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Journal

Journal of the Law Society of Scotland

Volume 68 Number 7 – July 2023

Creative precedents

A family law solicitor calls for Scots colleagues to show they are abreast of fertility issues and what they mean for legal practice

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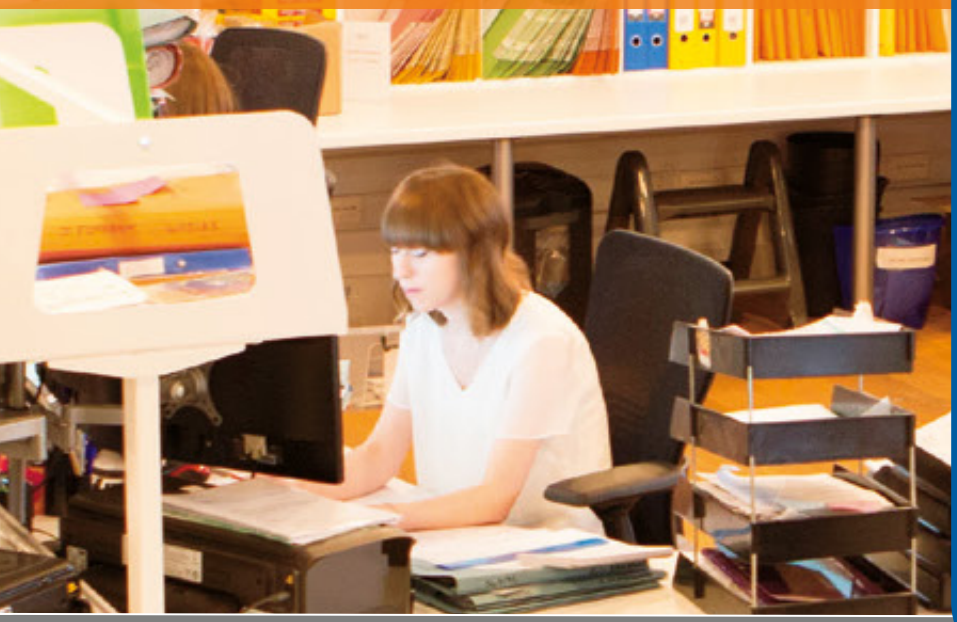

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Editor

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Justice stretched

Sections of the Scottish solicitor profession seem in pretty good health at the moment. Firms reporting results from recently closed financial years have recorded strong growth, and our biggest home based firm has just passed the £100 million turnover mark. Moves to state-of-the-art new offices continue, and so does the war for top talent, as evidenced by a steady flow of lateral hires.

But we know the picture is not a uniform one, and there must be many for whom such pictures belong to another world. Aside from private practice, we might instance those whose organisations are publicly funded, particularly but not only local government, who have been feeling the squeeze for years with little sign of any let-up.

Then there is the criminal defence sector. Legal aid has not made the headlines this year the way it did up until last summer, when the Scottish Government came up with its £11 million package which the profession eventually and reluctantly accepted as being all that was likely to be made available in the present climate. It fell well short of restoring the cuts in real terms income of recent decades, and we suspect it has made little difference to the rate at which defence lawyers are leaving the scene for alternative careers. We also still await a fee review mechanism that will set rewards by reference to something other than what the Justice Secretary can be cajoled into sparing from a budget under pressure from all sides, not least the Cabinet Secretary for Finance.

As if these difficulties were not enough, allied to the unpredictable demands of criminal court work, repeated instances are coming to light of the justice system being stretched close to breaking point, even as it attempts to recover ground lost due to Covid.

For one thing, those in custody are failing with alarming regularity to be delivered to court, resulting in sheriffs and court staff as well as lawyers sometimes being kept waiting until well into the evening. GEOAmey, the contract holder, is said to be short of staff; but the situation is intolerable and unsustainable, and unless the Scottish Government gets a grip, will surely lead to a rapid worsening of the vicious circle of factors causing more defence lawyers to quit. Emergency measures need to be devised.

And Scots who have always taken a pride in their legal system, now have to swallow an Irish court refusing an extradition request due to a "real and substantial risk of inhumane or degrading treatment" constituted by remand conditions in Scotland, if a mentally unwell accused is confined for 22 hours a day to three square metres of personal space. Whether this decision will stand, or is likely to be repeated, remains to be seen, but it is indicative of a system in crisis and one which has been underresourced for too long. J

Contributors

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

Amanda Masson is a partner and head of Family Law at Harper Macleod LLP

Valentin Pyataev is a legal assistant and **Frankie McCarthy** a commissioner, at the Scottish Law Commission

Martin Stepek is a mindfulness coach who works with legal and other professionals

Kevin Winters is a senior solicitor with Brodies LLP

Jasmine Wishart is an MSc student, and **Dr Ann Hodson** a senior lecturer, at Queen Margaret University

THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
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In practice

ONLINE INSIGHT

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

Employers: prepare for the new flexible rights
Newly enacted flexible working rights are likely to come into force next year, and have implications for potential discrimination claims that employers should be thinking through now, Sarah Gilzean advises.

Moveables reform: funds and the limited partnership
The Moveable Transactions (Scotland) Act 2023 will have a significant positive impact on fund finance transactions in Scotland. Hamish Patrick, Rod MacLeod and Andrew Kinnes look at how it will impact transactions that make use of Scottish limited partnerships.

Scottish Arbitration Centre Rules: a tempting prospect?
Craig Watt and Jamie Reekie compare the main features, and costs, of the new Scottish Arbitration Centre Rules and Court against those of established arbitral institutions, and their likely attractiveness to parties in dispute.

Can we talk about mental health?
Wellbeing lead Alana Warburton-Whitehead looks at some key issues that prevent employers from creating a positive environment for mental health conversations in the workplace, and suggests some ways to help tackle these.

How can businesses combat easy email mistakes?
Oliver Paterson highlights the principal ways in which errors in using email can lead to data breaches, and what businesses and organisations might do to help prevent costly mistakes.

OPINION

Jo McGilvray

The proposed member's bill at Holyrood to create a Commissioner for Older People could provide valuable support for an expanding section of the population, all for a relatively modest investment

Age Scotland is the national charity for older people. We have been long-time proponents of the establishment of a Commissioner for Older People. Our conviction that this is the right thing to do has been strengthened by the Covid-19 pandemic and its aftermath, which had a disproportionate effect on rights, experiences and outcomes for older people all over the country. But the challenges faced by older people did not start in 2020. The pandemic amplified and shone a light on problems and issues that already existed.

Scotland has a rapidly aging population. The number of older people living in Scotland is forecast to rise over the next 20 years, despite the overall Scottish population being forecast to decrease in the same period. By 2045, almost 50% of the Scottish population will be over 50 and the number of people aged 65 and over is projected to grow by almost one third.

Ageism persists in Scotland and has a destructive effect. It exacerbates loneliness and isolation, impacts health, wellbeing, finances and the economy, and has serious consequences for people's human rights. Age Scotland's Big Survey told us that over a third of respondents believe that older people are made to feel a burden to society. More than one third felt that life is getting worse for older people, and only around a fifth considered that older people are valued for their contribution to society. Over half of all respondents felt lonely at least sometimes. In recent polling conducted for Age Scotland, one in five people over the age of 55 reported that they had been discriminated against, treated unfairly or had missed out on opportunities because of their age.

Many older people are left waiting years for routine health services and operations, and waiting times for social care are sky high, with people commonly waiting over a year for a needs assessment. Last year, more than 18,000 people died while on waiting lists for NHS treatment.

That is why we welcome the consultation from Colin Smyth MSP, seeking support for a bill to introduce a Commissioner for Older People, who would raise awareness of the rights and interests of older people, celebrate their valuable contributions, ensure their needs are fully considered in policy and practice right across all Government departments and public bodies, and have powers to investigate issues that matter to people in later life.

We understand that a Commissioner will not solve all of the manifold problems, but we do think a landscape where the Scottish Government, local authorities and service providers are held to account, and where there is an independent, high-level champion for older people, is an important piece of the puzzle and will help to improve things for older people, as has been the case in both Wales and Northern Ireland, where there are Older People's Commissioners already.

We also recognise the value added by offices such as the Scottish Human Rights Commission. We believe cooperation between a new Commissioner and the SHRC, as happens already with the Children's Commissioner, would prove fruitful and effective – allowing expanded reach and focus, rather than duplication. And we further believe that the scale of the challenges and breadth of issues facing older people now and in the future merits dedicated focus. Those from all walks of life and backgrounds become older people, and services that are already struggling and failing people will be completely unable to cope. The issues that need to be addressed span multiple policy areas and ministerial jurisdictions, adding further credibility to the call for a single, dedicated advocate.

We are under no illusions. This is a challenging time to introduce this bill, in part due to recent pushback on a perceived proliferation of commissioner proposals. Introduction of this position would also require dedicated finance in a difficult budgetary time – but we believe the investment is one that would pay off, and in the scheme of Government budgets, is also relatively modest.

Our data consistently show that introduction of a Commissioner for Older People is widely supported by the public. The research shows just 3% of over 50s were opposed to the idea, and 70% of younger people were supportive. This is an important moment for policy makers to demonstrate their genuine and active commitment to advancing the rights of older people, and taking concrete action to make this happen.

Jo McGilvray is policy officer for Age Scotland

VIEWPOINTS

Justice woes

News reports have appeared that GEOAmey, which holds the contract to transport prisoners to and from court, is missing more than 50 transfers a week due to staff shortages, disrupting court business. The firm claimed it "facilitates the overwhelming majority of escorts across Scotland". Here's how it looks to criminal defence lawyers, from Twitter posts in late June:

Ian Moir (@IanMoir5)
"Client arrested in Glasgow yesterday on a warrant for Ayr Sheriff Court. At almost 4pm today they advised they couldn't bring him to court on the next lawful day due to a lack of available transport! @ScotGovJustice need to take swift action to sort this.

"Despite him being granted bail in his absence to avoid another day in custody he remains in a cell as nobody troubled to tell the police to release him before they went home! Utterly disgraceful."

Matthew McGovern (@mcgovernlawyer)
"The service GeoAmy are providing @SCTScourtstribs is an absolute disgrace. I'm advised the custody court at Hamilton is STILL waiting for accused persons to arrive from a police station less than 10 miles away. To put this in context, the custody court started at 12pm.

"Update– the custody court finished at 2220 with the final accused persons arriving in the building at 2200 after the police organised transport for them. Completely unacceptable that everyone else is having to work twice as long to compensate for GeoAmey's failings."

Gemma Elder (@gemma_elder1)
"Same in Paisley on Monday. Custodies not collected until 7pm. Arrived at 815. Last custody called appx 10.30pm. Juries and summary trials haven't been able to run as no staff. Glasgow not much better. ETA on a client coming to Kilmarnock today was 13.15 for 10am hearing."

Matthew McGovern
"Paisley– like Hamilton– is one of the courts currently implementing the Summary Case Management pilot. There has been no additional funding provided to support the pilot. Expecting solicitors to cover more courts after being in court until 10pm the night before is unsustainable.

"The SCM pilot is premised on cases being better prepared at an earlier stage of proceedings which can't be done if solicitors don't have time to prepare the cases. If you want an all singing all dancing justice system, you need to properly fund and run it @ScotGovJustice"

Iain Jane (@IainJane1977)
"Consistently late at Peterhead for either prisoners brought to court or fresh custodies. On Monday a custody for Aberdeen never got there until after 6pm meaning the court didn't finish until 7pm. Geo-Amey are a shambles."

And raising other justice concerns:
Ian Moir
"Now got a client trying to surrender to a warrant that shouldn't have been granted and the police station which is holding custodies and is a main station is locked so they can't hand themselves in. Beyond ridiculous!"

@DrHannahGraham
"This is interesting. Extradition to Scotland refused on 'humanitarian grounds' after Irish High Court judge notes severe prison overcrowding (citing Barlinnie, Low Moss) and perceived 'poor recognition' of neurodevelopmental and mental health disorders."
For report see bit.ly/46xmXMf

BLOG OF THE MONTH

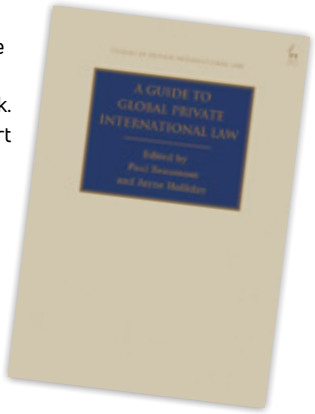
www.lawscot.org.uk

"Taming the overtime monster for work-life balance" is written by Andrew Laing, solicitor and health and wellbeing champion at COPFS. With the long hours culture still a live issue for much of the Scottish legal profession, he points out why it should be the exception rather than the rule, and highlights steps taken by his organisation to enhance staff wellbeing – including time and attendance software that encourages staff to take proper lunch breaks, and opportunities for alternative working patterns, which have "encouraged a much healthier culture".

BOOK REVIEWS

A Guide to Global Private International Law

PAUL BEAUMONT AND JAYNE HOLLIDAY (EDS)
PUBLISHER: HART PUBLISHING
ISBN: 978-1509932078; £100



A guide to global private international law is an impressive piece of work. Its main aim is to support the work of the Hague Conference of Private International Law. However, it also takes account of the other relevant international and regional developments, and examines how to use tools at national level to help solve challenges arising from the operation of PIL rules.

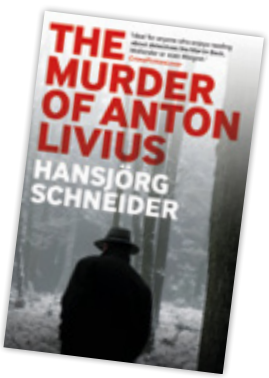
The first of the six parts and 41 chapters focus on theory, the challenges arising from the differences between civil and common law systems and domestic PIL rules, the Hague Conference and the role of national organisations, and analyse the service of documents and taking of evidence. The following parts systematically go through the civil and commercial law, covering a very broad range of issues; and family law.

The editors are from the University of Stirling; the 53 contributors equally represent civil law and common law traditions. Overall, the book provides a very informative and thought-provoking contribution. It is equally a source book and an analysis on how to take global PIL forward. Its systematic approach makes it a useful tool for practitioners, judiciary, students and scholars alike. Getting together all these contributions dealing with technical topics and ending up with a such a readable volume has taken a lot of work and should be applauded.
Dr Helena Raulus, member of the Law Society of Scotland Private International Law Reference Group. For a fuller review, and outline of contents, see bit.ly/3PP7fHo

The Murder of Anton Livius

HANSJORG SCHNEIDER, TRANS. ASTRID FREULER
(BITTER LEMON PRESS: £9.99; E-BOOK £5.99)

"Recommended, especially if you are looking for something well-written and a little different."
This month's leisure selection is at bit.ly/3PP7fHo



The book review editor is David J Dickson

Killer questions

This isn't hot off the press, but it's still worth sharing (and it is the silly season). US defense attorney (we'll let the spelling through this time) Charles M Sevilla has compiled and published *Disorder in the Court*, a collection of real courtroom exchanges (could you really make them up?).

For instance, exhibit A: "**Lawyer:** Are you sexually active?

Witness: No, I just lie there."

Or B: "**Lawyer:** Are you qualified to give a urine sample?

Witness: Are you qualified to ask that question?"

Or C: "**Lawyer:** Doctor, did you say he was shot in the woods?

Witness: No, I said he was shot in the lumbar region."

And finally: "**Lawyer:** This myasthenia gravis, does it affect your memory at all?

Witness: Yes.

Lawyer: And in what ways does it affect your memory?

Witness: I forget.

Lawyer: You forget? Can you give us an example of something you forgot?"

PROFILE

Jim McLean

Jim McLean is stepping down from his Society committee work, having dedicated his time and expertise to supporting the profession in several key areas

1 Can you tell us a bit about your career?

I knew the profession from an early age through my father's practice in Dunoon, his membership of Society committees and, later, his Vice Presidency. Being argumentative, and having some sense of justice, I too was attracted to the law. I became a commercial generalist. On UK accession to the EEC, I seized the opportunity this presented. For me, this mainly involved competition compliance of commercial contracts. IP law followed, then pan-British secured lending. Through the Young European Lawyers scheme, I mentored many interns.

2 What have been the biggest changes for the profession, and what are the main issues facing it now?

Price competition and time-based charging combined to end earlier business models relying on client loyalty. A management culture akin to financial services came in. Billing targets became the norm. Candid critical advice became unwelcome. Much documentation became standardised, not necessarily aligning with Scottish concepts.

As for today's challenges, the profession has to battle constantly to keep its independence. Lawyers need reassurance that those in management are subject to equivalent professional rules.

3 What would you say about your extensive committee roles?

Society committees have contributed immensely to the adaptation and modernisation of Scots law. Formerly this included proposals affecting the European Single Market. Today, vigilance remains necessary to ensure that Scots law aligns with the UK's international obligations. Occasionally, committees need to resist attempts to have them promote legal analyses favoured by interest groups.

4 What will you miss most about your Society work?

I relished the opportunity to bat around ideas and possible solutions with others facing similar issues. I will still be involved with the working party on the proposed National Care Service, and hope to help ensure that account is taken of procurement and state aid requirements in discussing policy options.

Full interview is at bit.ly/3PP7fHo

WORLD WIDE WEIRD

1 The living dead

A woman who was pronounced dead in Thailand after suffering from liver cancer stunned undertakers when she woke up on the way to her own cremation.

bit.ly/44ucuVo

2 Dos and donuts

A legal battle is taking place around a bakery in Conway, New Hampshire, over whether a 90sq ft mural depicting its goods comprises a "sign" that violates local regulations, or a work of art attracting First Amendment protection.

bit.ly/46xtLLx

3 You snooze, you lose

A 200-pound potbelly pig that went on the rampage in a Pennsylvania town was caught after it stopped for a snooze under a backyard trampoline. "Yes, we see the irony in three cops chasing a pig", the police department said.

bit.ly/44xPmoG

TECH OF THE MONTH

Action for Happiness

Google Play and Apple: free

We all need a bit of happiness in our lives, and this app will give you a daily boost by sending you inspiring and uplifting messages. It'll also give you friendly nudges to inspire you to do things, and you can engage and share ideas with fellow app users.

PRESIDENT

Sheila Webster

Wellbeing is an issue I mean to promote during my year, and an important factor is the way we treat others involved in a dispute resolution process – whatever the issue, kindness matters

A month since taking on the presidential role, I think I am beginning to find my feet. It has certainly been a busy few weeks, so far including meeting colleagues across many of the teams at the Society (still a few to go), speaking at our New Partner Practice Management Course, welcoming attendees at our Virtual Summer School to introduce school pupils to legal practice, welcoming those attending our In-house Conference and presenting the In-house Rising Star Award to a very worthy winner, attending a Faculty of Advocates' conference on pro bono initiatives and a reception to mark the centenary of the admission of Margaret Kidd as an advocate, and last, but certainly not least, working on our Society response to the call for evidence in relation to the Regulation of Legal Services (Scotland) Bill. It's definitely varied.

In the quieter moments, I have been pondering some of the issues which particularly interest me and which I aim to have as a focus of my presidential year. Those should not come as a surprise to those who have read my Journal interview (May 2023, 12) with our newest Honorary Member Peter Nicholson (congratulations again, Peter!).

Wellbeing: the kindness factor

Wellbeing is one of those issues – and my recent family holiday to Cape Cod and Martha's Vineyard was a great reminder of the importance of self care, of looking after ourselves, and taking time out to relax. Returning to the office, and with an eye on the TV footage of Glastonbury, the importance of our wellbeing struck me again as I watched the kindness of the crowd, helping out Lewis Capaldi as he struggled on stage.

Kindness. It is so important that we are kind to others, and that we consider how our behaviours impact on those around us. Many of you may have heard of the Mindful Business Charter (www.mindfulbusinesscharter.com) – as it says on the website, a practical framework that encourages us to be more thoughtful about the impact we have on each other. It is certainly worth a read. As you probably know, I practise as a commercial litigator. I was thus present, online, at the launch a couple of months ago of the Mindful Business Charter Guidance for Litigation Professionals, and it caused me to stop and think.

Litigator behaviour

I sense, over my time in practice (too many years to admit), that a slightly aggressive note has become more common in communication, written and verbal. Some solicitors, even today, refuse to contemplate processes such as mediation. Others appear to believe that berating the other solicitor at length will eventually cause the opponent to give in (doesn't work in my experience). A few seem to go so far as to be willing to act as mouthpieces for their clients – which is not how I see the role of the litigation solicitor.

And those behaviours have an impact on others in a dispute process. Other areas of practice will have their own examples. Is that how we should practise law? I have my doubts. I believe that we can each do our jobs, and do them well, while remembering the kinds of principles set out in the Charter. One of my most contentious cases, with clients diametrically opposed in views, was completed (a four-day proof, with experts on both sides), and decision issued within six months of the dispute arising – and that was in large part due to co-operation between solicitors as to management of the case, and respectful communication.

I remember a difficult case with some fondness – something I suspect is rarer than it should be. I wonder if my opponent in that case recognises themselves, many years on? Should that not be how it should be? Would observing the principles in the Charter not improve all of our wellbeing?

