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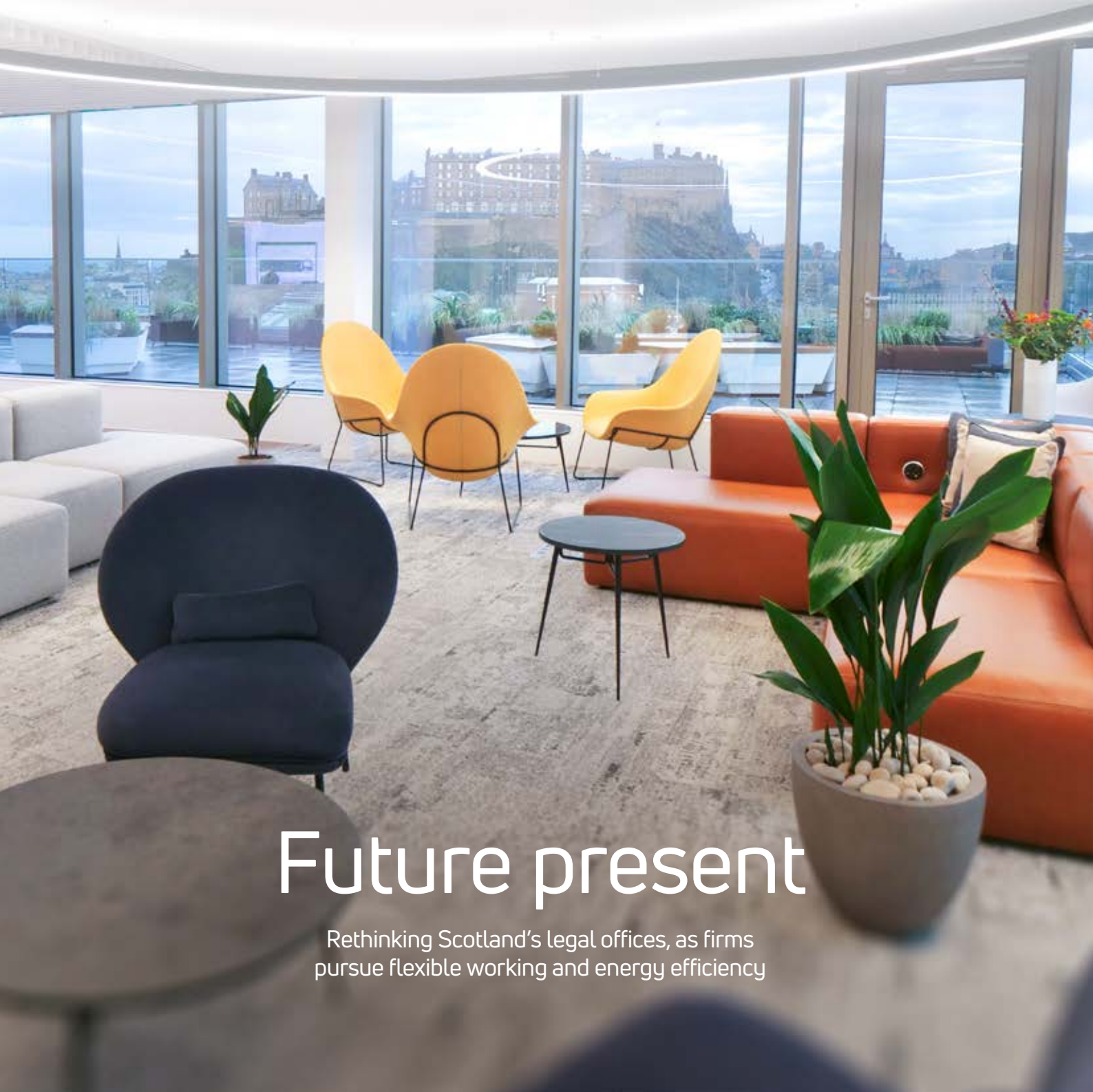
Journal

Journal of the Law Society of Scotland

Volume 67 Number 3 – March 2022



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International order

There are as many domestic problems as ever facing our national leaders, and our profession, but it feels wrong to open this issue without addressing the situation in Ukraine.

The terrible suffering of the people, inflicted by what, as I write, is beginning to look like systematic destruction of urban areas by bombs and missiles, probably evokes in millions watching from abroad the combined feelings of shock, anger and helplessness.

Those who value the international legal order and the role of cooperation between states in helping keep the peace in most of Europe since 1945 are particularly appalled by the ruthless and cynical attitude of President Putin in what is now the naked pursuit of his aim to eliminate an independent neighbour.

One consequence, however, and one that he most likely did not foresee, has been an unprecedented show of unity among so many nations in imposing economic and other sanctions. Whether or not they affect the pursuit of Putin's immediate military objectives, this opposition offers some hope that valuable longer term lessons can be learned about effective responses to illegal aggression by one state against another, other than escalating the use of force.

It has to be recognised that a resolution acceptable to the international community – whatever that means for pre-invasion Russian interference with Ukraine's territorial integrity – is unlikely to be achieved as long as Putin remains in power; and that the prospects of his being removed are speculative at best. That only increases the importance of the international order being used in the most effective and collaborative way possible to contain his foreign adventures. As I believe is well recognised by other governments, any direct use of force against Russian forces is fraught with peril for all of us.

Sadly, it does not seem likely to alleviate the suffering of the Ukrainian people, who have set an example with their courage and dignity, and indeed their compassion and humanity towards surrendering Russian conscripts who are likely to have had little idea of what they were being sent into. They allow us to believe in the possibility that the better aspects of human nature can prevail over brute force.

But the same generosity and compassion – and united international assistance – must be extended without delay to the hundreds of thousands of refugees massing on Ukraine's borders, to prevent further catastrophic suffering. Here the international community must insist on equal treatment, reports of racial discrimination by authorities and ordinary civilians being particularly disturbing; and it requires a reversal of the mean-spirited approach of the likes of our own Government, which once again has been shamed over its anti-refugee mentality. J

Contributors

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

Ann (Lady) Paton is chair of the Scottish Law Commission

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
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New code for new build homes: Page 34

In practice

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

Exploring imposter syndrome in the legal profession

To mark International Women's Day, Jennifer Wells looks at how "imposter syndrome", or doubt about one's own abilities or suitability for a role, can slow the career progress of women (more often than men), and how to break through this.

Paid leave and backdated claims

The claimant in the Pimlico Plumbers case has won the right to claim holiday pay for the whole duration of his employment, with potentially significant implications for employers, as Innes Clark explains.

Cybersecurity actions for 2022

David Fleming of Mitigo reports on the current highest areas of risk for legal practices from cybercrime, and the steps managers should be taking to check how vulnerable their firm is to attack.

Survivorship and the insolvent estate

Paul McDougall explains how the sequestration process can assist where a property transfers under a survivorship destination but the deceased dies in debt.

OPINION

Martin O'Brien

Despite the post-Brexit agreements containing important protections for equality and human rights under the Good Friday-Belfast Agreement, these are now threatened by the UK Government's current ambitions on a number of fronts

Northern Ireland is entering a new phase of instability which has been fuelled by the UK Government's decision to opt for a hard Brexit, when less disruptive alternatives existed.

But while media coverage has focused on the resulting trade and political crises, very little attention is being paid to the implications for human rights and equality in Northern Ireland.

In 1998 the UK Government was a signatory to the Good Friday-Belfast agreement which brought an end to decades of violence.

The agreement contained a blueprint for power-sharing government between divided communities, based on the bedrock of rights and equality for all.

An entire section of the agreement is devoted to "Rights, Safeguards and Equality of Opportunity", which includes measures ranging from the protection of fair employment rights, to freedom of expression and the right to pursue constitutional change by peaceful means.

It introduced equality-proofing for the operation of government and public bodies and an independent Human Rights Commission was created in Northern Ireland.

The peace accord also committed the UK Government to incorporating the European Convention on Human Rights (ECHR) into Northern Ireland law, including the power for courts to overrule legislation of the Northern Ireland Assembly if it did not conform to the Convention. The Irish Government similarly committed to incorporating the Convention into its domestic law and did so.

This extensive framework of checks and balances reflected the degree to which concerns over rights and equality go to the heart of the Northern Ireland conflict.

The Government subsequently introduced the Convention into UK law through the Human Rights Act, but Lord Chancellor Dominic Raab's recent proposals to amend that Act look set to cause further problems for the protection of human rights in Northern Ireland.

Legal academics at the Human Rights Centre at Queen's University, Belfast, in the submission they made to the review of the Act, laid out the dangers of tampering with the Act, in that, given the centrality of human rights to the Northern Ireland peace settlement, a weakening of the rights provided for in the Act threatens that settlement.

The Good Friday Agreement also recognised that addressing the needs of victims of the Troubles was a "necessary element of reconciliation".

Recently, however, the UK Government signalled plans to drop unilaterally an agreed blueprint for dealing with the painful legacy of the Troubles.

It instead proposes an effective amnesty in relation to crimes linked to the conflict, while also closing down avenues to information, such as inquests. The move is believed to be aimed at protecting security forces, but will apply to all alleged offenders and has been widely criticised.

At the same time, the UK Government is involved in longrunning and often fractious talks with the European Commission, aimed at altering the Brexit arrangements for trade between Britain and Northern Ireland.

Once again, while the political wrangling has dominated headlines and has led to the effective collapse of the devolved government in Northern Ireland, there is little appreciation of the role the Brexit arrangements play in protecting rights.

Two important agreements were put in place to address concerns that the UK's exit from the EU would lead to a diminution of rights protections in Northern Ireland: the Ireland/Northern Ireland Protocol and the Trade and Co-operation Agreement ("TCA").

Article 2 of the Protocol, the key provision dealing with human rights and equality, provides that there shall be "no diminution of rights, safeguards or equality of opportunity" as set out in the corresponding section of the 1998 Agreement, resulting from the UK's withdrawal from the EU.

The human rights provisions of the TCA state that co-operation between the UK and EU (especially in the criminal justice context) is based on the UK's continuing protection of fundamental rights and freedoms of individuals, including those set out in the Convention.

A new guide to human rights and equality under the Protocol has been produced by the Northern Ireland-based Social Change Initiative, the Human Rights Centre at Queen's University, Belfast, and the Donia Human Rights Center at the University of Michigan.

As Geraldine McGahey, Chief Commissioner at the Equality Commission for Northern Ireland, said at the launch of the guide, the rights protections contained in the Protocol deserve closer consideration: "It is negative aspects and concerns about the Protocol that we hear most about, rather than this particular important aspect – the Protocol article 2 and how it can benefit everyone's rights here in Northern Ireland."

Alyson Kilpatrick, Chief Commissioner at the Northern Ireland Human Rights Commission, spoke for many when she added: "No trade deal in our view can compensate for the infringement of fundamental rights; in fact it will fall if fundamental rights are infringed."

Martin O'Brien is director of the Social Change Initiative
w: socialchangeinitiative.com

VIEWPOINT

Endless arrear?

At the beginning of February 2022, the arrear of first registration ("FR") and transfer of part ("TP") applications at Registers of Scotland exceeded the shocking figure of 100,000, despite assurances from the Keeper in July 2021 that the arrear was "stable". At that point, it stood at 88,000.

In January 2021, RoS "ringfenced" the arrear with the stated intention of reducing and eliminating it. Clearly, that policy has failed. Moreover, resources were concentrated on trying to deal with current FR and TP applications within the set service standards of six and nine months respectively. Even this has been unsuccessful, as the February figures show only some 74.3% of FR and 50.8% of TP applications since April 2021 completed within service standard.

Over those nine months, RoS's own figures show a slowing number of applications cleared from the oldest parts of the arrear, to a monthly average of 114 of the 6,185 applications outstanding from 2017, 212 of the 21,691 from 2018 and 354 of the 28,931 from 2019. On those rates, the arrear from these years will not be cleared until 2026, 2030 and 2028 respectively, not taking into account arrear cases from 2020 or the buildup of cases from 2021 and 2022.

The Keeper maintains that, in principle, the arrear and consequent delay in registration does not prevent a property being sold or remortgaged.

While strictly true, that is only because a purchaser's or lender's solicitor is prepared to take over the risk of eventual rejection. Under the 1979 Act that may have been a justifiable professional position, but the major change to rejection brought in under the 2012 Act and the current, disgraceful arrear situation must surely make solicitors wary of simply accepting a title founded on an ongoing FR or TP application. Imagine the scenario of a title sent for registration in 2018 and rejected in 2030 after a couple of sales and a few remortgages. How is that mess to be sorted out? The seller's solicitor may be dead, retired or out of business. Any of the chain of selling clients may be dead, bankrupt etc.

A buyer in 2030 would not have a direct contract with sellers in 2018 and would require the cooperation of all in the chain to sort things out. I would not fancy explaining that to a 2030 buyer or lender who suddenly becomes the victim of a disappearing title.

I wonder what the views of current practitioners and indeed the Law Society of Scotland are? It would be interesting to see a response through these columns, and indeed from the Keeper as to how she sees the arrear progressing from its "stable" position?

I am conscious that my many articles and letters on this subject have, of necessity, been negative. I therefore have a positive suggestion to offer which perhaps the Keeper and the Society might press on the Scottish Government.

Notwithstanding the Keeper's mitigations, the major problem remains that of rejection after a long period and the practical difficulties that causes. The 2012 Act, s 21(3) provides: "To the extent the applicant does not so satisfy the Keeper, the Keeper must reject the application."

Would it not help to simply change the word "must" to "may"? The Keeper would then be free to resolve with submitting agents the applications which presently she must reject. Not a complete solution, but an improvement on what could happen at the moment. What do others think?

J Keith Robertson,
retired solicitor, Kingussie

Open letter on legal aid: see p 39

BOOK REVIEWS

Funding Personal Injury Litigation In Scotland

ROBERT MILLIGAN QC
PUBLISHER: LAW BRIEF PUBLISHING
ISBN: 978-1912687794; £34

As the author explains in this slender volume, the potential for litigation about expenses looks set to increase. The 2018 Act has swept away the old rule of expenses following success, in personal injuries actions. Under the new QOCS regime, the court must not make an award of expenses against the unsuccessful pursuer – provided the pursuer conducts the proceedings in an appropriate manner.

This is uncharted territory in the Scottish courts. To assist the litigator in assessing where the pitfalls might lie, and how they might be avoided, Milligan examines the case law from England & Wales, and also Ireland. The wording of the English provisions is different; however, it seems that the case law might well inform the thinking of the Scottish courts.

There is helpful advice in relation to tenders, which are likely to remain a potent weapon in the defender's armoury.

New rules about success fee agreements go a long way to simplifying and regulating success fees; however, the text highlights the potential for conflict between solicitor and client in some areas.

This concise text does well to bring to life the potentially dry world of expenses litigation. It will be a useful reference.

David McNaughtan QC, Compass Chambers.
For a fuller review see bit.ly/3pwJJdi

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"It is high praise to say that this novel reminded me of the work of Alasdair Gray."

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

The book review editor is David J Dickson

BLOG OF THE MONTH

www.freemovement.org.uk

Did you know that a Scottish (or Northern Irish) lawyer can represent a client in the Immigration Tribunal anywhere in the UK, but lawyers south of the border are confined to England & Wales?

This blog explores an anomaly created by an amendment to the Immigration and Asylum Act 1999, and the "headache" it creates for a UK-wide tribunal – which has however decided that taking part in a remote hearing across the border from one's own side is OK.

To find this blog, go to bit.ly/3MbNie1

Magic promises

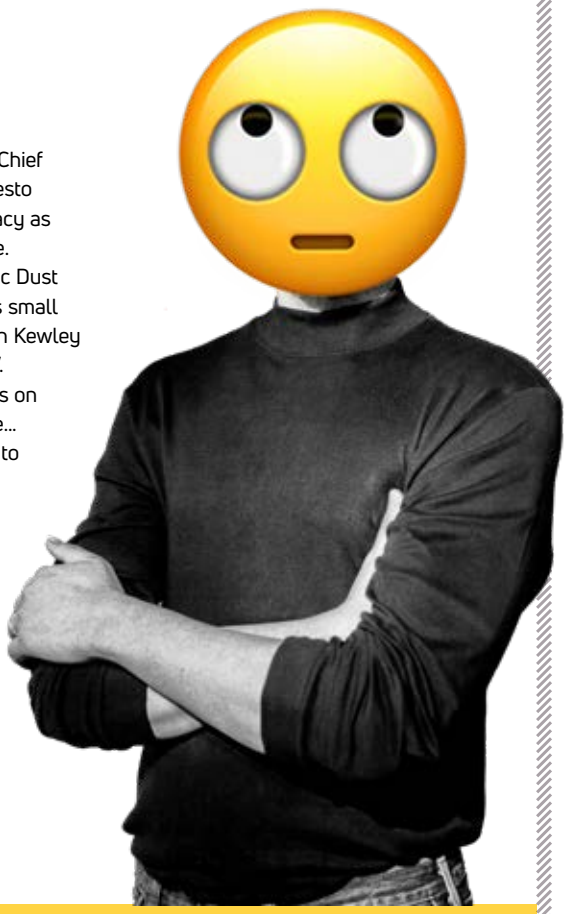
How about making your C-suite even sweeter with a Chief Happiness Officer? That's just one plank in the manifesto of Jonathan Kewley, circulated to support his candidacy as managing partner of Magic Circle firm Clifford Chance.

Don't say he isn't a visionary. "We need more Magic Dust in this Magic Circle," he lyricises, calling to mind one's small children's efforts to make sure Santa stops by, though Kewley has in mind a "creative, uplifting benefits programme".

Behind the flights of fancy there is certainly a focus on hybrid working, mentoring, career flexibility and more... accompanied by a little cynicism in the comments as to whether he can make it happen.

Names matter too. Fair enough, not to be regarded as a "resource" to be "utilised" – though while proposing to rethink the label "trainee" (because "these are some of the most driven, ambitious young people alive today"), he holds back from suggesting a replacement. House elf? Sorcerer's apprentice? Chief Gofer Officer?

Full manifesto courtesy of RollonFriday: bit.ly/3HzXEkf



PROFILE

Elaine MacGlone

Following International Women's Day, the Society's Equality and Diversity manager tells how four months' maternity cover at the Society developed into a 20 year career

1 Tell us about your career so far?

I'm a graduate of Aberdeen University and trained as a solicitor with a local firm. From private practice I went in-house at an insurance company, and then to the Society as complaints investigator. My first role was intended to be four months' maternity cover, but 20 years and several role changes later I'm still here!

2 How did you come to join the Society?

I joined in a temporary position with the thought that it would help me find my feet after being made redundant. I enjoyed the work and working in a close knit and supportive team, so when a permanent position arose I jumped at the chance.

3 Have your perceptions of the Society changed since you started?

Yes, absolutely. I never fail to be amazed by the wide variety of work the Society undertakes. Member support and engagement has developed massively since I started and it's a real pleasure to see new colleagues and members who are similarly surprised.

4 What have been the highlights for you personally?

The first female president in Caroline Flanagan in 2005 and the first openly LGBTQ+ president Amanda Millar in 2020 have been highlights; and in my work, participating in Pride events for the first time on behalf of the Society, and projects like the various *Profile of the Profession* surveys we have undertaken. Tracking the progress in diversity has been very satisfying. However, as Past President Amanda Millar often says, there is #MuchStillToDo

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

WORLD WIDE WEIRD

1 Unbearable hunger

Police in California are hunting a 500lb black bear, nicknamed Hank the Tank, who has broken into nearly 40 homes, not hibernating because he has found a constant food supply.

bbc.in/3tnzyEb

2 Blunt instruments

New Zealand anti-vaccine mandate protesters have been blasted with the music of James Blunt – at his suggestion. Their camp had already endured Barry Manilow and Celine Dion on loop when Blunt tweeted: "Give me a shout if this doesn't work @Nzpolice."

bit.ly/3tg2oq4

3 Musk do better

A Florida student has turned down an offer of $5,000 from Elon Musk to delete his Twitter account tracking the tech billionaire's private jet. "It wouldn't replace the satisfaction," he said – but $50,000 might.

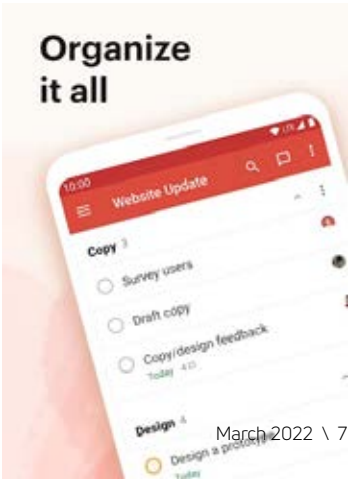
bit.ly/3hvCCAb

TECH OF THE MONTH

Todoist

Free: Apple Store and Google Play

If you're struggling to keep on top of everything, this handy app helps you with your daily to-do list. You can organise tasks and never miss a deadline by setting due dates and reminders. It also lets you track your progress and work with others on projects. Reminders can be location based and you can sort tasks according to priority.



PRESIDENT

Ken Dalling

First and foremost, this month we speak out for Ukraine and its people

I cannot introduce this month's Journal without referencing Russia's invasion of Ukraine, the appalling scenes we are witnessing and the stories we are reading about the desperate plight of Ukrainian nationals.

As is often the case in times of international crisis, it has been heartening to see the outpouring of support from around the globe, and inspiring to read about the courageous Ukrainians who have taken to the streets to oppose the invading forces. Their courage is matched only by that of those Russians who have spoken out against the invasion.

International law is clear that the invasion of Ukraine is an egregious breach of the rule of law, and we have added our voices to those of the CCBE, IBA and the UK Law Societies condemning Russia's atrocious attack.

As a profession, we can and must play our part in showing that unlawful actions have consequences. The recent sanctions imposed on Russia by the UK Government are a significant part of the global response to Russian aggression. By ensuring that the sanctions operate – carrying out robust checks and thorough risk assessments – we will show our solidarity with the Ukrainian people.

