording.

Compare this to the Law Society of Scotland FAQ, which gives this example: "A client is purchasing a flat for £400,000. The client, a teacher at a local high school, has obtained a mortgage but has a deposit of £25,000 to put down. The client explains that the deposit is a mix of employment savings and a gift from parents. The risk assessment is Medium (Standard CDD).

"Source of Funds may be assessed and evidenced by, for example, obtaining bank statements to check for sufficient and regular credits from the expected employer and obtaining bank statements to check for gifted funds matching the amount detailed by client. Should remitter details be available, it may also be possible to check any connection/related names to the client's details."

That's as may be

Of course, much of the guidance exhibits characteristic use of the word "may" everywhere, no doubt intended to be helpfully broad enough so that everyone can take part in the way that is right for them. That's no bad thing, as long as supervisory bodies are sticking to principles and pragmatism, rather than narrow rules around documentation.

The extent to which SoF checks involve being bogged down in endless reams of statements and forensic accounting was never clear to me, and, despite legal sector guidance coming a long way in the last five years, I wonder whether the increased focus on this has made the confusion more, less... or just different.

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

ASK ASH

Chill at first sight

My new colleague is freezing me out

Dear Ash,

There is a new colleague who has joined our team, but she seems to have taken an instant dislike to me and I'm not sure why. She has made a point of catching up with everyone in our team on a one to one basis to introduce herself, except with me. Also when I've emailed her about cases, she does not respond to me and will instead normally talk to another colleague also working with me on the cases. I'm not sure what her problem is, but it is difficult to say anything to anyone when everyone else seems to like her.

Ash replies:

You can either give your new colleague the benefit of the doubt and assume she is just trying to adjust to her new surroundings, or you can look to arrange your own catch-up with her to suss out what may be causing her to act in this way. It is clearly bothering you, so it is worth arranging a coffee catch-up, to introduce yourself properly, and to outline your role and experience. This will help to break the ice and allow you to get to know each other better.

She may just be shy or perhaps intimidated by your specific role, especially if you are in a more senior role in the team than others? Someone's inherent shyness can sometimes come across as arrogance so I would suggest giving her the benefit of the doubt for now.

Of course, if she does continue to blank you then there may be something bothering her at a deeper level. In that case you will need to try to address her behaviour as, at the end of the day, even she needs to understand that you both need to work together, whether she likes it or not.

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 *"Public Attitudes to the Legal Profession in Scotland", June 1973*: "Over 92 per cent of users were satisfied with the way Scottish lawyers conducted their business, and the authors of the report say it is in the light of this 'massive and wide-spread general feeling of satisfaction that any complaints about or dissatisfaction with the profession have to be viewed'. This compares with the findings of the English survey,... in which 52 per cent said they were very satisfied and 34 per cent said they were fairly satisfied with the services of their English solicitors. Only the medical profession rates higher in Scotland than solicitors; it may be noted that in the English survey bank managers came above solicitors in public esteem."

25 years ago

From *"President's Report", June 1998:* "IP – No not a typographical error; Intellectual Property. All too often over the last decade we have seen parts of our business eroded by accountants, estate agents and others. It is therefore encouraging to find one aspect of our work which is growing rapidly and in this connection I refer to Intellectual Property, which I see as a future growth sector for the profession. I am not, however, certain that the profession is totally au fait with Intellectual Property, and still given the potential of this sector of the business it is my intention to set up a small working party to report within six months as to how we might raise both the profession and the public's awareness of Intellectual Property."

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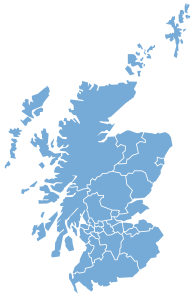

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