New guide

At the Society, we have been working on a new wellbeing guide – a Guide to Creating a Wellbeing Strategy. We will be launching that shortly, so much more on that then. Our work on this reflects the importance of wellbeing in our profession – and I would remind all of you of the valuable material available on our website under the Lawscot Wellbeing tab.

So the message this month is a simple one. Be kind to yourselves and to each other. And enjoy any upcoming holidays you have. Here's hoping for more of the beautiful weather you had here in Scotland while Canadian wildfires brought cloud to the Cape!

And this month's additions to that presidential playlist:

Old Cape Cod, Patti Page (obvious reasons).

Treat People with Kindness, Harry Styles (it had to be...).

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

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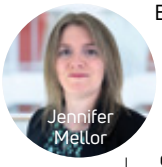
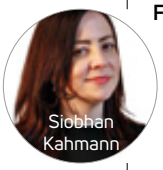


BURGES SALMON, Edinburgh and UK wide, announces the appointment of **Jennifer Mellor** as a director in its Funds & Financial Regulation team. She joins from BRODIES, where she was a senior associate in the Funds & Investment Management team.

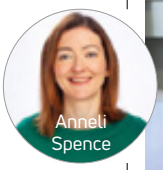


CMS CAMERON McKENNA NABARRO OLSWANG, Edinburgh, Glasgow, Aberdeen and globally, has promoted to partner **Siobhan Kahmann** (Competition & Regulatory, Brussels and Council member of the Law Society of Scotland) as part of its annual global promotion round. (*Correction to notice published in June.*)

DENTONS, Edinburgh, Glasgow and globally, has moved its Edinburgh office from Quartermile to First Floor, 9 Haymarket Square, Edinburgh EH3 8RY, part of the Haymarket Square development.

DIGBY BROWN LLP, Edinburgh and elsewhere, has announced a round of 13 promotions, headed by three new partners: **Catriona Headley** and **Ashley Sturrock** in the firm's Edinburgh Network team, and **Gary Ross** (Asbestos & Industrial Disease, Glasgow).

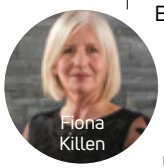
The firm has also named three new associates: **Catherine Hammond** (Edinburgh), **Paul Thomson** (Aberdeen) and **Jordan McCarter** (Glasgow); and seven senior solicitors: **Rachel Black** and **Justyna Rompca** (both Edinburgh), **Andy MacDonald**, **Sam Boyce** and **Nathan McHardy** (all Glasgow), **Ewen Reid** (Inverness), and **Kerry Whyte** (Aberdeen).



EDEN LEGAL LTD, Perth, has announced the promotion of **Anneli Spence**, who has been appointed as a director.

GILSON GRAY, Glasgow, Edinburgh, Dundee, Aberdeen and North Berwick, has appointed **Findlay Anderson** as a partner based in Aberdeen. He joins from BAKER HUGHES, where he was latterly vice president and general counsel for oilfield equipment, supporting global operations.

The firm has also made five promotions in its Litigation team: **Iain Grant** has been appointed a legal director, **Lorna Davidson** and **Fraser Cameron** appointed senior associates, and **Caitlin Bell** and **Laura Brennan** promoted to senior solicitor roles.



HARPER MACLEOD, Glasgow, Edinburgh, Inverness, Elgin, Lerwick and Thurso, has appointed **Fiona Killen** as a partner in its Corporate, Commercial & Regulatory team. she joins from BURNESS PAULL where she was a partner.

KEE SOLICITORS, Glasgow, has appointed **Pauline Ward** as an associate. She joins from NEILL CLERK & MURRAY where she was a partner.

MALOCO + ASSOCIATES, Dunfermline, announces that as of 20 June 2023, the practice re-branded and will henceforth be known as MALOCO MOWAT PARKER. The directors/"partners" will be as at previously: **Michael Maloco**, **Laura Mowat** and **Stacey Parker**. The business address will remain 6-8 Bonnar Street, Dunfermline KY12 7JR and the DX address remains DF 69.

SHAKESPEARE MARTINEAU, Edinburgh and UK wide, has appointed **Trevor Fenton**, qualified in England, Scotland and Canada, as a commercial and corporate partner based in Edinburgh. He joins from PLAIN ENGLISH LAW, which he founded in 2019.

SHEPHERD AND WEDDERBURN LLP, Edinburgh, Glasgow, Aberdeen and London, has relocated its Edinburgh headquarters to the top two floors at 9 Haymarket Square, Edinburgh EH3 8RY, part of the Haymarket Square development.

THORNTONS LAW, Dundee and elsewhere, has announced the promotion of four colleagues to partner: **Kim Campbell** (Corporate), **Amy Jones** (Employment), and **Kirsty Stewart** (Intellectual Property), all based in Dundee, along with **Debbie Dewar**, (Land & Rural Business), based in Perth.

WEIGHTMANS, Glasgow and Edinburgh, has made two appointments to its Employment, Immigration & Pensions team in Glasgow: **Paman Singh** joins the firm as principal associate and **Ben Brown** as solicitor. Both were previously at WORKNEST. **Rhian Griffiths** also recently joined the firm as an associate in Real Estate. She was previously with ENERGY LAW.

WRIGHT, JOHNSTON & MACKENZIE LLP, Glasgow, Edinburgh, Inverness, Dunblane and Dunfermline, has announced the promotion of five staff members. In Glasgow, **Sarajane Drake** becomes senior associate in the Commercial Property department; in Edinburgh, **Fergus Hollins** becomes an associate in Corporate; in Inverness, **Jenna Gallacher** becomes an associate in Commercial Property, **Daniel Stephen** a senior solicitor in Private Client, and **Anna MacLeod-Adams** a senior paralegal in Private Client.

TC YOUNG LLP, Glasgow and Edinburgh, has promoted five lawyers: **Claire Mullen** (accredited specialist in housing and residential tenancy law), **Neil Matheson** (Dispute Resolution team) and **Stephen Higgins** (Property) to senior associate; and **Kirstie Donnelly** and **Nina Derrin** to associate.

Thorntons' new partners, seated l-r: Jones, Campbell, Dewar, Stewart

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As courts in England become more creative in helping the law keep up with changing ways of achieving parenthood, Amanda Masson invites practitioners in Scotland to respond to a demand that also exists here

New families: the winds of change

As the Donor Conception Network celebrates its 30th birthday, it seems appropriate to reflect on how the law around family creation has evolved in the past few years. Advances in medical science have opened up the prospect of parenthood to many more people, giving rise to complex considerations around parenthood, rights and responsibilities.

As an attendee of the celebration in London, I was struck by the perception on the part of our colleagues south of the border that not much happens in Scotland in terms of the law of donor conception, surrogacy and adoption. One colleague indicated in terms that she tends to recommend that parents and would-be parents seek orders in the High Court in London, such is the lack of knowledge and expertise outwith the capital.

Challenge for the Scots

My invitation to fellow family law and child law practitioners in Scotland is that we shift that perception. The more confident we become in practising in this area, and the more cases are dealt with by the Scottish courts, the greater the recognition we will receive for our ability to advise effectively on cases in which our clients seek to create or expand their family via donor conception, surrogacy or adoption.

The reality is that much is going on in Scotland in the area of family creation. Members of the public are far more aware of the options available to them should they wish to start a family. A more open dialogue is emerging, with accounts of surrogacy arrangements featuring more often in the media. A more open culture exists now around fertility issues, and the methods of family creation available to single people and same sex couples. Instances of individuals in platonic relationships who seek to co-parent with another are not unheard of – even in Scotland. Clients are able to access treatment abroad. Surrogacy and adoption with an international element are becoming more commonplace in Scotland, in my experience.

It is important that we are also aware of the options for treatment abroad, from which particular considerations can flow. Advances in medical science including treatment with adopted embryos have made solo parenthood more accessible. Some clinics abroad specialise in treatment for female couples, embryos being created using the gametes of one partner, donor sperm, and the second partner then carrying the baby. Genetic parentage and gestational parentage are then achieved. We need to be aware of how such treatments translate into acquisition of parentage. Practitioners may also require to consider issues of jurisdiction and immigration.

Creative law?

The difficulties posed by our existing surrogacy laws are well documented, with the Scottish Law Commission and the Law Commission of England & Wales having published their joint report in March of this year. The law needs to evolve to keep pace.

With the exception of reform of surrogacy law, however, new legislation is not coming down the line. The Human Fertilisation and Embryology Acts have not been reviewed under consultation for many years. Legislative change does not happen particularly quickly.

What we are beginning to see is an emerging trend towards decisions which find creative ways of delivering what instinctively feels to many child and family law solicitors like the "right" outcome, notwithstanding the departure from a strict application of the legislative principles. Decision makers appear keen to deliver particular outcomes, even if that means significant legal gymnastics in terms of justification of the decisions.

Jennings: consent issue

In *Jennings v Human Fertilisation & Embryology Authority* [2022] EWHC 1619 (Fam) a widowed husband sought permission from the High Court to use the last embryo of his late wife, who had died in pregnancy. He sought declarator that it was lawful for him to use the embryo in a surrogacy arrangement. He accepted that his wife had not provided explicit written consent to the posthumous use of their shared embryo in a surrogacy arrangement, but argued that her consent could be implied. His application was granted in June 2022. He succeeded in achieving deviation from the strict statutory consent regime created by the Human Fertilisation and Embryology Act 1990 (as amended). The *Jennings* decision has been criticised by one legal academic as "an erroneous decision that escalated into a usurping of the strict consent regime of the Human Fertilisation and Embryology Act 1990 with an alternative form of consent" (Lisa Cherkassky, University of Exeter, Case Comment in (2023) 139 *Law Quarterly Review* (January), 19-25).

AY: surrogacy at home

In *AY and BY v ZX* [2023] EWFC 39 Macdonald J confirmed that a parental order can be made if a surrogate is artificially inseminated at home, and not in a licensed fertility clinic. This decision has proven controversial. The distinction exists for reasons of public policy. It is aimed at guiding would-be parents towards treatment at a registered clinic, for valid reasons; yet fertility treatment is not within the grasp of all, hence the rise in the incidence of artificial insemination by private arrangement.

It remains to be seen how the decision will be assessed in Scotland. The surrogacy legislation and the provisions of the HFEA are intra-UK. Will the Scottish courts be so bold as to blur the distinction between artificial insemination at a clinic and artificial insemination at home?

I have commented before on the crucial distinction between artificial insemination at a registered fertility clinic and private arrangement, the distinction being key to determining whether or not a non-gestational parent has parental rights and responsibilities in respect of a child. In certain circumstances one parent may require to adopt the child they consider to be theirs. The decision discussed above involved a surrogate; in some circumstances a second parent can have no generic or gestational link to the child they consider to be theirs, and they have to seek an adoption order in respect of the child in order to acquire legal rights and responsibilities in respect of that child. Will the courts find a way around that in a scenario in which a same sex couple conceive using donor sperm at home, without a surrogate?

Scottish decisions in the pipeline

There are at least two significant cases ongoing within our own jurisdiction which when decided and reported will signify the evolution of a body of Scottish authorities.

A written judgment is awaited from Lady Carmichael in the cases of HF1-23 and HFE2-23, setting out the basis on which she was prepared to accept that applications for parental orders were competent notwithstanding that the facts did not satisfy the terms of s 54 of the Human Fertilisation and Embryology Act 2008.

Twins were carried by the intended mother's sister, having been conceived with the intended father's sperm. The intended parents sought parental orders in terms of ss 54-55 of the 2008 Act. The merits of the applications required to be tested by reference to provisions in the Adoption and Children (Scotland) Act 2007, including consideration of "the need to safeguard and promote the welfare of the child throughout the child's life". There were however competency issues in the case, some of the terms of s 54 not having been satisfied at the time the applications were heard.

Specifically, the applications were lodged 21 months after the children's birth, rather than within the six month period specified in s 54(3). The applicants' relationship had broken down. They were living apart. They did not therefore satisfy the provisions of s 54(2)(c), which states that applicants must be two persons who are living as partners in an enduring family relationship. The children lived with the female applicant only. In terms of s 54(4) the child's home must be with the applicants at the time of the application and the making of the order.

The justification for the granting of the orders is expected within the next few weeks.

Secondly, an action is ongoing at Glasgow Sheriff Court in which the factual issue of whether a child was conceived naturally or via artificial insemination by private arrangement is key to determination of who holds parental rights and responsibilities in respect of the child, and whether or not it is in the child's best interests to have a contact relationship with a person to whom his mother was married at the time of his birth but who is neither a gestational nor genetic parent.

Issues for practitioners

Practitioners need to be able to flit seamlessly between the Children (Scotland) Act 1995 and the Human Fertilisation and Embryology Acts, depending on the particular circumstances in which a child was conceived and the relationship(s) between those involved in the child's creation. It is important that we ask the right questions about how and where a child was conceived and subsequently carried. Parenthood is context specific, depending on the method of conception and whether or not a surrogate was involved.

There is much that we need to grapple with in terms of weighty concepts of parentage, right to family life, access to treatment, and legal remedies. The need for solicitors to understand the art of the possible, and the complex legal framework governing what is necessary to regulate parenthood emanating from the possible, has increased.

Public policy considerations and the notion of fairness will no doubt continue to feature in the discussion, but the fundamental principle of the child's best interests will I hope prove the determining factor in any judicial decision relating to parentage, regardless of how and where the child at the heart of proceedings may have been created.

Amanda Masson is a partner and head of Family Law at Harper Macleod LLP

Security reform: the final piece

Difficult questions around non-monetary securities, and securities over securities, are tackled by the Scottish Law Commission in its third and final *Discussion Paper on Heritable Securities*, introduced here by Valentin Pyataev and Frankie McCarthy

The Scottish Law Commission has published its third *Discussion Paper on Heritable Securities*, exploring issues around non-monetary securities and sub-securities. This article sets out the key points raised and questions asked in the paper, on which comment is invited until 29 September 2023.

Project outline to date

The Commission project on heritable securities, which started in 2018, is the first broad review of the law in this area since the Conveyancing and Feudal Reform (Scotland) Act 1970. The first discussion paper in the project (Scot Law Com DP No 168, 2019) addressed a number of pre-default issues, including the creation and assignation of standard securities. The second discussion paper (Scot Law Com DP No 173, 2021) sought views on default and post-default issues, including the process of exercising a security to enforce payment of the underlying debt. Building on earlier work, the third and final discussion paper focuses on two areas of particular difficulty in the current law, namely securities in respect of non-monetary obligations, and sub-security arrangements.

Overview of the current paper

The latest discussion paper is made up of six substantive chapters. The first four chapters cover non-monetary securities and proposals for a new mechanism to protect obligations to transfer land, and include 15 consultation questions. The latter two chapters focus on sub-security arrangements and include three consultation questions.

Securing non-monetary obligations

The 1970 Act permits standard securities to be taken in respect of obligations *ad facta praestanda* (non-monetary obligations). However, there is confusion as to how securities of this kind operate, and particularly how they can be exercised to enforce performance of the relevant obligation.

Some commentators suggest that what such a security actually secures is a substitutionary financial obligation, such as payment of damages for non-performance of the non-monetary obligation. This is in keeping with the law in comparator jurisdictions considered by the project, and the paper discusses two options for reform along these lines. Option 1 is that security in respect of non-monetary obligations ceases to be possible under new legislation. Substitutionary financial claims in relation to non-monetary obligations could continue to be secured. Option 2 is that security in respect of non-monetary obligations continues to be possible, but with legislation providing that the security holder is entitled only to damages for non-performance of such an obligation. Consultees are asked which of these options is preferred.

The paper also asks whether any issues will arise in relation to ranking of non-monetary securities if one of these options for reform is adopted.

Protecting obligations to transfer land

Non-monetary securities are often taken to protect obligations to transfer land, such as those contained in an option agreement, against a competing grant by the land owner. In such cases, the purpose of taking security is to give a form of third party effect to the secured obligation by making it visible on the Land Register. This publicity will, in some circumstances, allow for a transfer of land in breach of the obligation to be reduced by the creditor under the so-called rule against offside goals. In this context, the financial remedies normally made available by a standard security are not sufficient to meet the needs of the creditor. Rather, what is sought is protection of title.

"The design of conditional advance notices would require various points of difference to the advance notice scheme"

The paper asks whether a bespoke mechanism should be introduced to protect the priority of obligations to transfer land, as is possible in English law through use of a restriction and in German law by way of the *Vormerkung*. The paper suggests this could be most appropriately achieved through a new form of notice – referred to in the paper as a "conditional advance notice" – based on the current advance notice system.

Advance notices are designed to protect the priority of deeds due for imminent delivery in implement of a contractual obligation. In contrast, conditional advance notices would protect the priority of deeds due for delivery typically months or years after an obligation had been agreed, and generally only where conditions agreed between the parties had been fulfilled. As such, the design of conditional advance notices would require various points of difference to the advance notice scheme.

For example, the length of the "protected period" for conditional advance notices would have to be significantly longer than that of advance notices, and voluntary extension of this period may need to be permitted. The paper seeks consultees' input on this and other essential elements of the proposed new scheme, such as the content of a conditional advance notice, who may apply for such a notice to be

entered on the Land Register, and whether it should be possible to transfer the right to the notice to an assignee of the claim protected by the notice.

Another important feature of the new scheme considered in the paper is the effect of a conditional advance notice. During the protected period, an advance notice protects the priority of a deed against both voluntary and involuntary competing deeds. It also protects against inhibitions and insolvency events having a similar effect. So, an advance notice guards against the risk that a competing deed might be granted and also the risk that the granter might become insolvent, at least where the granter is a natural person. The paper seeks consultees' views on whether a conditional advance notice should provide this kind of dual-pronged protection. It also asks whether a conditional advance notice should protect not only the deed, but performance of the obligation to deliver the deed, against competing voluntary deeds.

The paper notes that a scheme based on the advance notice system is not the only possible mechanism for protecting obligations to transfer land, and briefly outlines three alternative options for reform: modifying standard securities legislation to ensure performance of obligations to transfer land, creating a new form of personal real burden for this purpose, and introducing a "personal charge" which could operate as a future or conditional inhibition. Views are sought on whether any of these mechanisms should be explored further in preference to a conditional advance notice scheme.

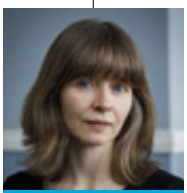
Sub-securities

Under the 1970 Act, it is competent to take a standard security over another standard security, commonly referred to as a secondary security, "piggyback" security or sub-security. In practice, such arrangements may be encountered in relation to securitisations and debt warehousing transactions, among other examples. The question of how such securities operate, and particularly how they may be exercised, has never been fully resolved. The paper seeks views on how the law in this area should be clarified.

A key difficulty with taking a secondary security over an existing standard security is that the primary security has no market value independent of the claim it secures. This makes it difficult or impossible for the primary security to be sold or otherwise used to realise funds for the secondary creditor. The paper suggests that allowing for security to be taken over a real right with no independent financial value is conceptually incoherent. It tentatively proposes that the competence of standard securities over standard securities should be discontinued in any new legislation, and asks for the views of consultees on this issue.

The paper then considers whether it should be possible for a standard security to be assigned in security, an arrangement which is not competent under the 1970 Act. The Moveable Transactions (Scotland) Act 2023 places on a statutory footing the general principle that accessory security rights follow the claim to payment which they secure. In other words, where a claim to payment is assigned, the assignee is also entitled to acquire any right in security held in respect of that claim. This principle operates regardless of whether the claim is assigned outright, or assigned for the purposes of security.

The paper emphasises that this principle will apply equally where a claim is secured by a standard security. An assignee of that claim, including an assignee in security, is also entitled to an assignation of the standard security. The paper considers whether such an assignation could appropriately be characterised as an "assignation in security". It also addresses the question of how such an assignation may operate where the standard security is for all sums due or to become due. Views are sought on whether it should be possible to assign in security a standard security and, if so, what consequences should flow from this.



Valentin Pyataev is a legal assistant, and **Frankie McCarthy (pictured)** a commissioner, at the Scottish Law Commission

Next steps

Consultation on the discussion paper runs until 29 September 2023. The Commission eagerly awaits responses to help it improve this complex area of law. The results of consultation on all three discussion papers will be drawn together in a final report and draft bill, anticipated in 2025.

Need we fail the stress test?

Mindfulness coach Martin Stepek challenges the need for a long hours culture within the legal profession, calling on its leaders to be more proactive in addressing the issue – with the aid of his discipline

Crisis is a word that is easily used to exaggerate a passing difficulty, but the current scale of mental health issues in the legal profession doesn't appear to be a passing phase. Because of the magnitude of the disruption during the worst of the Covid years – while noting that it is still prevalent – we have a tendency to blame all issues on the pandemic.

One UK-wide study done before the Covid pandemic wrote of people in the profession as having "compromised wellbeing", with higher levels of mental health issues and lower levels of wellbeing than the general public.

I teach mindfulness – the original, deep version, not the shallow "tick the box" version that is sadly sold as the real thing – and I have been a director of a medium-sized Scottish law firm. Way back in the early 1980s when my friends at university graduated and moved into the profession, I chose another path but kept in touch with many of them. My friends closest to me quickly left the profession or moved out of the solicitor domain into other, more niche areas of law. Their reasons varied, but much of it was about the relentless nature of the work. Others who progressed in their role as solicitors, instantly commented when we met up that they weren't happy in their work but felt stuck in the profession, partly because they had become used to the better than average standard of living they had achieved.