We will of course continue to communicate with our members to make sure you have the most up-to-date information about what is required.

Listening mode

My column this month is otherwise about listening. The timing of it is perhaps ironic, given that listening is something of which President Putin appears incapable.

Back in the day, before inclusive call plans, "It's good to talk" was an advertising strapline for a telecoms giant. Talking is certainly good for us – and to be recommended over the alternative; but conversation involves *listening* too.

It was in that vein that the Society hosted an engagement forum last month to discuss our next five year strategy. Not to talk, but to listen to our members.

We are keen to engage the profession and others in the formation of our new strategy, and were delighted to welcome 110 participants at the event on 18 February: attendees from island communities as well as big cities, solicitors in small high street practices and large corporate behemoths, solicitors from the Crown and the defence. Participants filled the spectrum between student associate members and fellows and, as an added bonus, a number of lay Council and committee members joined us too. Because, despite the value of improvisation – and we have all had to do a lot of that during the pandemic – it is only right that the Society identifies the profession's key priorities, so that we can discharge our regulatory and representative functions in the public interest.

Many colleagues at all levels across the Society have worked hard thus far, and will continue to do so, to bring our new five year strategy to life; and the outputs of this forum will feed into Council debates as they set the strategic direction of our organisation.

I would like to say a huge thank you to all those of you who joined and contributed to these preliminary discussions. Be in no doubt, the concerns as well as the positive views of the profession will remain central to our thinking. If you weren't at the forum but would wish to contribute, please do get in touch.

Listening too?

Within days of the forum, I attended meetings with both the Secretary of State for Scotland and the Cabinet Secretary for Justice – to listen *and* to contribute. My innate understanding of issues around the not proven verdict is perhaps greater than the issues around freeports, but it is good to learn about other things; and Michael Clancy, our director of Law Reform, is someone whose views are taken seriously, not only by myself but also by the Secretary of State. It was a wide ranging discussion including, in the UK context, the new Bill of Rights consultation which by the time you read this will have been completed. It was helpful to receive reassurances around conformity with the rule of law, respect for Scotland's distinctive legal system and the future application of Convention rights in Scotland.

As for not proven, I listened with interest to Sandy Brindley, CEO at Rape Crisis Scotland who also participated in the meeting with the Cabinet Secretary. It is perhaps inevitable, though, that there is a tension between someone whose starting point to the criminal justice system is the presumption of innocence and someone who seeks to support a victim at a point before there is a conviction. With the help of much work from the Society's Criminal Law Committee, the Council has provided a response to the Scottish Government's consultation on "the not proven verdict and related reforms". The Cabinet Secretary has assured me he will read it. You should too. I can only trust that the Government is in listening mode.

And I close, urging you to do all you can – professionally and personally – to support our brothers and sisters in Ukraine. Theirs is a desperate plight and extending the hand of friendship in whatever way you may feel you can, will I am sure be very gratefully received.

Ken Dalling is President of the Law Society of Scotland – President@lawscot.org.uk

People on the move

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journalsales@connectcommunications.co.uk

ANDERSON STRATHERN, Edinburgh, Glasgow and Haddington, has appointed **Mike McGregor**, a former partner at DELOITTE, as a non-executive director, replacing **Graeme Bissett** on the firm's board.

BOYD LEGAL, Edinburgh and Kirkcaldy, has taken over the client business of SOMERVILLE & RUSSELL, Musselburgh, which has entered administration. Boyd Legal will serve clients requiring wills, trusts and executry, and estate agency and conveyancing services, but not court work or family law services.

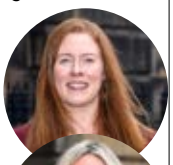
BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has launched a family law offering, appointing as partners **Richard Smith**, who will lead the new team, and **Jennifer Wilkie**. Both join from BRODIES, and are accredited as specialists in family law and as family law mediators.

Alistair Buttery intimates that with effect from 28 February 2022 he has resigned as a partner with FREELANDS, Motherwell, to take up a position with WHYTE FRASER & CO LTD, 7 Scott Street, Motherwell ML1 1PN (t: 0141 378 5711).

COULTERS, Edinburgh, has merged with PURDIE & CO, solicitors and estate agent, Edinburgh. **Struan Douglas**, partner at Purdie & Co, and three colleagues, have joined Coulters.

DAC BEACHCROFT, Edinburgh, Glasgow and internationally has appointed **Jilly Petrie** as a construction partner in its Professional & Commercial Risks team, based in Glasgow. She joins from BTO SOLICITORS.

GIBSON KERR, Edinburgh and Glasgow, has made the following appointments and promotions in Family Law: **Nadine Martin** has been promoted to legal director; **Karen Wylie** has joined from MORTON FRASER as a senior associate; **Karen Sutherland** has been promoted to senior solicitor; **Katie Fulton** has joined from THORNTONS as a solicitor; and **Sara Boyle** has joined as a paralegal.



HARPER MACLEOD, Glasgow, Edinburgh, Inverness, Elgin and Lerwick, has appointed **Ashley Fleming**, qualified in England & Wales, as a senior associate in its Immigration team. She joins from BINDMANS, London.

JAMESON + MACKAY LLP, Perth and Auchterarder, announce the appointment of **Samantha Kennedy** as an assistant solicitor in their Private Client department with effect from 14 February 2022.

MACDONALD HENDERSON, Glasgow, advise the appointment of **Gail Docherty** as head of the firm's Residential Conveyancing team. She joins from PATTEN & PRENTICE.

McKEE CAMPBELL MORRISON, Glasgow, has appointed **Graham Wilson** as senior associate in its Commercial Property team. He joins from ADDLESHAW GODDARD where he was managing associate.

PINSENT MASONS, Edinburgh, Glasgow, Aberdeen and internationally, has moved its Edinburgh office to Capital Square, 53 Morrison Street, Edinburgh EH3 8BP.

RAEBURN CHRISTIE CLARK & WALLACE, Aberdeen, Ellon, Banchory, Inverurie and Stonehaven, has appointed **Claire Clubb** as an associate solicitor in the Residential Property team at its Banchory branch. She joins from STEWART & WATSON.

RUSSELLS GIBSON McCAFFREY, Glasgow are pleased to announce the promotion of their assistant **Taylor Muir** to associate from 1 March 2022.

SCULLION LAW, Hamilton and Glasgow, has promoted **Farrah Mahmood** and **Nick Harbison** from its Conveyancing team to associate director.

SHEPHERD AND WEDDERBURN, Edinburgh, Glasgow, Aberdeen and London, has appointed **Ian Bowie** as a partner in Real Estate in its Glasgow office. He was previously head of Real Estate in MACROBERTS' Glasgow office.

SHOOSMITHS, Edinburgh, Glasgow and UK wide, has announced the appointment of **Simon Dawes** (previously with PINSENT MASONS) as a legal director in Real Estate, supported by paralegal **Morven Pinkerton** (previously with MORTON FRASER); **Simon Mayberry** (previously with LEXLEYTON) as a senior associate in Employment; and **Angela Robertson** (previously with THORNTONS) as an associate in the Dispute Resolution & Litigation team, all in Edinburgh; and in the Glasgow office, **Calum Stacey** (previously with TOTAL UK) as a legal director in the Commercial team, **Rachel Munro** (previously with SHEPHERD AND WEDDERBURN) as a senior associate in Real Estate, and immigration specialist **Pavan Sumal** (previously with FIVE STAR INTERNATIONAL LTD) as an associate in Employment.

THORNTONS, Dundee and elsewhere, has acquired the nine-strong Dundee office team of MACROBERTS, including **David Milne** and **Kyle Moir**, partners in the Commercial Real Estate team, supported by paralegal **Kirsty Smith**; **Derek Petrie**, partner in Residential Conveyancing, with senior solicitor **Gemma Scrimgeour** and trainee paralegal **Jodi Blakeman**; and **Chris Gardiner,** legal director in Private Client. Thorntons has added to its Dundee conveyancing team by merging with KIM BARCLAY SOLICITORS. Founder **Kim Barclay** returns, along with paralegal **Fiona Whittaker**, to the firm where she began her career.
Callum McCue, previously with CAREY OLSEN, Jersey, has joined Thorntons as a senior solicitor in the Commercial Real Estate team in Glasgow.
Iain Nicol has joined Thorntons' Edinburgh office as a consultant in the Dispute Resolution & Claims/Personal Injury team, from LEFEVRES.

WRIGHT, JOHNSTON & MACKENZIE, Glasgow, Edinburgh, Inverness, Dunblane and Dunfermline, has appointed **Vicki Provan**, a former partner at the firm, most recently with NEWGALEXY SERVICES, as a consultant in the Commercial Property team, which **Amen Chaudry**, previously with McVEY & MURRICANE, has also joined as a solicitor. **Fergus Hollins** and **Alex Mudie** in the firm's Corporate team have both been promoted to senior solicitor, as has **Jenna Gallacher** in the Inverness Commercial Property team.

denovo

"It's Game On!", law firms say

Why New Business Teams are catching on this year

It is held to be a universal truth in football that it is harder to retain a league title than to win just one.

José Mourinho famously said, "Good teams win titles, but great teams retain them". Makes sense. And acquisition and retention, albeit in the form of clients, is definitely something we are seeing more law firms focusing on in 2022.

If it's not broken, don't fix it?

It is far more complicated for champions to strengthen their side than it is for their rivals. Winning the league means that even a flawed team has a legitimacy, that even those players a manager believes might be improved on most easily have a right to keep their place. Football has always believed that you do not change a winning formula, that if something isn't broken, you don't fix it, even when it might be rather more broken than first appears.

The same can be said for law firms. Firms sometimes don't know there are better ways to work. They do quite well; they're bringing in fees; so all is well. But not adapting to a changing environment can be costly. And as much as many lawyers and law firms have formed great relationships, and in many cases friendships, your rivals' desire is to win, to do better, to overhaul the firm that did better than them the previous year.

That is a powerful emotional impulse, particularly when combined with a freedom to change their working practices to address their problems.

A taste for success

Great football managers often talk about a hunger for trophies. Brian Clough always said that the most important triumph in his time at Nottingham Forest was not the league title or the European Cup, but the 1977 Anglo-Scottish Cup, because that was the one that gave the team a taste for success and set them on the way to further glory, including two European Cups. This is called the "Champagne effect".

For law firms to change and succeed can be difficult. Mainly because, as friendly as you might be with the firm along the high street, you really don't know what they're up to internally. You don't know what they're planning, the trends they are following or the work the backroom staff are doing to get their team ready not just to compete, but potentially take the title! But what you can do is create small wins to give you that taste for success.

Structured success

Many of the law firms we speak to are gearing up and restructuring for a busy year. One even used the term, "It's Game On!", hence the title of this article. The trend we're seeing is that the introduction and/or expansion of New Business Teams ("NBTs") will be business critical for law firms.

We've heard so many law firms talking about this, and many are now adopting a dedicated NBT to enhance and structure their sales processes. Primarily because the importance of tracking the marketing spend and conversion values can't be overestimated in today's market. Firms are becoming laser focused on not only driving new business but improving comms and analysing their client data to ensure they retain clients.

Change your tactics

The general rule successful firms are following is that if the cost of client acquisition is too high for the work the client is paying you for, it's time to change tactics.

The trouble with law firms is they are normally hired for a one off piece of work for a client, and struggle to sell other services to enhance the income stream they worked hard to sign up. The enthusiasm to try and structure this process and retain business wanes because most firms are busy and believe they don't have the time. This may be true, but the amount of money being lost and the likelihood of you falling down the law firm league table because you don't focus on this growth area is going to make or break the long term success of your business.

Here are three key areas you need to consider to succeed in the NBT challenge:

1. Methodology and process – how to do it within the context of your work types, legal knowledge and customers.

2. People and organisation – are you structured in the right way for success, with the right people owning the right things?

3. Systems and resources – using the right tech and resources is critical, as is ensuring your software includes a dedicated way to intake, track and convert enquiries easily.

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Forward to the office

A trend has emerged of promoting law firm office moves as supporting new ways of working. But what does that mean? Peter Nicholson reports on how office design now involves more than just doing away with a few partitions

An office "designed from scratch to support agile working". Or how about "an ideal springboard for the new hybrid working model". Recent months have seen press releases from a rash of well known legal firms in Scotland announcing moves to new offices designed, they claim, around the working patterns that, if not born from the pandemic, have certainly become prevalent as a result. Are such descriptions just PR spin, or how different is the cutting edge legal office from its predecessors? We checked out some of the latest moves.

Capital Square: transforming

Capital Square, Edinburgh is one of the developments forming what is now known as the city's business district, that have transformed the area between Lothian Road and Haymarket. Just a stone's throw from the Society's Atria One HQ, its eight levels have since new year become the Edinburgh base of both Brodies and Pinsent Masons.

It is no surprise that for Brodies the new location marks a future shift from its long-time New Town base in Atholl Crescent. A tour of the new office, in the company of managing partner Nick Scott, was an eyeopener all the same.

The expansive reception area that greets the visitor occupies the castle-facing end of the top floor. Like the adjacent large, divisible meeting rooms, it opens on to a roof terrace. Further rooms of various sizes on that floor are well equipped for virtual meetings, including a large litigation room with full width wall screen as well as table and ceiling microphones.

Main working areas take up the two floors below. The central space at each level – the "focal point", Scott proudly calls it – is a stairway, Brodies' specification, around which is set the firm's library. The firm values this resource even in this digital age: "We are a knowledge business," Scott declares. As well as becoming the office hub through its location, the library provides one of many different work environments on offer.

For an open plan office serving a 400-strong Edinburgh presence, the layout is flexible, and subtly varied. No one, Scott included, has their own work space or station, apart from teams like People Engagement (HR) and Business Development. Others must book space before coming in; everyone has a locker for anything they leave behind. The idea is to encourage random mixing of colleagues; but beyond that, people can expect to do different tasks in different places, as Scott explains. You might choose to make a phone call from a private booth, collaborate on a project round a larger table, or have a one-to-one over a coffee in the spacious café, which outwith the lunch period is part of the whole flexible space.

Display shelves partition different areas – moveable as needs change, of course – and even the carpet tile colours demarcate individual and communal space, also as a flexible and changeable feature.

As offices open up again, Brodies is not laying down set rules about attendance but expects that people will come in – and will want to come in – for much of their working time. "People will realise what they've been missing", Scott believes. They may also want to use the training rooms – more communal areas with a mix of tiered bench seating and cushioned stools, a different look and feel again, with space that will also be used for yoga and pilates classes – while the top level energy efficiency and "WELL" standard certificates recognise features such as lighting that adjusts according to the natural light conditions.

Right, Brodies' open-plan reception at Capital Square and (inset) the library

Agile working commitment

In the same building, Pinsent Masons has relocated more than 200 lawyers and others in order to further the firm's commitment to agile and hybrid working. Key specifications were factored into the office design to take into account changing working practices, meet the company's environmental objectives and promote wellbeing.

Partner and head of office Ewan Alexander explains that while the firm has long-established agile working practices across its international locations, "we felt it was necessary to review how the pandemic had

"The design team put a lot of thought into the aesthetics, moving away from older office styles to a warmer environment"

changed staff attitudes to hybrid working and how we could best maximise the space available". He continues: "As a result, we dialled down the number of physical workstations by more than 20% and freed up space to introduce more collaboration zones and meeting spaces.

"The design team put a lot of thought into the aesthetics, moving away from the older and colder office styles, to create a warmer, more welcoming environment.

"We also revised our technological needs in view of the lessons learned from working through the pandemic, and now have a single video technology which is accessible for every user, be that on a meeting room screen, an individual laptop or mobile device."

Dedicated spaces for collaboration, wellbeing and focused work, a stylish café and multifunctional social hub all feature, along with a vibrant colour scheme. In addition, fabrics, materials and furniture have all been chosen for their sustainability credentials.

"The initial response from our people who have so far seen the new offices has been overwhelmingly positive," Alexander assures me, "and it is widely recognised that we have attempted to strike a balance to suit those who prefer working most of their time in an office environment, and colleagues who have embraced hybrid working, including working from home."

St Vincent Plaza: efficiency

Across in Glasgow, meanwhile, two moves have caught the eye, one by a long established practice and the other by a more recent arrival.

Though only flitting across the road – completing around the time this is published – Wright, Johnston & Mackenzie's 100-strong team in the city will find their new St Vincent Plaza base radically different from their office over the past 25 years.

Managing partner Fraser Gillies tells me that exchanging 14,500 square feet over three floors for 10,000 square feet on a single floor delivers a much better use of space, and in an energy efficient building focused on cycle and public transport.

"It's very unlikely that everyone will be in the office at any one time," he explains, "so we're operating on the basis of a much reduced occupancy on any given day. That combination means that this is a more than adequate space for the size of the team and it allows for a bit of growth as well."

WJM will provide a mixture of allocated desks and flexible working

Above (two photos), Pinset Masons' new office for its more than 200 Edinburgh staff has an aesthetic design with a vibrant colour scheme

spaces. "Some people will be here much more regularly, so we haven't gone fully along the road to hotdesking yet, though that might happen if the occupancy of the building increases. At the moment there is a blend of hotdesks and spaces where people can sit next to their colleagues in the same team."

The big change will be moving to open plan, which will encourage more collaboration between different teams. Various flexible spaces can be used for different purposes, "because we recognise that what people want to come into the office for is changing. And I think a lot more time will be spent on the purpose of being in the office, certainly not exclusively on fee earning work".

With people also wanting to collaborate, socialise and catch up with their team members, "We've ensured that we've kept a number of really good spaces where you can just sit with your laptop or papers or have a coffee and chat with a colleague. We're not being too prescriptive about how these spaces are used; we're just going to let people use them and see what they do with them."

WJM allows a choice of office or remote working. "While we're giving people a lot of flexibility, we are trying to encourage them to be in the office two to three days a week, unless there are particular circumstances, and subject to what clients need, what's right for the business. We're not returning to five days a week in the office or anything like it."

In tandem, everyone's IT has been upgraded to support that freedom. "All these things were coming but have been accelerated by the remote working that was forced on us all. The timing and our opportunity to move into this office has been pretty good in that respect as well. It has allowed us to take what we think are the good bits about the way the working environment has changed and hopefully cement those for the future."

WJM were able to influence the design, taking on board feedback from different teams. "I think most firms of our size have different ways of working between different groups – private client, property, corporate and so on – so we've come up with what we think is a solution that is going to work for everyone," Gillies affirms.

Cadworks: zero carbon

Hot on their heels, within a few weeks TLT will have moved its 80-strong Glasgow team, also to a single floor of 10,000 square feet, at the top of the Cadworks development in Cadogan Street.

The UK firm, with a Scottish presence 10 years old this year, refrains from setting any proportion of working time that its people are expected to spend in the office. "We've tried to be as entirely flexible as we can, because we're keen to have a flexible, progressive and inclusive environment," Scotland location head John Paul Sheridan confirms. "What we've done is allow people to choose where and when to work, that suits them, their clients and their role." To do that, TLT has invested in the technology and digital environment, but also ensured a supportive culture: Sheridan, like his partners, regularly takes a day working from home.

That said, he too believes the new building will tempt people in. "The space we've got is designed to encourage people in for specific things – collaborative work spaces, a café space, but also one-to-one meeting rooms, quiet work pods, and rooms that can be used for court or licensing hearings. It's very much designed around the question, what is the purpose of being in the office? When you're doing a detailed piece of work you can do it as easily at home, or I can anyway, whereas you're coming into the office to collaborate with your colleagues."

Again operating on a hotdesking basis, with zones for teams and lockers for storage ("These days we all have a clear desk environment anyway, for security and so on"), and experimenting also with standing desks, the firm will offer other incentives to attend – barista style coffee, free fruit boxes and other healthy snacks, all to help build a sense of community. Staff were able to provide input, resulting in a dedicated court hearings room, as well as the café and other collaborative spaces.

A particular claim for Cadworks

Above (two photos), Fraser Gillies in Wright Johnston & Mackenzie's new St Vincent Plaza base

TLT

Below, The zero carbon environment at TLT and John Paul Sheridan outside the Cadworks building

is – it is believed – it is the first zero carbon office development. Construction is mostly from recycled materials, including the window glass; energy sources will be 100% renewable; there is LED lighting throughout; air source heat pumps provide heating. It's also designed for environmentally friendly transport: apart from some electric vehicle charging points there is no car parking, but 120 cycle rack spaces. With TLT having a target of carbon neutrality by 2025, "We as a firm were very keen on this particular building", Sheridan states. "TLT is one of the leading firms in renewable energy and we are very keen to live those values as a business."

Haymarket Square: hub

Further down the line, autumn 2022 will see three prominent firms take up occupancy in Edinburgh's Haymarket Square development as it reaches completion. Shepherd and Wedderburn are taking the top two floors, and Shoosmiths and Dentons a floor each, again for combined reasons of facilitating hybrid and collaborative working and enhancing their carbon reduction effort.

Less detail has as yet been provided of the work environments that will be on offer, but the building is set to achieve an "A" energy performance certificate rating along with a "very good" BREEAM certification (the pioneering sustainability rating scheme for the built environment), with features including roof-mounted photovoltaic panels and highly efficient heating, cooling and lighting systems. Along with 130 cycle spaces, it is situated at a transport hub, with bus, rail and tram services on its doorstep. Three buildings also incorporating a hotel, shops and leisure facilities will be configured around a landscaped public realm for the benefit of the local community and business district.

"We are committed to being net zero for greenhouse gas emissions by 2030, which means, like many other businesses, we are implementing a programme to make our business more sustainable," Shepherd and Wedderburn managing partner Andrew Blain states. "We integrate sustainability considerations into all our business decisions and are focusing initially on reducing energy consumption, materials use, waste production and travel.