"Life should be much more than just work, work, work, and more work, and life should contain enjoyable and fulfilling work"

It reminds me of a poignant quote from the late Whitney Houston, which I read for the first time in a fascinating – and somewhat related – book called *Fragile Power: Why Having Everything is Never Enough*, by Dr Paul L Hokemeyer: "I was talking to [another celebrity] the other night and we were talking about being a regular person years ago and how we wanted the fame and fortune. But then we got it – we lost our lives. He wondered if we'd made the right choice... It's been more than I bargained for."

Stuck in the cycle

Change the words "fame and fortune" to "social status and income", and we might be getting close to how many stressed and burned-out lawyers feel today, and have felt for decades. Of course, for most of us hopefully it's not quite that bad, but life should be much more than just work, work, and more work, and life should

How to take care of yourself at work... and home

Mindfulness is simple and practical. Here's how you can reset your state of mind at any time, (provided you make an effort to develop the skills required).

Let's say you are feeling stressed because of a work situation.

- Notice that you are stressed.
- Feel the unpleasant experience it creates in your mind, and often in your body.
- Now imagine that you can pause that unpleasant feeling, temporarily freezing it.
- When you have done that, gently slip your attention away from the feeling of stress to the flow of air through your nostrils as you slowly breathe in, then as you breathe out.
- You may feel the stress reduce.
- If it is not fully gone, just continue to notice the breath and become aware that those sensations are fresh and peaceful, clear and calm.
- The longer you do it, the more the stress dissipates.
- The more frequently you do it each day, the less the stress will accumulate, leaving you with little or no stress by the end of your day.

You can do the same for tiredness, just substituting the awareness of stress in your mind and body for the feelings of fatigue.

Doing this simple practice every half hour or so for 30 seconds to a minute can be remarkably effective.

You have a personal responsibility to look after yourself. These mindfulness practices are a very effective way to do so.

contain enjoyable and fulfilling work rather than your career sliding into just an exhausting way of paying the bills and enjoying a holiday – which we take to try to recover from the stress of working. How ironic.

I won't even get into the statistics. Google if you wish to know. The figures are there for Scotland, the UK, the USA. Mental health issues above the national average. Why is this so? There is nothing inherently depressing about the law, nor about the work lawyers have to do, nor about the structures that legal firms have to fit within to remain on the right side of the law.

So, it must be an internal but international set of causes. Let's take my life as an example. I work roughly nine to five during weekdays, but not at weekends except for very occasional exceptions. I don't accept calls or work on emails after hours unless it is a genuine emergency. My work roughly divides into three areas: helping family businesses deal with complex issues, helping people's mental health through delivering and teaching mindfulness, and writing things like this article, blogs, books, and poetry.

Inherently stressful?

The last of the three rarely requires exceptional circumstances. Few people require a life-saving poem at short notice. The other two do include moments of crisis; but unlike the real emergency services, most of these issues can wait till the next morning or the start of a week.

I suggest this is the same as legal matters. Relatively few legal matters really require working after hours or at weekends. It's a failure of management and leadership if this becomes too common an occurrence for solicitors in a firm.

Likewise if working during normal hours creates stress and burnout for employees in the profession. There are always going to be problems and challenges in any workplace, but that is not the same as saying that stress and burnout must also occur. The two are not the same thing. A problem is not inherently stressful. Challenges need not lead to burnout. It is how these things are dealt with that makes the difference, and dealing with things is a leadership and a management matter.

Challenge for our leaders

At the macro level we must ask questions of the profession as a whole. It's one thing to offer quality care and advice, as I know the profession's bodies do well; quite another to have a strategy or campaign to prevent such unacceptable levels of stress and burnout from happening in the first place. Where are the targets to reduce the figures? Who is leading any such campaign? Who is representing the profession in talks with client groups to reduce the demands from clients that solicitors must be available 24/7 regardless of the actual urgency or importance of a legal matter?

I suspect that most causes of the long hours, and continuing to answer emails and do paperwork after hours at home, stem at least in part from the mindset of the solicitors themselves. When a profession or a workplace, inadvertently or otherwise, creates a culture or expectation of long hours, working from home in one's personal free time, most employees tend to slip into that culture and follow suit. Worse is when it is explicitly stated, which is a form of coercion or bullying. People's mental health is of paramount importance and must be protected from unreasonable expectations of senior partners, clients, or both.

Two levels of treatment

In my own work, helping people help their own mental health through mindfulness, I have often come across the accusation that doing such work is only putting a plaster on a massive wound rather than dealing with the bigger problem. I totally accept that; however, it is better to put a plaster on a wound than do nothing, which is sadly still the most common "response".

The bigger issue, the continued acceptance of unacceptable stress and burnout among lawyers, can also be addressed through mindfulness, but at a much higher level. Mindfulness can help the senior people in any organisation properly investigate the extent and root causes of mental health issues in their organisation – or indeed in the profession as a whole – in a clear, insightful, and calm way, free from presumptions and prejudiced, out of date ways of seeing things. "That's just how it is and always will be" is no longer the case in so many areas of work and business, and the same applies to the legal profession with regard to the impact its working traditions have on its members. One way or another the culture and the practices that cause stress and burnout have to change – and will change. Better to do so proactively, clearly, and calmly, than be forced to change.

Martin Stepek offers one to one transformational mentoring which merges neuroscience, mindfulness, and meditation, to help CEOs and senior management achieve greater fulfilment in their professional and personal lives
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Cross border estates: some top tips

Dealing with an estate that includes assets located abroad poses particular challenges for solicitors. Kevin Winters highlights some of the key issues that can arise, and suggests how they might be tackled

The movement of people across national borders is not a particularly new phenomenon. Furthermore, where an individual relocates from one country to another, even for a limited time, it is reasonable to assume that they will acquire assets in that new jurisdiction, and those assets may remain there, notwithstanding the individual's decision to return to their home country.

For lawyers advising on succession to private wealth, situations like this call for a detailed analysis of, among other things, the client's worldwide estate and domicile to ensure that appropriate succession and tax planning measures are put in place.

In the abstract all of this makes perfect sense. There are however certain challenges which can present themselves in the course of dealing with an executry for a Scottish domiciliary who has an international estate.

1. Distinguish between succession law and tax law

Where an estate does have a cross border dimension, it is not uncommon for there to be two (or more) wills in place, with each governing succession to the assets in its own jurisdiction. This may have been done for particular reasons, for example to allow for the ease of distribution of different aspects of an estate to different beneficiaries, or to deal with heritable property more effectively.

In the context of executries, where there is a Scottish will dealing with the majority of the deceased's estate, and another will dealing with specific foreign estate, it will be important for both wills to be considered side by side. This ensures that succession to the relevant assets is handled appropriately. The key point to note here is that the wills concern *succession* to the relevant assets. While it may be obvious, the basic (but worthy of underlining) point is that this is distinct from the tax treatment of the estate, something that should not be lost in the course of analysing an estate.

It is also important to check at an early juncture that the wills are formally valid and that there are no accidental revocations of the other wills. "I revoke all prior wills and testamentary writings" is generally not a good start where there are two or more wills in an international estate!

Scottish domiciliaries will be subject to UK inheritance tax ("IHT") on their worldwide estate. It may be the case that questions are raised, perhaps by executors of a foreign will, as to why IHT applies to foreign estate when there is already a tax charge applicable on death in that foreign jurisdiction (more on this below). As will be well known to private client solicitors, the UK tax treatment of the estate will follow the deceased's domicile.

2. Cash flow

In international estates where IHT is payable, there can be a challenge in accessing funds in good time to settle any tax that is due to HMRC in advance of the payment deadline. HMRC's deadline for settlement of IHT is no later than six months from the end of the month in which the deceased died, after which interest will begin to accrue on the unpaid tax (and there have been some material increases in those interest rates in recent times). The issue is however that it may not always be possible to get access to funds in the time allowed. This is not a problem unique to estates with foreign assets, but the international dimension can make accessing funds to pay the tax more difficult.

It should be borne in mind that a lack of funds is unlikely to be deemed a "reasonable excuse" by HMRC in terms of late payment of IHT. It is important, therefore, that advisers in all jurisdictions consider this as early as possible and agree on a plan to settle tax and liabilities as early as possible. This will be further complicated if there are different executors and beneficiaries in the different jurisdictions.

3. Double taxation

As is not uncommon with international estates, both the UK and the foreign state may look to impose their own "death tax" on assets. While it is true that not every state in the world levies IHT on the value of an estate on death, there may still be taxes chargeable abroad by virtue of the same event, i.e. death. That is when the issue of double taxation needs to be considered.

The problem of double taxation is not a new one, and many states have entered into treaties to deal with it as and when it arises. It should be borne in mind that while the UK has several double tax treaties ("DTTs") in place covering a number of taxes, it has relatively few in place for IHT (only six in total). There are, in addition to those treaties, specific treaties in place between the UK and France, Italy, India and Pakistan, but those relate to estate duty and their detail needs to be considered where double taxation is an issue. Advisers should also consider the merit in looking to take advantage of any DTT relief; the process of claiming relief will inevitably involve an investment of time and require relevant expertise. In cases where the amount of double tax suffered is modest, it may not always be a sensible use of (ultimately) estate funds to attempt to take advantage of the terms of a DTT.

In the absence of a DTT, the only course would be to look to take advantage of unilateral relief. In broad terms, unilateral relief is a mechanism whereby HMRC gives credit against IHT for tax charged by a foreign state on assets in that jurisdiction. As with DTTs, securing unilateral relief will take time and involve additional professional costs which many executors may not have anticipated.

4. Court process

Depending on the value and asset mix of the estate, there may be a need to apply for grant of confirmation in the Scottish courts. The obvious issue is that the Scottish courts cannot grant confirmation to foreign estate, which may create issues in terms of ingathering foreign assets. In that situation there may be a need to involve the courts in the jurisdiction where the foreign assets are located.

Historically, any logistical challenge in getting access to foreign estate tended to be overcome by simply having the Scottish grant "resealed". Whether or not that is the most cost effective and efficient course will ultimately depend on the circumstances, and will need input from lawyers in the relevant jurisdiction. It may be preferable to simply seek to have the foreign court grant probate to the foreign asset. This is where it can be beneficial to have multiple wills, as this can allow for the court processes in the different jurisdictions to be progressed simultaneously.

As Scots lawyers, we will ultimately need to liaise with our counterparts on what the needs of their courts will be. It is however the duty of the executry solicitor to manage the expectations of their executor clients; the time taken to have an application for confirmation granted in Scotland can be significant, and that can be even more so where foreign courts are involved. This may also involve additional paperwork: there may be a need for an opinion to be given on the validity of a Scottish will, or there may be a need, as part of the foreign court's process, to contact each beneficiary under a will to notify them of their entitlement before any grant of probate is issued. This will all take time and may not be met with much sympathy by executors who are anxious to wind up an estate while mourning the death of a loved one.

Manage expectations

The process of executry administration can often be deemed frustrating by executor clients or beneficiaries which is, of course, understandable. Much of the process relies heavily on third parties and generates a significant amount of paperwork. The same can be true of estates with foreign assets, which have the added dimension of potentially needing to involve foreign lawyers, notaries, tax advisers and their courts. As with much of the work in this sphere, it is advisable for lawyers to have a firm grasp of the many moving (often at the same time) parts of the executry with a view to being able to manage client expectations, and seamlessly navigate the various challenges which will undoubtedly arise.

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Are we getting through?

Communication needs in criminal justice

Many individuals who encounter the justice system have speech, language and communication needs, but there is little specialist provision to mitigate the resulting risks to justice. Jasmine Wishart and Ann Hodson report on their research carried out with practitioners

Speech, language and communication needs ("SLCN") affect a person's ability to understand, listen to and communicate with others. Common features of SLCN include difficulty with speech, difficulty understanding words and sentences, difficulty listening and paying attention, and difficulty answering questions. SLCN may also affect social communication, impacting on the use and understanding of sarcasm, body language, social cues, and emotion.

Difficulties can present in one or all of these areas, occurring in isolation as a result of trauma or injury, or alongside neurodevelopmental conditions such as autism and developmental language disorder. Although SLCN commonly develop in childhood, they often persist into adulthood. SLCN are also often a hidden disability, as they are difficult to detect by untrained professionals.

People with SLCN often find ways of masking their difficulties to avoid feelings of embarrassment or shame. Identifying, assessing, and supporting SLCN fall within the professional remit of speech and language therapists ("SLTs"), who are currently minimally utilised within the justice system, despite research demonstrating the benefit of their involvement and consistent recommendations to increase their provision within the system (Holland et al, 2023).

Effects of the system

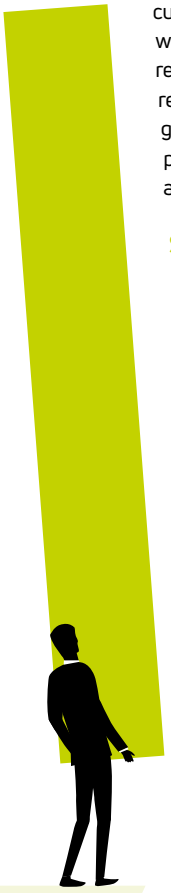
UK studies estimate that 60% of the youth offending population has SLCN (Gregory and Bryan, 2011), six times that of the general population (Norbury et al, 2016). While the exact prevalence of SLCN within the adult justice system is uncertain, there is evidence of an above average prevalence rate (Iredale et al, 2011). Such a high prevalence would suggest that many Scottish lawyers are likely to have encountered and supported a person with SLCN through the justice system.

Our justice system places significant demands on a person's speech, language and communication capabilities, even without any added SLCN. Police interviews and criminal trials often require the ability to comprehend, retain and respond to a variety of interchanging registers, complex questioning styles and legal jargon from multiple professionals in high-pressure environments (Sowerbutts, 2021). Individuals in contact with the law have noted that disengagement from the justice process is often easier than attempting to seek clarification for terms they don't understand (Iredale et al, 2011).

Difficulties articulating a story or recalling an event in a logical and ordered manner can also have profound effects on justice outcomes (Holland et al, 2023). Social communication difficulties can affect how the accused is perceived by the police or in the courtroom, often being misinterpreted as apathy, boredom and/or disregard for the process (Snow and Powell, 2004). Consequently, people with SLCN can be at a disadvantage when interacting with the justice system. The risks of misunderstanding one's rights, false admissions, misunderstanding sentencing, and failing to comply with the rules and procedures of the justice system have all been shown to increase for people with SLCN, as may the likelihood of conviction also (Holland et al, 2023). With SLCN being difficult to detect, not always disclosed or frequently masked, and the reported lack of support provision in this area, people with SLCN may not have fair and equal representation within the justice system.

It is therefore essential to gain insight into Scottish lawyers' understanding and experience of SLCN, current barriers people with SLCN face in justice settings, any potential adaptations to the justice system that could be made, and any consensus on further integration of SLTs within the justice system.

A questionnaire was sent via email to lawyers in Scotland and was available online between December 2022 and February 2023. Twenty six currently practising lawyers who work predominantly with adults responded. While the number of respondents was small, the data garnered useful insights and can potentially serve as a baseline for any future research into this area.



Study findings

Most respondents reported frequent encounters with clients who have features of SLCN, such as difficulty understanding words and sentences and difficulty listening and paying attention. This experience seemed to have promoted some awareness and knowledge of SLCN, resulting in most respondents being able to produce an accurate description of the term, such as "people who have difficulty understanding oral or written

communications and expressing themselves". Comorbid conditions such as "learning disability" or "autism" were mentioned frequently in SLCN descriptions. While SLCN can co-occur with these conditions, the speech and language therapist's primary focus is on describing the speech, language or social communication strengths and needs, and supporting identified needs, rather than the aetiology of SLCN or co-occurring diagnosed conditions.

It was encouraging that many respondents noted useful, practical strategies which they used to help facilitate communication, in turn supporting their clients with SLCN to have further autonomy over their legal case. These included simplifying and adapting complex legal jargon, asking questions to ensure understanding, reframing advice, and modifying the environment to reduce distractions and stress.

In contrast to similar studies (Clark and Fitzsimons, 2018; Macrae and Clark, 2020; Mullaley, 2022), no respondents had experience of referring their clients to speech and language therapy services. The majority of respondents did, however, believe that SLTs can provide a valuable service in the justice system in the form of assisting clients and legal professionals to mitigate SLCN difficulties and facilitate understanding and communication.

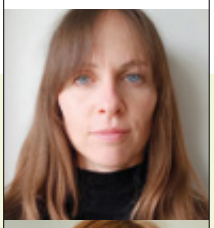
Two of the 26 respondents had received specific SLCN training, and only a slim majority expressed interest in receiving SLCN training. However, respondents also noted the high level of responsibility that lawyers, in addition to social workers and police officers, hold over the identification and management of SLCN in the justice system. This is in conjunction with most respondents stating that further support, in the form of modification to the legal process, is required for people with SLCN. Many respondents expressed that while further support may be required, there were serious concerns regarding the feasibility of implementing any meaningful change to supporting people with SLCN in the justice system. Many concerns stemmed from the rigidity of the system and the current dearth of monetary resources and time to provide such modifications.

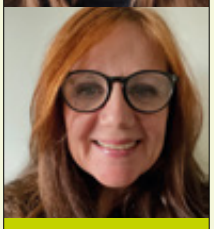
Unmet need

The data highlighted some serious concerns from Scottish lawyers regarding the support available not only to people with SLCN in the justice system, but also to the lawyers supporting them. One stated: "Criminal defence work is very challenging. Most of our clients have complex needs and we are often trying to communicate in very difficult and stressful circumstances and in dreadful environments." With the impact that SLCN can have on access to justice, there is a significant need for integration of SLTs within justice settings.

SLTs are well placed to occupy a consultative role within the justice system, being called on by lawyers and other justice system professionals to provide advice and support when necessary, using a tiered model of service provision, such as that described in Snow et al (2015). This would ideally run alongside providing training and coaching sessions to lawyers to build confidence on how and when to refer SLT services. SLTs are also able to provide support for individuals in environments identified as high risk of communication breakdown, such as police interviews and the courtroom. Individual lawyers are able to contact their local adult or paediatric SLT services if they are concerned about a client's communication abilities. Contact details are to be found on local NHS websites.

Valid concerns were raised regarding the feasibility of integrating a further service into a resource constrained system. However, the unmet need of SLCN within the justice system is evidently putting strain on the professionals working in the system. Many respondents stated that their job would be easier if more SLCN support was provided for their clients. While such changes would require funding and collaboration of multiple services, the results of our study clearly highlight the need for change.





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Litigation funding:

unlocking value in insolvencies

Options available through litigation funding can enable insolvency practitioners to pursue claims when this might otherwise be problematic, as Stuart Clubb and Frances Sim explain

When an insolvency practitioner ("IP") is appointed over the estate of an insolvent company or individual, their primary duty is to realise as much money as possible for creditors. That involves identifying and recovering the assets of the estate, as well as investigating and pursuing any viable claims which may have arisen on insolvency. These could include unfair preference or gratuitous alienation claims, as well as, in the case of companies, claims against the former directors for breach of duty or wrongful trading.

If assets require to be recovered through litigation, or a viable claim is identified which should be pursued, ranking high among the myriad considerations for the IP will be the question of how the costs of any action are going to be funded.

Increased options

It is often the case that there will be few or no funds in the estate to fund litigation, and therefore in order to fulfil their duties to creditors and avoid criticism for failing to take forward otherwise viable claims, IPs will require to consider alternative funding options to cover their legal costs, as well as any adverse awards of expenses.

Such options can include speculative fee agreements, damages based agreements, creditor funding agreements, after the event insurance, and the funding and purchasing of claims by third party finance companies.

The increase in the availability of third party litigation finance has led to a much wider range of potential funding options for IPs. These have evolved to be cheaper and more flexible financing solutions than were historically available. In addition to receiving funding on an ongoing basis, options can include selling the claim in its entirety at the outset and taking a single one-off payment into the estate, or assigning the claim and retaining a financial interest in the outcome.

Litigation funding has therefore allowed IPs to pursue claims which might not otherwise have been brought. For access to justice, increased funding options can only be good news too.

Game changer

One of the key benefits for IPs is that litigation funding is usually provided on a non-recourse basis – meaning that the funder will not seek to recover any money from the IP, solicitors, or the insolvent estate if the case is unsuccessful. In return for taking on all of the risk, if the case is successful the funder will receive its return on the basis agreed with the IP at the outset. Funders may also be prepared to fund the initial investigations required to ascertain whether a viable claim can be brought.

In practice, litigation funding will often provide the best options for an IP with a strong claim but a lack of funds to pursue it. The involvement of a litigation funder is also increasingly seen by IPs as the most effective model for encouraging early settlement by defenders.

Solicitor advocate Stuart Clubb regularly acts on behalf of IPs in pursuing claims which have arisen on insolvency. He notes: "The rise in the availability of third party litigation funding has been a game changer for insolvency litigation in Scotland. Claims which historically might not have been pursued due to a lack of funding or a concern over adverse expenses are now being taken forward with renewed confidence, as IPs work in partnership with experienced insolvency litigation funders. It is therefore not surprising to see a rise in the takeup of funding by IPs in Scotland. For funders, IPs, and ultimately creditors, it is a win-win."

Frances Sim, general counsel for Restitution, adds: "Among the numerous challenges facing IPs as the world continues to deal with the consequences of the last few years is the potential spike in commercial disputes which they must raise to fulfil their duties to creditors. The litigation funding market in Scotland continues to innovate to provide wider choices to work with them and support their efforts."

Insolvency trend

As the latest Scottish insolvency statistics (for the quarter January to March 2023) show a dramatic increase in the number of corporate insolvencies, as well as in personal bankruptcies, an increase in the volume of insolvency claims and litigation seems almost certain to follow.

IPs faced with a lack of funds in the insolvent estate to pursue viable claims therefore need to be cognisant of their duties to creditors and explore available funding options. Obtaining litigation funding and successfully pursuing or settling a claim can make the difference in terms of whether creditors receive a dividend in the insolvency.

The availability and support of third party litigation funding has perhaps therefore never been as important as it is now, as IPs increasingly look to use such funding to unlock the value in insolvent estates for the benefit of creditors.

Stuart Clubb is a partner and solicitor advocate, and joint head of the Scottish Litigation team at Shoosmiths. **Frances Sim** is general counsel for litigation funder Restitution.

Moveable transactions: reform at last

Scots law finally has new means of creating securities over moveables – once the legislation is brought into force. Jonny Hardman outlines how the Act will work, and the Society's continuing input

The Moveable Transactions (Scotland) Act 2023 received Royal Assent on 13 June 2023. This marks a milestone in the decade-long push for moveable transactions reform in Scotland, a reform that the Law Society of Scotland has keenly supported. This will change the way that business can be transacted in Scotland.

Traditionally, the rules in respect of the transfer of incorporeal moveable property (i.e. assignation), and the rules in respect of creating a real right in security over corporeal moveable property (i.e. pledge), have been challenging for Scottish business. For assignation to have legal effect, each underlying debtor has to be provided with formal notice (intimation). This makes assignation in bulk, and/or on a repeated basis, very difficult and costly. For pledge to have legal effect, the pledged property has to be delivered to the secured creditor. This means that if a business was using something to generate profit – such as a machine – it cannot be pledged, making it problematic to raise finance on it.

New processes

The Act reforms both of these cumbersome processes by the introduction of new statutory registers, to be maintained by Registers of Scotland. To assign an incorporeal moveable, you will be able to register the assignation rather than rely on intimation. You will be able to assign future incorporeals, too, which will automatically be assigned upon them falling within the assignor's patrimony. To pledge a corporeal moveable, or intellectual property, you will be able to register the pledge rather than deliver the pledged property. This will mean that your profitable machine will be able to be pledged as a way to raise finance. The traditional methods of achieving these legal goals will remain in place, though, meaning that these new methods will be facilitative rather than mandatory.

For those areas of business that rely on assignations and real rights in security, the Act will dramatically ease the process of transferring or creating legal rights. It will also open up new possibilities for business, by facilitating the transfer and creation of new rights. So not only will the Act ease current ways of doing business, it will also create the potential for a new raft of business possibilities. The Act will push Scots law to the vanguard of transactional possibilities, making our legal system internationally competitive when previously it had lagged behind.

Following concerns that consumers could be taken advantage of, the regime is now very protective of individuals. Individuals will not be able to grant statutory pledges, unless in the course of their business, as part of the actions of a charity of which they are trustee, or as part of the actions of an unincorporated association of which they are a member. Even then, the assets pledged will need to be used wholly or mainly for the relevant category, and must exceed £3,000 in value. A court order will be required to enforce a pledge against a sole trader.

Dr Jonny Hardman, University of Edinburgh and convener of the Law Society of Scotland's Banking, Company & Insolvency Law Policy Subcommittee

Final stage

The reform process began with a Scottish Law Commission discussion paper in June 2011, which led to a report in 2017, culminating in the introduction of the bill in May 2022. The Law Society of Scotland's Banking, Company & Insolvency Law Policy Subcommittee has been keenly involved in responding to consultations, and is delighted that the Act has passed. The work is not yet completed, though, for two reasons. First, the Act has Royal Assent, but is not yet in force, and we need to keep our celebrations muted until it is. Secondly, the devil is always in the detail. General principles can easily be outweighed by practical hurdles to achieve them. The operation of the two new registers will be key, and we are working closely with Registers of Scotland to make them as user-friendly as possible.

So we are not at the end of the process yet, but a key milestone has been reached. The changes introduced by this Act will be vital for Scotland's economic competitiveness for years to come. One final push is needed to make the reforms as beneficial as they can be.

Laying down the law on expenses

Several issues concerning costs and expenses have arisen recently, and lead this month's civil roundup, followed by a variety of other matters of interest

Civil Court

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

In May 2023, the Scottish Civil Justice Council celebrated its 10th anniversary. I suggest that its most notable achievements so far have been the creation and revision of entirely new rules for the Sheriff Appeal Court and for simple procedure cases. Both procedures seem to have bedded in well. While we are now close to having new procedure rules for family actions, it is disappointing that work on the new Civil Procedure Rules seems to be progressing slowly, with a first report being published in 2017 and a second report in July 2022, but still no sign of any consultation paper on the draft proposals.

The opportunity (as some saw it) presented by Covid to make remote hearings a norm was comprehensively rejected after consultation, and the new rules about attendance at hearings reflect the flexibility and adaptability that plainly made more sense to practitioners. They can be found in the Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Attendance at Hearings) 2023 – who comes up with these snappy titles? – which came into force on 3 July 2023 and provide that substantive business is likely to be heard in person, with most procedural business attended virtually or by hybrid hearing. Users can apply by motion if they wish to change the mode of attendance for their hearing at any time.

Costs and expenses

Meantime, at the coalface, the costs of litigating and liability for expenses are often more significant factors than the merits of the dispute. England has a rigorous costs regime, and their judges are often involved in conducting forensic investigations into what particular costs are reasonable. Generally speaking, our judges tend not to be drawn into such sordid matters and are not at all enthusiastic about entering this particular fray.

In *Mather v EasyJet Airline Co* [2023] CSIH 20, the Inner House was asked to determine the incidence of expenses arising from this personal injury case, which included disputes about several matters including liability, contribution, apportionment, the appropriate national law that applied, and time bar. After the decision at first instance, there was an appeal and a cross appeal with divided success. The opinion of the court refers to a number of authorities on various aspects of expenses and, in relation to the expenses of the appeal procedure, the court applied the "customary broad axe with the blunt edge". This can perhaps be contrasted with, let us say, the "keenly sharpened scalpel" applied to the merits of that complex and difficult case.

In *Nimmo, Petitioner* [2023] CSOH 27, on the fixing of remuneration and outlays of joint administrators, Lord Braid raised a "quizzical eyebrow" at some of the costs involved. The petitioners had been appointed by the company's directors on 14 September 2021 but replaced by administrators appointed by the creditors on 25 November. The total remuneration claimed was just over £300,000, of which about a quarter related to the period after their replacement. Outlays claimed included legal fees of just over £70,000. The practice for determining the appropriate figures, if in dispute, was to remit to a reporter (an insolvency practitioner) and to the Auditor of the Court of Session. The reports were challenged on various grounds, the intricate details of which are laid out in the judgment, and Lord Braid remitted the matter back to the auditor and to the reporter to give further consideration to the criticism and comments presented. No "broad axes" deployed here!

In *School and Nursery Milk Alliance, Petitioners* [2023] CSOH 32 the disposition of Lord Braid's eyebrows is not recorded, but he had to consider a note of objection to the auditor's decision on the level of fees charged by English solicitors in a judicial review. The petitioners had instructed English solicitors and counsel to undertake considerable work in relation to the petition. On taxation, the auditor refused to allow the recovery of any fees for that work. The issue was whether he had erred in so doing.

The test is a broad one (a bit like one of the "axes" referred to above?): rule 2.2(1) of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 provides that the auditor is to allow only such expenses as are reasonable for conducting the proceedings in a proper manner. The application of these rules in any case is a matter for the auditor's discretion. The only criticism of the auditor's approach that was upheld by Lord Braid was that, although the auditor had said that in his experience the expense arising from the instruction of foreign agents was usually greater than if Scottish agents were instructed, there was no information before him to demonstrate whether that was so in this particular case. He remitted the matter back to the auditor to reconsider in light of his comments. One interesting point made was that if an auditor makes the fundamental decision that it was not reasonable to instruct English agents, no charges for any of their work can be allowed, even at Scottish rates.

Finally, in *Young v Aviva and Axa* [2022] SAC (Civ) 32 the Sheriff Appeal Court had to adjudicate on a question of expenses that often arises in personal injury cases but may not be fully appreciated by practitioners. The pursuer was a passenger in a parked car. The driver opened the door, and a passing van struck it. The van driver (per his insurers) "did not engage with" the pre-action PI protocol, as the court put it, and the pursuer sued the van driver for damages. Eventually, the van driver blamed the other driver in his pleadings, and the pursuer amended her claim to convene the car driver as jointly and severally liable. Both parties were sued in the name of their insurers. After the pre-trial meeting, the car driver settled the case and a joint minute was lodged, which, among other things, found her liable for the pursuer's expenses, and reserved the question of the van driver's expenses. The question at issue was "Who pays the van driver's expenses?" The sheriff found the pursuer fully liable for all of them. The pursuer appealed.

The appeal was heard by Sheriff Principal Ross. He reiterated the general principles surrounding awards of expenses and went on to consider the terms of OCR, chapter 3A concerning the pre-action protocol. He said it was unsatisfactory that the aims of the protocol had been defeated by the van driver and that all of the procedure up to the convening of the car driver had been "wasted". He modified the award by refusing the van driver's expenses up to that point. The pursuer argued on appeal that she should have a right of relief against the other defender for the remaining expenses but, since this had not been raised at first instance, the sheriff principal said that, as a matter of principle, it was not open to her to raise the point on appeal.

It is arguable that, if the protocol is important in regulating the conduct of parties in PI cases pre-litigation, as it surely must be, then a stronger message could have been sent out to defaulters. Proper compliance with the protocol might well have obviated the need for any litigation whatsoever in this case.

Protective expenses orders

Halley v Scottish Ministers [2023] CSIH 9 was an appeal by the petitioner in an application for a protective expenses order in respect of proceedings to which I have referred in previous briefings. The court rejected the application

and referred to the "*Corner House* principles", derived from *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, which are worth repeating here: "If a case has a real prospect of success a PEO may be made on such conditions as thought fit if (i) issues of general public importance require to be resolved; (ii) the applicant has no private interest in the outcome; (iii) having regard to the likely costs and the financial resources of the parties it is fair and just that a PEO be made; and (iv) absent a PEO the applicant will probably discontinue the proceedings and will be acting reasonably in so doing... It is for the court, in its discretion, to decide whether it is fair and just to make a PEO, and if so, the terms of the order will depend on what is appropriate and fair." The court refused to grant the order.

Data protection in litigation

Riley v Student Housing Company [2023] SC DNF 8 was a claim for damages by an individual who alleged that the defenders (his employers) had breached his rights by using personal information about him in tribunal proceedings in which he had been a witness. The defence was that any disclosures of the pursuer's personal data were made in connection with legal proceedings and for the purposes of defending legal rights. After a debate the sheriff dismissed the action.

The legislation is too complex to detail here, as are the arguments, but the court held that the defender was exempted from compliance with the provisions of the Data Protection Act 2018. For good measure, the action also failed because the pursuer's averments regarding the data involved were so lacking in specification as to be irrelevant, and were insufficient to enable him to prove that any damage that he might have suffered was caused by the defender's alleged infringement.

Time bar again

If anyone thought that arguments about prescription of claims for damages had been fully exhausted and that all possible combinations of factual circumstances had been explored, *Highlands & Islands Enterprise v Galliford Try Infrastructure* [2023] CSOH 21 will have come as a surprise, not to say a severe disappointment. The pursuers claimed damages of £11.5 million for defects in the Cairngorm Mountain Railway, whose construction had been completed in 2001 and whose operations had been suspended in 2018. Between these 17 years, various structural issues and alleged defects of major or minor significance had presented themselves and were set out in the pleadings.

The pursuer founded on the Prescription and Limitation Act 1973, *s* 6 (4) (any period during which the claimant was induced to refrain from claiming as a result of error induced by the wrongdoer would not count) and *s* 11 (any period during which the claimant was unaware or could not with reasonable diligence have become aware of loss would not count). Lord Sandison inspected the pleadings and discussed them in some detail in his judgment, but took the view that proof before answer to hear evidence bearing on both arguments was appropriate. "The pursuer's averments are sufficient – in some respects, barely so – to entitle it to proceed to a proof before answer with the first defender's prescription plea standing."

I would not be surprised if an appeal follows, given the value of the claim and the complexity of the legal principles surrounding this notoriously difficult area of law, but, on the other hand, I doubt if the Inner House would be inclined to carry out a microscopic examination of the pursuer's pleadings at this stage.

Pleading fraud

In *Leander CB Consultants v Bogside Investments* [2023] CSOH 26 the facts are exotic enough to bear repeating. The alleged fraud surrounded the formation of a company which was supposedly to receive the sum of $2.4 billion held by a New York law firm, and to which the defenders were prevailed upon to lend the sum of $7.5 million, which (it was said) was required to secure the release of the $2.4 billion which had been earned from the supply of personal protective equipment. The loan was advanced in January and February 2021. In May 2021, it was discovered that the New York firm knew nothing of the transaction and did not hold, and had never held, the $2.4 billion in question.

The issue for decision by Lord Braid was whether the pursuers' pleadings were sufficient to allow a proof. He reviewed the authorities on the requirements for pleading fraud, which can be summarised as follows: "the party making the case... must aver: that the alleged false statement was relied on in entering the transaction in question...; and that the representation was made knowing that it was false... As regards specification, the defenders must make specific averments setting out the acts or representations complained of, the occasions on which such acts or representations were made, and how they caused the defenders to enter into the transaction". With no great difficulty, he considered that the pleadings in this case were sufficient.

Vexatious litigant

Lord Advocate v Sime [2023] CSIH 23 was an application under ss 100 and 101 of the Courts Reform (Scotland) Act 2014 for a vexatious litigant order. Reference was made to five prior actions raised by the party concerned and to outstanding awards of expenses against him. The order was granted, the court pointing out that that did not prevent the respondent from raising new proceedings or engaging with existing litigations. Instead, it represents a safeguard whereby the respondent will be able to do so only if he satisfies the court that there is a reasonable ground for taking such a step, in terms of *s* 101(4).

Contempt in civil proceedings

In *UH v ST* [2023] SAC (Civ) 16, a family case, the sheriff made certain orders regarding contact, the details of which can be found in the judgment. The sheriff decided *inter alia* that the appellant had been in breach of some of the orders and found her to be in contempt of court. The Sheriff Appeal Court allowed the appeal.

The SAC referred to *Robertson and Gough v HM Advocate* 2008 JC 146 at para 29: "Contempt of court is constituted by conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court".

The sheriff had made a number of findings of contempt in respect of the interlocutors but, in order to determine whether or not a party has complied with an order, one must first determine what was required of them: *Sapphire 16 SARL v Marks & Spencer plc* [2021] CSOH 103 at para 39. In essence, the terms of the interlocutors had not imposed any specific obligations on the appellant, so there was no contempt.

Default: party litigant

In *RBS v Aslam* [2023] SAC (Civ) 20 the defender was a party litigant who appealed to the SAC against the granting of a decree by default in relation to a summary application by the bank for recovery of possession of heritable property. A debate had taken place in which he behaved in a way described by the sheriff as "inappropriate" and "hysterical"; he began to shout and swear; he made accusations of corruption and racism; he threatened to "torch" the security subjects; he demanded that the police be called. He left the courtroom before the debate had concluded. Thereafter the sheriff found him in default and granted decree by default, with immediate extract.

The appeal sheriff, Sheriff Cubie, considered in some detail, and with reference to various authorities, the following issues:

- Was it open to the sheriff to grant decree by default at the hearing?
- If so, was there a default?
- If so, did the sheriff err in granting decree as a result of any such default?
- If not, was the sheriff correct to grant immediate extract?

He decided that there was a default "arising from actions which might on one view constitute contempt of court", and the sheriff had not erred in granting decree, although the bank conceded that the sheriff had erred in granting immediate extract. I recommend reading his opinion in full.

Briefings

Licensing

AUDREY JUNNER, PARTNER,
MILLER SAMUEL HILL BROWN

In June, new firework rules were brought into force in Scotland by virtue of the Pyrotechnics Articles (Scotland) Act 2022. These new provisions afford local authorities powers to prohibit the use of fireworks in designated control zones, and further restrictions including a licensing system are expected next year.

The real fireworks with the law and policy around licensing have however been elsewhere, retail and hospitality becoming more political than they have ever been before. Following the appointment of our new First Minister in March, the alcohol advertising consultation was immediately sent "back to the drawing board"; and the ill-fated Deposit Return Scheme has been postponed until October 2025, if not indefinitely.

The future of another Government scheme was in question last month, following the decision of the Court of Session to partially uphold a challenge to the City of Edinburgh Council's Short Term Lets ("STL") Licensing Policy by a group of accommodation providers in what was the biggest crowdfunded legal case in Scotland's history: [2023] CSOH 35.

The Edinburgh scheme

Adopted in September 2022, Edinburgh's policy contained a rebuttable presumption against the grant of an STL licence for secondary lettings in a tenement or premises with a shared main door. Secondary letting is defined as accommodation which is not, or is not part of, the licenceholder's only or principal home. The majority of STL properties in the capital were expected to fall into this category. Further, any STL licence approved for such a dwelling would be restricted to one year; a standard condition for all secondary lets would require carpets or other suitable floor coverings; and temporary licences for secondary lettings would face a similar rebuttable presumption.

The petitioners sought reduction of the policy, averring that it was irrational and oppressive at common law; breached regs 15, 16 and 18 of the Provision of Services Regulations 2009; and amounted to an unlawful and disproportionate interference with their interests under article 1 of the First Protocol to the ECHR.

Unclear and irrational

Lord Braid held that the policy was unlawful at common law, in respect of the rebuttable presumption, the lack of provision for temporary licences, and the requirement to supply floor coverings. It also breached the 2009 Regulations. He rejected the petitioners' challenge regarding the restriction to one year, holding that this part of the policy was rational, proportionate and justified; and similarly dismissed the ECHR argument.

Considering the question around the rebuttable presumption, in response to the respondents' assertion that refusal of an STL licence for a secondary letting in a tenanted building would not be the normal outcome as there was an expectation that well run businesses would be granted a licence, Lord Braid stated at para 46: "There must come a point when there are so many exceptions to a policy that it ceases to be a policy at all". In those circumstances the grant of a licence cannot be regarded as exceptional, and the "rebuttable presumption itself will not in fact create consistency, nor will it assist applicants in knowing whether or not an application is likely to be granted".

He went further and found that the adoption of a normal practice of not granting an STL licence for a property which has received planning permission is irrational and contrary to the purpose of the overall statutory scheme. The legislation envisages that a local authority will have separate, but complementary, planning and licensing regimes, and decisions on a blanket policy basis regarding the suitability of a particular type of property in a particular area are matters for planning. It would be "perverse and oppressive"' for an application for an STL licence to be refused by virtue of the type of property.

What next?

What does this mean generally for the future of short term let licensing? While some within the sector hope that this decision will have wider implications across Scotland, it appears that the Scottish Government is standing resolute behind the scheme, at least until it has completed the interim review and report to Parliament in early 2024. Lord Braid made numerous references to the policy purpose behind the legislation and the outcomes of the dual business regulatory impact assessment, stressing that the primary motivation for the scheme was to enhance guest and neighbourhood safety.

It is unlikely that the ability to achieve this purpose is shaken substantially by the decision in this case. It may however give some local authorities cause to revisit their own policies, in particular those who have taken a similar approach in restricting the use of temporary licences. Where efforts to exclude certain types of properties are no longer appropriate we may see more comprehensive conditions used to achieve the policy objective – conditions which can of course be legally deployed and enforced in the context of a licensing scheme.

The case highlights the close line local authorities walk between planning and licensing policy and the unique interplay between the two regimes, not just in STL but across the spectrum of licensing. STL has been a polarising policy since day one, so no doubt we can expect more individual challenges as we move through this implementation stage.

Planning

ALASTAIR McKIE, PARTNER,
ANDERSON STRATHERN LLP

My last article (Journal, April 2023, 30) focused on the National Planning Framework 4 ("NPF4") as part of the development plan. This article considers the Scottish Government's published *Local development planning guidance* on the procedures and processes to be followed for the new style of local development plan ("LDP") which must now be prepared and adopted by all Scottish planning authorities. The intention is that once adopted, the new style LDP will last 10 years.

This guidance is a significant step in initiating the new style LDPs required under the Planning (Scotland) Act 2019. Once adopted, they will, together with NPF4, form (for each planning authority area) the "statutory development plan" against which all new development will be assessed, and thus form the cornerstones of the plan-led planning system. The development plan is pivotal in deciding what gets built and where, and just as importantly what should not be built. This is achieved through the legal presumption in favour of development enshrined in *s* 25 of the Planning (Scotland) Act 1997 where a development proposal is in accordance with the development plan, and a (rebuttable) presumption against where it is not.