"We will be fitting out our new office to provide a more collaborative working and meeting space and to accommodate hybrid working patterns. 1 Haymarket Square offers premium facilities and a working environment that we believe will be warmly received by colleagues and clients."

Alison Gilson, partner and head of Shoosmiths' Edinburgh office, also emphasises that the move reflects the firm's commitment to "the very best infrastructure in support of our clients and our staff as we expand further in years to come. The office space is also designed to a high environmental specification, which fits well with the firm's ESG goals".

Claire Armstrong, Dentons Scotland managing partner, adds: "The location and facilities fit perfectly with our vision for the Future of Work strategy, which we devised after consulting with our people and commissioning research into the role of the office given the changes that came during the pandemic.

"The research confirmed Dentons is much more than just an office space and that, as everyone adapts to working in a more distributed way, anchoring our people and our clients to our values as a firm, and a community, will be hugely important."

The workplace as a community has become a recurring theme. A sense of belonging is likely to play an important role if the age of the Great Resignation continues, with so many employees across the economy said to be considering a move.

Perhaps Brodies' Nick Scott sums up the collective aim: "The culmination of the past two years has enabled us to embrace a new way of working, with work being the thing you do, not the place you go. Resetting the way in which we approach work provides a great opportunity for keeping colleagues engaged and retaining people throughout their journey through life, as well as recruiting a more diverse workforce."

Fair compensation?

Is further reform needed to the law on damages for personal injury? In a new discussion paper the Scottish Law Commission asks whether previous statutory changes need bringing up to date

Damages for personal injury is an area of the law which has benefited considerably from legislative intervention. Significant changes have been brought about by statute, without which the law might have remained unclear, unresolved, or in some cases unfair.

There are many examples.

- Unpaid services rendered to an injured person (such as nursing, bathing, dressing, shopping and cooking) used to be unrecognised. Section 8 of the Administration of Justice Act 1982 enabled appropriate monetary recompense to be made.
- Personal services which an injured person can no longer render (such as DIY, childcare, and gardening) were similarly unacknowledged in damages cases. Section 9 of the 1982 Act changed matters and created a competent head of claim.
- Deductions from damages is another area which benefits from legislative clarification. Where an injured person receives state benefits or pension payments or grants from a benevolent fund, the question whether damages should be reduced to any extent to reflect those payments is a matter governed by s 10 of the 1982 Act, ensuring that, for example, payments made from a benevolent disaster fund do not result in a reduction of any award of damages.
- The possibility that a more serious condition caused by the negligent act might emerge in the future was traditionally dealt with on a "once-and-for-all" basis, possibly resulting in under- or over-compensation. An injured leg might ultimately, after unsuccessful conservative treatment, require amputation; an epileptic condition might slowly develop; mesothelioma might not appear until many years after asbestos exposure. Section 12 of the 1982 Act introduced the concept of provisional damages, in terms of which a pursuer can recover a certain amount of damages but return to the court many years later seeking additional damages, once the condition has been diagnosed.
- Where a young child is injured, questions may arise concerning the management of any damages awarded to the child. Section 13 of the Children (Scotland) Act 1995 empowered the court to "make such order as it thinks fit relating to the payment and management of the sum for the benefit of the child".

Decades have passed since those statutes were enacted. There have been major socio-legal changes and developments. Would those areas of personal injury law benefit from some further statutory intervention?

Decades have passed since those statutes were enacted. There have been major socio-legal changes and developments. Is further reform needed to reflect those changes? Would these areas of personal injury law benefit from some further statutory intervention?

In a *Discussion Paper on Damages for Personal Injury* (Scot Law Com No 174) published on 23 February 2022, the Scottish Law Commission provides a survey of current law and practice, and seeks views concerning possible further reform of the law relating to damages for services, deductions from damages, provisional damages, and management of children's awards.

Services claims

One important question relates to services. Should s 8 claims for necessary services continue to be restricted to "relatives"? As the discussion paper points out, in modern society an injured person may have little or no support from family members. A friend or neighbour may have

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given significant assistance by providing services on a gratuitous basis, such as shopping, cooking, cleaning, bathing, and so on. Should an award in terms of s 8 be extended to include friends and neighbours? Such an extension might be seen to reflect changes in society, including the fact that a large percentage of the population no longer live in family units. While therefore the Commission in 1978 took the view that "it is only within the family group that there is a demonstrable social need to allow recovery in respect of services rendered", it may be that circumstances have changed.

What about the loss of personal services formerly rendered by the injured person to relatives (s 9 claims)? Should there be a similar extension to non-relatives? In 1978 the Commission thought not. In the current discussion paper, the Commission seeks views, asking: "Would society today still consider the loss of personal services previously rendered to a non-relative as too remote, and not within the reasonable foreseeability of the responsible person? There would be a broad spectrum of possible claimants, some (but not others) closely reflecting the model of a family group. Examples might include two friends living together, one providing personal care to the other less able party; a neighbour providing personal care such as shopping and grass-cutting for one or more individuals, generally 'keeping an eye' on them as they have no one else to help; someone providing a 'befriending' service, perhaps visiting a non-relative in their own home once a week."

The Commission would welcome views on this issue.

Deductions

The discussion paper also examines deductions from damages, including matters relating to social security benefits, treatment from the NHS, and care and accommodation, both private and local authority. There is discussion concerning the issue of an employee's permanent health insurance and the Scottish authority of *Lewicki v Brown & Root Wimpey Highland Fabricators* 1996 SC 200, generally considered to be divergent from English authority. Ultimately the Commission suggests that the relevant authorities may be reconcilable on the basis that wherever an employee can demonstrate that they have contributed financially to a permanent health insurance scheme (even if only by paying tax and national insurance contributions on the notional benefit arising from membership of the scheme), any payments emanating from that scheme should not be deductible. Views are sought and questions asked, including whether any reform of s 10 of the Administration of Justice Act 1982 is required.

Provisional damages

In a chapter concerning provisional damages, the Commission requests views about asbestos-related disease, and in particular whether an unforeseen time bar problem concerning pleural plaques and subsequent more serious disease such as mesothelioma, has emerged. This would arise from a combination of the Prescription and Limitation (Scotland) Act 1973 (the three-year limitation), the Administration of Justice Act 1982 (provisional damages), the Damages (Asbestos-related Conditions) (Scotland) Act 2009 (pleural plaques and other asbestos-related conditions to be personal injury for which damages can be recovered, contrary to the approach adopted in the House of Lords in *Rothwell v Chemical & Insulating Co* in 2007), and the decision in *Aitchison v Glasgow City Council* 2010 SLT 358 emphasising the principle of "one action, one harm". The recent decisions of *Quinn v Wright's Insulations* 2020 SCLR 731 and *Kelman v Moray Council* [2021] CSOH 131 are referred to, as illustrations of a possible solution lying in the discretionary power given to the court by s 19A of the 1973 Act. Views are sought on this important issue.

Management of children's awards

Finally the paper discusses the management of awards of damages to children. The roles of the court and the Accountant of Court are examined, as are ss 11 and 13 of the Children (Scotland) Act 1995, and the option of setting up a trust. Reference is made to an article by D A Kinloch and C McEachran, "Damages for Children – Some Reflections" (2003) 51 Rep B 2. There the view is expressed that "Even if the decree is for a very substantial amount, it is considered demeaning to concerned parents to suggest that they are not capable of managing a capital sum awarded to their child, when they have responsibility for his or her care, education and upbringing and with all the other major decisions in his or her life".

Nevertheless it might be thought that some parents or guardians, when faced with the task of investing and managing large sums of money for the child, may welcome assistance. It is also suggested that a possible procedure might be for the court, when about to grant decree for damages for a child, to make inquiries about the future administration of funds and property to be held for the child, and if considered necessary, to remit the case to the Accountant of Court for a report in terms of s 13.

Responses welcome

The discussion paper acknowledges the invaluable assistance provided by many personal injury practitioners and by the Accountant of Court and her staff. The Commission looks forward to receiving further experiences and views when consultees respond to the questions posed in the paper. All responses, whether or not covering every question, will be welcome. The closing date for responses is 15 June 2022.

Lady Paton is chair of the Scottish Law Commission

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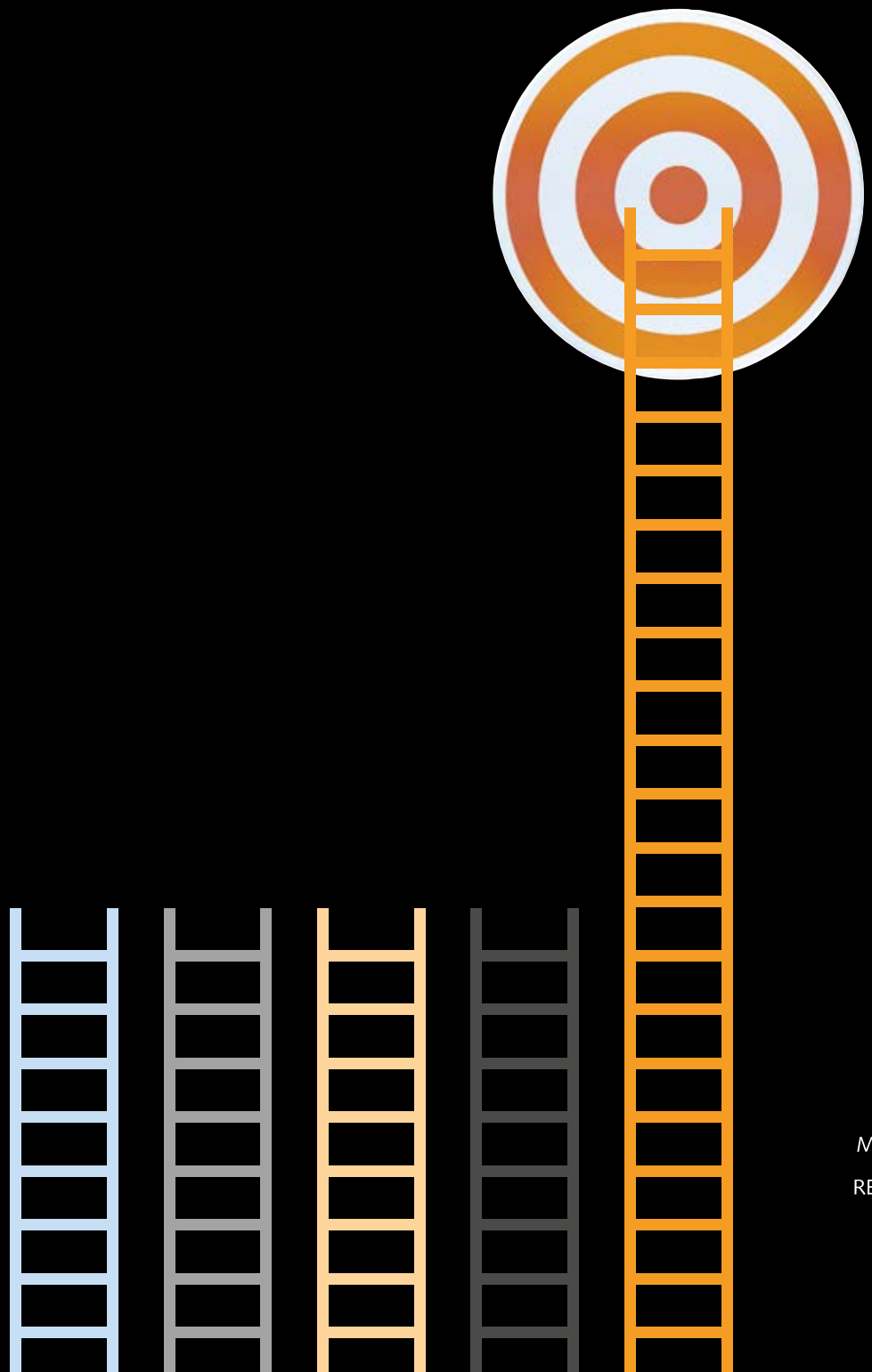

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Pause for thought

Gillian Cumming explains why issues arise for employers concerning women with symptoms of the menopause, and how best to handle such matters in the workplace

Menopausal women are the fastest growing group of workers in the UK. The menopause can have a significant and debilitating impact on health and wellbeing. A recent study found that almost a fifth of those experiencing menopausal symptoms were considering leaving the workplace. What then should employers be doing to support their employees and workers who are experiencing symptoms of the menopause?

Who does the menopause affect?

The menopause is when a woman stops having periods and is no longer able to get pregnant naturally. There are three different stages to the menopause:

1. peri-menopause;
2. menopause;
3. post-menopause.

The menopause usually occurs between age 45 and age 55; however it is important to be aware that there is no exact science to its timing. While the average age in the UK to go through the menopause is 51, one person in 100 will go through the menopause before they reach age 40. In addition, some people may go through surgical menopause much earlier in life.

The menopause can affect women, trans people, intersex people and those who identify as non-binary.

What are the symptoms?

Common symptoms of the menopause include, but are not limited to, hot flushes, night sweats, difficulty sleeping, headaches, low mood, anxiety, panic attacks, palpitations, joint stiffness, irregular or heavy periods, and problems with memory and concentration.

The symptoms experienced will differ from person to person, and the symptoms can be very mild to very severe. Everyone's experience will be different, and there is therefore no "one size fits all" approach when supporting employees and workers who are going through the menopause.

Symptoms of the menopause can last from four to eight years, or even longer in some cases. The symptoms can present years before periods actually stop, and last for several years thereafter.

Can the Equality Act 2010 apply?

The short answer is yes, and potentially on a number of different grounds.

In terms of discrimination, menopause is not a standalone protected characteristic under the Equality Act 2010. However, the symptoms being experienced could bring an individual within the definition of a disabled person in terms of the Act. To qualify as such, a condition must have a long-term adverse effect on an individual's ability to carry out day-to-day activities, and the condition must last, or be expected to last, for a year. This means that someone suffering with symptoms of the menopause could qualify as a disabled person in terms of the Act, depending on the severity of the symptoms they are experiencing.

In *Donnachie v Telent Technology Services Ltd* ET/13000005/20, the question of whether symptoms of the menopause met the definition of a disability in terms of the Equality Act was considered. Donnachie was experiencing hot flushes, palpitations, anxiety, night sweats, fatigue, memory difficulties and concentration difficulties as a result of the menopause. The Employment Tribunal held that her symptoms brought her within the definition of a disabled person, therefore qualifying for protection under the Act. The judge also confirmed that they saw no reason why, in principle, "typical" menopausal symptoms would not have the relevant disabling effect on an individual. Accordingly, it would follow that those experiencing typical menopause symptoms would likely qualify for protection in terms of the Equality Act.

An employee or worker could also consider raising claims for sex discrimination, age discrimination or gender reassignment discrimination, depending on their individual circumstances.

What should employers do to offer support?

ACAS has published a guidance document, *Menopause at work*, which provides advice on how best to handle menopause related issues in the workplace.

Within this guidance, ACAS recommends that employers consider taking the following action:

- Have a menopause policy in place, which outlines the process for raising menopause related issues, and the support that you offer. The policy could also outline details of the training that is provided to managers, and encourage open conversations in the workplace.
- Manage absence from work sensitively when an employee or worker is suffering from symptoms of the menopause. Employers could, for example, record absences related to the menopause separately, and not use such absences as the basis for disciplinary action or action under an absence management policy.
- Consider any reasonable adjustments that may be appropriate in the circumstances. What will be appropriate will of course depend on the symptoms that are being experienced. Reasonable adjustments could include working from home if this is appropriate, changing hours of work, allowing additional breaks, agreeing to change duties, or providing a workspace near a window or equipment such as a fan. Any changes made should be agreed in writing. The duty to consider reasonable adjustments would be an ongoing duty, as symptoms may vary over time,

and so it would be important for employers to schedule follow-up conversations to ensure the adjustments made are working and to discuss any changes that may require to be made.

• Train managers on the effects of the menopause and how to speak to employees and workers sensitively about the menopause, the symptoms being experienced and the support that is available for them within the workplace. This will hopefully lead to affected employees and workers feeling more comfortable speaking to their managers, and lead to them having constructive conversations with them. It will also make managers feel more confident when having such discussions with staff.

• Have open conversations with employees and workers (if they want to do so) about the symptoms that they are experiencing and what you can do to support them in the workplace, on an ongoing basis. It is important that they are made to feel as comfortable as possible during any such discussion. Conversations should take place in private, and the content should not be disclosed to anyone else without the individual's consent. If an individual does not feel comfortable speaking to their own line manager, they should be offered the opportunity to speak to someone else in the business they feel comfortable talking to.

• Take into consideration any performance issues which may be the result of menopause symptoms.

• Have a designated menopause wellbeing champion in the workplace. This person would be a designated point of contact for employees and workers to approach if they are looking for support or guidance related to the menopause.

• Carry out all relevant risk assessments and review them on a regular basis.

Solicitors' resource

As it stands, more than 50% of solicitors in Scotland are women, and over two thirds of new entrants to the profession in Scotland are female. Dealing with menopause issues in the workplace is therefore an issue which greatly affects the profession. The Law Society of Scotland has published a useful Menopause Support Resource, tailored to the profession, which provides recommendations to organisations and support for individuals, and signposts valuable resources.

The recommendations made by the Society to organisations include the following:

• Create an open culture, so that the menopause can be discussed freely in the workplace. Organisations could consider, for example, starting an internal networking group to discuss issues and share experiences.

• Champion employees and workers to speak freely about the menopause in the workplace.

• Share resources and guidance within the workplace, so that employees and workers receive advice and information which may be of assistance to them if they are experiencing symptoms of the menopause.

• Carry out training within the workplace, to raise awareness.

• Use key dates, such as World Menopause Day (18 October) to increase awareness within the workplace and encourage open discussion.

• Offer staff support with specialist menopausal practitioners if they are experiencing symptoms of the menopause.

• Consider making reasonable adjustments for those experiencing menopausal symptoms.

Of course, what is appropriate in terms of supporting employees or workers experiencing menopausal symptoms will differ from job to job and workplace to workplace. Engagement with staff is therefore crucial to ensure that the necessary support is put in place. It is hoped, by implementing such measures, that not only will businesses comply with the law and avoid discrimination claims, but that it will also help to retain experienced talent within the workplace.

Gillian Cumming is a senior solicitor with Just Employment Law

FoI: rights needing a new law

Scotland's freedom of information law badly needs brought up to date, argues Carole Ewart of the Campaign for Freedom of Information in Scotland, which has drafted a bill now out to public comment

The Campaign for Freedom of Information in Scotland ("CFoIS") believes robust legal rights can only be delivered by amending the Freedom of Information (Scotland) Act 2002 ("FoISA"). It has therefore published a draft Freedom of Information (Scotland) (No 2) Bill along with a policy memorandum, explanatory notes, financial memorandum and statement on legislative competence.

Consultation on the draft is open until 24 April, which coincides with the 20th anniversary of the Scottish Parliament passing FoISA. The focus will now be on the pace as well as the detail of reform.

Comprising 21 sections, the bill is grounded in the consultation and inquiry led by the then Public Audit & Post-legislative Scrutiny Committee ("PAPLS") of the Scottish Parliament. The process began in 2018 and concluded with a thorough report, published in May 2020, which recommended legal reform.

The catalyst for the inquiry was MSPs unanimously voting for post-legislative scrutiny of FoISA in 2017. This year is an opportunity to break the cycle of prevarication. Central to the debate is whether voluntary measures, policy initiatives and fine words will do, or whether the strategy is to strengthen enforceable rights and duties and define more precisely the consequences for failure to comply. While the Scottish Government's participation in the voluntary Open Government Partnership initiative is welcome, it cannot replace a robust and enforceable FoI law.

Why reform is needed

FoISA is and remains part of the delivery vehicle for the founding principles of the Scottish Parliament, which were to be "open, accessible and accountable". However, we need an updated law with loopholes being closed, as well as increased proactive publication of information of the type people want.

Two years ago, CFoIS published a report which identified that over half of FoISA's 76 sections and four schedules needed to be reviewed, and four months later the PAPLS evidenced over 40 areas for reform. However there is still no consultation from the Scottish Government, which has stated that it will consult on "if" rather than "how" FoISA should be reformed.

The inbuilt agility of FoISA is another reason for urgent reform. Section 5 is designed to enable the number and type of bodies covered to be extended through a process of periodic "designation", but has been woefully underused. For example, despite promises in 2002 that registered social landlords would be covered, it took until 2019 for delivery. A confused and inconsistent approach to designation has developed, with the onus on Scottish ministers to initiate the process.

Given the diversification in the delivery agents of publicly funded services, there has been a systematic erosion of enforceable FoI rights because the s 5 power has not been used. This was identified as a problem in the 2015 report of the Scottish Information Commissioner ("SIC"), *FOI 10 years on: Are the right organisations covered?* It was also raised by Audit Scotland in its written submission to the PAPLS inquiry.

The SIC's 2015 report warned that immediate steps must be taken to protect FoI rights from the damage caused by the outsourcing of important public services. Little progress

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has been made. For example, the 2019 consultation on extending FoISA to care homes run by the private sector has not been progressed, despite the urgency of the situation as exposed by the high level of deaths in Scottish care homes during the pandemic. All care homes are subject to public regulation by the Care Commission, so meet the designation rules. As the Scottish Government points out, "Care services aren't allowed to operate unless they're registered with the Care Inspectorate." It is useful to note that SIC polling in 2019 reported that 80% of survey respondents agreed that private sector companies working on contracts for public bodies should be subject to the same FoI laws as public bodies.

The draft bill therefore sets out a much broader set of criteria to capture those delivering public services and services of a public nature, which are consistent with the law on access to environmental information and the Human Rights Act 1998.

Need to build trust

Scotland will soon set up a National Care Service, and providers will come from the private and third sector too. The designation of all providers of social care is therefore a matter to be addressed now, to ensure there are consistent standards of transparency and accountability regardless of who delivers the service. (CFoIS has a published submission: see its news for November 2021.) If a potential provider does not wish to be covered, they need not tender.

Concerns about the unwillingness of third sector organisations to be covered by FoISA may be overstated. There is a bigger picture. Openness builds public trust, and grant income, and OSCR promotes the need for openness and transparency. An organisation's designation under FoISA should be regarded as an asset rather than a liability.

The repeated delays in legislative reform may create a tension between parliamentary sovereignty and Government power. The PAPLS Committee inquiry report, from a cross-party group of MSPs, provided conclusions that were unequivocal: "There is a broad consensus that FoISA has brought significant benefits... However, witnesses have identified a number of areas for improvement, both in terms of the legislation itself and in its implementation."

Unlike some legal controversies, this is a mainstream issue as so many people in Scotland have used their FoI rights since they became fully operational on 1 January 2005. The public's affinity with the legal right is also evidenced in independent polling for the SIC: in 2017 94% agreed it was important for the public to access information, and 77% would be more likely to trust an authority that published a lot of information about its work. The public's right to know has proven to be effective on everyday issues such as public safety, hygiene in restaurants and housing provision, and helps prevent fraud, corruption and maladministration.

Matching standards

The bill's reforms are designed to match UNESCO's call to build back strong institutions for the public good and sustainable development, as well as to understand the right to information as a tool to deliver all our human rights. One of the sections which will make the biggest impact is the appointment of a freedom of information officer within each designated authority. This replicates the approach in the Public Records (Scotland) Act, the UK's Data Protection Act and the EU's General Data Protection Regulation (GDPR). This important line of accountability, independent scrutiny and internal enforcement will change culture and practice in some designated authorities and marks an acknowledgment of the importance of FoISA within organisations and the need to manage risk in terms of legal compliance and public reputation.

CFoIS is not a lone voice on the issues. The SIC published a special report in January – *FOI during and after the Covid-19 pandemic* – which "analyses key impacts across 2020 and 2021 and reflects on lessons to learn to strengthen FoI practice, performance and culture".

Despite all the evidence and support, the Scottish Government is still not persuaded that legal reform of FoISA is necessary. Drafting the bill was, therefore, prompted by legislative inactivity.

It is important to emphasise that the CFoIS bill contains a detailed set of proposals, so a lot of the work is done and ready for Parliament to exercise its powers. CFoIS is keen to work with a cross-party coalition of MSPs and with the Scottish Government to expedite reforms. Specifically, we have agreed to meet with two MSPs to discuss building parliamentary support, and are encouraging supporters to join our "bill coalition".

Civil society role

The CFoIS initiative also reveals the important role played by civil society organisations, a role acknowledged by the UN as we comply with the standards of "human rights defenders".

Our experiences resonate with a recent survey of campaigners and activists, carried out by the Sheila McKechnie Foundation. It found that the sector was "exhausted", due to a "growing range of barriers" that ranged from a lack of funding to a challenging campaigning environment.

Its CEO said: "We need to make sure campaigners have the resources and support they need to keep going.

"Without that support, opportunities are lost, and people's energy, determination and even hope begin to dissipate.

"If organisations and donors want to create change that really sticks, they must be willing to fund efforts that shift the system – from the grassroots strength of movement and community building to the convening and knowledge-gathering power of established charities."

Let's make the legislative change needed to FoI rights and duties, and acknowledge the importance of civil society in evidencing need and informing reform in Scotland.

The bill and explanatory notes can be accessed at www.cfois.scot. CFoIS is a Scottish charitable incorporated organisation (SCIO), number SC051263. To support the work of CFoIS and support its current fundraising appeal, please go to the CFoIS website (e: info@cfois.scot; Twitter: @CFoIScot).

Carole Ewart is the Convener of the Campaign for Freedom of Information in Scotland

Scottish Enterprise

EOTs: a business winner

Employee ownership trusts offer benefits for businesses, owners and workers

One of the most challenging times for any small business is when the owner decides to withdraw. Family succession, a trade sale or winding the company up can all be considerations.

Another route is to set up an employee ownership trust ("EOT"). This effectively turns those working in the firm into stakeholders.

These trusts were launched in 2014 and are becoming increasingly popular. They now include household name firms such as Wallace and Gromit creators Aardman Animations, hi-fi retailer Richer Sounds and the UK's largest guitar retailer, Guitar Guitar.

Some 170 of these businesses now operate in Scotland, of which more than 120 have Scottish headquarters. We are now the UK region second only to London in terms of numbers.

Dedicated support

The Scottish Government offers dedicated support for EOTs through Co-operative Development Scotland (CDS), a specialist unit within Scottish Enterprise working on behalf of the country's three economic development agencies.

The CDS team can provide free advice, guidance and support including access to experienced advisers. It can also help clients of law firms explore whether employee ownership is right for them, in the form of a funded succession review and employee ownership feasibility study.

There are several advantages for business owners in selling to an EOT. It can

achieve a competitive price and the exit is generally pain free.

"It's a consensual sale," explains Glen Dott, Employee Ownership Special Adviser at CDS. "It meets with owner expectations and the owners don't have to exit the business immediately.

"If the buyers and sellers are from the same company and are sitting on the same side of the table, then it makes the process a whole lot smoother.

"Using this route means you'll get a fair price for the business and you can outline the terms of your exit. Quite often the owners stay connected to the business, perhaps as employees, for some time. It's very much a win-win."

There is also evidence, he adds, that the EOT route creates a strong business. "It's not a faceless office with external shareholders benefiting from the profits. If the company is doing well, all employees can benefit from a tax-free bonus of up to £3,600."

Stability bonus

Clients, too, like EOTs as they offer stability and continuity. "There are some good lawyers actively working in this field who understand the minutiae of these deals. However, we would like to see an increased awareness in this area."

Another strong advocate of EOTs is Carole Leslie, from Stirling-based Ownership Associates, who project manages transactions in this area.

She says: "By taking this track, owners are really guaranteeing stability and security for the business as well as continuity for the clients and suppliers. They don't want to see the company relocated or downsized or the way of working changed."

An EOT ensures a fair value and that the people who are most interested in it – the people who work for it – get the chance to run it, Carole adds.

"It doesn't mean the seller has to compromise on the price, and the owners are able to remain involved. With a trade sale, they immediately hand over control to the acquiring business."

The success of EOTs can be measured on a range of key metrics: productivity, innovation, profitability, sustainability, resilience, recruitment and retention, and employee happiness and wellbeing. "It's a very, very stable platform for growth."

Law firms in Scotland enjoy working on these transactions, Carole says.

"Everyone's interests are aligned, so it tends to be a really enjoyable process. We have a number of lawyers who are actively looking to do more of these."

To find out more about the EOT transaction, watch a new video guide: www.scottish-enterprise.com/eot

Prepare for the great tax catch-up

Changes are coming to the time at which profits of unincorporated businesses are brought into the calculation of tax liabilities, requiring advance planning of the necessary funding, as Ronnie Brown explains

Most law firm partners visibly shudder at the mention of "overlap profits" and "overlap relief". The good news is that they are soon to be a thing of the past. The bad news is that their removal may cause a significant call on many firms' working capital, where they reserve for partners' tax, or on partners' own cash resources, where their firm doesn't do so. So careful steps are needed to plan ahead for it.

The way in which trading income of unincorporated businesses is allocated to tax years is changing. The existing "current year basis" is set to be replaced with a new, simpler "tax year basis". The new system will result in unincorporated businesses being taxed on their profits arising in a given tax year, regardless of their accounting date. This change will affect all self-employed traders, whether individuals, partnerships or LLPs.

It dovetails with the introduction of Making Tax Digital for income tax, from April 2024 for sole traders, April 2025 for general partnerships and, as yet unconfirmed, April 2026 for LLPs.

The new measures will come into force in the 2024-25 tax year rather than 2023-24 as originally proposed, with a transition period in the tax year 2023-24. This welcome deferral gives businesses much-needed time to prepare properly for the changes.

The proposed changes are detailed in the Finance Bill 2021-22.

Policy objective

The overall aim of the reform, stated by HMRC, is to create a simpler, fairer and more transparent system by which to tax self-employed trading income.

The new rules will remove the need for the complex basis period rules. The introduction of a tax year basis will also result in businesses paying their tax liabilities nearer to the time that the relevant profits have been earned. It is expected that this will improve compliance and reduce tax debt write-off, as businesses should be in a better position to plan their tax payments.

The new rules will also bring the tax treatment of trading profits into line with that of other forms of income for individuals.

Current position

The current position is that trading profits are assessed on a current year basis, under which the basis period for a tax year is, normally, the 12 months ending with the accounting date that falls during that tax year. This means that the profits or losses disclosed on a tax return are based on the business's accounts that end in that tax year.

The overall aim of the reform is to create a simpler, fairer and more transparent system by which to tax self-employed income. The new rules will remove the need for complex basis period rules

Under the current rules, two businesses that are identical in all aspects other than their accounting date may have significantly different taxable profits for the year.

This is because the current year basis makes it possible to defer the payment of tax on profits by electing to set the accounting date early in the tax year.

There are specific, more complex rules that apply to determine the basis period in the early years of trading, which can result in businesses experiencing double taxation during this time on "overlap profits". These profits are carried forward, and "overlap relief" is given when the business changes its accounting date or ceases trading or the individual partner retires. The overlap relief provisions ensure that profits which are generated by the trading business are only taxed once. However, there can be a significant gap between the year in which the tax is actually paid and the year in which the relief is applied.

As an example of the current year basis, assume Drumsheugh Law LLP, a two member firm, starts in business on 1 July 2010. It makes a respectable profit of £100,000 in its first year of trading to 30 June 2011 and £200,000 in its second year to 30 June 2012. The partners' combined taxable profits will be as follows:

Tax year 2010-11 – 1 July 2010 to 5 April 2011 – 9/12ths of £100,000, i.e. £75,000

Tax year 2011-12 – first full year profits from 1 July 2010 to 30 June 2011, i.e. £100,000

Tax year 2012-13 – second full year profits from 1 July 2011 to 30 June 2012, i.e. £200,000

It will be noted that although profits in the relevant period totalled £300,000, tax has been paid on profits of £375,000. This excess of £75,000, being the proportion of the first year profits that is taxed twice, is the "overlap profit" for which "overlap relief" will be available in due course.

New rules

The new rules will replace the existing current year basis with a tax year basis, under which the profits or losses disclosed on a tax return will be the profits or losses arising in the current tax year (from 6 April to 5 April). This would remove the need for overlap relief, as no overlap profits will be generated, and also the ability of businesses to choose

a specific accounting date to defer the payment of tax on profits.

The new rules do not mandate a specific accounting date for businesses. Businesses will still have the flexibility to choose an accounting date to suit their commercial requirements. However, where the accounting date is not the end of the tax year, businesses will be required to apportion their profits for tax purposes. This will create a new administrative burden.

Businesses with an accounting date between 31 March and 5 April will be unaffected by the new rules, as the rules will treat these dates as equivalent.

Continuing our example, the intervening years have been kind to Drumsheugh Law LLP and it makes a profit of £500,000 in the year ending 30 June 2024, £600,000 in the year ending 30 June 2025 and £640,000 in the year ending 30 June 2026. The partners' taxable profits will be as follows:

Tax year 2024-25 – 3/12ths of £500,000 and 9/12ths of £600,000, i.e. £575,000

Tax year 2025-26 – 3/12ths of £600,000 and 9/12ths of £640,000, i.e. £630,000

Transition period

Special rules will apply in the 2023-24 tax year to allow businesses to transition from the current system to the new rules. During this period, businesses will be taxed on their profits using the current year basis (i.e. for the 12 months ending with the accounting date that falls between 6 April 2023 and 5 April 2024), plus the apportioned profits for the period between the accounting date and the end of the tax year.

The transitional provisions will result in tax liability being accelerated for many businesses. Depending on the accounting date, a business may be charged to tax on almost two years' profits in a single tax year. To mitigate the impact of this, the transitional period additional profits will be automatically spread over a period of five years. It will be possible to opt out of spreading the profits and elect to pay tax on the full amount in the transition period.

Drumsheugh Law LLP made a profit of £480,000 in the year to 30 June 2023. With its profit of £500,000 to 30 June 2024, the partners' taxable profit for the transitional year is as follows:

Tax year 2023-24 – 12/12ths of £480,000 and 9/12ths of £500,000, i.e. £855,000.

Against this will be set the overlap profit of £75,000 from when the business started, leaving the partners with a combined taxable profit of £780,000.

The additional profit is the amount for the period 1 July 2023 to 5 April 2024 less the overlap relief, i.e. £300,000.

This will be automatically spread equally over the five years commencing 2023-24, subject to each partner having the option to accelerate the assessment of their portion. It is also accelerated for any partner who retires during that five year period.

Practical consequences

The ongoing administrative burden of apportioning or estimating profits to be included in a tax return may result in businesses opting to change their accounting date to align with the tax year. This may not be possible or desirable for all businesses, particularly seasonal businesses or those operating internationally as they are likely to have set accounting dates for commercial purposes.

Particularly where a business's accounting date falls later in the tax year, it is unlikely that they will have their accounts finalised by the filing deadline for the prior tax year, into which a portion of the current accounting year's profit falls to be assessed. Where this is the case, these businesses would be expected to submit their tax return using provisional figures based on estimated profits. The Government is exploring, ahead of the transition period in 2023-24, a number of options as to how any provisional figures will be updated.

Concerns have been raised regarding how the spreading of profits arising during the transitional period might impact an individual's entitlement to certain reliefs and benefits. It has been confirmed that these profits will be treated as a one-off separate item of taxable profits, rather than as part of a business's normal trading income, so as to minimise any impact on allowances and means-tested benefits. Nevertheless, these excess profits may push taxpayers into a higher income tax band, thus resulting in a greater tax liability.

Even with the spreading of additional profits, these changes are likely to lead to a significant increase in partners' tax liabilities for the 2023-24 tax year. While the mandatory offset of overlap relief will assist, it is unlikely to provide a complete solution. It is essential that firms seek advice as soon as possible and start to plan funding for these changes now.

Ronnie Brown is head of Corporate Tax at Burness Paull LLP and a member of the Society's Tax Law Committee

Redaction: completing the picture

Proper practice around redacted documents features in our latest civil procedure roundup, as do title to sue, personal injury actions raising points of wider interest, and a refresher on reduction *ope exceptionis*

Civil Court

CHARLES HENNESSY, RETIRED SOLICITOR ADVOCATE, PROFESSOR AND CIVIL PROCEDURE EXPERT

I start with two matters of significance for civil practitioners. First, the Sheriff Appeal Court has celebrated its sixth anniversary, not with a party (although who knows?) but with a new set of rules which came into effect on 6 January 2022.

Broadly speaking, the changes are designed to assist the case management of appeals at the procedural stage, distinguishing between pre-hearing procedures in appeals requiring one appeal sheriff and those requiring three appeal sheriffs.

Secondly, the eagerly awaited fourth edition of Macphail will shortly be on the shelves, or their electronic equivalent. Congratulations to general editor Sheriff Andrew Cubie and all the contributors for their efforts in pulling this together. I am told that it even includes material on the new SAC rules. (More from Sheriff Cubie below.)

Reduction *ope exceptionis*

I probably should not admit it, but I never really understood what this meant – not that it did me any harm. An opportunity to assist those similarly challenged came in *Eastern Motor Co v Grassick* [2021] CSIH 67 (17 December 2021). The parties had contractually agreed to be bound by an expert's determination of a dispute. The defenders wanted to challenge that determination; the pursuers, seeking implement, argued that this could only be done by judicial review. The defenders proposed to challenge the decision in the course of these proceedings. The Inner House was asked to consider, first, whether the court was entitled to interfere with the decision at all, and secondly, whether it was competent to do so by challenging the decision *ope exceptionis*.

Finding for the defenders on the latter point but not the former, the court explained the basis for this remedy and the circumstances in which it might apply, in paras 51-62 of the judgment. In simple terms, it provides that where a writing is founded on by a party, all objections to it can be stated "by way of exception" in the action itself, rather than having to raise a separate action of reduction. This option was introduced in the Court of Session in 1907 and subsequently in the sheriff court. The current rules can be found in RCS, rule 53.8 and OCR, rule 21.3, although it should be noted that the remedy would not be available in the sheriff court if it involved a proposed reduction of a court decree, because the sheriff court has no competence to do so: Courts Reform (Scotland) Act 2014, s 38(2)(g).

The remedy was also invoked by the defenders in *GWR Property v Forrest Outdoor Media* [2022] CSOH 14 (3 February 2022) in relation to a completion certificate in a building contract, said to have been obtained by fraud, proof being allowed on this issue.

Documentary evidence

The rules and practices regarding documentary evidence have come a long way from the days when failure to comply with what might now be regarded as ancient formalities would often be fatal to a claim or defence. In *Guidi v Promontoria (Chestnut)* [2021] SC GLW 59 (1 October 2021), Sheriff Reid considered two issues of procedural significance during a commercial action debate. The defenders were assignees of multiple debts and securities on the books of the Clydesdale Bank. As is well known, they have been taking enforcement steps in a number of actions throughout the UK and have faced a variety of defences. The first 105(!) pages of his judgment deal with whether the bank could competently assign this security (he considered they could not), but the second issue was whether the assignation had to be lodged and, where it was redacted, whether that was sufficient to comply with the rules. The redactions were said to be justified on grounds of "commercial sensitivity".

The sheriff considered at some length the position regarding the lodging of redacted documents, observing that "It has become quite the fashion" for parties to do so without obtaining leave of the court. He carried out a comprehensive review of the law and practice regarding the lodging of documents in civil proceedings (practitioners would be well advised to keep a copy of this section for future reference), noting the fundamental principle that a party who founds on a document must lodge the original, complete and unredacted version. He discussed the status of copy documents and the relative procedural rules, then dealt with redacted documents. A party wishing to lodge a redacted version of a document founded on, he said, should seek leave of the court and must justify their request. It is for the court, not the party, to decide what can be redacted and why. There will be situations where challenging the lack of a "clean" and technically acceptable document might be regarded as opportunism rather than a genuine defence, so redactions should not automatically be regarded as a smokescreen to hide some fundamental flaw in the claim.

Interestingly, since this was a commercial action, the sheriff dealt with this by exercising his powers under OCR, rule 40, ordaining the defenders either (1) to lodge in process, complete and unredacted, the documents founded on (or a true copy certified in terms of s 6 of the Civil Evidence (Scotland) Act 1988), or (2) to seek and obtain leave of the court to lodge redacted certified copies in discharge of the obligation incumbent upon them in terms of OCR, rule 21.1(1).

As a postscript to this judgment, although I doubt they would see it this way, the Court of Appeal in England said virtually the same thing six weeks later in *Promontoria (Oak) v Emmanuel* [2021] EWCA Civ 1682. Real civil geeks may want to do a comparison of our respective systems and procedures on such matters and note that nowadays they are not very different at all: see paras 43-48 of that judgment.

A completely different issue about a critical document was centre stage in *Glasgow City Council v First Glasgow (No 1)* [2022] CSOH 9 (27 January 2022) – the Glasgow bin lorry case. The council was seeking to recover the £6.5 million damages it had paid out from the party that had provided what the council alleged was a negligent reference for the lorry driver. The actual written reference was not lodged because it was nowhere to be found. Evidence was nonetheless led about it, objection being taken in reliance on the best evidence rule.

Lord Ericht repelled the objection and admitted secondary evidence of the reference and its wording. Another remarkable feature of the case was that not a single witness spoke to remembering ever having seen a reference. Lord Ericht ultimately decided that "Where, as here, a pursuer's case turns on the precise wording of a document which is not produced, then clear and cogent evidence will be required that the document exists and what the wording said. Even if such evidence is available, there are obvious difficulties in assessing that evidence as it is not possible for the evidence of the pursuer's witnesses as to the wording of the reference to be tested against the document itself." The failure to produce and prove the reference which was the whole foundation of the pursuer's case was fatal.

Title to sue

The pursuer's title to sue was successfully challenged in Riddell v Arcus Solutions (Holdings) [2022] SC EDIN 1 (3 November 2021). The pursuer sued in his purported capacity as executor dative of his late wife in relation to a claim arising from an accident she sustained in February 2018. She died of unrelated causes in July 2018. An action was raised in February

2021. In July 2021 he moved for the action to be sisted, so that he could be confirmed as executor dative, no such confirmation having been obtained previously. Sheriff Mundy decided that as at the date the proceedings were raised, the pursuer had no authority to act as executor and no power to instigate proceedings. That situation could not be cured retrospectively. The action was dismissed. I must confess that, at first sight, this struck me as a surprising outcome.

Title to sue was established in *Club Los Claveles v First National Trustee Co* [2022] CSOH 6 (20 January 2022). The first pursuer was an unincorporated association. The three other pursuers were individuals who said they were on the club's committee. Members of the club held timeshares in properties in Tenerife. The defenders unsuccessfully contested the individuals' status. Following a proof Lord Clark carried out a detailed analysis of the club's constitution, which appeared to have been drafted with a view to giving lawyers something to argue about. There is some discussion about the law on title to sue in relation to unincorporated associations, but ultimately the case turned on very particular and abstruse facts.

Right of relief

In *Loretto Housing Association v Cruden Building & Renewals* [2021] CSOH 127 (21 December 2021) Lord Braid poses the question succinctly at the start of his judgment: "Does a person who settles a court action, obtaining decree of absolvitor in their favour, have a right of relief against any joint wrongdoer under s 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) 1940, failing which, at common law?"

A defender (D) settled a claim by a pursuer against several joint wrongdoers and obtained absolvitor. D tried to recover a portion of the settlement from a defender not party to it. It was argued that they were not entitled to do so. Read shortly, the statute says that anybody who has paid damages in which "he has been found liable" shall be entitled to recover a "just" contribution from a joint wrongdoer. As Lord Braid put it, "The submission that it is less than obvious to hold that a decree of absolvitor is a decree finding a party liable, is something of an understatement." He found the claim for relief under statute to be neither relevant nor competent. I suspect that came as no great surprise to anyone involved in the case.