Preparation

The guidance indicates every planning authority should have a new style LDP in place within around five years of the regulations coming into force, i.e. by May 2028, and that LDP preparation to adoption should take around three to four years, considerably shorter than the cycle for the old style LDP. The timings for the new process mean that this will need to start in 2024. The shorter period for preparation and adoption is intended to enable a planning authority to focus on delivery of the LDP together with subsequent monitoring and evidence gathering to inform the next LDP, in an efficient rolling programme.

In order to ensure the overall plan making process is joined up, the preparation of the new style LDP must take into account NPF4 and any relevant local improvement plan, any local place plan, and have regard to regional spatial strategy and other plans. NPF4 already contains a suite of 33 national planning policies, and it is not intended that these need to be repeated in the LDP.

The new style LDP will address all forms of development including housing, retail, leisure and energy. They should be delivery focused and deliver for people and places. The 1997 Act defines the purpose of planning, which is managing the use of land in the long term public interest, which includes contributing to

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Pavement parking prohibition

The Scottish Government seeks views on improving local authority enforcement of the prohibition on driving and parking on pavements in order to tackle inconsiderate and obstructive parking. See consult.gov.scot/transport-scotland/enforcement-regulations-for-local-authorities/
Respond by 28 July.

Local authority disqualification

The Government seeks views on extending the scope of the disqualifications from office in s 31 of the Local Government (Scotland) Act 1973 to include those subject to sexual offender notification requirements who have not received a custodial sentence. See consult.gov.scot/local-government-and-communities/disqualification-criteria-for-local-authority/
Respond by 9 August.

Permitted development rights

Ministers are reviewing permitted development rights. This consultation is part of phase 3, which relates to matters including renewables equipment, electricity undertakers, reverse vending machines and temporary shooting ranges. See consult.gov.scot/planning-performance/scottish-government-review-of-pdr3/
Respond by 23 August.

Employee share schemes

HM Treasury seeks views on improving and simplifying Save As You Earn and share incentive plan employee non-discretionary tax-advantaged share schemes. See www.gov.uk/government/consultations/non-discretionary-tax-advantaged-share-schemes-call-for-evidence
Respond by 25 August.

Regulating umbrella companies

The UK Government is consulting on options to regulate, and tackle non-compliance regarding employment rights and tax by, umbrella companies – similar to employment agencies but not currently specifically regulated. See assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1161120/230411_Umbrellas_condoc_HMT_template.pdf
Respond by 29 August.

Local television

The Department for Culture, Media & Sport is consulting on proposals for the future of both the local TV multiplex licence and the 34 individual local TV services operating across the UK. See www.gov.uk/government/consultations/consultation-on-the-renewal-of-local-tv-licences
Respond by 30 August.

Land justice

Mercedes Villalba MSP seeks views on her proposed Land Justice and Public Interest (Scotland) Bill. It would introduce a presumed limit of 500ha on individual sales or transfers of land and on the aggregate amount of land any person can own, with any transfer over that size subject to a public interest test. See www.parliament.scot/bills-and-laws/proposals-for-bills/proposed-land-ownership-and-public-interest-scotland-bill
Respond by 12 September.

... and finally

As noted last month, Holyrood's Economy & Fair Work Committee seeks views on the Bankruptcy and Diligence (Scotland) Bill (see yourviews.parliament.scot/efw/bankruptcy-bill/ and **respond by 21 July**).

sustainable development and achievement of the National Performance Framework. The new LDP should include the expectations for new development and the continued need for developer contributions.

Similar to the existing LDPs, the new LDPs will allocate sites for development, but going forward, sites will be carefully assessed for deliverability and should be free from constraints, or if constrained the LDP should indicate how such constraints will be removed, and the timeframe.

Engagement

The guidance explains in considerable detail the key stages of plan-making, including the evidence gathering which will include the need for an "evidence report", assessed at an early stage through a "gate check", where ministers will appoint a reporter to assess the adequacy of the report.

Using the evidence report, the planning authority must then develop a spatial strategy with early public engagement such as a call for sites. The proposed LDP will then be prepared under the delivery programme, consulting with key agencies and persons named in the programme. Once approved by the planning authority, they must publish the proposed LDP and evidence report and undertake public consultation with the ability to modify the proposed LDP.

The proposed LDP and modification report (if applicable) will then be submitted to ministers; unresolved representations will be subject to examination by a reporter. The examination procedure will be a matter for the reporter, but could take the form of a hearing or further written submissions. The report of that examination may include a recommendation that the planning authority make modifications. If, having completed the examination, the reporter is not satisfied that the planning authority has allocated sufficient land to meet the local housing land requirement, they can issue a notice to the planning authority that it must prepare a new LDP.

The LDP (which may be modified) can be adopted by the planning authority, and must be published together with the delivery programme. It must then be kept under review and monitored in terms of changes in characteristics and the impact of policies and proposals. The delivery programme must be renewed and the housing land audit prepared annually. J

Insolvency

ANDREW FOYLE, SOLICITOR ADVOCATE AND JOINT HEAD OF LITIGATION, SHOOSMITHS IN SCOTLAND

The Bankruptcy and Diligence (Scotland) Bill was introduced by the Scottish Government on 27 April 2023.

While many of the provisions are technical in nature, in some cases tidying up errors in previous legislation, there are some headline-grabbing provisions.

Mental health moratorium

Amongst the most important is the introduction of a mental health moratorium. The current moratorium regime applies where a debtor notifies the Accountant in Bankruptcy of their intention to enter a statutory debt solution, such as the debt arrangement scheme. In that instance, the moratorium allows breathing space for the debtor to gain advice, by preventing creditors from taking certain actions

while the moratorium is in place. Originally six weeks, the moratorium period was increased to six months during the pandemic, and this change in timescale was later made permanent. Only one moratorium can be applied for in a 12-month period.

The bill introduces a power to create a moratorium aimed at those struggling with serious mental health issues. The precise details of how this moratorium will operate are subject to future regulations by ministers. Notably, there is a similar scheme in place in England & Wales, which applies primarily to those with particularly acute mental health issues requiring treatment. The proposal received broad support during the Scottish Government's consultation on statutory debt solutions, and it is understood that further consultation will take place before the detailed regulations are laid before the Parliament.

Diligence

While the introduction of the moratorium is a key development, it's important not to overlook that the bill also introduces important changes to the diligence regime.

For arrestments, there is already a duty on the arrestee to report if funds have been caught by the arrestment. The new bill introduces a duty to report if no funds have been arrested, and the reason why. While this seems a minor amendment, it will certainly save time, as creditors and their agents routinely check in with arrestees to confirm that the arrestment was unsuccessful and has not simply been missed.

As the reasons for the unsuccessful arrestment will be given, this provision will also assist creditors in considering their next steps. Creditors will know, for example, if there are simply no funds in a bank account or if the debtor doesn't have an account at all.

In relation to earnings arrestments, similar duties will apply. This means an employer will now be required to report to the creditor where the earnings arrestment is unsuccessful and the reasons for this – for example, where the debtor earns below the minimum threshold of earnings.

When introducing these new duties, the bill also changes the penalties for non-compliance. For failure to report on arrestments, the arrestee might now be found liable to pay to the creditor a sum of up to £500. For earnings arrestments, the penalty might be to pay the sum due by the debtor to the creditor, or £500, whichever is the lesser.

Changes are also made to diligence on the dependence. It will now be mandatory to provide the debtor with the statutory debt advice and information pack in advance of any hearing on an application for diligence on the dependence. If the court is dissatisfied that the pack has been provided to the debtor, they may not grant the warrant. If warrant was granted in advance of the hearing, and the pack is not issued prior to the hearing, the warrant must be recalled.

Again, this provision was broadly supported in the Government's consultation. It's a measure that appears to maintain a balance, whereby urgent applications can be made and assets secured, but the debtor is given access to information on how to gain debt advice before any hearing takes place.

Commentary

The bill's major innovation is the introduction of the moratorium for mental health. The precise mechanism as to how that will work is yet to be seen. However, there appear to be data from England & Wales suggesting that there is demand. The Government's policy memorandum suggests that they are planning for 200 to 500 applications per year, depending on the exact parameters of the scheme.

While that is the flagship policy, there are traps for the unwary in the changes to the diligence regime. In particular, litigators will need to ensure that they can evidence provision of the debt advice pack prior to any hearing on diligence on the dependence. Likewise, those routinely served with arrestments, such as banks, will require to ensure that they have procedures in place to add in notices where the arrestment is unsuccessful.

Tax

HAYLEY STEVENSON, SOLICITOR, PINSENT MASONS LLP

AND LOIS DALE, ASSOCIATES, PINSENT MASONS LLP

The UK Government has published its proposals for the modernisation of stamp taxes on securities in a consultation – now closed – which is the latest step in its efforts to simplify the administration of stamp taxes. Under the new proposals, the existing stamp taxes on securities – stamp duty and stamp duty reserve tax ("SDRT") – would be replaced with a combined single tax.

Sums due

The new single tax is to be charged at the same rate as its predecessors: 0.5% of the chargeable consideration for the securities. The 1.5% charge on clearance services and depositary receipts is not covered by the proposals, and HMRC has confirmed that a further consultation will take place for that charge if the reforms go ahead.

Under the new proposals, the chargeable consideration will include "money or money's worth", as is the case for SDRT. The legislation will include reliefs and exemptions to carve out transactions which are not intended to be in scope (for example, obligations to pay pension benefits).

The rules pertaining to contingent consideration will be simplified, such that tax will be charged upfront on the full amount of any fixed contingent consideration, and on a reasonable estimate of any variable or uncertain consideration. As with SDLT, it will be possible to apply for a deferral of payment for up to two years in certain circumstances.

Controversially, the Government has proposed to remove the £1,000 *de minimis* threshold that currently exists for stamp duty. HMRC considers that the threshold will become unnecessary, as the new digital system should be simpler to apply, and in any case, not any more burdensome than completing the current declaration. It remains to be seen whether this will be the case, but any additional administrative burden imposed on low value transactions is unlikely to be welcomed by businesses.

Administration

The new single tax is to be self-assessed, like SDLT and LBTT. For the many transactions that are processed through CREST – the UK's central securities depositary – tax will continue to be collected via that system. Other transactions will need to be notified to HMRC and tax paid via an online portal. A unique reference number will then be issued to the taxpayer automatically, and the company registrar will be permitted to register the transfer of the shares. Reliefs will also be self-assessed by the taxpayer via the online system.

This represents a significant departure from, and an improvement on, the current system. At present, taxpayers calculate the stamp duty owed, pay it to HMRC's bank account, and submit, via email, a letter explaining their assessment and requesting confirmation that HMRC has received the tax payable. Only once HMRC has provided

confirmation via email may the registrar register the new ownership of the shares. This often means a corresponding delay between completion of the sale and the buyer obtaining legal title to the purchased shares while taxpayers await HMRC's response. For time-critical transactions, this can force the parties to complicate their transactions – for example, by transferring legal and beneficial ownership separately – as a workaround. Accordingly, the new online platform should, in theory, simplify this process.

Unlike most other self-assessment taxes, there would be no statutory pre-clearance system, but taxpayers would be able to access a non-statutory clearance system for an informal opinion if there is uncertainty.

The new single tax is to have a single charging point, to be either the date of the sale agreement or, for a conditional agreement, the date on which the conditions are satisfied (subject to a two year time limit from the date of the agreement). Any tax would need to be paid within 14 days of the charging point. While this is not a significant departure for SDRT – an SDRT charge has always arisen on the date of the sale agreement, and transactions settled in CREST currently have a 14 day deadline – it will make a noticeable difference for transfers that would have been subject to stamp duty, as stamp duty charges currently arise on the execution of the instrument of transfer and taxpayers are given 30 days from the charging point to pay the tax.

Given that the new single tax should provide a more efficient way to pay stamp duty, many businesses and advisers will welcome the coming changes. However, affected parties may have concerns about the details of the proposals, and we can expect that these have been expressed to the Government in responses to the consultation. It remains to be seen – if and when these changes arise – whether those points of concern will be addressed.

Immigration

ANNA FALCONER,
SOLICITOR, LATTA & CO

On its introduction to Parliament by the Secretary of State for the Home Department ("SSHD") on 7 March 2023, the Illegal Migration Bill was met with a media furore. The bill demonstrates a continuation of the policy objectives demonstrated in the Nationality and Borders Act 2022, which legislated for the penalisation of those claiming asylum following "illegal" entry into the United Kingdom by granting a less favourable form of refugee status than those who had entered directly from an unsafe country.

The bill has been denounced by NGOs and third sector organisations as further advancing the UK Government's anti-migration policy, the effects of which will plunge the most vulnerable asylum seekers into destitution and risk their further exploitation. Aside from these practical impacts, its provisions raise a number of issues in respect of its interaction with existing international and domestic law.

Provisions

The bill aims to achieve its stated objective of preventing and deterring unlawful migration through various amendments to existing immigration law. Perhaps most notably, it mandates the SSHD to make arrangements for the removal of persons who, *inter alia*, entered the UK without leave to enter or with leave attained by way of deception, passed through a country other than that in which they were threatened, and do not hold the required leave to enter or remain in the UK. These powers are granted in relation to persons entering the UK on or after 7 March 2023, resulting in retrospective application.

No right of appeal is set out against decisions taken pursuant to these powers, thus these decisions are only open to challenge by way of judicial review. The bill also weakens the barriers to removal.

Additionally, the SSHD is permitted to disqualify referrals made under the National Referral Mechanism where persons have entered the UK illegally, on the basis that such entry is contrary to public order. Potential victims of trafficking or modern slavery will therefore have no right to access specialist support services or obtain a conclusive grounds decision in relation to whether or not they are a recognised victim. Such persons will also lose the right to a recovery period during which they may not be removed from the UK.

Powers of detention are also extended: the SSHD is empowered to detain indefinitely those considered to have entered the UK illegally. The bill dispels safeguards which prevented the detention of pregnant women, victims of trafficking and modern slavery, and unaccompanied asylum-seeking children. An amendment passed in the House of Commons directs the SSHD to specify a time limit in relation to the detention of children; however it did not include any direction in relation to timescales.

The bill contains various ouster clauses, limiting the ability of those affected by its provisions to engage the assistance of the courts.

Potential incompatibility

The bill is notable for being one of a few where the sponsoring minister has been unable to include a declaration of its compatibility with the European Convention on Human Rights pursuant to *s* 19(1)(a) of the Human Rights Act 1998. Additionally, it disapplies *s* 3 of the Act, which requires legislation to be read and given effect in a way compatible with the Convention rights.

Further, there is an apparent consensus among legal commentators that the bill is incompatible with the UK's obligations under the 1951 Convention Relating to the Status of Refugees. Pursuant to this Convention, party states must guarantee that those who seek protection have their claims processed and considered. By deeming certain claims as inadmissible, the bill facilitates the shirking of this obligation and strips persons of their right under international law to claim asylum in the UK.

Commentators have also noted that key aspects of the bill are incompatible with the European Convention Against Trafficking, the Convention on the Rights of the Child and domestic law in relation to arbitrary detention.

Exactly how these issues will be dealt with through the judicial challenges that will likely arise as a result remains to be seen. However, the inclusion of an amendment which grants the SSHD the power to frustrate interim measures issued by the European Court of Human Rights in relation to persons issued with a notice of removal to a third country evidences the Government's objective of blocking such challenges.

Potential devolution issues

Although the Government maintains the position that the bill does not require the legislative consent of devolved governments to pass, the bill apparently encroaches upon areas of devolved legislation. While immigration remains a reserved matter, the provision of support to survivors of human trafficking and modern slavery and to unaccompanied asylum-seeking children are matters devolved to the Scottish Government. The fact that the bill mandates Scottish ministers to engage with refugees in a manner likely contrary to domestic international law and to duties imposed by the devolution settlement, may therefore give rise to constitutional issues.

Progress

The bill is currently at report stage in the House of Lords and therefore subject to further scrutiny; however it is expected to pass without substantial further amendment. Many will be keen to garner information on its practical impact, not least refugees themselves.

AI and in-house: where are we heading?

The rise of AI systems such as ChatGPT, and what they mean for in-house lawyers, was a particular focus of the 2023 Annual Conference

In-house

PETER NICHOLSON, EDITOR

This year's In-house Annual Conference covered a lot of ground, but with a dominant theme of the opportunities and challenges presented by new developments in artificial intelligence.

The opening keynote from Martin Nolan, GC at Skyscanner, set the tone. With many businesses on an agenda to build back better after the disruptions of recent years, the new spectre of ChatGPT, the large language model of AI, has emerged. It brought a dawning moment a few months ago due to media hysteria, and a new challenge for Nolan's team.

In discussing staff needs, the question was raised whether there was scope for reducing legal headcount. The issue was fielded, Nolan told us, but may return, and is one that will have to be faced head on: there is still a lack of understanding about how in-house lawyers spend their time, and the value that they create.

AI won't replace us, he maintained: it is revolutionary, but it comes on the back of years of development and in fact the legal sector is already way ahead of many others in using AI. It's a good tool but it's important to use it wisely – as illustrated by the well publicised Schwartz case, where a US lawyer failed to realise that a submission for a judge that he had generated using ChatGPT contained completely bogus citations that the program had simply made up.

Nolan remarked too that ChatGPT had "failed miserably" when asked to help write his talk!

However he urged his audience to "act now to improve the way we showcase the value we bring". Questions about our role are often driven by a typical aversion to lawyers, and these will be raised again if there is a perception that AI can carry out more legal functions. Legal teams should take opportunities to position themselves as strategic partners in their organisations. We have too modest an approach to claiming recognition, and much of what we do flies under the radar.

Contracting for progress

Use your supplier contracts to achieve what regulation and litigation will not, in terms of meeting your 2030 carbon reduction targets, urged Becky Annison, director of engagement at the climate change-focused Chancery Lane Project, in a breakout session. If you are serious about your targets, turn them into something enforceable using contract law.

That way, she said, you can make an obligation bespoke, targeted, specific, backed up by for example termination rights or liquidated damages. It isn't so far from your day job!

Annison pointed out that if you have a contract under discussion on your desk now with a seven year term, you need a climate clause in it or you can't touch the other party's performance before 2030, and you are setting yourself up for failure with your targets.

The project's web page has some style clauses, and a glossary. Clauses are labelled "light green" or "dark green" depending whether they set less demanding or more demanding adjustments towards carbon neutrality – Annison advised that you should start from where you (and your contractors) are in terms of readiness. Resources include "Griff's clause", which is not really a clause but a set of prompts to assist a board in considering climate impacts when looking at a contract; and "Owen's clause", a "net zero target supply chain cascade" containing emissions reduction targets for suppliers, with obligations to pay for carbon offsets if these are not achieved.

"Frontload the process with your suppliers", Annison concluded: hold upfront meetings to pave the way.

Risk management for all

A panel session on the first day attempted to take the mystique out of risk management, with Nisha Sanghani of Ashurst Risk Practice UK and consultant Ian Jones setting out how it should integrate with in-house lawyers' other tasks.

We don't have to be experts in risk, Jones emphasised. We all manage risk; it isn't something that happens on its own but is a tool for better decision making: you should take a step back regularly to help understand how you make good decisions. "Embrace uncertainty and use your skills to improve your approach to decision making."

For Sanghani, risk management has to be "pre-emptive and proactive". In-house lawyers have to bring this approach in order to support their organisation, rather than, as often happens, apply resource to risk without thinking about the strategic gain.

It isn't about a zero risk position, she continued, but about understanding

Look out for the platform

A web platform dedicated to the in-house lawyers' community in Scotland is at the test stage ahead of a hoped-for launch later this year. The conference was treated to a preview of the Lawscot In-house Community Platform, which will allow members to create their own profiles, tag their sectors of interest, choose their privacy settings and find people with similar interests.

As demonstrated by the ILC's Vlad Valiente and Lynette Purves, features will include a direct messaging function, articles and other information, and a forum comprising a collaborative space where, for example, members can post requests for information about chosen topics (there is a menu of these, which is "fluid").

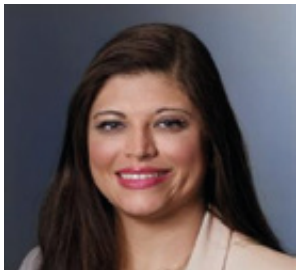
SOLAR members may find the platform similar to the one they already have. Said to be "relatively intuitive" and accessible by phone, its launch is targeted for this autumn, subject to final testing. Guidance and a video will be released to help you get started.

Martin Nolan

Becky Annison

Ian Jones (Image © Jo Scott)

Tanja Podinic



Nisha Sanghani

Ally Thomson

Victoria Vardy

risks – how to manage them and whether to accept them. And risk management should become more holistic – for example ESG (environmental, social and governance) factors are impacted by jurisdiction, supply chain and greenwashing issues.

Asked how in-house teams should interact with their boards, Sanghani believes there is a huge and underestimated impact due to boards being accountable, while Jones called out the notion that risk management only belongs in one part of the organisation: it's about culture, and he returned to his theme of it being a tool for better decision making. In-house lawyers should "act as the conscience of your organisation".

Rather than setting risk tolerance thresholds, he proposed that appetite for risk should be based on the circumstances at any given time.