The additional argument for D, that a right of recovery existed at common law, was contrary to the authoritative decision in *National Coal Board v Thomson* 1959 SC 353. The court was asked to overturn or distinguish that case, but Lord Braid considered that neither was justified despite some judicial and academic reservations about the decision. Perhaps the door is not completely shut, but meantime the moral is for a settler to take everyone with them, formally or informally, to avoid any such problems. Easier said than done though.

On a related point, although it did not involve joint wrongdoers as such, I note that in the bin lorry case above the defenders also argued that the council was not entitled to recover from a third party the amount it had paid in settlement of actions in which it had not run a potential defence, i.e. automatism on the part of the driver. It was submitted that, by settling the claims, the pursuer had failed to mitigate its loss and the settlements achieved were not reasonable ones. The council's response was that the claims had been settled on the advice of senior counsel. Interestingly, the court expressed no view on this, having decided that there was no factual basis for the claim.

Personal injury procedures

Personal injury actions, in which case management is much more prevalent than in ordinary actions, throw up many issues about procedure which will, I am sure, impact on all types of civil proceedings in future.

In *Thorvaldsen v Dundee City Council* [2021] CSOH 120 (2 December 2021), the court noted that the proof had been set down for four days by Webex, but "as a result of frequent interruptions caused by technical difficulties it required to be split over seven days... having regard to the overrun... parties invited me to dispense with oral argument and to require written submissions (only)". Written submissions were lodged just over a week after the conclusion of evidence. Might written submissions (only) after proof be the shape of things to come?

EG v Governors of the Fettes Trust [2021] CSOH 128 (22 December 2021) was an abuse claim in which the pursuer sought a jury trial. That motion was opposed on the grounds that averments of similar behaviour towards other children were of doubtful relevancy, there had been substantial delay in bringing the proceedings (the events were in 1975-76), and difficulties would arise in assessing damages and interest. It is noted that the court "had the benefit of written submissions for each party", but it appears there were oral submissions too. No doubt this method of proceeding was all agreed beforehand, but it is interesting to speculate whether we will end up with formal rules governing when and how such written/oral submissions should be made, and what is expected of parties in each.

As it happens, the motion was refused on the basis that objections to evidence about similar behaviour would give rise to undesirable interruptions during a jury trial, and there was room for material uncertainty in a case like this about the jury's views on the various matters that bear on damages and interest, so much so that it would be difficult for a judge fully and accurately to understand the individual elements which in the jury's mind made up the sum awarded in damages. Whether this will set a precedent for such cases remains to be seen.

A v Glasgow City Council [2021] CSOH 102 (13 October 2021) was a claim for damages arising from alleged abuse of the pursuer by a foster carer. The detailed history was extremely complicated and would have been a nightmare to establish at proof, regardless of anything else. An extensive joint minute had been agreed prior to the proof which covered numerous factual background matters and no doubt made it easier for the parties and the court to conduct this proof. This is a useful reminder of the benefits of deploying joint minutes and/or notices to admit in all civil actions.

Pleural plaques and limitation

For the purposes of limitation of actions, does the fact that a person knows he has pleural plaques set the clock running? In the particular circumstances of *Kelman v Moray Council* [2021] CSOH 131 (24 December 2021), Lady Wise said no. The pursuer was diagnosed with pleural plaques in 1999 and continued well and working until 2019 when he developed symptoms of breathlessness, sadly diagnosed as mesothelioma. At a preliminary proof the three witnesses for the pursuer were led in three different ways, and the defenders' three witnesses in the traditional way. The case raised important and difficult issues, but there was no concern about credibility and little about reliability. The different modes of proof suited all parties and witnesses – and the interests of justice, it would seem.

On the merits, it was held that the claim was not time barred because the pursuer did not become aware that he had an injury sufficiently serious to trigger making a claim until his diagnosis in 2019. Before that, he was unconcerned about his health because, amongst other things, the way in which his diagnosis of pleural plaques was explained to him was "reassuring rather than alarming". If it had been held that the claim was time barred, the court would have exercised its discretion to allow it to proceed under s 19A.

Cubie's law

As a reward for editing Macphail, Sheriff Andrew Cubie seems to have been appointed the nominated sheriff at Glasgow for obscure civil cases, if the next two are anything to go by.

Section 38(2) of the 2014 Act extended the jurisdiction and competence of the sheriff to proceedings for proving the tenor of documents which had, until then, been exclusively with the Court of Session. In *RW v JW* [2022] SC GLW 2 (12 January 2022), Sheriff Cubie had to consider what appears to have been the first reported such application in the sheriff court. The rules can be found in OCR, chapter 53. The missing document was a will and

the pursuer provided a copy of the principal will along with an affidavit from the solicitor involved. This relatively brief note provides useful guidance on the legal test to be satisfied and what evidence is required in support.

AB, Applicant [2022] SC GLW 3 (7 January 2022) was an unusual (in my experience) application by the child of an adopted person to have access to the court process of the adoption itself. The adoption took place in 1933. The Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 (SSI 2009/284) makes such papers confidential for 100 years unless there are special circumstances. However, after some sterling investigative work, the court found that, at the time the adoption took place, the embargoed period was only 20 years. While that was not determinative of the issue, Sheriff Cubie considered all the circumstances, including the likelihood that anyone would be affected by the disclosure of the information, and granted the application.

Corporate

EMMA ARCARI
ASSOCIATE, WRIGHT, JOHNSTON & MACKENZIE LLP

While the UK Government continues with scaled-back proposals to overhaul the procurement regime, certain judicial reviews brought by the Good Law Project ("GLP") are of interest. These pandemic procurement cases relate to the direct award of contracts by the Government without prior publication, under reg 32(2) of the Public Contracts Regulations 2015 ("PCR").

Apparent bias?

R (Good Law Project) v Minister for the Cabinet Office [2022] EWCA Civ 21 concerns allegations of bias where a contract for support services relating to COVID-19 public communications was awarded to a firm with close contacts of Dominic Cummings, then chief adviser to the Prime Minister and who had previously worked for Michael Gove MP. The contract was awarded at the beginning of the pandemic and was later extended to other areas, such as Brexit.

A High Court judgment had found the award did give rise to apparent bias, though dismissed claims that the grounds for making an emergency direct award were not met and that the contract length was disproportionate. This was reversed by the Court of Appeal, which considered that there was a "tension" between the finding that the minister was allowed to rely on the reg 32 exception ("reasons of extreme urgency") in making the award, yet should have considered and evaluated other organisations, keeping a clear record of the selection process in order to avoid an appearance of bias. The court also stated it was unsurprising, given the specialised nature of the industry in question, that those involved could have built up friendships over the years.

In short, it held that an impartial and informed observer would not have considered a serious possibility of bias because of the lack of either a "procurement regime-light" or a formal, documented process.

Another issue raised by the Appeal Court is the legitimacy of GLP (or of anyone who is not an "economic operator" with any commercial interest) even raising the judicial review action. Although the GLP has asked for permission to appeal to the Supreme Court, this issue will not be decided there. With the Government proposing a more "simple and flexible" procurement regime (see below), could we receive guidance on this issue in the near future?

Equal treatment

Good Law Project v Secretary of State for Health and Social Care [2022] EWHC 46 (TCC) relates to contracts entered into again by use of the reg 32 exception. This involved nine contracts for the supply of PPE, much of which was later found to be faulty, at a cost of over £700 million. GLP, together with a doctors' group, sought declarations that the Secretary of State acted unlawfully in awarding the contracts. The claimants were refused permission to challenge the use of reg 32(2)(c), but received permission to challenge on the following grounds:

- That there had been a breach of the principles of equal treatment and transparency by failing to put in place procedures that identified the selection criteria or evaluation guidance in deciding which supplier to use, or any fair competition between suppliers. It was argued that the creation and use of a "VIP" high priority lane for suppliers referred by ministers, MPs etc meant more favourable treatment and a much greater chance of being awarded a contract to those suppliers.
- That there had been a failure to provide proper reasons for the decisions.
- That the decisions to award the contracts to two of the suppliers were irrational due to insufficient financial/technical verification, and also due to the use of the VIP lane.

In relation to the failure to provide proper reasons, it was held that this duty had been complied with prior to the issue of proceedings. It was also held that none of the award decisions were irrational, there had been no reliance on VIP lane status in awarding contracts to two of the suppliers, and sufficient technical and financial verification had taken place.

However it was held that the operation of the VIP lane, which gave more favourable treatment to those suppliers referred to it, was in breach of the obligation of equal treatment under the PCRs and therefore unlawful. Nevertheless, two of the suppliers would likely have been awarded contracts even if they had not been allocated to the VIP lane. As the outcome would likely not have been substantially different, the court refused declaratory relief.

Progress on procurement reform

The Government has scaled back some of the more controversial proposals in its green paper *Transforming public procurement*. For example, there will no longer be a cap on damages and the light touch regime will not be abolished but reduced in scope. The Government has responded with further detail to other proposals, e.g. the framework for excluding unsuitable suppliers (to be backed up with statutory guidance and a debarment list), but also a move from assessing bids on a "most economically advantageous tender" to a "most advantageous tender" basis. Although concerns were raised about the latter causing a burden to SMEs, the Government considered this issue alleviated by "embedding concepts of proportionality" into the award criteria.

Space does not permit further detail here; however it is worth noting that these proposed changes to a more principles based system are only to the English procurement regime, and there is the possibility of increased divergence given the varying devolved powers in the UK. The Welsh and Northern Irish administrations are mentioned in the Government response; however Scotland is omitted. Given the short timescales involved (at time of writing the as yet unseen Procurement Bill is proposed to be in effect in 2023), and the consequences for the whole of the UK, we should keep a close eye on developments.

Intellectual Property

ALISON BRYCE, PARTNER, DENTONS UK & MIDDLE EAST LLP

This article will look at the relationship between NFTs (non-fungible tokens) and intellectual property rights. We will examine two key areas: who has the right to create and sell NFTs, and what potential IP issues might arise when transferring NFTs.

What are NFTs?

However, before we dive into the law in this area, we should perhaps set out what NFTs are. NFTs are blockchain based units with a unique ID linking them to an underlying asset. NFTs are

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

National Planning Framework

The Government seeks comments on its draft National Planning Framework 4, which will set out priorities and policies for the planning system up to 2045. See consult.gov.scot/local-government-and-communities/draft-national-planning-framework-4/

Respond by 31 March.

Local development planning

The Government seeks views on secondary legislative requirements and draft guidance on implementing the future local development plan system. See consult.gov.scot/planning-architecture/local-development-planning/

Respond by 31 March.

Economic cyber resilience

The UK Government is consulting on proposed new laws to strengthen the cyber resilience of organisations important to the UK economy. See www.gov.uk/government/consultations/proposal-for-legislation-to-improve-the-uks-cyber-resilience

Respond by 10 April.

Public sector equality duty

Scottish ministers are reviewing the effectiveness of the duty in Scotland and asking what could be done to improve the Scottish specific duties regime. See consult.gov.scot/mainstreaming-policy-team/public-sector-equality-duty-review/

Respond by 11 April.

Rented sector strategy

The Government invites comments on its draft rented sector strategy in pursuit of its vision for housing to 2040. It aims to ensure that all tenants, private or social, can access stable tenancies with affordable choices. See consult.gov.scot/housing-and-social-justice/draft-rented-sector-strategy/

Respond by 15 April.

Setting the pension age

Baroness Neville-Rolfe is seeking evidence in order to make recommendations to the UK Government on the metrics to be used to inform setting the state pension age. See www.gov.uk/government/consultations/second-state-pension-age-review-independent-report-call-for-evidence

Respond by 25 April.

Customs processes

HMRC and HM Treasury welcome views on improving the UK's customs system by "simplifying processes for traders and embracing innovation". See www.gov.uk/government/consultations/call-for-evidence-an-independent-customs-regime

Respond by 2 May.

Taxing online commerce

HM Treasury seeks views on the appropriate policy regime to "rebalance the taxation of the retail sector between online and in-store". See www.gov.uk/government/consultations/online-sales-tax-policy-consultation

Respond by 20 May.

Damages for personal injury

The Scottish Law Commission has published a *Discussion Paper on Damages for Personal Injury*, covering provisions of the Administration of Justice Act 1982 and the management of damages awarded to children. See feature on p 16 and www.scotlawcom.gov.uk/files/8716/4555/1018/Discussion_Paper_Damages_for_Personal_Injury.pdf

Respond by 15 June.

essentially a one-of-a-kind token that cannot be replaced with something else (in other words they are non-fungible). They are minted so that they can connect to the underlying assets (be these digital or physical). Often, these underlying assets are protected by intellectual property rights such as copyright, designs or trade marks.

It is important to note that NFTs are not the asset itself, but instead just a certificate of ownership of the NFT. By way of an analogy, limited edition artist prints work in the same way: the artist's signature and print number authenticate the work, indicating that it is one of a kind, but do not confer rights in the original artwork. The value of NFTs comes from their non-fungible nature. NFTs can be attributed to anything from drawings to music to a photo of a designer handbag.

In the past year, we have seen NFTs being sold for increasingly high sums. For example, the digital artist Beeple sold an NFT of his collage "Everydays: The First 5000 Days" at Christie's auction house for $69 million in March last year. Rather confusingly, anyone can copy a digital file, including what is included in an NFT; however, ownership of an NFT cannot be copied. Again it is helpful to consider the limited edition print analogy: you can download as many copies of Mona Lisa as you like, but only one person can own the signed and numbered print.

Rights to what?

The IP rights that come with NFTs are not straightforward, as purchasing them is not the same as purchasing a physical asset. Rights of ownership of the actual NFT are straightforward; this can be verified by the owner displaying proof of ownership of the NFT. However, having ownership of the NFT does not give ownership of the asset that the NFT represents. This was illustrated recently when former Twitter CEO Jack Dorsey auctioned an NFT of his first tweet. The Valuable platform which facilitated the auction, noted the buyer was acquiring an "autographed certificate of the tweet". This made it clear that purchase of said NFT did not transfer the copyright in the tweet to the buyer.

Confusion over who owns NFTs is further exacerbated when the seller's right to the underlying asset is questioned. In January, we saw Hermès bring legal proceedings against an American artist, Mason Rothschild, for selling "MetaBirkin" NFTs inspired by Hermès' Birkin bags. Hermès accused Rothschild of trying to profit from Hermès' trade mark. In response, Rothschild noted that he was not selling or creating fake Birkin bags but instead making artworks that depict imaginary, fur-covered Birkin bags. Which, he went on to say, was a freedom of expression protected by the US constitution, likening his artworks to Andy Warhol's use of Campbell's soup cans.

In an ideal world, the minter or seller of the NFT would ensure they have the required rights and permissions to the files they are minting or selling. The potential repercussions of copying, selling, or publicly displaying works without authorisation from the original creator or brand owner in the physical world are the same when it comes to NFTs. There is a risk of copyright, design right and trade mark infringement.

Final thoughts

- NFTs are still very much a new concept, and when it comes to IP, the position remains relatively untested.
- Beeple, the digital artist we mentioned earlier, has likened the current NFT craze to the late 90s dotcom bubble.
- Craze or not, it is a risk that many brand owners are taking seriously, with Nike, Gucci, Disney and L'Oréal all looking to expand their trade mark portfolios to include the virtual world.

Briefings

Agriculture

ADÈLE NICOL, PARTNER, ANDERSON AND KIRSTY NICOLL, SENIOR SOLICITOR, STRATHERN LLP

Although there have not been a significant number of agricultural cases this quarter, three recent cases are of relevance to both landlords and tenants. I also discuss the latest general licences issued for 2022 relating to wildlife in Scotland.

Tenant's improvements

Cotland & Co v Charteris SLC/83/21 (9 February 2022) considered part 10, chapter 8 of the Land Reform (Scotland) Act 2016. The Act enables agricultural tenants to give notice to their landlord of improvements to their property that they wish to claim compensation for, on termination of the tenancy. An objecting landlord can in response give notice under s 115(1) of the Act, and if there is no agreement the tenant can apply to the Land Court for a determination under s 116(1). The court can approve the carrying out of the improvements, either unconditionally or subject to conditions, or reject approval. For approval the court must be satisfied that the landlord has benefited or will in the future benefit from the improvements, and that in all the circumstances it is "just and equitable" for compensation to be paid to the tenant on termination.

Court procedure is necessary only where the parties failed to agree on compensation before the close of the amnesty period in December 2020. In this case no agreement was reached, resulting in the landlord issuing an objection to the whole improvements made and the tenant applying to the court for approval. Although receipt of the application was acknowledged by the landlord's agents, no substantive response was issued. The court held that in that event the improvements were unconditionally and wholly approved.

This decision should act as a stark warning to any landlord that there must be an effort to make a rebuttal in response to the tenant's s 116(1) application, otherwise the landlord may end up liable to pay compensation in full.

Crofting Register challenges

Recently, the Land Court has heard two cases challenging entries in the Crofting Register via s 14(1) of the Crofting Reform (Scotland) Act 2010.

In *Murray v Reid* SLC/37/20 (16 December 2021) the applicant, tenant of croft 1 Manais, Isle of Harris challenged the common boundary with neighbouring number 2 Manais. The latter was registered by the respondent in late 2019. The court turned to historic information about the crofts and carried out a site inspection.

A number of factors, namely the applicant's failure to provide a convincing estate map (the authenticity of the map provided was unknown and as such was "not regarded as binding by either the estate or the crofters": para 28), together with the fact that there appeared to be clear evidence in favour of the boundary as registered, provided by the township clerk and physical features of march stones marking the disputed boundary on site, led to the registered boundary being upheld.

In *Harrison v Macdonald* SLC/66/20 (3 December 2021), the dispute was between two sisters in relation to their respective crofts, 14A and 14B Newmarket, which historically formed one croft. There was also an access element which I will not cover here.

The applicant, tenant of 14B, sought the removal of an area from the respondent's registered croft. The respondent argued that the area had previously been decrofted and the parties had agreed to it being included in the respondent's croft boundary. The court found in favour of the applicant in this instance, noting "there is no doubt that the land... was part of 14B" (para 10). Even if there was a formal agreement at the time of decrofting, "it could not be legally effective without a good deal of additional formal procedure so as to comply with crofting legislation" (para 11). The area still formed part of croft 14B and the Crofting Register was modified as a result.

In light of both of the above cases, when registering a croft it is imperative for boundaries to be checked and any discussions had at the time, properly documented and reflected in plans, in order to avoid future disputes arising.

NatureScot general licences

Following the enactment of the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020, there has been a growing effort to limit behaviour destructive to Scottish wildlife. The general licences issued by NatureScot for 2022 allow some members of the public, most commonly those working in rural businesses, to carry out otherwise illegal activities within limited time windows through the year. These activities include the killing of certain birds, with the overarching purpose of conserving wild birds. Other legitimate reasons may include prevention of damage or injury to livestock, crops or livestock foods.

There are various conditions given in each licence which must be complied with by the licence holder; failure to do so can result in the business, as well as the perpetrator, being held criminally responsible. As such, it is prudent that rural business owners ensure that they and their staff are familiar with any licence conditions in order to avoid any unwanted liability or sanction.

Succession

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

On 1 January 2022 the Inheritance Tax (Delivery of Accounts) (Excepted Estates) (Amendment) Regulations 2021 came into force. These regulations amend the Inheritance Tax (Delivery of Accounts) (Excepted Estates) Regulations 2004, and it is to be regretted that HMRC have confirmed that they do not intend to consolidate the regulations.

The changes introduced by the 2021 Regulations will greatly reduce the inheritance tax reporting requirements for estates to something like they were before the introduction of the C1 and C5. It is thought that 90% of non-taxpaying estates will now involve no reporting whatever, whereas before, although only around 25,000 estates per year had inheritance tax liabilities, more than 10 times as many required to submit full returns. A happy result is that the lack of reporting should speed the administration of estates.

How will the changes affect executry practice?

Perhaps the most significant practical change is that for deaths on or after 1 January 2022 the C5 is no longer required. Instead, the updated C1 form, which is now the only form that will be required in most cases, simply asks the declarant to confirm that the estate is either excepted or exempt. The Scottish Courts &

Tribunals Service has confirmed that it will reject applications made using the wrong version of the C1.

Along with the demise of the C5, the IHT217 makes a welcome departure though, again, only for deaths on or after 1 January 2022. Until now, where any nil rate band had been used on the first death, it was necessary to complete an IHT400 on the second death because the second estate would not qualify as an excepted estate. That is no longer necessary provided either that the estate is a low value excepted estate or an exempt excepted estate. To claim unused nil rate band, all the executor need now do is tick a box on the new C1. This change will be hugely helpful since the old procedure could mean an otherwise simple estate would take many months to complete.

Although there is much to be welcomed in the changes made, the new regime does still require one to know and understand what makes an estate an excepted estate. If nothing else, the structure of the C5 meant it was quite easy to determine what sort of estate you were dealing with. It was also easy to see whether anything about the estate would mean that it could not be treated as a low value excepted estate or an exempt excepted estate and consequently when an IHT400 would be required. Practitioners may well wish to create their own checklist and, it is suggested, the C5 might form the basis of that. The C5 cannot be used unadulterated, however, because the 2021 Regulations altered some of the figures as follows:

- The figure for an exempt excepted estate is increased from £1,000,000 to £3,000,000.
- The figure for specified transfers is increased from £150,000 to £250,000.
- The figure for a qualifying interest in possession is increased from £150,000 to £250,000.

It remains the case that when working out whether an estate is excepted, any available reductions for agricultural property relief or business property relief should not be included in the calculation of the gross value of the estate.

A consequence of the reduction in reporting could be that when dealing with a second death it will sometimes be more difficult to establish what happened on the first death, and it may be thought useful to retain the checklist with the executry papers.

Compliance checks

HMRC says it will monitor the effects of the reduced reporting requirements through compliance checks, and it will be interesting to see how many estates are so affected. If the executors do not hear from HMRC within 60 days from the date of the grant of confirmation, they can assume that they are discharged save in cases where there is incorrect or incomplete information in the return, additional estate comes to light that means the estate no longer qualifies as an excepted estate, or where HMRC has made a request for further information within the 60-day period.

Sport

BRUCE CALDOW, PARTNER, HARPER MACLEOD LLP

Football supporters may be forgiven for thinking that contracts are not worth the paper they are written on in professional football, such is the way players and managers are perceived to move club or be transferred when "in contract". Typically, contracts will be fixed term, reflecting many variables that can exist, including form and fitness, for the professional sportsperson.

In the Scottish Professional Football League ("SPFL"), clubs are obliged to use the template contract of employment for professional football players, in a form mandated and published by the SPFL. The detail regulates the relationship in many areas, including player remuneration, image rights and intellectual property. The detail also reflects the significant regulatory backdrop cascading down from FIFA, the international federation, and principles flowing from FIFA regulations concerning player status and transfers. There are, in addition, many behavioural provisions. All of this makes the situation between Raith Rovers and David Goodwillie most intriguing.

Club's problem

Goodwillie's recent on-field reputation as a goalscorer is in marked contrast to his off-field history, having been successfully sued in 2017 in a civil action for rape. That action did not end his professional football career, but Raith's signing of Goodwillie in January 2022 prompted outrage from supporters, leading to the club declaring that they would not be playing Goodwillie and would be seeking talks with him to terminate his contract. But can the club refuse to consider Goodwillie for selection, and does the club have grounds to terminate his contract, given that matters surrounding Goodwillie are well known within football and would have been well known to Raith Rovers before signing him? A cursory glance at the template SPFL contract discloses little obvious hope for the club in reaching an early resolution.

Away from football, many employers and employees will contract on the basis of either statutory notice or a relatively short period of notice being due to terminate the contract of employment. Until two years' service is attained, very few protections exist (aside, of course, from protections around equalities, whistleblowing and health and safety matters). Common law remedies based on inducement or misrepresentation may possibly, although rarely, assist an employee terminated early on in their relationship, but while any such remedies might theoretically be available to a footballer terminated in term and without cause, if a club was to change its mind as to the signing it has made, the football regulatory landscape can cause severe difficulties for clubs and players alike if they do not observe the sanctity of the footballer's contract of employment.

Unilateral termination is vehemently discouraged by the regulatory landscape in football. Stability in the contractual relationship is seen as vital, to protect both player and club. Typically, football regulations will, in certain circumstances, impose both financial and sporting sanctions on the party who does not observe contractual stability and who terminates without cause. This typically means that where players and clubs wish to part company, an agreement is negotiated and reached. Football dispute jurisprudence would suggest that Goodwillie's two-and-a-half year contract with Raith Rovers will need to be valued, and absent any early termination provisions, the club could face significant difficulty. Leaving Goodwillie to train alone and not selecting him is unlikely to be a solution, as that itself could leave Goodwillie well placed to terminate the contract and seek sanctions and significant damages against the club. In all, a very difficult situation.

Morality regulations?

Should Goodwillie have been allowed to play football in the professional league at all? That is a separate and complicated matter that goes well beyond the moral issues arising from his circumstances. We have, however, undoubtedly entered an era where questions of morality and behaviour are far more prevalent than before in sport and need to be considered. Possibly, this may be due to enhanced media exposure for sports in general, through the internet and social media.

The outrage caused by West Ham United footballer Kurt Zouma and his treatment of his pet cat has prompted calls over whether enough is done to regulate the behaviour of persons who are prevalent in the public eye. A fine and donation to the RSPCA seems to have been the extent to which Zouma's club has been prepared to act – unlike in rugby, where leading English club Exeter Chiefs cleverly rebranded to remove all native American imagery in order to ensure that it could maintain its most important property, its brand name, while swiftly changing its logo, to ensure that fans in the sport could no longer criticise and in turn jeopardise its standing and reputation with commercial partners and supporters of the club.

Whether developments such as these will take us to "morality" regulations being enshrined in sports regulations will require further careful consideration.

New code for new homes

Buyers of new build homes will soon benefit from a new code with stronger customer protections at all stages – and an ombudsman service to go with it

Property

ANDREW TODD, GROUP DIRECTOR AND GENERAL COUNSEL, THE SPRINGFIELD GROUP

Ninety-four per cent of new build customers report at least one defect after they move into their home, according to a poll of homeowners in England by the Home Builders Federation. Poor plastering, bad brickwork pointing and damaged windows are the most commonly reported complaints.

In the past 15 years, the number of complaints has almost doubled. The average new home has over 150 defects – and stories of "our new build nightmare" have become regular articles in the local and national press.

To protect customers, the UK Government is introducing a new code of practice and an ombudsman scheme. The code and scheme will apply to all private customers buying a new home for owner-occupation anywhere in the UK.

What is the new code of practice?

The new code of practice – the New Homes Quality Code – was published in December 2021.

The Code aims to improve the quality of new-build homes and strengthen customer protections. Every aspect of a new home purchase is covered: starting when a customer walks into a sales office; continuing through missives and completion; ending with a strong after-sales and complaints system for two years after completion.

It will influence all stages of purchasing, moving in and living in a new home.

What does the Code cover?

The Code is split between "fundamental principles" and "practical steps".

Principles include fairness, safety, quality, service, responsiveness, transparency, independence, inclusivity, security and compliance. Practical steps – mandatory requirements which must be followed – include:

- protecting vulnerable customers, banning high-pressure selling and requiring any deposits to be protected;
- requiring developers to provide relevant information such as factoring charges (both current and future) upfront;
- requiring fair reservation agreements, including a "cooling-off" period for a customer to change their mind about buying a new home;
- giving customers the right to appoint an inspector to carry out a pre-completion inspection of their home;
- stopping housebuilders from selling "incomplete" homes, as all homes must be "complete" before a customer moves in;
- strengthening requirements for developers to provide a strong after-sales service and complaints process, with the option of referring a complaint to an independent New Homes Ombudsman Service.

Who created the Code?

The Code was created by the New Homes Quality Board ("NHQB").

What is the New Homes Quality Board?

The NHQB is an independent not-for-profit body established by the UK Government in January 2021. The NHQB developed the new Code and has overseen the appointment of a New Homes Ombudsman Service ("NHOS").

What is the New Homes Ombudsman Service?

Currently, if a customer has a complaint, they may have to deal with different organisations.

If the complaint is about the quality of the home, and the customer is not happy with the housebuilder's response, the customer can complain to its warranty provider, e.g. NHBC. But, if the complaint relates to the service provided by the housebuilder, the customer may have to complain separately under the Consumer Code for Home Builders' Independent Dispute Resolution Scheme.

A customer may not realise whether their complaint is about quality or service. It would be better for customers to raise a complaint with one party rather than determine who should deal with a complaint.

In the future, customers buying a new home who are not happy with the quality of their home, or the service provided by the housebuilder, will approach the NHOS for all complaints.

Who will run the NHOS?

NHQB has appointed Dispute Service Ltd as its preferred partner to manage the new service. Dispute Service Ltd already deals with disputes concerning Safe Deposit Scotland (and the Tenancy Deposit Scheme in England), and deals with more than 20,000 disputes each year.

When does the NHOS launch?

The NHOS will launch later this year (estimated Q2 2022). Further details as to how it will operate will be published by the NHQB and Dispute Service Ltd shortly.

What do lawyers need to know about the new Code?

Standard documents will need to be reviewed to reflect the Code.

This will include reservation forms, standard offers, completion procedures, and documents on the developer's side. For example, offers will need to refer to the customer's right for a pre-completion inspection, and entry dates will need to reflect the requirement to carry out the inspection and review any findings.

On the customer's side, the customer's lawyer should be aware of the changes to the reservation forms, including the customer's right to change their mind after signing. This would be important if a developer failed to provide information upfront and a customer

wished to exercise their opportunity to terminate the reservation.

As part of the handover, the customer's lawyers should also be aware of the pre-completion inspection and the requirements on developers to ensure that a home is "complete". Developers should not be offering incentives, such as cash payments, for customers to move into homes that may, for example, only have a temporary electricity connection rather than a permanent mains supply.

After the handover, lawyers assisting with any complaints should know the timescales for housebuilders responding to complaints and the customer's right to speak to the NHOS to resolve any issues or delays.

When will the new Code take effect?

Developers will be expected to register with the NHQB by 31 December 2022.

Will customers be automatically covered by the Code from 31 December 2022?

No. Registration does not automatically mean that a developer will apply the Code. There is a two-step process. The first step is registration, and this will take place by the end of the year. After a housebuilder is registered, the housebuilder has time to complete a transition period to ensure all training, processes, and marketing materials are in place. The housebuilder can then activate its membership with NHQB, which may be in phases, for example by division or location. Once activated, customers reserving new homes from that date will be covered by the NHQC and the NHOS.

Will housebuilders delay activating the new Code?

I believe this is unlikely. Responsible housebuilders welcome the new Code and its benefits to customers. The Springfield Group is committed to registering mid-2022. There will be a strong market demand for housebuilders to move to the new Code.

Equally, there is a strong economic case for moving to the new Code. Housebuilders must pay the annual registration fee for the Code from the point that they register. Developers will avoid paying for two systems at once by activating the new Code.

Where can I find out more about the Code and the NHOS?

The Code and NHOS are being introduced under the Building Safety Bill, which had its second reading in February 2022, and which, for the sections dealing with the Code and NHOS, will apply to the whole of the UK.

You can find more information about the Code from the New Home Quality Board website – www.nhqb.org.uk/ – including copies of the Code, FAQs, developer information and more.

Is there anything we don't know yet?

Yes, we need to know more about the New Homes Ombudsman Service.

Will the Code and the NHOS improve the way new homes are bought and sold?

Absolutely. Everyone deserves a decent home, and any steps we take either as a housebuilder or as an industry to improve standards and service benefits all new build customers.

The Springfield Group incorporates Springfield Properties, Dawn Homes, Walker Group and Tulloch Homes

Democracy behind the scenes

[In this month's in-house interview, the Solicitor to the Scottish Parliament tells of her pride in her team's ethos, their response to the pandemic and how it is shaping working practices

In house

JUDITH MORRISON, SOLICITOR TO THE SCOTTISH PARLIAMENT

Tell us about your career path to date?

I trained at a "top five" Edinburgh firm, staying on as an assistant in their commercial property department. They were quite forward thinking in their support for part-time working when I started my family in the early 1990s. I enjoyed the work among lovely colleagues, but realised the traditional route to partnership was not motivating and seemed incompatible with the family life I wanted.

I took a career break after my third son was born. With great serendipity, within a few months I was offered an opportunity in the Scottish Office Legal Department property team. In 1999 I became a team leader in the newly formed Government Legal Service for Scotland ("GLSS"). Having spent time at the Scottish Law Commission and in advisory roles for the Food Standards Agency and Scottish ministers, I joined the Parliament team on GLSS secondment in 2007, becoming Solicitor to the Parliament in 2015.

As Solicitor to the Parliament, what are your main responsibilities?

The Scottish Parliamentary Corporate Body (SPCB) is responsible for providing the services the Parliament needs to function effectively as the devolved legislature, to hold the Scottish Government to account and facilitate democratic debate and engagement with the electorate.

Essentially my role is to ensure the legal team provides a high-quality advice service that meets the SPCB's needs across the full range of its responsibilities and which demonstrates our values of stewardship, excellence, inclusiveness and respect.

You head the Legal Services Office, a relatively new team for the Parliament. How has the team evolved?

It is an exciting time to be leading the team (23 staff, including 20 solicitors). We are going through a period of change, growth and development.

The Legal Services Office was established as the Parliament's in-house legal team in September 2019. Prior to that our solicitors were seconded from the GLSS pool. We retain strong, constructive links with the GLSS, but are now employed within the Scottish Parliamentary Service (SPS). This means we are fully integrated into parliamentary culture and operations.

We began by agreeing the values we wanted to embed as the foundation for our team culture. All being signed up to caring for one another and supporting team success has been a powerful cohesive force during a challenging period of change. Around two thirds of the team transferred from the GLSS and one third are new, but we all share that team ethos and growth mindset.

I am very proud of how our new team supported the Parliament and its staff to adapt our services and sustain parliamentary business throughout the pandemic. I was delighted to see their hard work recognised at the 2021 Scottish Legal Awards as winners of the Public Sector In-house Team of the year.

What was your main driver for working in the public sector? Would you encourage new lawyers to consider such a career?

From an early age I found being part of a team that worked for the benefit of the community very rewarding. It made sense to follow a similar career direction. I wasn't surprised to find myself surrounded by collaborative colleagues proud of their contribution and committed to delivering excellence. What I was surprised by was the calibre of the work, the buzz of supporting change that aims to improve people's lives and the breadth of opportunity to develop as a more rounded adviser.

Public sector lawyers should not usually find themselves in the spotlight – but that does not mean we are not essential to good governance and supporting the operation and observance of the rule of law. Both are fundamental to ensuring a healthy and cohesive society. If you are looking for a challenge, the opportunity to learn in centres of excellence and to feel engaged in making a difference for people, then I encourage you to spend at least some of your career in public service.

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

Do everything you can to really understand your organisation's business, what it needs to achieve, how it operates and why. Our trusted business partner model is built around providing objective but solution focused advice that supports colleagues to achieve their strategic objectives within the rule of law. That, and in-house practice in general, requires appreciation of the principles underpinning the legal framework and sound governance and their resonance for your business, as much as application of the law itself.

You are also head of the Business Assurance Group. What is this group and why is it important?

As head of Business Assurance, I am a member of the SPS Leadership Group. As such I am responsible for the development of strategy and plans to achieve the Parliament's objectives, and accountable for the operation of services within the group (legal and procurement). I am accountable to my group colleagues for embedding SPS policies and building an environment where our values come to life.

The most important element of this for me is role modelling our culture and values as best I can. Pride in and commitment to how we do

our job is as important as the quality of the professional skills we deploy. Our group name reflects what I hope is our brand – a reputation as excellent trusted business advisers who support our colleagues to make informed decisions based on sound legal advice and risk management.

You are senior sponsor for the Mental Health Network at the Parliament. How can solicitors build good mental health, increase resilience and manage stress?

I am very proud to have been given this opportunity. The Mental Health Network encourages a working culture that is open about, and mindful of, mental health and wellbeing. I think creating that foundation is the place to start. We began by raising awareness of what can affect mental health, practising listening, and through that built trust to share our experiences and become comfortable speaking about how we are feeling.

Begin by learning – as a team if possible. We are all different: understand what you need to feel and live well – walking breaks, social interaction, quiet time for reflection – and work with your manager/colleagues to build that into your working life. Of course, we have deadlines to deliver, but if we can optimise the workplace to offer as much support for each other as possible, it becomes a positive force to manage stress and build our resilience. Be appreciative of others, but also be kind to yourself – often we can be our own worst critic. Volunteering positive feedback and appreciation should make you feel good and is likely to be reciprocated.

The pandemic has had a significant impact on people's mental health and wellbeing. Have you seen any positives coming out of this period?

The restrictions placed on our daily lives have been of an order most of us had never experienced, but I am optimistic. I think we have raised awareness of the importance of addressing staff wellbeing within the scope of our duties to protect staff from exposure to risk. Discussion of how people are feeling, and coping, has been embedded as part of our performance management conversations and tailored wellbeing plans developed to support us. Working remotely from colleagues has challenged us to connect and communicate in different ways and allowed us to be more flexible in when and how we work. Not all of these effects are helpful, but I hope we can use this experience to shape a workplace of the future that recognises personal wellbeing as a key enabler of excellence and effectiveness.

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

Each in-house service will be different, but we are all looking to add value in the way we deliver our service, pursuing operational excellence and supporting innovation of our client's "product" within financial parameters. For some teams, using technology to integrate legal functions within processes will be the growth area in improving value.

Our core strength is in our personal interaction with our clients and tailoring solutions to fit our unique circumstances. Emerging from the pandemic and navigating the complex post-Brexit legislative framework, we have seen a rise in demand for our input. To sustain that demand we are strengthening team resilience and agility through expanding our team at team leader, solicitor and assistant solicitor level and investing in diversifying our skills base. It's an exciting time.

You're also a career mentor. Where do you see the value in that mentoring relationship, both for the mentee and the mentor?

It sounds like a cliché, but I hope that sharing my experience of balancing a career and family life, and working in a range of different power dynamics, is of use to someone in the earlier stages of their career. Often it is not the lightbulb moment you need, but affirmation that you are already on the right track and building confidence in the skills you already have. I would have found more opportunities for that helpful earlier in my career.

Learning is also not a one-way street. I am still engaged in and motivated by it every day. It is refreshing and rewarding to listen to my mentee's experience and how they are working through their challenges.

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

The most significant (and welcome) change since I qualified in 1990 is the diversity of roles available, and recognition that it will deliver positive results for your business (whether public or private sector) if you support people to balance their work and home life. I have been lucky to benefit from managers who shaped roles and processes in ways that supported you to perform well, but I have also experienced resistance to sensible adjustments and flexibility. We have done much to improve our appreciation of emotional intelligence and people skills as part of our professional toolkit, but there is still room for improvement.

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

I can see benefits from both – I think it would be interesting to explore whether new structures would help support more hybrid training opportunities.

What is your most unusual or amusing work experience?

It was always clear there were important and interesting legal principles in play in the case brought by the SPCB to remove a permanent camp on the Parliament's grounds. But if you have read media accounts of the proceedings, you will see that there were several unexpected and unusual events during the case which made it a great learning opportunity.

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

I love working within such a supportive, caring and committed team. Their ability to embrace challenges, deliver excellence and look out for one another with grace and good humour is truly inspiring.

You can't beat sitting down in front of the fire with a chilled glass of wine after a long country walk with the dog.

Lawyers unite against Ukraine invasion

The Law Society of Scotland has joined lawyers around the world in condemning the Russian invasion of Ukraine. President Ken Dalling said: "International law is clear that such actions are both legally and morally reprehensible. The invasion of Ukraine is an egregious breach of the rule of law and we support lawful action that will help bring this terrible conflict to an end as swiftly as possible."

A statement by the CCBE echoed this language, going on to welcome the statement of the Prosecutor of the International Criminal Court reminding all sides that his office "may exercise its jurisdiction over and investigate any act of genocide, crime against humanity or war crime committed within the territory of Ukraine since

20 February 2014 onwards". The Prosecutor, Karim Khan QC, has since announced his intention to open an investigation into possible war crimes and crimes against humanity.

International Bar Association President Sternford Moyo stated: "This act by President Putin is a watershed moment that indisputably violates international law. Member states of the United Nations have, since 1945, agreed that territory should only change hands by consent. This rule is at the centre of maintaining international law and order between states. The IBA, founded to promote and protect the rule of law, strongly condemns Russia's invasion of Ukraine."

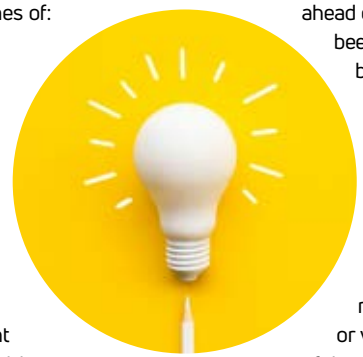
In a further statement as the Journal went to press, the Society said the Scottish legal sector "must be alert to the implications of the current crisis and has a shared responsibility to comply with UK Government sanctions and present a united front against Russia's violations of international law". See the website for more.

Strategy session draws a crowd

More than 110 solicitors from across the profession (and some of the Society's non-solicitor volunteers) joined an online session last month held to enable members to feed into the creation of the Society's next five year strategy.

Following addresses by chief executive Diane McGiffen and the office bearers, a series of breakout sessions took place where those present could discuss in smaller groups the themes of:

- the future shape of the legal profession;
- the rule of law and the constitutional future;
- the justice system;
- wellbeing, equality, diversity, and barriers to the profession; and
- climate change, the environment and sustainability.



Diane McGiffen opened the event by explaining that the strategy would need to confront some big issues: the still fragile economic recovery; major changes to our courts and justice system; maintaining wellbeing in the profession; improving equality and diversity; protecting access to justice through the proper resourcing of legal aid; the impact of climate change; and much more.

Ken Dalling added that the Society was undertaking what it hoped was a rigorous process of engagement with members and stakeholders. Recent positive trends he noted included the growth in hybrid and flexible working, and the number of women now in top positions. Negatives included the pressures on fees, anti-money laundering regulation, and the number of Scottish firms being taken over from outside Scotland. COVID-19 had taken us years ahead of where we would otherwise have been in the use of online processes, but there were "still legitimate concerns about how well we are served by online justice". Legal aid remained in crisis.

On-the-spot polls of those attending indicated that 86% believed they had adapted well, or very well, to the COVID restrictions; 57% felt optimistic or very optimistic about the future of the profession (with 16% pessimistic and 27% neutral); and 62% agreed or strongly agreed that their firm took positive steps to support wellbeing (with 22% disagreeing and 16% neutral).

A report for the Journal was promised in due course, collating the views expressed from the various breakout groups.

Members who wish to are still able to offer their input to the strategy.

Society-Hey Legal venture creates learning channel

The Society has teamed up with knowledge sharing platform Hey Legal to create the Shaping your Success Channel, an all-new online channel for legal learning.

Providing an hour's free CPD every month, sessions will feature unique thinkers and industry innovators: entrepreneurs, business leaders and disruptors from not only the legal sector but also sectors such as technology, media, sports, finance and more. Check the web page for dates.

Content aims to inspire, educate and introduce new thinking for both individuals and law firms. Skills development will cover technology, leadership, performance and finance.