AI: Taming the Wild West

Much of the second morning returned to the subject of AI. First off, Hey Legal's Ally Thomson surveyed the impact, potential and risks of ChatGPT.

A quick survey of attendees revealed that about a quarter had used or tried it, though not for work; only half even knew whether their organisation had an AI strategy; only a few confirmed that it had; and even fewer had been asked for advice on an AI matter. However, Thomson quoted Bill Gates' belief that the development of AI is as fundamental as the creation of the microprocessor or the internet, because it brings such increases in processing power, and opportunities from what it can do.

Of course it can deliver false information, so you have to be careful with it. "It depends how you use it", was Thomson's answer to the question, does it really save you time if you have to double check everything. And it wasn't just research where attendees saw its potential: drafting, due diligence, and automation and population of documents, all caught their interest.

Is there guidance from professional bodies? Like governments, they are "fast pedalling" on the subject, but trying to produce anything is difficult when the pace of change is so fast – as the Hey Legal/Law Society of Scotland channel Shaping Your Success has found.

"It's the Wild West at the moment", Thomson concluded. "It's exciting, worrying, but it's here."

What comes next?

Are the predictions for AI and in-house lawyers realistic? That was the question posed by Tanja Podinic of Digital Legal Ventures in the next main session.

It's important to recognise the influence you have, Podinic began. She then detailed some of the efficiencies AI is already helping to deliver: a US judge providing FAQs for court users; judges in Colombia and India finding it an aid in giving rulings. If used correctly, it can summarise large documents, it empowers creativity, and it has the potential to improve access to justice and reduce bias. Testing AI and its potential benefits is also easy.

Of course there are also challenges, with potentially false text, security and privacy issues, and the expense of training the system – not to mention the impact on the next generation of lawyers: what will it mean for their training if AI carries out the more mundane tasks through which they have hitherto developed their professional skills?

As practical takeaways, Podinic offered:

- educate and create awareness of the benefits and challenges of using AI within your organisation;
- devise a policy as to how AI should be used – and not used;
- don't enter personal information or sensitive/confidential data;
- think in terms of an AI strategy (for the short, medium and long term), and also a data strategy, because you need clean, quality data to work with;
- with vendors, consider what tools you really need, and don't sign long contracts;
- and with external advisers, ask how they are using your data, and insist that any efficiency savings are fully reflected in reduced fees.

Echoing Richard Susskind, she believes that AI won't mean the end of lawyers, but it will revolutionise what we do – and "make things much more interesting".

The positives of failure

"Facing failure" might seem an odd theme for a closing keynote, but for Victoria Vardy, CEO of the Gen+ skills programme for young people, failure is a necessary element of success – though neither should be a constant. "If you almost never fail, you're probably not trying hard enough", she declared. Even Einstein was only productive in bursts, and was "gentle with himself" in between.

Vardy had some advice on setting goals, which can seem overwhelming. Start with why you are doing something, not what you are doing: decide your values and be true to them. Bite sized steps make goals more achievable.

Leaders should encourage a learning culture in their business: it produces happier employees and a more innovative, risk taking environment; and should themselves stay curious and keep learning, as the best leaders are well read.

You don't have to do it alone: collaboration is always better for problem solving. Learn how to bounce back from failure. For support, surround yourself with people whose opinions you respect and trust, so you can "failure well and recover well".

"Failure is not fatal," Vardy concluded. "It's the courage to continue that counts."

In practice

PC fee to rise by 25%

Solicitors will pay an extra 25% for their practising certificate for the 2023-24 practice year, following a vote at the Society's AGM on 29 June.

A resolution supporting a fee of £731.25, as recommended by Council, was passed after President Sheila Webster told the meeting that although the Society had supported members during Covid, below-inflation increases could not continue without "very serious effects".

After the vote she said: "This uplift is an important step in securing the Law Society's long-term financial sustainability. It ensures the Society continues to be an effective voice for solicitors on important issues such as legal services regulation, criminal justice reform, legal aid and access to justice, in addition to our statutory role as a regulator to safeguard the public and the reputation of our profession.

"We recognise and respect the fact that a number of our members voted against the measure as we continue to face a difficult economic climate and real pressures in particular parts of the legal sector. However, I'm grateful to those members who backed the resolution and gave the vote of confidence to press ahead with the changes and investment plan we set out."

AGM report: see p 37.

Knudsen is In-house Rising Star

A solicitor for a company focused on reducing food waste has won the Law Society of Scotland's 2023 In-house Rising Star Award.

Christopher Knudsen, global legal counsel at Too Good To Go since December 2021, was selected ahead of co-finalists Stephen Annis, Eilidh MacQuarrie and Kerri Montgomery for the award for Scottish-qualified solicitors with up to five years' post-qualification experience.

The judging panel cited the improvements and innovations Knudsen has introduced, including launching an intranet to allow internal stakeholders to access legal resources, creating self-serve contracts and conducting colleague training. They added: "On top of this, your extracurricular contributions are highly commendable, from working with community farmers in a developing country in order to better understand sustainable food production practices and completing your level three Japanese language exam, to completing not one but three marathons in 2022 alone."

All the finalists were praised for their impressive careers to date, as was the strong standard across the nine entries received overall.

Debate champions crowned

Two pupils from Broxburn Academy have won the Society's 2023 Donald Dewar Memorial Debate Tournament.

Emma Bell and Ruby Ferguson beat off strong competition from the three other finalists, Albyn School, Balfron High School and George Watson's College, to take the first prize of £1,000 and a trophy plate, donated by headline sponsor Hodder Gibson Publishing. Runners-up Balfron High School received £250 thanks to the Glasgow Bar Association. The two schools also share educational books to the value of £500 provided by Hodder Gibson.

The motion for the final was "This house supports government intervention to prevent gentrification."

Meanwhile the team from St Peter the Apostle, Clydebank, were judged winners of the COPFS Schools Public Speaking Competition. Solicitor General Ruth Charteris KC presented the trophy to Beth Dalrymple and Katie Orr, who came out on top taking on the topic: "The most pressing equality issue in Scotland today is... to address it I would..."

Lawson honoured

Peter Lawson, consultant to Miller Samuel Hill Brown, has been awarded a CBE (Commander of the Order of the British Empire) in King Charles III's first Birthday Honours list, for services to the arts.

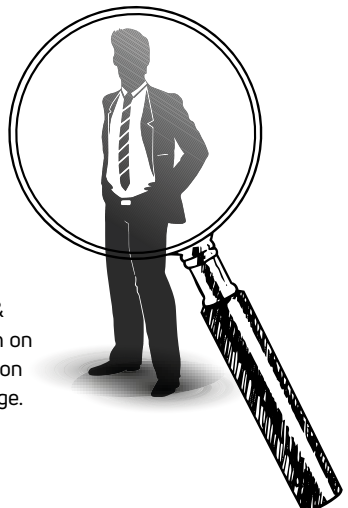
He is a past chairman of the Tron Theatre Company, former chairman of GUCOM (Glasgow Unesco City of Music) and a former BAFTA Scotland Committee Member. He is currently a director and the chairman of Scottish Opera, and a director of the Theatre Royal, Glasgow, as well as a supporter of, and adviser to, several arts focused charities.

SYLA elects new committee

Patricia Taylor, a commercial litigation associate at DLA Piper, has been elected President of the Scottish Young Lawyers' Association at its annual general meeting. She follows Laila Kennedy of Burness Paull. Vice President is Amina Amin, IPTC solicitor at MacRoberts; secretary, Brianella Scott, assistant solicitor to the Sheku Bayoh public inquiry; and treasurer, Heather Gibson, trainee solicitor at BTO.

Non-executive committee members are Sophie Campbell, CMS; Giorgio Ventisei, procurator fiscal depute; Amanjit Uppal, future trainee; and newly elected Caitlin Bell, senior solicitor, Gilson Gray; Katie Wright, trainee, Jardine Phillips; Thomas McGovern, trainee, McGovern Reid; and Latasha Kirimbai, trainee, Thorntons Law.

Committee vacancies



Eight of the Society's regulatory subcommittees are currently inviting applications to fill vacancies, with solicitors wanted for four of them: Admissions, Anti-Money Laundering, Appeals & Reviews, and Complaints & Oversight. The closing date is 12 noon on Thursday 27 July. For more information see the Committee vacancies web page.

PUBLIC POLICY HIGHLIGHTS

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

Criminal law: misogyny

The Criminal Law and Equality Law Committees submitted a joint response to the Scottish Government's consultation, *Misogyny – A Human Rights Issue*. The response supported the creation of the offence of misogynistic harassment in principle, but raised a number of concerns and questions which would need to be addressed in the drafting of any offence.

Notably, the committees pointed out that the draft legislation does not include a definition of misogyny, and suggested that consideration should be given to the definition of "woman". If the intention of the legislation is to cover all women, including trans women with or without gender reassignment certificates, this should be considered in the drafting of any offence.

In supporting the creation of a misogynistic harassment offence, the response offers the view that this should not be limited to public places, as the workplace or educational environment might not then be protected under the new law.

The committees were not convinced by the consultation's case for the creation of a misogynistic behaviour offence, suggesting that it sets the bar too low for criminality.
Find out more at the Society's Criminal law page.

Wildlife Management Bill

Rural Affairs Committee member Jamie Whittle gave evidence on the Wildlife Management and Muirburn (Scotland) Bill to the Scottish Parliament's Rural Affairs & Islands Committee.

Echoing points made in the committee's response to the call for views earlier this year, he suggested that licensing may not act as the ultimate deterrent to raptor persecution and wildlife crime, and would need to be supported by enforcement and information sharing.

He also pointed out that current wildlife legislation is particularly complex, being fragmented over a number of statutes. The Society would welcome efforts to consolidate the law, make it clearer and provide certainty for individuals.

Further, if the focus of the bill is specifically on raptor persecution, the suggested list of offences that could trigger a warning, temporary suspension or revocation of a grouse moor licence might not be appropriate and could raise issues of fairness, with grouse moors being treated differently from the wider countryside. However if the bill were to dovetail with potential land reform changes in the wider context of the biodiversity and climate change emergencies, there could be scope to regulate grouse moors as part of possible environmental management plans for larger landholdings.
Read the response, or watch the evidence session, via the Society's page on the bill.

Coronavirus inquiry

The Society's Public Policy Committee submitted a memorandum of comments to the UK Parliament's Scottish Affairs Committee Coronavirus and Scotland inquiry.

The comments explained that despite broad collaboration between justice agencies and a variety of mitigating measures, the pandemic had a significant long-term impact on the legal profession. As the professional body for Scottish solicitors, the Society provided a support package for its members equivalent to £2.2 million.

Despite Scottish Government funding of around £100 million to address delays, the criminal court backlogs in solemn cases are unlikely to be cleared before March 2026. Despite a £20 million package for legal aid (10% increase in fees, £9 million resilience fund, £1 million traineeship fund), and a further £11 million package this year, the number of practitioners registered for legal aid continues to decline.
Find out more at the Society's Public policy page.

Scottish Law Commission

The Society was pleased to note that three of the four new projects in the Commission's Eleventh Programme of Law Reform were suggested by its Public Policy Committees: executry law, execution of documents and consolidation of nature conservation law.

In turn, the Commission noted the Society's detailed account of the issues with regard to executry law and echoed its comments that this law is of considerable age and lacks clarity. Reform could bring real benefits to individuals across Scotland.

The Society also hopes that the Commission will give thorough consideration to the current law regarding execution of documents, to ensure that the provisions for execution of traditional and electronic documents are cohesive, integrated, and fit for purpose.

With regard to environmental law, the Society noted that the legislation is fragmented, complex and often dependent on secondary legislation to make it effective. It welcomes the Commission's commitment to bringing together the key items of legislation into a coherent and systematic body.
Find out more at the Society's Public policy page.

ACCREDITED SPECIALISTS

Child law
Re-accredited: JENNIFER GALLAGHER, Lindsays (accredited 11 May 2018); LUCY MILLARD, Mill & Millard (accredited 19 June 2018); LINDSEY OGILVIE, Turcan Connell (accredited 25 June 2018).

Employment law
Re-accredited: SIMON ALLISON, Blackadders (accredited 27 June 2013).

Family law
Re-accredited: RUTH CROMAN, Macnabs (accredited 17 June 2008).

Family mediation
JULIA DONNELLY, Livingstone Brown (accredited 30 May 2023).
Re-accredited: JENNIFER COLLEDGE Colledge & Shields (accredited 1 June 2017); SANDI SHIELDS, Colledge & Shields (accredited 1 June 2017); NADINE MARTIN, Gibson Kerr (accredited 28 June 2017); JADE CARTHY, A C O'Neill & Co (accredited 28 June 2017).

Freedom of information and data protection
EUAN McCULLOCH, Office of the Scottish Information Commissioner (accredited 6 June 2023).

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

ACCREDITED PARALEGALS

Civil litigation – debt recovery
SARAH CARROL, Taggart Meil Mathers; VERONICA McWILLIAM, Yuill & Kyle Ltd.

Civil litigation – reparation law
LEE CAIRNEY, SINEAD FLANAGAN (both Digby Brown).

Commercial conveyancing
AMANDA LONG, Morton Fraser LLP; EVE McKINNEY, Brodies.

Residential conveyancing
EMMA FORREST, Stronachs; ANGEL REVELL, The Chamber Practice Ltd.

Wills and executries
ELAINE CLARK, Holmes Mackillop Ltd; JANETTE ROBERTSON, R & R Urquhart LLP.

OBITUARIES

EILEEN CAMPBELL BROWNLIE WS (retired solicitor), Edinburgh
On 3 May 2023, Eileen Campbell Brownlie WS, formerly partner and latterly consultant of the firm G W Tait & Sons SSC, Edinburgh.
AGE: 67
ADMITTED: 1979

WINIFRED MARGARET EWING (retired solicitor), Comrie
On 21 June 2023, Winifred Margaret Ewing, formerly partner and latterly consultant of the firm Ewing & Co, Glasgow.
AGE: 93
ADMITTED: 1952

DIVERSITY

Survey reveals growing lawyer diversity

Data collected during the 2022 PC renewal process reveal progress towards a more representative and inclusive profession

The Scottish solicitor profession is becoming more diverse, though the rate of progress is not equal across all fronts, according to the latest data released by the Law Society of Scotland.

Data collected – all anonymously – as part of the 2022-23 practising certificate renewal process show a profession more ethnically diverse, and more female, than on the first such exercise in 2020-21. The data, which will help the Society understand better what the profession looks like, support the Society's equality and diversity work, and track changes within the profession over time, will be collected every two years.

How you responded

Around 80% of members (more than 9,000 in total) completed the 2022-23 diversity data, in line with the proportion of respondents in 2020-21. Major change would not be expected over that period, particularly when the majority of the respondents will have been the same, although there were over 1,000 individuals who could have responded for the first time in 2022-23. However the key findings include:

- The Scottish legal profession continues to become gradually more ethnically diverse: 86.48% of solicitors are white, compared to 88.01% in 2020/21, and more than 10% of solicitors aged 30 and under are from an ethnic minority background, up more than 3% in two years. At least 4.01% of the profession is from a Black, Asian and Minority Ethnic (BAME) background, up 0.63% in two years. (The true percentage is likely to be higher, having regard to those who chose not to disclose, or answered "other".) However, progress is not equal across all ethnicities. For example, solicitors under 30 from a Pakistani background have increased, while those under 30 from a Chinese background have decreased.
- Almost 57% of solicitors are female, compared with 55% two years ago.
- There continues to be an acute issue attracting young men from an ethnic minority background into the profession, although they now comprise 32.63% of ethnic minority solicitors under 30, compared with 28% two years ago.
- At least 4.18% of the profession is LGBTQ+, compared to 3.2% in 2020-21, and those so identifying rise to 6.6% for the under 30s.
- At least 5.67% of the profession has a disability, such as blindness, deafness or a mobility impairment, compared to 4.8% in 2020-21. The biggest single change was the number of people who indicated they had a learning disability and those indicating they were neurodivergent.
- More than 47% of Scottish solicitors do not subscribe to a religion, up 1% on 2020-21.
- At least 67.1% of the solicitor population is state educated, compared to 66.7% in 2020-21. This proportion increases to at least 72.94% of those aged under 30.

The findings are intended to complement the in-depth *Profile of the Profession* research that is conducted every five years. The most recent *Profile of the Profession* survey ran earlier this year, and the results will be published in late summer.

You cannot be what you cannot see

The Society believes that collecting and compiling such data is important to two ways; first, to let it see and measure how representative the profession is of the world we live and operate in; and, secondly, to let potential new entrants see that there is a place for them in the world of law.

Encouraging and cultivating a more diverse range of entrants into the profession brings different views, different insights, and different voices to the table, which all contribute to a more vital and representative workforce. Scotland's national diversity does not stand still, and if solicitors are to best understand and represent their clients, neither can the profession.

Sheila Webster, President of the Law Society of Scotland, commented: "While there is only so much change that can happen within the profession in a two year period, it is encouraging that the broad theme in each area is of progress towards a more representative profession that better reflects the society it serves.

"Of course, there is more yet to do, but the data provides us a strong evidence base to help set effective policies to address the issues identified and measure our progress towards a more inclusive profession."

Access the full report via the Society's news release of 23 June 2023.

The next set of diversity data will be collated during the PC renewal process of autumn 2024. J

AGM roundup

The Journal reports on an AGM that heard of much ongoing work at the Society, but produced no grumbles from members on the night

The Society's 2023 annual general meeting on 29 June proved a non-contentious affair, despite a measure of opposition in advance voting on the main motion for debate, the proposed increase in the practising certificate fee.

Speaking to that motion, the President, Sheila Webster, recognised that it had provoked some strong feelings, and that it might not come as much comfort that the fee would still be lower in real terms than 15 years earlier. However the present level of funding could not continue without very serious effects, and Council, drawn from all sectors of the profession, had unanimously supported the rise in view of the potential consequences of not doing so, and wanted the Society to continue in the best possible form. Pointing to the Society's track record in supporting members during the pandemic, she promised to continue to listen as she toured the country.

Ahead of that, the meeting had heard the reflections of Past President Murray Etherington on his year of office, and the new President on what she saw ahead.

The Past President's highlights included speaking to members around the country and hearing their concerns and issues to inform the Society's work; the wellbeing project, including a round table when the Society and justice sector partners had shared their experience and understanding; the sustainable annual dinner which reflected the setting up of the Sustainability Committee; and the record number of new solicitors admitted. Historic events had included the memorial service for Queen Elizabeth and the swearing in of the new First Minister. He paid tribute to Ken Dalling and Pat Thom for their "incredibly hard work" with the Government on legal aid, and thanked the Society's staff, especially the senior leadership team, his "inspirational" fellow office bearers, and his own partners for their support.

Sheila Webster spoke of the huge honour of taking up office, and promised to do her utmost for the benefit of the profession, "however diverse our practices are". One of her key areas was to make the Society accessible to all members, and she looked forward to her own presidential tour starting in August.

The Society faced a "double whammy" of significant bills, on criminal justice and regulation, which affected the very fabric of what it was to be a solicitor. Reform was needed, but it had to bring benefits, allowing the profession to thrive and enhancing the public interest.

The annual accounts (reporting a £5,000 loss over the year, due to a drop in the value of investments held) were adopted without questions, and chief executive Diane McGiffen then gave an update on the Society's work under its 2022-27 plan. She instanced its briefings on 16 bills and responses to 86 consultations – "a mountain of work" but work that was taken very seriously by legislators; support for record numbers of trainees and NQs; hundreds of hours of CPD, much of it online; 11,600 enquiries handled by the Professional Practice team; and closing 248 conduct complaints.

A constitutional amendment to secure the Society's mutual tax status was also agreed without debate.

Two Honorary Members welcomed

The AGM welcomed the 20th and 21st Honorary Members to have that honour conferred by the Society: Michael Samuel, founding partner of Miller Samuel, and Peter Nicholson, long serving editor of the Society's Journal.

Michael Samuel was Miller Samuel's chairman from its founding in 1973, continuing in the role when it merged to become Miller Samuel Hill Brown in 2016. He has also served as convener of the Society's Business of Conveyancing Committee, vice convener of the Property Law Committee, Dean of the Royal Faculty of Procurators in Glasgow, and 22 years as chairman of Glasgow Solicitors Property Centre, as well as trustee and chair of a number of charitable and non-profit organisations.

Peter Nicholson spent more than 20 years editing the *Scots Law Times* and was the founding editor of *Greens Weekly Digest*, alongside editing other reference sources including *Parliament House Book*. He has edited the Journal since 2003, also taking it into the digital age. President Sheila Webster said: "His diligence, commitment to impartiality, and attention to detail have shone through his work over the past 20 years, making the Journal a hugely valued and important resource for our members."

Michael Samuel and Law Society President Sheila Webster

Peter Nicholson and Law Society President Sheila Webster

RISK MANAGEMENT

Letters of engagement: **why they matter**

Alan Calvert and Jo Kelbrick offer some thoughts on the importance of letters of engagement in terms of managing client expectations

How well do solicitors engage? was published by the Scottish Legal Complaints Commission in May, following a review of over 80 engagement letters or terms of business. While the findings were generally positive, it highlighted a real variation as to the clarity and therefore effectiveness of the documents used.