Join more than 300 lawyers by signing up at www.lawscot.org.uk/shaping-success

Streams are live on the Hey Legal YouTube Channel, Hey Legal LinkedIn and Hey Legal Twitter, and remain available to view after going live.

The channel is sponsored by Denovo.

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. Key areas from the past few weeks are highlighted below. For more information, see the Society's research and policy web pages.

Environment principles

The Society responded to the Scottish Government's consultation on draft statutory guidance under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. The guidance concerns the duties in the Act to have due regard to five guiding principles on the environment.

The response highlighted that guidance should set out the significance and weight to be attached to the environmental principles as compared to other legal principles, and provide direction on the interaction of the principles with substantive legal rules. The importance of the principles being considered at an early stage of policy development was noted. Clear and more specific use of language would ensure efficacy of the guidance. The description of the "polluter pays" principle in the draft guidance is narrow; wider interpretations are in use, for example that the potential polluter should contribute to the costs of preventative or avoidance measures. Such interpretations should at least be considered. Detail could usefully be provided in the guidance as to how authorities might balance the principles with other existing duties, for example in relation to equalities, human rights, and islands matters. Without such guidance, the effectiveness of the environmental principles is at risk.

Offenders with learning difficulties

Following previous work on the needs of vulnerable accused, the Access to Justice Committee has been working with the SOLD (Supporting Offenders with Learning Difficulties) network, which represents offenders with learning disabilities. The network is developing a custody toolkit which provides a set of visual indicators to help people with learning or communication difficulties better express their understanding of and engagement with the justice process, for example in police interviews.

In partnership with SOLD, the Access to Justice Committee held a round table event on 24 February to discuss the toolkit and its potential rollout to solicitors, the police and others who may be involved in interviews under caution. Police Scotland, COPFS, the Scottish Government, COSLA, the Faculty of Advocates and the Judicial Institute were also represented and discussed the practicalities of introducing the toolkit, and other issues raised in the network's Practice Guide for Defence Solicitors and the next steps for the project. The committee will shortly publish its report on the event; but anyone with an interest and keen to learn more is encouraged to contact policy@lawscot.org.uk

Court fees consultation

The Society issued its response to the Scottish Government consultation on court fees, led by the Access to Justice Committee with input from several policy subcommittees including Civil Justice, Environmental Law, Mental Health & Disability Law, and Equalities Law. The Society's overall position remains that it opposes the imposition of fees and the policy of cost recovery by the Scottish Government and SCTS; a significant part of its response deals with the impact of that policy, citing differing policies regarding Employment Tribunal fees and potentially beneficial approaches taken in other jurisdictions.

However, given the current position, the Society has also made a series of pragmatic recommendations on how court fees are managed going forward. These include exemptions for those in receipt of PIP payments and for certain types of case including those covered by the Aarhus Convention and constitutional law matters. It also opposes fees being levied on all claimants involved in a group action, and specifically any increase in OPG fees, arguing instead for these fees to be removed entirely. The Society also warns of the impact that the current crisis in legal aid provision may have on party litigant representation or those who must cover private fees themselves despite qualifying for legal aid.

Society Fellows speak out for legal aid

Around 20 of the Fellows of the Law Society of Scotland have signed an open letter calling for urgent action to ensure the future of the legal aid sector.

The group, all retired after between 25 and 50 years in practice, say they seek to use their knowledge and experience to support the profession in serving the public. They express concern that access to justice through legal aid has significantly worsened over the past 20 years.

"Scotland is currently experiencing a crisis in legal aid provision which threatens the very core of justice," the letter states. "There are more solicitors leaving the criminal defence and civil legal aid sectors than ever before, which puts access to justice and our whole justice system at the risk of irreparable damage.

"To address this, urgent action must be taken now to ensure there are still some independent criminal defence solicitors left in Scotland and that our citizens have access to civil legal advice and representation whatever their financial position."

They highlight that despite recent uplifts, rates are over 50% lower in real terms than when the Scottish Parliament opened in 1999; while the Government's stated aim is to pay solicitors fairly for legal aid services, some earn below the minimum wage when carrying out legal aid work.

The letter continues: "It is of the utmost importance that access to justice, which we all take such pride in, remains a reality for future generations. Without legal aid practitioners, vulnerable accused people cannot rely on access to their own lawyer to defend themselves from prosecution by the state.

"People who need support for their debt, family and immigration cases but do not have the funds to pay will simply not be able to access the civil justice system and will have their rights eroded. There will be no equality of arms."

The upcoming spending review "must contain plans for significant investment in legal aid, or there is a genuine concern that the system may cease to provide fair and equal justice for all. For that to happen in our justice system in Scotland would be a source of much national shame".

ACCREDITED PARALEGALS

Civil litigation – family law
KATHERINE LOGAN, Gibson Kerr Ltd.

Residential conveyancing
PAMELA LIVINGSTONE, Raeside Chisholm Solicitors Ltd; CHRISTINE MUNRO, MHD Law LLP; SANDRA PETTIGREW, Thorntons Law; SARAH STRATHDEE, Ledingham Chalmers LLP.

Wills and executries
MARGO LATHAM, Jameson + Mackay LLP; REBECCA MEIKLE, Hill & Robb Ltd; TRACEY O'BRIEN, Anderson Strathern; CAROLINE WARK, Neill Clark & Murray.

OBITUARIES

ANDREW FORMAN (retired solicitor), Edinburgh
On 22 March 2021, Andrew Forman, formerly partner of the former firm of Donaldson & Henderson, Nairn.
AGE: 79 ADMITTED: 1968

RICHARD BARNES RICHARDSON, Irvine
On 13 October 2021, Richard Barnes Richardson, sole partner of R B Richardson & Co, Irvine.
AGE: 65 ADMITTED: 1980

SHONA ELIZABETH LAMONT, Glasgow
On 29 December 2021, Shona Elizabeth Lamont, partner of the firm Turner & White Ltd, Glasgow.
AGE: 68 ADMITTED: 1997

NEIL CAMPBELL MORRISON (retired solicitor), Cupar
On 29 December 2021, Neil Campbell Morrison, formerly partner of the former firm of McGrigors, Glasgow.
AGE: 75 ADMITTED: 1972

ASK ASH

Back to the old ways?

Returning to the office has hit my work-life balance

Dear Ash,

Since returning to the office after the pandemic, I have noticed that I am working longer hours again, and am struggling to get back to that work-life balance that I thought may now be possible. My children are especially struggling with not having me visible in the home, and I have already missed a couple of their bath and bedtimes. Other colleagues seem to be in a similar situation to me, but I don't want to raise concerns with my manager in case I'm somehow deemed to be lacking commitment to my work.

Ash replies:

The pandemic certainly did allow a number of us some much needed and valuable time with family; and it's important that post-pandemic we look to try to maintain at least some better work-life balance.

It seems that your colleagues are also working longer hours after returning to the office; and it may be worth speaking to them about how they are coping with the change in situation.

Many employers are looking to offer *blended* working arrangements going forward and you could maybe ask your manager or HR as to whether this is something that you could be considered for. This would allow you the flexibility to be able to achieve a better work-life balance by being able to work from home at least one or two days per week.

Getting back to normality is important, but it is also important for employers to try to maintain some of the positives from our time during the pandemic.

Being merely present in the office should not be the primary factor in demonstrating your commitment to your work; and if anything the pandemic has helped to illustrate the importance of employees being trusted to do their work outside the confines of the office.

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).

Notifications

ENTRANCE CERTIFICATES ISSUED DURING JANUARY/FEBRUARY 2022

ADAMS, Catherine
ARMOUR, Calum Iain
BELL, Darren Brian
BRECHANY, John Joseph
CUNNINGHAM, Lucy Margaret
CUNNINGHAM, Priya Sonum
DALEY, Kenneth Charles
DUNDAS, Lorne Edwin
FINCH, Tony Clayton
HOOD, Ruairidh Stuart
HUTCHINSON, Lauren Rachel
JAMES, Maya Vassileva
McANDREW, Ksenja
MACCOLL, Christie Abby
McDONALD, Alexandra Anna
MACDONALD, Eilidh
McFADYEN, Eoin
McKAY, Rachel Louise
McLAUGHLAN, Euan Leslie
McMURRAY, Kirsten Lorna
MATHESON, Shell Anthea
MATTHEW, Gillian Martha
MURRAY, Maria Rose
ONWENI, Stephanie N
QUEEN, Kerry Ellen
STEWART, Katie
VEAR, Gemma Louise

APPLICATIONS FOR ADMISSION JANUARY/FEBRUARY 2022

ALI, Abbas
AL-LATIF, Mohammed Belal
ANDERSON, Kimberley Iona
ANDERSON, Meegan
BALLÓK, Dávid Gáspár
BANKS, Kevin Francis
BASTIANELLI, Katie
BEATTIE, Morgan
BENSON, David Trayner
BOYLE, Thomas Oliver Steging
BROWN, Laura
CAMPBELL, Rebecca Loren
CAMPBELL, Sarah Margaret
CARLING, Megan Mairi
CARVER, Vikki
CLUBB, Megan Louise
CROMBIE, Ewan Fenton
DAWLAT, Aller Jamal Saleh
DOCHERTY, Sinead Marie
DODSON, Laura Kirsty
DOMINGUEZ-SALAVARRIA RUFINO, Francisco de Borja
DONALD, Catherine Margaret
GAMBA, Elaine Miller
GEMMELL, Eliott Robert
GIBSON, Hannah Georgina
GLYNN, Findlay James McLeod
GOUDIE, Stephanie Jane
GRANT, Gillian Elizabeth
HARES, Hannah Charlotte
HAZELDEN, Sarah Louise
HOFFMANN, William Peter
HOWELLS, Alison Georgia
HUNTER BLAIR, Caoimhe
KISSEN, Paul Harold
McHOULL, Hazel Marion Elizabeth
McKINNON, Katie Ann
MACNEILAGE, Jessica Harriet Taylor
MARAMBA, Innocent Sifelani
MATHESON, Euan George
MILLER, Jamie Thomas
MINTER, Janette Carruthers
MOIR, Evelyn Anne
NIMMO, Gemma Louise
PANTELI, Catherine Maritsa
PODLESNY, Jaide Lynn
QADIR, Manahil
RASHID, Asif
RIDGWAY, Hannah Victoria
ROY, Ali
SHIRREFFS, Georgia Gail
SMITH, Chloe Laura Jane
SMITH, Ruaridh Alexander MacNair
STEWART, Rory Connell
STREET, Kirsty Ann
TUOHY, Clare Filippi
WATT, Charlotte Lauren
WILKINSON, Sarah Elizabeth
WILSON, Morgan Jane
YOUNG, Iona Forbes
ZDRAVKOVA, Yoana Plamenova

IN ASSOCIATION WITH

Clio

How legal workflow automation can improve your firm's operations

Legal administrative work is crucial to running a successful firm, but it's something law firms can struggle with. For many law firm staff, the processes at their firm make admin time-consuming and tedious and can pull their focus from building the firm. That's where task and workflow automation comes in.

According to Clio's *2020 Legal Trends Report*, 84% of legal professionals believe they could better serve their clients by automating more aspects of their firm's operations. We also found that firms using a combination of legal technology collected an average of $19,541 (£14,334 at the time of writing) more per lawyer than those that did not use legal workflow automation.

Let's look at three legal workflow automation tools that can save your firm hours:

1. Document automation and management

Creating new documents from scratch can eat up a lot of law firm time. Document automation makes it easier for lawyers and other law firm staff to create new documents from existing templates, reduces the time to create a first draft, and speeds up contracting and communication processes.

2. Time recording

Time recording can often fall to the bottom of to-do lists – and items can get missed. With legal time recording software, users simply have to start and stop a timer to record how long they spend on any one particular case or matter. From there, they can create detailed (and accurate) time and expense reports in minutes, which can save hours for fee-earners and those responsible for collating and billing for time.

3. Issuing bills

Speaking of billing, legal workflow automation can be a huge boon for legal firms here, too. Instead of manually collecting and applying the information needed to client invoices, automating the process can cut hours from end-of-month billing cycles. If you use software that syncs to your accounting system (Clio, for example, integrates with Xero, QuickBooks Online, Klyant, and Cashroom), you can save even more time and admin work on your processes.

By automating what can be automated, law firm staff can spend more time on high-value tasks. If you're seeking to maintain a competitive edge in a crowded market, embracing legal workflow automation could be the exact thing you need to take your law firm to that next level.

To see how Clio helps with workflow automation, see clio.com/uk/lawscot-home
Or, Law Society of Scotland members can take advantage of a seven-day free trial: clio.com/uk/lawscot-free

AML: time for a review, but how?

When did you last review your firm's anti-money laundering documents? Ian Wattie highlights the need for a thorough review from time to time, and some pointers to how to go about it

New year resolutions: easy to make, difficult to keep. It will no doubt be the case that many money-laundering reporting officers ("MLROs") will have promised themselves to update their anti-money laundering documentation this year. But is it happening? And, what precisely needs to happen?

In practice, most businesses subject to the Money Laundering Regulations have two key documents: (i) a firm-wide risk assessment; and (ii) an AML policy document (or a series of documents) that sets out the policies, controls and procedures the firm has put in place (together referred to as the AML documents in this article).

Law firms (and other businesses subject to the AML regulations) must keep their AML documents under regular review and update them as required. Most will have, at the very least, tinkered at the edges as the legal framework, policy and practice have been updated and developed – whether as a result of statutory changes, updated risk assessments from relevant authorities, guidance from the Law Society of Scotland, or after reported judicial decisions.

But there comes a time when a more comprehensive review is called for to ensure that the AML documents continue to be fit for purpose. This is also a very important health check for the internal controls and procedures that they reflect.

So, why do it? Well, first, a comprehensive review may flag up deficiencies requiring remedial action that, once implemented, should help reduce the risk of money launderers successfully targeting your firm. Secondly, the Society may of its own accord choose to audit your AML documents; you do not want to find yourself on the back foot trying to explain why your AML documents are out of date. And, if things do go wrong, evidence of a comprehensively updated set of AML documents will significantly assist you in any discussion with the Society or other authorities. Put simply, if your AML documents are out of date and no longer reflect either your firm or what is expected of your firm, you will have some very hard questions to answer, at best.

What to look for

To assist, in this article I set out for MLROs (or whoever in your organisation may be tasked with this) the sorts of questions they should be asking themselves as part of the review.

1. What was the origin of your AML documents? Were they a quick fix in 2017 (or later) using online templates? If so, there is a greater likelihood that they will benefit from a thorough review so that they correctly reflect your firm, its business and the degree of risk it carries.

2. Do your AML documents reflect how the AML legal and policy landscape has developed since 2017? Take some time out to go back through the legislative changes, the National Risk Assessment ("NRA") (Home Office/Treasury, December 2020), the updated Affinity Group guidance (2021) and other guidance and advice from the Society. What has changed and what do you need to change?

3. Do your AML documents take into account developments in your firm, including changes in working practices and any impact they may have had on your assessment of the firm's risk level, or the procedures and controls that may be required as a result? Take a big picture overview of your firm and, in particular, ask what has happened since 2017. Have any practice areas expanded or contracted? Are there any new service lines? New sources of business? Material changes in the number of employees? New offices? Mergers? New technology? Use of a third-party supplier for client verification? What has been the impact of working from home? Any material changes should be narrated in your updated AML documents so that you can clearly demonstrate to the Society or any other relevant authority that you have taken these into account in the reassessment of risk and in the review of the AML documents.

4. Is your assessment of the level of risk (whether at firm level or for the individual practice areas) the same as when you last did a comprehensive review of the risk level? Bear in mind that the NRA identifies conveyancing (residential or commercial), trust and company services, and the use of a client account, as inherently high risk. If a significant part of your firm's practice involves any of these, can you reasonably consider that your firm is inherently "low risk"?

5. At a more basic level, do the AML documents properly reflect what is done on a day-to-day basis in your business? It is all very well having carefully crafted procedures and controls set out in a document, but if they are not being adhered to in practice, you need to establish why not and to determine what further changes are required. In practice you need to assess whether what is happening on the ground is (or is not) compliant with the regulations. And if not, consider what action is required to bring practice into line.

6. Review and refresh how you communicate AML requirements with your clients. Your clients are undoubtedly now more familiar with AML compliance requirements than they were in 2017. You can afford to be more directive and less apologetic. They will understand.

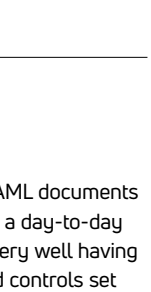
7. Is your training programme still appropriate for how your firm has chosen to organise itself in response to requirements of the AML regulations? It is essential that you review your training programme. External webinars have their place but they are not the complete solution. A well-structured training programme should address the evolving needs of your firm and be bespoke for its requirements. The training programme for a firm with a centralised AML team will not (or should not) be the same as that for a firm where the lawyers and their PAs are directly responsible for all client ID and verification as well as the necessary risk assessments.

8. As MLRO, can you be suitably objective? In many cases, the MLRO will in effect be marking their own homework and arguably may be too close to the process. You may want to consider getting someone from outwith the AML team to help you carry out the review (or to conduct a light touch "review of the review"). Sometimes it takes a fresh pair of eyes to test your AML documents robustly.

9. Action on amendments: if the review results in any amendments to your firm's AML policies, controls and procedures, in terms of the regulations these changes must be approved by senior management and communicated to staff (and a written record kept of that approval and the staff communication).

AML compliance necessarily involves a continual cycle of review. This need not be unduly burdensome if proper thought and action are directed to what good review looks like. It will save you many headaches (or worse) in the future.

Ian Wattie, former managing partner of Burness Paull, is a consultant with a focus on AML compliance. This article reproduces a blog by the author.



Cryptocurrency? No thank you

Brian Inkster offers five reasons why his firm will not be taking payment or paying its consultant solicitors in cryptocurrency

A fee-share law firm has announced that it is the first top 200 UK law firm to take payment in cryptocurrency. It claims this means it can work with a wider variety of clients, and its "partners" (self-employed consultant solicitors) can be paid how they choose.

It is, of course, not the first law firm to do so in the UK, with others having done so as early as 2013.

Inksters (one of the first fee-share law firms in Scotland) will not be following suit. I have five reasons why:

1. Volatility

Cryptocurrencies can fluctuate widely in value. Inksters would not expect its consultant solicitors to agree a fee in ether that might end up being a small fraction of the pound sterling equivalent on payment.

2. Lack of regulation

The current lack of regulation in the cryptocurrency market has seen many scams, hacks and market manipulations. It is therefore not an area that Inksters would wish to be seen in or have its consultant solicitors be part of.

3. Money laundering

Cryptocurrencies are susceptible to money laundering activity. The predominant reason is anonymity. Individuals and criminal organisations can mask their true identities by using different aliases and pseudonyms, essentially allowing transactions to be conducted anonymously.

4. Slow and cumbersome

Due to their complexity and their encrypted, distributed nature, blockchain transactions can take a while to process, compared to traditional payment systems such as cash or debit cards. Bitcoin transactions can take several hours to finalise.

5. Environmental harm

Cryptocurrency transactions use a huge amount of computing power and vast amounts of energy. The electricity used per year to mine bitcoin surpasses the annual energy usage of many countries in the world.

For these reasons Inksters will continue to take payment, and pay its consultant solicitors, in good old fashioned pounds sterling.

Brian Inkster is CEO of Inksters

Going phishing

For this month's risk management article, Paul Mosson explains a project being run by the Society to heighten awareness around phishing email risks

The Law Society of Scotland, in collaboration with Master Policy lead insurers RSA, brokers Lockton and cybersecurity specialists VYUS, is offering firms the chance to participate in a Scotland-wide cybersecurity awareness exercise. Firms will be contacted by the Society with a view to them signing up to the scheme, whereby highly convincing but fake emails will be sent to email addresses provided by the firm in an effort to remind staff of the importance of vigilance when using email.

What is phishing?

While email has become an indispensable feature of legal practice, it is also replete with risks for those who too readily click on a link or open an attachment. "Phishing" generally refers to any attempt by criminals to trick users into granting them access to protected computer systems or confidential information for nefarious ends. When private individuals are targeted by phishing it is generally to find out personal information such as their bank details, but attempts on institutions will have bigger aims than that.

The criminals will attempt to infiltrate or even gain control of the organisation's systems. They may harvest data held by the organisation to sell on the black market, or lock users out of the system pending payment of a ransom. They may also gain access to individual users' email accounts, enabling them to send or intercept emails, giving out false bank account details and making off with the money.

Phishers will not necessarily act immediately on having gained access to the firm's systems, but may instead hide and wait for their moment. This inactivity can allow them to remain undiscovered in the system, even where the security breach has been identified.

Mark Gray, client director at Lockton, comments: "While the Master Policy does provide protection to the profession against claims arising from losses sustained by a firm's client resulting from a cyber breach, it does not cover losses the firm itself may suffer from such a breach. These costs would generally be classed as "first party" losses and include things such as breach event costs, cyber extortion and digital asset loss. Firms interested in learning more about the protection offered by a cyber insurance policy can approach the Master Policy brokers, Lockton, or their own insurance brokers for some more in-depth advice."

What to look out for

Spelling and formatting errors used to be easy giveaways for a fake email, but fraudsters are becoming ever more sophisticated in their efforts to trick recipients into clicking on malicious links or opening attachments containing malware.

The emails will often be about an enticing topic, such as payslips or online shopping deliveries, to excite the user into clicking. They may also be about more mundane topics but contain a sense of urgency, to pressure the recipient into acting quickly without thinking about the risks. What the most effective phishing emails have in common is that they look highly plausible, making them even more difficult to spot.

Sender email addresses will be made to look convincing, or indeed the sender account itself could already have been hacked through phishing. More sophisticated hackers may even have been watching the communications for some time and learned to mimic the sender's style of writing.