This suggests that as a profession there is room for improvement in how we document our engagement with clients. As one of the Master Policy panel solicitor firms, we can attest to the difficulties created or exacerbated by inadequately framed appointment documentation.

A well drafted letter of engagement or equivalent is a crucial part of a professional's risk management toolkit. It documents the business relationship we enter into with our clients, and is far more than a "tick box" requirement in order to comply with rule B4: Client communication. The SLCC's recent report should prompt us to reassess how best to meet our obligations in this respect.

Managing expectations

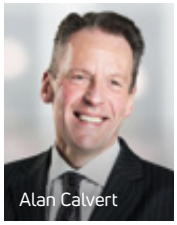
All too commonly, claims and complaints materialise from clients facing an unexpected situation. From experience, this often arises not so much from the outcome achieved in a transaction or litigation but from a failure to manage the client's expectations along the way.

For example, clients are typically concerned about what their matter will cost, and transparency is key to managing their expectations. It is often difficult to stipulate how much a piece of work will cost, but at the very least the client should be made aware of the method by which fees will be calculated (typically, but not exclusively, hourly rates). The more transparent the information, the less risk of confusion arising.

Poor communication is consistently the most common source of complaints and can often be traced back to a failure to set out clearly for your client how you intend working with them. Your engagement documentation should set the "ground rules" and can set the tone of an instruction, so it is recommended that you communicate in a manner which is as clear and concise as possible. As solicitors, while we might pride ourselves in the ability to draft complex documents, our regulator and complaints body are less impressed with this approach when it comes to communications with clients. In its report the SLCC considered that only one third of the sample documentation it reviewed would be easily understood by a client.

It is wise to stipulate who a client's point of contact will be; how you intend to communicate with the client; and should there be multiple clients, which of them it is agreed should be the point of contact for instructions. We have seen this last point giving rise to multiple claims and complaints and it appears to be commonly overlooked. It is not uncommon for a solicitor to take instruction from a majority of, rather than all, executors, but this can lead to issues if there is later a dispute between the executors where one or more of them were not consulted. It will be uncomfortable for a solicitor who is unable to demonstrate that their intention to liaise with select, or a majority of, executors was clearly communicated and consented to.

This is certainly not an exhaustive list of topics which ought to be addressed in a letter of engagement, but the Master Policy brokers, Lockton, have produced a helpful guide on this, and it is worth reviewing this before updating any existing terms of business.


Alan Calvert

Limiting liability

It is good business practice to include a limit of liability in our contracts with our clients. Legal practices should consider their insured limit of indemnity and tailor their letters of engagement accordingly, to minimise the risk of being liable for an amount in excess of their insurance cover.

As with all contracts, limitation clauses will have to survive the reasonableness test in the Unfair Contract Terms Act 1977. This may include a situation where a cap on an organisation's limit of liability is significantly below the value of the transaction it is advising on. Such a cap may be open to challenge if it were ever sought to be relied on.

It's worth noting that the Law Society of Scotland considers that liability should not be capped below the minimum level of Master Policy cover (currently set at £2 million), and also that doing so would almost certainly be considered unsatisfactory professional conduct (see para 4.05 of *Law, Practice and Conduct for Solicitors*).

To ensure any terms

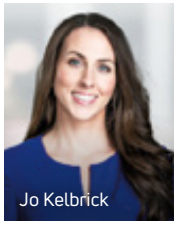
containing liability limitations are sound, they should be set out expressly, as ambiguous terms are more likely to be construed by the courts in favour of the weaker negotiating party (likely the client). To avoid "unfairness" under the 1977 Act, terms and conditions must also be reasonable in all the circumstances, bearing in mind the identity of your client and nature and extent of your relationship with them.

Scope of the instruction

What we undertake to do for our client dictates to a large extent the duties incumbent upon us. Landmark cases on the scope of a professional's duty have had, and will continue to have, repercussions across all professions.

The Supreme Court in *Manchester Building Society v Grant Thornton LLP* [2021] UKSC 20 built on the principle that determines whether damages for negligence are recoverable, holding that there must be a link between the loss suffered by a client and the scope of the duties assumed by the (allegedly) negligent professional advising them. The court will consider exactly what risks the professional's advice was intended to protect against, taking into account the relationship between the two parties. This highlights the importance of carefully considering the purpose of your instruction and ensuring that is clearly documented.

As important as setting out what you will do for a client, is being clear on anything you specifically will not advise on. Unfortunately, the Master Policy is regularly engaged in respect of claims where a solicitor has provided advice beyond the originally intended scope of their instruction. Particularly prone to this trap is advice relating



Jo Kelbrick

to tax. It is quite common for terms of business to exclude tax advice, but since many solicitors have some understanding of it, and a desire to help clients as much as possible, there is a risk of straying into commenting on matters beyond their expertise and intended scope. We frequently see such advice being given ad hoc, or verbally, without an appreciation of the potential repercussions. Even if such advice was specifically excluded by the terms of business, should a solicitor go on to advise on it, even if informally, they may be held liable for losses incurred by their client should that advice transpire to be negligent.

A client's "end goal" might be modified due to any number of factors, and such a change of tack can result in work being undertaken which was not as originally set out. Known as "mission creep", this can be particularly difficult to identify when the change occurs organically or gradually. There is nothing untoward about this in itself, but if the engagement documentation no longer adequately addresses the current instruction, it could leave the professional firm vulnerable should a dispute later materialise and they require to fall back on the recorded terms of their instruction.

It is helpful to include a clause in a letter of engagement which states that, should a client's instruction vary, greater time and cost may be incurred. This however is no substitute for regularly reassessing whether the scope of instruction is accurately documented and whether a fresh letter of engagement requires to be issued.

Existing clients

Repeat instructions are usually welcome and indicate that a client is happy with the service they are receiving, but can make it easier to overlook issuing appropriate engagement documentation. Some practices might be repeatedly instructed by the same client for the same type of work (e.g. high volume recovery litigation), and issuing repeat information at the outset of each new matter can fall down or off the "to do" list. Engagement letters with any relevant T&Cs attached constitute our contract with our client, but they are matter specific, so if an engagement letter is not issued for each new matter, the contract is open to greater interpretation. In these situations, an "umbrella" or "framework" contract with the client should be considered.

Some professionals undertaking several instructions for the same private individual might worry that issuing contractual documentation on each new instruction could frustrate clients. Experience shows this is more common with sole traders or small firms across professions beyond solicitors, but highlighting that you are obliged to issue such material by the Law Society of Scotland should help minimise any awkwardness. Ultimately the consequences of not complying with this rule could significantly outweigh any perceived short-term benefit.

One size does not fit all

There is no "one size fits all" approach when it comes to documenting an engagement with clients as, for the most part, each instruction is unique. Having a template available is a useful starting point and can help ensure compliance with rule B4 when we are otherwise focused on getting on with the job. However, seek to avoid over-reliance on templates, as the importance of issuing a client and matter specific letter of engagement cannot be overstated.

It follows naturally that any template should be revisited on a regular basis to ensure it still meets requirements. Delegating this task to a few select individuals or a committee can help ensure the task does not become lost in the plethora of administration involved in running a legal practice. Updates may be required more frequently, but it is wise to diary a time to revisit letters of engagement at least annually. That might be at the beginning of a new financial year, ahead of insurance renewal, or following any increase in the hourly rates charged.

Getting your scope of business accurately captured first time around is the goal, but there are various elements which can frustrate that. As some of the examples mentioned above demonstrate, it is useful to reconsider the terms of your instruction regularly, and if necessary, supplement a previously issued letter of engagement. Ensuring the whole organisation understands the importance of this can go a long way to securing timeous issue and revisiting at appropriate stages.

Setting out specific expectations and boundaries in engagement letters can serve to protect professionals in the event of any future misunderstandings that could lead to a complaint or claim.

This article was authored for Lockton by Jo Kelbrick, associate and Alan Calvert, partner of Brodies LLP

THE UNLOVED LAWYER

"Opinions are my own"

Can you leave your professional persona behind in your private life and social media? If only...

With the rise of social media, we all now have a forum where we can publicly express our views to the masses – to our "friends" and "followers". So can personalities once pigeonholed into perceived areas of expertise.

Take the recent Gary Lineker controversy. Once known simply as a footballer and pundit whose fame was used to promote Walkers crisps, he has unapologetically made his views known on immigration and asylum seekers – for which he was criticised and temporarily suspended from *Match of the Day*. Why shouldn't he express his own views?

Fame certainly has its drawbacks. Nicola Sturgeon said when she resigned that she is so much in the spotlight that she is unable to enjoy a simple walk in the park without an entourage to protect her. It also means the public make assumptions about you: you have to watch what you say, how you act and where you go. Being a solicitor is no different.

No leaving it behind

Take social media, for example. You may post as an individual and not a solicitor, but if your profiles are public, your colleagues, employers and clients can all see them, which, whether you like it or not, could affect your prospects if your socials resemble a stint on *Geordie Shore*.

On that subject, you have to watch your behaviour and actions on nights out. Although you are "off the clock", the unspoken rule is that you are always representing your firm or profession whatever you are doing. Do you really want to get blind drunk and be captured arguing in the kebab shop queue at the end of the night?

What if you are looking for love? You might think, what does that have to do with my profession? Well, "nothing" is strictly the answer, but if you are active on dating apps you also need to be mindful of your profile in terms of its content, the pictures you upload and who might see you on it, be it clients or colleagues who could feed back to your employers.

I am aware of several dating profiles of solicitors (with and without photos) wherein they state they are married and looking for discreet fun, which may be fine, but noting your occupation and having photos available heavily increases your chances of being identified for such an ethically questionable intention. What if a client sees that?

How you conduct yourself on such apps could potentially affect your reputation as a solicitor, and that is the harsh reality. Does that mean solicitors aren't entitled to find love? Of course not, but maybe you should think twice about that audition for Channel 4's *Naked Attraction*...

Free to speak?

Back to the socials: you also need to be mindful of the status updates you post and the views you express in a public setting. Even if your profiles are all private and you think you can trust everyone you are "friends" with, it is always possible that someone could screenshot what you've said and spread it for their own agenda. Does this mean you should stay silent on matters close to your heart? No – we all have a voice and when things mean that much to us, we should be able to make our voices heard. Sharing our feelings can feel liberating. But, as a solicitor, you need to be careful how you word your views, and to be mindful that any statements are your own views and nothing your employer would find inappropriate should they search your social media.

I know of a small group of professionals who attended an indoor party during Covid restrictions, and a friend of one attendee took a screenshot of the post on social media, re-posted it on their own profile and tagged Nicola Sturgeon in order to shop them!

In short, you can be the life and soul of the party and enjoy a good drink; you can have strong views on matters that mean a lot to you; and you can have a desire to find love or to find a hook-up or situationship or anything in between. However, you should realise that you will probably be seen by people around you first and foremost as a solicitor, and – like it or not – that night you ended up face down in the street, or your former Tinder profile that mentioned your kinks, will be remembered in that light.

Does this mean you have to act to fit in with the "boring lawyer" persona? No, it just means you should think about ringfencing your wild antics. If you're going to get black out drunk, save it for that house party with your close friends, and if you're going to rant online about something political, draft it, leave it, revisit it, revise it, and at least take out the expletives! As if Big Brother is always watching...

The Unloved Lawyer is a practising solicitor

Diploma admissions: a thorny issue

With applications for the Diploma in Professional Legal Practice regularly exceeding available places, course providers face difficult choices in trying to operate a fair admissions system, as Kerry Trewern and David Boag describe

Diploma in Professional Legal Practice providers wrestle annually with admissions. Those in the profession have differing views on the Diploma (providers have heard them all), but there is agreement on one fact: there are too many applicants for the number of places available.

Across the six providers, there are approximately 750 places available. For the past three years demand has outstripped supply. This year, there are around 1,000 applicants across the board.

Increasing Diploma places

One solution is to increase the number of Diploma places available. However, providers have a duty to the profession and are mindful of the accreditation standard which states that providers must have "awareness of the needs and requirements of the legal profession, including likely future trainee numbers across Scotland".

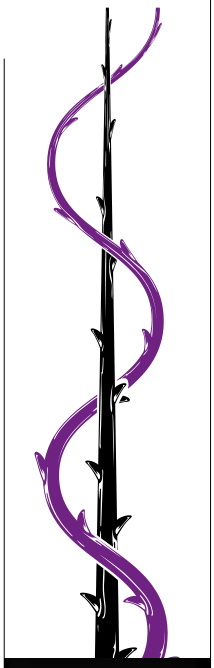
Given current uncertainty, it may be irresponsible of providers to increase numbers to any great extent. Indeed, the Law Society of Scotland ("LSS") wrote to providers in these terms in 2020 and 2021.

Diploma places therefore remain static, while demand continues to exceed supply.

Decreasing LLB places

Another obvious solution is to reduce LLB places. There are 10 LLB providers across Scotland and, anecdotally, LLB intakes have increased annually across the board.

However, not all LLB graduates wish to practise law. A considerable number go on to alternative careers. Therefore, it may be unfair to restrict access to the LLB.



Kerry Trewern is director, and **David Boag** deputy director, of the Diploma in Professional Legal Practice at the University of Glasgow

Ranking applicants

On the basis that neither of the above is feasible, providers make offers in the knowledge that a proportion of applicants will be unsuccessful.

Historically, applicants to the Diploma were ranked solely based on their results in foundation subjects (for most, subjects studied in first and second year). These are the subjects accredited by the LSS and in which those seeking an entrance certificate must demonstrate a pass.

On the one hand, this approach is both fair and consistent, i.e. there is a level playing field, in that all applicants will have a grade point average ("GPA") across foundation subjects.

On the other hand, providers are aware of other relevant factors. Each of these factors, of course, presents its own challenges.

- **Honours results**
  Applicants are generally keen for their honours results to be considered. Of course, not all applicants will have completed honours. Some have completed LSS examinations, some have ordinary degrees, while others have completed accelerated (two year) LLB degrees, so have honours in different, often unrelated subjects.

- **Additional qualifications**
  Some applicants have achieved master's degrees and others PhDs. If an applicant does not secure a Diploma place, it is arguable that their chances should be increased the following year if they achieve a master's in law. Of course, not everyone can afford to undertake a master's programme. Further, it may be inappropriate to take into account master's degrees in unrelated subjects.

- **Traineeship status**
  The question of whether those applicants with traineeships secured should be entitled to a Diploma place divides opinion. Those with traineeships at such an early stage tend to fall into one of two camps: first, they have traineeships with large, corporate firms who recruit years in advance; or secondly, they have connections with traineeship providers (either through employment or personal contacts). Not every applicant is in the fortunate position of having a traineeship at the outset of the Diploma (and some will have their heart set on a traineeship provider which does not recruit until a much later stage).

- **Work experience**
  Some applicants will have a wealth of legal experience and should perhaps be given credit in the application process. Of course, there is a clear distinction between a paralegal of 20 years and someone who shadowed counsel for one afternoon. Any application system taking work experience into account would need to differentiate clearly between levels of experience.

- **Mitigating circumstances**
  Applicants are asked if they have any mitigating circumstances that affected their GPA, which were not taken into account by their undergraduate institution. For example, some applicants state that mental health issues prevented them from advising their undergraduate institution of difficulties in their first or second year.

- **Widening access**
  Applicants are asked to confirm whether they entered higher education via a widening access programme, a factor that providers may take into account.

Points-based?

Discussions have been ongoing between providers and the LSS regarding implementation of points-based systems. Most providers use discretion in relation to some of these factors already, and one provider is piloting a new points-based system this year. All are committed to fairness and transparency, as well as the promotion of equality and diversity in the profession.

Ultimately, though, if demand continues to outstrip supply, there will be disappointed applicants each year, whatever the admissions process. Market forces prevail, perhaps, but providers are left with the difficult job of advising some applicants that their legal careers are on hold for at least a further year.

Put your whole self in

Encouraging people to "be themselves" at work is good, but will only really succeed if the workplace culture allows them to feel psychologically safe when they do

"Just wanted to say I loved your green saree. Not like the usual photos I normally see of professionals on LinkedIn! I showed my mum – she was so happy you wore one to a work event haha!"*

This was a message I received recently from a young person starting out in their career, and it made me reflect on how far I had come in my own journey. Although I am finally confident enough to show off my Indian heritage and wear traditional clothing to an awards dinner, for many years I felt I needed to hide my true personality and mask quite a bit of my identity to "fit in" at work.

I've lost count of the number of times I pretended to know about the music, films, and food my colleagues were discussing, rather than just tell them I had no idea what they were talking about as I was brought up mainly on a diet of Punjabi food, Bollywood movies and the glorious voices of Mohammed Rafi, Nusrat Fateh Ali Khan, and Gurdas Maan! The fear of being judged or looking stupid for not knowing, or liking, the same things that my colleagues did, was very real.

How things have changed. Now, law firms actively encourage and advise staff to bring their "whole self" to work as it's seen to have a raft of benefits – building trust, enhancing teamwork, and fostering inclusion being some of them. The legal profession wants its members to feel welcome and that they belong, no matter what their background.

But is it safe?

However, the reality can sometimes feel like "Bring your whole self to work but maybe don't be so obvious about the XYZ part." So, how much do we, or should we, share of our authentic selves in a professional setting? Or do we simply show our "best self"?

Most people tend to have a work version of themselves and another (real?) version that is usually reserved for their friends and family. Bringing the real version to work – quirky habits, individual looks, cultural mindset, political views – without the risk of discrimination, ridicule, rejection, or fear may be seen as the ideal scenario for some.

However, most people are afraid, or simply don't want to. Having no boundaries whatsoever in the workplace is unlikely to go down well. Similarly, hiding our true selves can prevent us from forming meaningful professional and social networks that help towards building a successful career.

Being genuine is credited with enabling people to perform better and create collaborative, open-minded environments.

Having spoken to colleagues and friends about this, the consensus seems to be that people tend to bring their full selves to work when they feel safe. To help employees feel safe, employers must invest more into training leaders to help create inclusive cultures where someone's background is not seen as a barrier to success at work. Good, emotionally intelligent leaders, who really listen to individuals and appreciate differences, are vital to making this happen, as are leaders from diverse backgrounds with lived, authentic experience that will inspire others.

"To help employees feel safe, employers must invest more into training leaders to help create inclusive cultures"

Organisations must also be careful not to single out those who do bring their authentic selves to work, especially if they are the only person from a particular background. Saying things like "Yes, but you know what I mean... where are you really from?" when you don't like the answer of "Glasgow", or making assumptions based on individual perceptions of a person's background, is never a good idea!

Also, this is not just about individuals feeling safe enough to share personal matters – it applies to talking about work matters too. If individuals feel unable to share their true concerns or feelings about work issues, how can employers improve?

Leadership matters

While the intent behind "be yourself" is good, it can only truly work if underlying workplace culture problems are addressed first. Individuals need to feel psychologically safe. Seeing leaders set an example by being themselves, showing strengths and weaknesses, resonates and builds trust and safety.

Employers that invite openness and encourage staff to show more of their personal talents and skills at work, in a supportive culture, to get jobs done with efficiency and excellence, are on the right track. Ultimately, however, what, or whether, individuals share will always be a personal choice based on how safe they feel. Until that trust exists, much of the workforce will likely continue to filter themselves, just as they do on social media.

saree – a garment consisting of a length of cotton or silk elaborately draped around the body, traditionally worn by women from South Asia

Rupa Mooker is Director of People & Development with MacRoberts

Clio

Five essential questions to ask a potential legal software provider

Conference and exhibition season is coming up, when you may be seeing loads of different tech suppliers and legal software providers all trying to sell their wares.

Here are five questions you should ask of any technology supplier. (Please bear in mind that the following points are by no means exhaustive, but should start you off down the path of issues to consider.)

1. What are the contract terms of the legal software?
When you are offered terms by the legal software provider, are they excessively long and filled with legal and technical jargon, like the Apple or Facebook user licence agreements? Long and complex terms of service offered by a supplier are not an indicator of quality. They may also indicate an attempt by the supplier to dissuade the customer from reading and reviewing all of the terms in an attempt to ensnare the customer into an overly restrictive contract.

2. What is the contract length for the legal software?
Does the supplier's contract amount to a minimum fixed-term deal? In other words, are you locked into using a supplier for two, three, or four years? You might be sure this supplier is perfect for you now, but if your needs change, what happens then? Make sure you know the answer before you sign on the dotted line.

3. How secure is this legal software?
What security measures are in place, such as encryption, or multi-factor identification ("MFID")? The supplier should be able to confirm the encryption standard, e.g. SSL or AES. They should also confirm whether it is up to a level of 128-bit, 256-bit or higher.

4. Where is your operational and legal data held?
Where is the data held – i.e. where are the servers located, and if located outside the UK/EEA, are the appropriate safeguards in place? You would expect to see safeguards such as Standard Contractual Clauses ("SCCs"), or the supplier may claim to have Binding Corporate Rules ("BCRs") in place.

5. Does this legal software ensure regulatory compliance?
Does the platform meet basic regulatory standards as required by the ICO and other applicable regulators, such as the FCA depending on the activities of your clients? Do not make the assumption that just because a platform is used by other organisations that are highly regulated, it will mean that they comply with the requirements of your local regulator or indeed that they display adequate compliance with the ICO.

You may be surprised by the lack of compliance demonstrated by many well-known platforms, which often only becomes apparent when you dig a little deeper.

Find out more about Clio

Want to see how Clio stacks up as a practice management and client relationship management software provider?
See clio.com/uk/lawscot-home

ASK ASH

Holiday pressures

I have been landed with a new project as my annual leave is coming up

Dear Ash,

My annual holiday is scheduled in the coming weeks, but I feel under enormous pressure to cancel, as a new project has landed on my desk and my manager has recently decided to take annual leave around the same time as me too! I am determined not to let my family down as our holiday was planned some time back, but I'm also not sure that I'll be able to fully relax.

Ash replies:

Ironically the stress that you are currently experiencing means that it is even more vital for you to take a break and go on holiday, so please do not feel guilty about taking time off.

There are studies which advocate the benefits of a holiday for our physical, mental and emotional wellbeing, with improved blood pressure, stress levels, energy levels and emotional stability. However, it is important that you are able to switch off while away too, in order to feel the full benefits.

There is normally an expectation at this time of the year that project timelines may need to factor in holiday leave. I therefore suggest that you review the key priorities for the project and then outline realistic timelines to accommodate holiday leave. If you phone around other key stakeholders you may find that a number could be on annual leave around the same time as you in any case, and this should allow you to prioritise.

Also consider delegating to a more junior member of staff to at least review emails while you are away; and confirm that you can be contacted by phone at certain times of the day, if any critical issues arise which cannot await your return. This way you can try to relax by knowing that any critical issues can be notified to you, if required.

Happy holidays!

Send your queries to Ash

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

Please note that letters to Ash are not received at the Law Society of Scotland. The Society offers a support service for trainees through its Education, Training & Qualifications team.

Email legaleduc@lawscot.org.uk or phone 0131 226 7411 (select option 3).

FROM THE ARCHIVES

50 years ago

From *"Appeals in the Sheriff Court"* (lecture by Sir Allan G Walker), July 1973: "It seems to be generally known by those who appear frequently in [Glasgow Sheriff Court], that my practice is to read at least the interlocutor of the Sheriff before I come on to the Bench in the appeal, and it is therefore assumed that I know something about the case before the appeal commences. Some pleaders accordingly take short-cuts and do not read to me all that should be read if the appeal were being presented properly... the safer method is to assume no knowledge of the case at all on the part of the Sheriff Principal. Many, perhaps most, Sheriffs Principal would regard it as wrong to read any of the papers in the case before the hearing in the appeal commences."

25 years ago

From *"Policing the superhighway", July 1998*: "Given the nature of the Internet, there are few reliable and no comprehensive measures of the true extent of criminality or its potential for harm. Nor do we know how criminals will use the technology to benefit from opportunities to commit old crimes in a new way, and new crimes, nor if the faster, more sophisticated and secure communication methods used by them will thwart traditional policing techniques. I believe it is vital that the nature and scale of the threat posed by computer crime is continually assessed – particularly given the speed of development in technology and growth of the Internet, which it is predicted will have 200 million computers linked to it worldwide by the year 2000."

Law Society of Scotland

Expert Witness Directory

2023

Law Society of Scotland

Expert Witness Directory 2023

I am very pleased to introduce the 2023 published *Expert Witness Directory*.

I hope you will find it useful for finding experienced experts that will provide essential technical analysis and opinion evidence in court and reports.

All our listed individuals and companies have demonstrated experience and ability in providing expert witness services through an application process and professional references and have agreed to our code of practice. Many also have specific training in report writing and giving evidence in court.

If you need more in-depth information about any of the experts, you will be able to find their full profile detailing qualifications and experience in our recently improved online directory www.lawscot.org.uk/members/expert-witness-directory.

We welcome any suggestions you may have for areas of expertise that you would like to see represented in the directory, or indeed recommendations of experts that you have worked with who may benefit from joining it. My contact details are listed below.

Through our CPD programme, we will continue to provide training for solicitors when instructing expert witnesses, most notably at our annual Personal Injury Conference. If you want to know more about the training, please email CPD@lawscot.org.uk.

Angus Maclauchlan
Head of Marketing
Law Society of Scotland

If you are an expert witness and would like to find out more about how to be listed in the Law Society of Scotland Expert Witness Directory, please email **angusmaclauchlan@lawscot.org.uk**

WHO RATES OUR EXPERTS

Reference system underpins entries for all those listed in this index

The directory is comprised of expert witnesses who live and work in Scotland, and expert witnesses who are based in other areas but are willing to travel to Scotland to work. New experts applying to be listed are required to demonstrate experience and ability in providing expert witness services, normally by providing references from two solicitors holding practising certificates who have instructed them within the last three years.

The reference form asks the referee to rate from "very good" to "very poor" several aspects of the expert witness's report: accuracy; understanding and analysis of the expert subject area; presentation; and adherence to timescale. Where the expert has presented evidence in court, referees are asked to rate their understanding of the court's requirements, and the preparation, content and delivery of the expert's evidence.

Referees are asked whether they have received any adverse comment from the judge or others which gives them cause to doubt the expert's expertise and whether the referee would use the expert again or recommend the expert to other solicitors.

Where any of the ratings fall below "good", the references are carefully scrutinised. Other than in very exceptional cases, low ratings lead to the expert's exclusion from the listing of checked experts. It is always the responsibility of the instructing practitioner to ensure any expert witness possesses the knowledge and experience required for each individual case.

Individual expert witnesses and corporate expert firms

All experts listed in a corporate entry must provide satisfactory references for their individual work as expert witnesses. In addition, all firms must supply the name of a main contact person.

Other referees

One reference must be from a solicitor from the same jurisdiction as the expert witness, who has instructed him/her within the last three years. The other reference, also pertaining to instruction as an expert within the last three years, may be given by:

- practising solicitors/lawyers from Scotland, England or Wales
- a lawyer from another jurisdiction
- an advocate in Scotland or barrister in England, Wales, Ireland or Northern Ireland
- a judge, sheriff or holder of other judicial office.

Cases where references have not been required

There are certain cases where our reference requirements have been superfluous because the expert has already passed through a rigorous accreditation process, which has included proven experience and understanding of expert witness work. In these cases, the Law Society of Scotland may accept experts who have worked for or been vetted by other organisations. The Law Society of Scotland will verify the procedures employed by other organisations to ensure that their procedures meet or exceed our requirements and will verify membership/employment where appropriate.

CODE OF PRACTICE IS EXPERT SUPPORT

Law Society of Scotland Code published to assist expert witnesses engaged by solicitors

The Law Society of Scotland has published a Code of Practice to assist expert witnesses engaged by solicitors in effectively meeting their needs, so those solicitors can better serve their clients and the interests of justice.

The Code applies generally, but there may be additional requirements relating to cases in specialised areas of law. Experts must also comply with the code of conduct of any professional body to which they belong.

At the outset, experts should ensure they receive clear instructions, in writing. In addition to basic information such as names, contact details, dates of incidents, etc, these should cover the type of expertise called for, the questions to be addressed, history of the matter and details of any relevant documents. Experts should also be advised if proceedings have been commenced or if they may be required to give evidence.

When medical reports are involved, it must be highlighted whether the consent of the client or patient has been given, and in cases concerning children, that the paramountcy of the child's welfare may override the legal professional privilege attached to the report and that disclosure might be required.

Instructions should only be accepted when the expert is fully qualified to speak on the matter and has the resources to complete the matter within an agreed timeframe.

Experts should provide terms of business for agreement prior to accepting instructions, including rates of payment or the agreed project fee, and travelling expenses, etc.

Solicitors must be notified, and their agreement obtained, if any part of the assignment will be undertaken by anyone other than the individual instructed.

Client confidentiality must be observed.

Guidance is also given as to the content of the report prepared, which should be in plain English with any technical terms explained.

Independence and complaints

Once they have accepted instructions from a solicitor, experts are under a duty to provide an objective and independent opinion relating to the case.

The key to being an expert is maintaining independence. When giving evidence at court, the role is to assist the court. Any and all personal or professional relationships, business dealings and competing interests that might influence the expert's work must be fully advised to the solicitors at the start of each project. Experts should immediately withdraw if a conflict of interest arises.

Site visits or client meetings should first be discussed with the solicitor.

Experts should also provide a procedure for resolving any complaints, and respond quickly and appropriately if any complaint arises.

The Law Society of Scotland reserves the right to exclude any expert who has failed to adhere to the Code of Practice from any future edition of the Directory of Expert Witnesses.

This article provides only an overview of the Code of Practice. For a complete and comprehensive guide, please visit: **www.lawscot.org.uk/members/business-support/expert-witness**

EXPERT WITNESS CVS – WHAT TO INCLUDE?

Experts vouching their qualifications and experience to a court should provide crisp, clear information rather than a lengthy, unstructured document, as a senior English judge has recently commented

The section on qualifications and experience in expert court reports often causes concern. While some experts worry that they don't have enough material, others find it hard to cut material out.

Paragraph 16(h) of the Law Society of Scotland's Code of Practice specifically states that the report should cover "a summary of the expert's qualifications and experience". The term "qualifications" is probably intended to be interpreted broadly, to include all relevant expertise, whether from academic qualifications or practical experience. In England & Wales, the procedural rules mandate the inclusion of qualifications.

How to approach this section of your report?

There are two principles to follow:

(i) Relevance

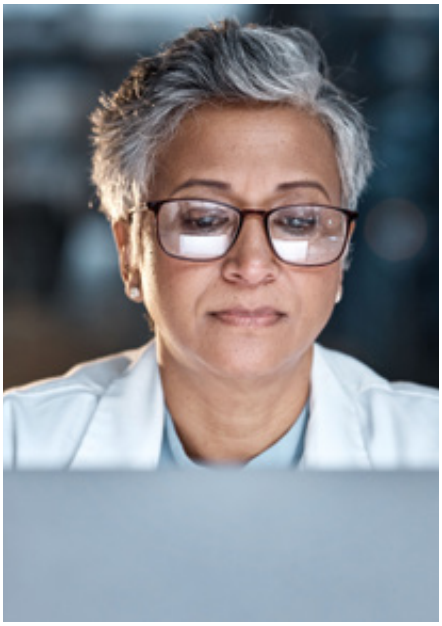
The court must know whether or not the expert is competent (or "qualified") to give opinion evidence *on the issue before it*; this part of your report is where you demonstrate that competence and qualification.

Your focus must therefore be on the issues before the court. The court is not going to be interested in the entirety of your career to date, but *only* the relevant knowledge, skills, experience, training, or education you may have which can help the court reach a decision on those issues.

(ii) Clarity of information

Comments by the President of the Family Court, Sir Andrew McFarlane, in *Re C* [2023] EWHC 345 (Fam) related to the issue of an unregulated psychologist giving expert evidence, but the principles can be applied across the board by all expert witnesses. Although this is an England & Wales case, the comments can usefully be applied in Scotland too.

One lesson he draws, at para 97, is: "the need for clarity as to an expert's qualification and/or experience. The more diffuse and unstructured a CV, the less effective it is likely to be in transmitting information crisply and clearly. In this regard, lawyers,



magistrates and judges are lay readers. They need to be able to see with clarity, and in short form, the underlying basis for an individual's expertise".

Sir Andrew identifies registered membership of the relevant regulatory or professional body as a "reliable, one-stop, method of authentication" which can be taken as "sufficient qualification to offer an opinion within that field of practice".

That is, of course, only the starting point and specific further knowledge may additionally be necessary.

Where such additional information is needed, it should be set out "shortly and clearly", to identify any "formal qualifications, posts held and published work" (see para 102 of the judgment).

Do:

- Focus on the issues for the court.
- Tailor your CV accordingly.
- Set out relevant formal qualifications and registration status first.
- Think about other relevant experience:
  - authorship of relevant published papers or textbooks;
  - relevant training or teaching which you have delivered;
  - relevant studies you have carried out; and/or
  - relevant panels or committees you have sat on.
- Consider including a short narrative section, describing your current practice and how frequently you deal with the same issue which is now before the court.
- Include relevant qualifications as an expert witness, e.g. the Cardiff University Bond Solon Certificate or the Aberdeen University Bond Solon Certificate, once you have attained them.

Don't:

- Include everything you have ever done.
- Include hobbies, interests and prizes.
- Run over more than one or maximum two pages.
- Include every publication ever written.
- State how many times you have given evidence as an expert witness.

Remember, there is a difference between a court report CV and a marketing CV to send out to instructing solicitors. Your marketing CV can certainly contain everything that you would put in the court version, and the following:

(i) CPD in your area of expertise.
(ii) CPD as an expert witness (particularly vital for healthcare experts in light of the requirement of the Academy of Medical Royal Colleges that those who carry out expert witness work "should" undertake expert witness training).
(iii) How many reports you have written for court.
(iv) How many times you have given evidence in court.
(v) Any positive comments from judges on your evidence.
(vi) The balance of instructions you receive from claimants or applicants or the prosecution and from the defence or respondents.

Above all, remember that you are aiming your report CV at the judge, to assure them that you are qualified to give your opinion on the issues before them.

If in doubt, keep it short, relevant, and clear.

Nicholas Deal is a trainer and subject matter expert at Bond Solon

Expert Witness Directory 2023

Accountants

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Banking and Insurance

Expert Evidence International Ltd
Bankers, Property Financing Advisers, Investment Advisers, Regulators and Tax Advisers
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Rugby team makes winning return

On a beautiful spring afternoon in May the Law Society of Scotland Rugby Football Club made its long awaited return to the field, following a Covid-enforced hiatus of almost four years, taking on the Scottish Parliament RFC who play regular games against other parliament sides from across Europe.

Since LSSRFC's last outing, a number of club stalwarts have hung up their boots and could not be tempted out of retirement. A recruitment drive (supported by the Journal) prior to the match was very successful, with around 15 new players from the Scottish profession signing up, and 11 debutants running out against the Parliament.

Following a number of late calloffs, however, LSSRFC only had 14 players available compared to the Parliament squad of at least 25. The Parliament very sportingly loaned a player – but LSSRFC needn't have worried as they ran in their first try almost straight from the kickoff, and quickly took control with new standoff Finlay Smith (McEwan Fraser Legal) directing the team to great effect. Powerful running of new recruits Finlay Williamson (Thorntons Law) and Jacob Ramsay (Davidson Chalmers Stewart) – who turned out the following day for Caledonian in the Scottish District Rugby Championship – resulted in LSSRFC taking a commanding lead, and though the Parliament side rallied and scored a couple of tries of their own, LSSRFC ran out 98-19 winners in a very free flowing game. Try of the match goes to another new recruit, Fraser Hammond (Burges Salmon), finishing off a lovely team move.

Sporting encounter: the Society and Parliament teams

Many thanks to the Parliament side for the game and for arranging facilities, a referee and food and drinks after the match. LSSRFC hope to play more regularly now and are looking to arrange another match later this year. Anyone interested in joining the side can email club captain Alistair Wood: alistair.wood@pinsentmasons.com.

Chris Nicholson, Scottish Government Legal Directorate

Notifications

APPLICATIONS FOR ADMISSION 26 MAY-26 JUNE 2023

ANDERSON, Justine Emma
ANDERSON, Richard Douglas
BAXTER, Greig Adam
BONINI, Nikki Lynn
BURGESS, Gary
BURNS, Hayley
COLQUHOUN, Anna Elizabeth
CONNELLY, Anna Louise
DILLON, Kyle Berg
DOUGLAS, Megan
FERGUSON, Adam Joseph
FINCH, Tony Clayton
FREER, Abbey
FYFE, Kimberley
GARDNER, Katie Rachel
GRAHAM, Jamie Edward
HALEY, Kym Megan
HAMILTON, Iona
KENYON, Scott Ian
KERR, Jennifer Alison
LIPSCHITZ, Gabriella Tamar
MACASKILL, Melissa Ann
McGIBBON, Leah Summer
McGUIRE, Mark John
McKIE, Kaitlin Minnes
McSKIMMING, Amy
McSORLEY, Daniel James
MARTIN, Olivia Dominique Garland
MIRZA, Farah Parveen
MORRISON, Taylor
MUNRO, Wallis Bryden
NJOKU, Ikenna Kingsley
O'REGAN, Callum
POOLE, Jonathan Richard
POZZO, Francesca Natalia
SCOTT, Claire Fiona
SIMPSON, Dean Aaron Scott
SONG, Jee-Young
STEEL, Kyra-Alison
STRACHAN, Kerry Ann
TAYLOR, Abby
TAYLOR, Jack
THOMPSON ROBERTSON, Sarah Jane
THOMS, Yasmin Bibi Kym
WATSON, Caroline
WATSON, Murray Taylor
WILSON, Corie Rae

ENTRANCE CERTIFICATES ISSUED 29 MAY-24 JUNE 2023

ADAMSON, Zoe
ALI, Anisah
ANDERSON, Darroch George Scott
ANDERSON, Emily
ARCHIBALD, Euan Robert
BAILLIE, Rachel Hannah
BAKER, Addison Judith
BELL, Arthur Alexander Stuart
BENNETT, Taylor-Louise Linda
BONNAR, Julie Margaret
BORTHWICK, Rory Sverre
BOVAIRD, Grace Helen Rice
BOWIE, Deborah Louise
BOYLE, Liam Neil
BRONSKY, Nicola Lorraine
BROZ, Jiri
BRUCE, Emma Nadia
CHRISTIE, Robert
COLL, Charley Frances
COOK, Paul David
CUMMINE, Ella Jean
CUMMINGS, Christina
CURRAN, Rebecca Anne
CUTHBERTSON, Robyn Louise
DABROWSKA, Anna
DONAGHY, Anastasia Isabel Claire
DONNELLY, Nicole Catherine Marian
DOWNHAM, Bethany Louise
EUNSON, Bryony
EVANS, Christopher Neil William
EVANS, Katelyn Mhairi Helen
FERRIER, Olivia Grace
FINDLAY, Kirsty Anne
FOGARTY, Matthew Kevin
FORBES, Gregor
FRANCIS, Louis Charles
FRASER, Megan Joanne Laing
GIBSON, Jemma Anne
GILCHRIST, Kara Mary Jane
GILL, Roma Eles Kaur
GOLD, Georgia Grace
GREEN, Suzie
HAMMOND, Fraser
HARLEY, Kyla Chalmers
HARRINGTON, Meghan
HAYHOW, Olivia Grace Victoria
HENNESSY, Lucy Marion Elizabeth
HOLLAND, Emma Victoria
HOLLAND, Kirsty
HORNE, Teigan Aleeza
HOUGHTON, Ryan James
HUNT, Alanis Leah Anne
HUNTER, Alexandra Nicol
HUTCHISON, Lynn Elizabeth
IRWIN, Lauren Antoinette
KENNEDY, Joel Myles
KING, Christopher
LAING, Louise Elizabeth
LAWSON, Victoria Helen
LITTLEJOHN, Laura Victoria Jeanette
McCAIG, Janet Alison
McCLINTOCK, Chantelle Victoria
McCORMICK-HOLMES, Savannah
McDOUGALL, Gemma
McDOWELL, Amy Patricia
McFADZEAN, Kirsty Elizabeth
McGHEE, Louise
MACGREGOR, Catriona Rachel
McGUIRE, Samantha Jo
McINTOSH, Keir
MACKAY, Annabel
McKENZIE, Olivia Jane
MACKIE, Scott
MACRITCHIE, Iona Charlotte Ballantyne
MALONE, Amy Beth
MANN, Ann Helen
MEDFORD, Alisha Mairead
NEWELL-BRUCE, Kara Eleanor
NICHOLSON, Katherine Margaret Joan
NIVEN, Finlay James
O'SHEA, Bethany Jane
PETRIE, Rebecca Ellie
PROCTOR, Leoni Lauren
PURVIS, Danielle
QAYYUM, Jennah Zaynab
QUINN, Hannah Louise
READ, Catherine Louise
RICE, Niamh Margaret
RITCHIE, Alan
ROBERTSON, Rachel Louise
ROBERTSON, Scott
ROCHE, Ciara
SARWAR, Qaila
SHUFFAQ, Meryam
SMITH, Caitlin
SMITH, Ellen Elizabeth Irene
SMITH, Franchesca Ashley
STEIN, Brandon McGhee
STEWART, Kayren Emma
SWAN, Sacha
VOY, Megan Catherine
WALKER, Abby Louise
WALKER, Lewis Alexander
WEBSTER, Kayla Ayesha
WHAN, Alex
WHITE, Lauren Isobel
ZIEMONS-McLEAN, Anna Katarina

Classifieds

Catherine Donnelly
Deceased.
I am seeking information on the whereabouts of a will for a Mrs Catherine Donnelly D.O.B 29/07/1935 who resided at 3 Staffa, St Leonards East Kilbride, G74 2DZ. I believe the will was drawn up by solicitors in Glasgow in 2015 together with a Mr John Donnelly D.O.B 19/04/1938 who currently resides at Ashton Grange Care Home, 9a Hamilton Road, Mount Vernon, Glasgow, G32 9QD. Please contact me at Victoriajdonnelly@yahoo.co.uk or by mobile 07506 525419

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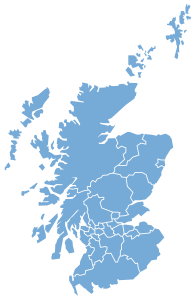

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