As there is no single immediate way to spot a phishing attempt, staff should approach all emails with a general level of caution. Links contained in them should be hovered off with the mouse to check the destination address, and the same should be done with the sender email address – though caution should still be exercised even if that address is correct, for the reasons given above.

Attachments are even harder to screen, but the same caution should be exercised. Is the email expected or does the message explaining the attachment make sense? Sending files around is an essential part of doing business, but we should all feel comfortable picking up the phone for a quick confirmation if anything looks unusual.

While the software to combat these attacks is becoming ever more sophisticated, staff are any organisation's first line of defence against cyberattacks and there really is no software substitute for human vigilance.

Other security tips

The risks facing legal firms continue to evolve, so keeping staff up to date on cybersecurity risks through appropriate training is key. As well as informing participants of new or evolving risks and the latest avoidance strategies, regular training should serve to keep the importance of cybersecurity in the front of people's minds when going about their day-to-day work.

Maintaining the firm's anti-virus and anti-spyware software and an efficient firewall should also help to inhibit phishing attempts. Remember too that phones can be just as susceptible as computers to attacks, so make sure that staff are regularly updating the operating systems to take advantage of new security patches.

Regularly changing passwords (and changing them altogether, rather than just "Dundee1" to "Dundee2" and so on), and not using the same password over multiple services, are easy steps to take and will reduce – though not eliminate – the chance of a hacker being able to exploit the firm's systems. Two-factor authentication (whereby users verify their identity through a second method after their password, usually an app or code sent to a mobile device) is also an effective tool, but does come with cost implications.

Firms should also maintain a policy, clearly communicated to clients at the outset of a transaction, that bank details will not be accepted by email without face-to-face or telephone verification, and that a change to them in the course of the transaction will not be accepted. Telephone verification should always be carried out using a number that is known to be correct and never one taken from the suspicious email itself. Recognising

the increasing threat to law firms, in 2020 the Society established a strategic partnership with cybersecurity firm Mitigo to help Scottish law firms with information, best practice and cyber risk management support services.

More details can be found on the Society's website, including a helpline if you are under a cyberattack.

Phishing trip

Firms will shortly be contacted by the Society to invite them to participate in the exercise, being called "Phishing Trip". It is absolutely free for all firms and there will be no implications on the Master Policy arising either from taking part or from the firm's performance. Recipients' email addresses will be provided by the firm itself, meaning the firm can decide which users should be included. It is recommended for transparency that each firm makes its staff aware that it is participating.

The exercise will see a one-off, phishing-style email delivered to each employee email address submitted by the firm. Emails will come at different times and be in different highly-convincing formats, to mimic the nature of real phishing emails. They may contain a link, an attachment or both, and the external provider running the exercise will gather information as to how many users in each firm click on them or open them up.

Anyone who does fail the test will be taken to a learning page showing them exactly what they missed, the lessons they can learn and the steps they can take to protect themselves from a real phishing attack. The information on this learning page will also be made available to the firm in its report following the exercise and used for staff training. No information will be gathered about how individual users perform in the exercise.

Once the Phishing Trip is finished, firms will receive a detailed report of their own firm's performance and of the broader profession's, as well as advice to understand the key risks uncovered and recommendations for improving threat prevention and employee resilience.

How to participate

Firms will be contacted by the Society by email in the coming weeks and invited to sign up by 31 March, but can do so right now at www.lawscot.org.uk/phishing-trip.

Email addresses for recipients at a firm will be collected later, so there is no need to wait until those have been compiled before signing up. Further information about the process and contact details for queries can also be found at that link.

The Society hopes that as many firms as possible will agree to participate in the exercise and raise awareness of the phishing threats that legal firms across Scotland are facing.

Paul Mosson is executive director of Member Services at the Law Society of Scotland

FROM THE ARCHIVES

50 years ago

From *"Practical Problems in European Law", March 1972:* "An effort had to be made to speak at least one other language. Even if it was done badly and the grammar was completely wrong it was still worth the effort in breaking down barriers. Mr Crossick [whose address was being reported here] said that he often felt that he had an important advantage in being prepared to try to speak French. Language was communication – however one sounded... There had been no progress in the Common Market towards a solution on freedom of services, establishment and free provision of services for lawyers, and nor was there likely to be in the foreseeable future."

25 years ago

From *"Post-Bosman Legal Issues", March 1997:* "The game's clubs and ruling bodies will no doubt continue to fight their rearguard action against this recent and dramatic increase in 'player power'. However, these desperate efforts to paper over the cracks in what is so clearly an antiquated and discredited system serve no useful purpose. With huge funds pouring into top-class football, the game has a unique opportunity to put its house in order... There is faint hope that professional sport will ever be made a special case in either domestic or Community law. Bill Shankly once said that football was more important than life or death, but try telling that to the European Court."

Race: time to be open

The report of the Society's Racial Inclusion Group caused a stir with its finding of structural unfairness in the profession and accounts of discrimination. RIG convener Tatora Mukushi gives the Journal his own assessment, and where he sees potential for a better future

Published shortly before last month's Journal went to press, the report by the Law Society of Scotland's Racial Inclusion Group ("RIG") on the experiences of BAME members of the profession in Scotland generated considerable headlines.

Many of these featured President Ken Dalling's warning that parts of the report would "shock and upset" many members, and his call for action on the part of all in the justice sector to help bring about change. But did the group find a uniform pattern across the profession, or is the picture more nuanced? We spoke to RIG convener Tatora Mukushi in order to dig a little deeper.

The RIG was set up with the specific remit to produce the report, and publication completes its current work – though the last of its 60 recommendations is that the group be reconvened after a suitable time to review progress. Its 14 members ranged in seniority from trainee to partner, with one advocate and one law lecturer, and from a range of ethnically diverse backgrounds.

As instructed in its remit, it took as its starting point the Society's *Profile of the Profession* survey, sought out other data sources, and gathered experiences from more than 150 BAME practitioners, trainees and law students – among 215 respondents to a survey on experiences of bias – to all of which the group applied its lived experience to build an overall picture. "Although we had an open door policy, we were pretty proactive and we did seek out specific voices, organisations, and some individuals as well," Mukushi confirms.

It followed this by speaking to, among others, universities, law firms, in-house counsel and bodies such as Scottish Courts & Tribunal Service to discuss best practice, the challenges, and possible ways to overcome the latter.

A structural problem?

A recurring phrase in the report is "structural unfairness" (or "structural disadvantage") in the profession.

I ask Mukushi how this was identified.

"That's the biggest question, I guess," he replies. "If you look at people's journeys through the profession, there's a tapering, so from people at university level, to diploma level, trainees, assistants, associates, it does taper quite sharply for ethnic minorities in a way that it doesn't for other groups. Because it's quite consistent, it suggests that in the profession as a whole, we have something that is causing, or at very least is correlated with, that tapering."


Tatora Mukushi

A closer look suggested a number of contributing factors. Unpaid internships, which can be a necessary precursor to a traineeship, may be unaffordable to a higher proportion of BAME students. Even paid internships may be problematic for some. At application and interview stage further into their career, people may be filtered out simply on the basis of their name. "There is plenty of evidence from the literature review of algorithmic measures in recruitment sifting that did the same thing, an inherent like for like bias: people go with what they know, they keep on recruiting the way they always have and therefore some people miss out," Mukushi explains. "It's not that there is one overlord pulling the strings, but the institutional nature of it is that these things are embedded and it's quite hard to filter them out."

Some people have found their disadvantage compounded by a number of factors. Sex or gender is identified in the report as a big issue. Some who identify as Muslim women, for example, could find themselves excluded simply because they look distinctive; someone who doesn't drink because of their religion or cultural practice could feel excluded from work events, "and if you're a woman such atmospheres can be problematic in a way that they wouldn't be to someone who is far more homogenous to Scotland".

Further, whereas large firms have set processes, and can capture and analyse data from recruitment rounds, smaller firms may not have the resource or the ability to do likewise. This was evidenced during the recent scheme to support trainee recruitment in legal aid firms: "recruitment had to be done on a particular basis, using a set form, and a lot of firms had never done such a formal practice before". At the same time BAME solicitors tend to be concentrated in practice areas more associated with smaller firms – immigration, crime, mental health, "which itself reveals a sort of bias", Mukushi adds.

Shock and upset

I ask whether Ken Dalling's comment about shock and upset reflected the group's own feelings on their findings – or did these not come as a surprise?

"That's a tough one," Mukushi replies. Having previously practised in England, he personally was somewhat shocked on coming to Scotland to discover just how sparse the BAME element in the population is by comparison. On top of that, "it was quite saddening that even with smaller numbers the same sort of pattern was emerging where people were being discouraged from the profession and from potential careers they could have".

He continues: "From what I knew of the profession in advance, I thought people were generally quite openminded, and that is the case with most of the individuals I have met within the profession, although I knew that institutionally that might translate differently. So I was a bit disappointed to see the institutional thing following the same trend. But overall, yes, there were shocking and upsetting things, but I also found a lot of willingness to innovate: people really wanted to engage with our work and see where they could improve."

Speaking of England, a chapter in the report is headed "What can we learn from the experience of our counterparts in England & Wales?" Compared with most other chapters, however, it concludes with fewer recommendations. Does that mean England suffers from the same problems, only on a

bigger scale? "Not exactly," Mukushi laughs, "but because they have much larger numbers it almost feels as if they are worse off – you feel that if you have the numbers you should be able to pull the strings.

"There is a tendency, and this is not just in law, to think of ourselves as a smaller scale of England. And our work definitely showed that we are not just on a smaller scale. There are similar trends, but also different things that can be done; and attitudes to progress, to innovation here were certainly on the whole more positive.

"I think what we can learn is, let's not always base ourselves on England, because what the data teach us is that we probably have some unique strands to our problems that we could use to our advantage, because we are smaller numbers, and we are starting with data."

Message for all of us

About half of the 60 recommendations are addressed principally or jointly to legal employers, covering everything from targeted outreach to BAME students, to critically evaluating recruitment processes, keeping various types of diversity data, tracking career progress, facilitating changes of trainee seats and post-qualifying practice areas, mentoring, setting key performance targets for themselves as employers, and generally encouraging discussion of race issues.

Recommendation 34, however, contains a series of points for all lawyers as individuals to take to heart. It comes at the end of the chapter on experiences of racism and discrimination. Here a term in play is "micro-aggressions" – particular behaviours, individually perhaps minor, that have a cumulative impact on the BAME lawyer: a "death by 1,000 cuts" is one quote from the report.

I ask whether these are as big a problem as anything. Do they indicate a need for people to undergo bias training to try to eliminate them? Would that make the biggest difference?

Here, it appears, views in the group were mixed. But these micro-aggressions, which can be entirely accidental, or even well meaning – "People can be doing something quite well meaning and it can be the wrong response," Mukushi points out – are symptomatic of the bigger problem in our culture. And the way to tackle it, he is certain, is through "a culture of openness, of integrity, of accountability, and again this is an ongoing conversation – I would like the profession as much as possible just to engage in the conversation and feel that it's theirs to have, across the board".

He is "not 100% sold" on unconscious bias training. "What I would say is if you appreciate a bias in your firm or your practice or among your partners, if you are willing to address it and you think you can find an unconscious bias trainer or awareness that helps, then go for it. But the solution needs to hit the problem, and unconscious bias training is still somewhat untested, to my knowledge anyway. People need to feel that they are reaching valid solutions to their problems. And the first of those is openness and conversation."

"Overall, yes, there were shocking and upsetting things, but I also found a lot of willingness to innovate: people really wanted to engage with our work and see where they could improve"

So the most important thing that individuals and firms should be doing, is just encouraging this openness? "Absolutely, without a doubt, across the profession, in firms, in courts, in robing rooms, everywhere. The more conversation is had, the more people can learn and discern what it means when they say things. Taking offence when none is meant is tragic. Taking offence when it is meant is also tragic, but if we can avoid at least one..."

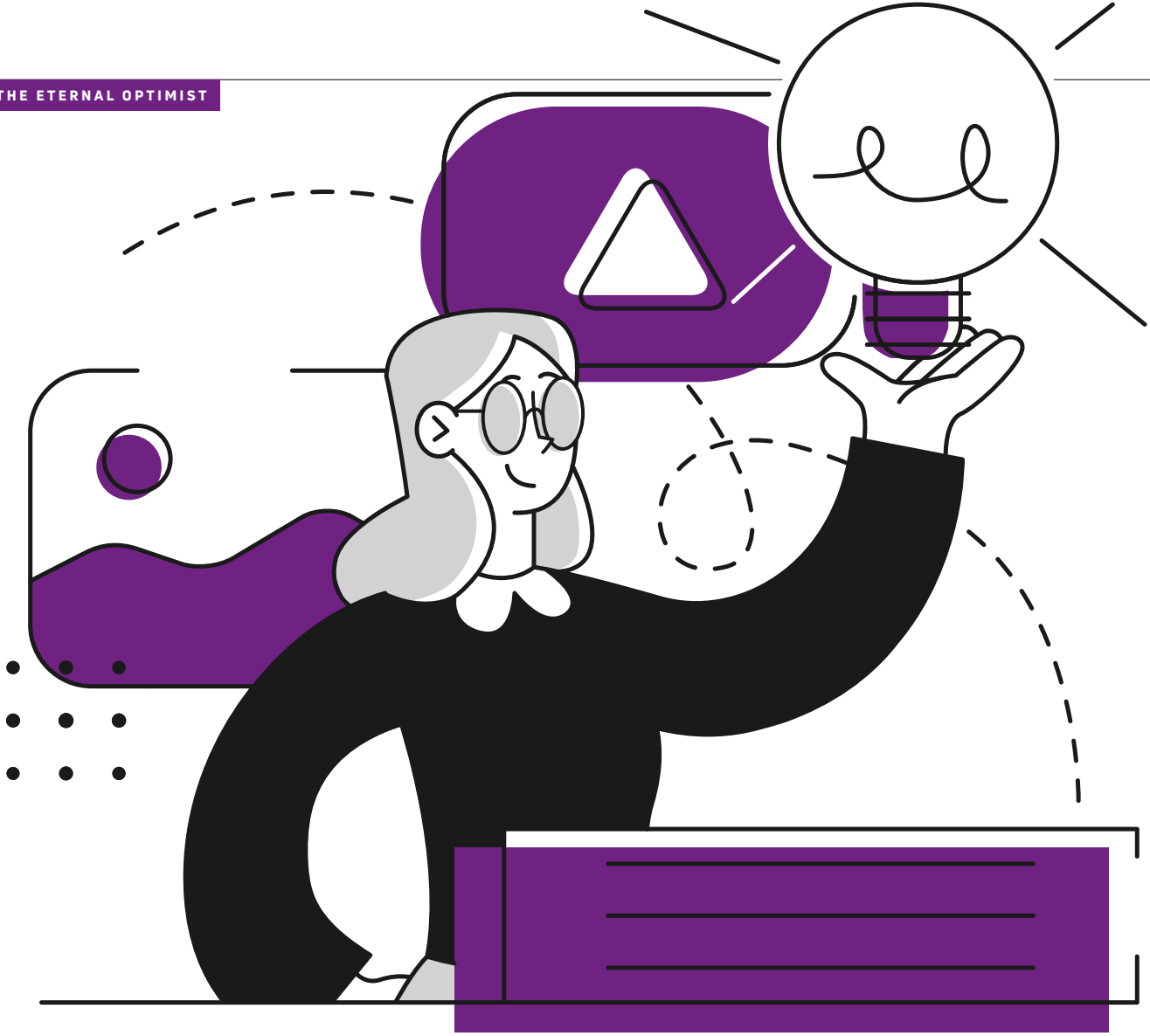
On the journey

Is he satisfied with the Society's own response in its action plan? "Yes, I'm satisfied that they are beginning on the journey, because they did set up the group in the first place. And they had the data, so they have taken this seriously and have invested time and money and resource into it. And if the members of the profession are willing to give it their support and enthusiasm then yes, I can't really ask for more."

He concludes: "I can't stress enough, the willingness to be open is so important. We are in an age where culture wars could quite easily enter these conversations. As lawyers we already have our own lexicon, we have traditions, lots of things some of which can facilitate these kind of conversations, and some of which can get in the way.

"The need for willingness to innovate, to step out of our own comfort zones, can't be overstressed. I'm maybe overconfident in my profession, but I think we are intelligent people who want to do better, and we should be able to."

Read the report at www.lawscot.org.uk/media/372186/rig-full-report-january-2022.pdf



IT for dummies

Mapping your "client journeys" into individual steps can achieve smoother running of your case management system and assist in working out where the opportunities for improvement lie

I'm blessed that both my parents are still with me, but with that come the regular calls bemoaning that their TV, phone or internet is no longer working. There is almost no piece of technology too simple for them to misuse.

I have long since learned that all of their issues are in fact caused by "user errors".

In this post-lockdown world we as a profession have come to rely more than ever on technology and the benefits it brings. There is no doubt that over the past two years we have jumped forward many, many years in our use and implementation of our IT systems. I do though hear practitioners bemoaning that their system still falls short of what they need or want it to do. I'd like to put forward a few simple pointers of things we can do to make sure that these issues are not down to the users.

Get on the map

I'm probably a little unusual as a lawyer in that I like numbers and computers. For anyone old enough to remember, I owned a Tandy TRS 80 in the days before even Sinclair Spectrums were popular. As a result I have some understanding of logic trees and process mapping, although neither are particularly complicated concepts. In brief they are just a way of breaking down a task (like a conveyance or a will) into its flow of the smallest constituent pieces or tasks, with choices at each decision point that will progress you along one of several different paths towards a conclusion. For the purpose of this piece let's refer to these process maps as "the client journey".

"Once you and your colleagues look at the client journey for your firm, you will be able to locate where the leads and roadblocks are, and even any shortcuts or detours you could take"

In order for our IT/case management system to do its job properly, we really need to understand what "the job" is. At some level we all of course do, but have you ever tried to write it down with all the myriad options and consequences as above? You could argue that all conveyancing transactions (as an example) are the same, but my own experience tells me that different firms have their own unique way of addressing all or parts of any transaction. While there will be key parts that we all need to comply with, there may be

different twists and turns we take along that path, that client journey, that are unique to our firm. In some cases I've experienced, there can be differences even between colleagues in the same firm.

The starting point then is to map out clearly on a piece of paper (probably a pretty big one) each and every step of the client journey from first contact with your office through to the file being archived, with all the decision points and potential options along the way.

A huge task, I appreciate, and some of you I suspect are already thinking that you'd rather live with the small inconvenience of a less than perfect system. It's worked for you so far, right?

For many it's why the IT grumbles never really get fixed: the current pain point isn't sore enough to deal with. So why go to all this time and trouble now to fix it?

Once you (and your colleagues) look at the client journey for your firm, you will be able to locate where the leaks and roadblocks are, and even any shortcuts or detours you could take.

Do you send out lots of fee quotes, with few instructions? Well, there is a leak needing addressed. Is work piling up at a stage of a transaction or on a particular person's desk? We've located a roadblock.

Likewise, if you don't obtain much additional work from clients, is there a detour that could be built in for cross-selling or recommending other services to them? The exercise, although time consuming, will allow you to look at your own processes and identify where they can be improved and adapted. It can be painstaking, and it does involve looking at everything you do along that client journey down to its very smallest parts. If you then add in feedback from your clients that you collect along the way, there are some pretty impressive improvements you can achieve.

From an IT perspective, you will then have something that fits with the way most case management systems are designed. You can start to work with your IT suppliers on how to automate many of these small parts and how to adapt your IT system to reflect as much of the client journey as possible. You can even build in extras such as the updates and feedback forms that we all need to improve that process further.

Staying young

To take it one step further, make sure you are maximising both your own and your staff's use of training. The ubiquitous Microsoft Word and Excel have functionality that few of us ever access even a fraction of; how much less so then for our bespoke IT systems with their own quirks and styles? How many issues with your own systems come about due to a lack of understanding of what they are capable of and how to get the best out of them? Additionally, like learning a foreign language, the better you understand your system the easier it will be to communicate exactly what you need or any system shortcomings with your supplier.

Finally, don't get old. Aging we can't prevent, but try to remain young in your thinking or at least not fixed in your ways. New solutions for most challenges are being developed almost daily, and a healthy curiosity about what is available and how it might work for you will go a long way.

The number of little pieces of software that I come across to make my life just a little easier always astound me. Many are free or for little cost and well worth the time in locating and learning them. Moreover, while I don't always love new IT, I try to remain interested enough in it that it doesn't scare me.

I'm not for a moment saying that all IT systems are perfect, far from it – let's just try not to be the user error!

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

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ALAN CLINTON BROWN, DECEASED
Would anyone holding or having knowledge of a Will by Alan Clinton Brown, late of 52 Arden Street, Edinburgh EH9 1BN who died on 30th December 2021 please contact W. Derek Robertson of Stirling & Gilmour LLP, (d.robertson@stirlingandgilmour.co.uk) Tel. 01389 752641.

Rhona Mairi Peet, deceased.
Would any person having any Will or having any knowledge of a Will by the late Rhona Mairi Peet, sometime of 6 Roman Way, Dunblane, FK15 9DQ and late of 28 Drumcastle Court, John R Gray Road, Dunblane, FK15 9EJ please get on touch with Andrew J Ion, Kerr Stirling LLP, 10 Albert Pace, Stirling, FK8 2QL – email address: ajion@kerrstirling.co.uk – telephone number 01786 463414.

Marion Alison Chalmers - deceased
If anyone holds or has knowledge of a will for the late Marion Alison Chalmers (date of birth 30/11/1928), who resided at Fluelen, 28 Hardthorn Road, Dumfries, DG2 9JQ, please contact Stuart Millar at Gibson Kerr solicitors (stuart.millar@gibsonkerr.co.uk, 0131 226 9163).

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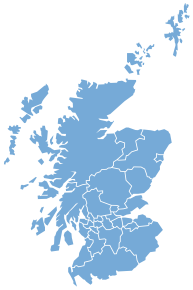

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