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Journal

Journal of the Law Society of Scotland

Volume 68 Number 5 – May 2023

# Come in, number six

The Society's sixth female President tells of an unintended career, the importance of being a role model and her many hopes for her forthcoming term

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# Editor

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## Double issue

Towards the end of April, two major bills were introduced to the Scottish Parliament in the space of five days. Both have the potential to make a significant impact on the Scottish legal profession.

First, the Regulation of Legal Services (Scotland) Bill paves the way for significant streamlining – and, we hope, cost saving – in the process that complaints against practitioners must follow, along with greater transparency in regulation and, at last, regulation of entities as well as individuals. But it also, in the eyes of many including the Society, encroaches on the independence of the profession through powers of intervention conferred on ministers, even if their use bears to be confined to certain situations and mostly subject to the concurrence of the Lord President.

Rather more headlines have been generated by the Victims, Witnesses and Justice Reform (Scotland) Bill, largely due to it taking forward the proposal by Lady Dorrian's review for a pilot scheme of trials of serious sexual offences before a specially trained single judge, with no jury, in the Sexual Offences Court that the bill would also create. The furore that has created among criminal defence lawyers has almost obscured the fact that the bill would also finally abolish the once-hallowed not proven verdict, and cut the size of the Scottish jury to 12, still with eight votes required for conviction.

The issues raised by each bill are very different, but both could result in a trial of strength between the profession and the Scottish Government. With the Regulation Bill, the contest is more likely to be confined to the parliamentary arena: can MSPs be persuaded, for example, that enabling ministers to "directly authorise and regulate legal businesses", albeit the provision presupposes the failure of the designated regulator, is simply not acceptable? The new Government has got off to a difficult start, but it is an open question whether party unity is likely to come under threat on this issue.

Even if enacted, however – and among politicians, sympathy for victims and witnesses may prevail over the protests of the profession – the pilot court seems vulnerable to the non-cooperation of defence lawyers, and at this stage a collective view is rapidly emerging against accepting instructions in any case sought to be brought through the scheme. The bill does not give accused persons the choice whether to be brought before the pilot court, only a right to make representations as to whether the criteria are met, but in effect they are likely to be able to opt out.

One can sympathise with complainers' reluctance to have to relive their experience at trial, but other mooted reforms could greatly mitigate the trauma of giving evidence. As with not proven, if increasing the prospects of conviction is a principal aim, the profession would be right to take a stand. J

# Contributors

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**James Chalmers, Fiona Leverick** and **Vanessa Munro** are professors and criminal law researchers

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**Erin Grieve** is a solicitor advocate and a managing associate with Addleshaw Goddard

**Anna Jaconelli** is a trainee solicitor, and **Jamie Watt** a partner, with Harper Macleod

**Marianne McJannett** is Head of Employment with Bellwether Green

THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.68 NO.5 – MAY 2023

## Perspectives



## Regulars



## Features



## Briefings



Terms of business: two thirds are not client friendly: Page 39

## In practice




**ONLINE INSIGHT**

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

**Children under the GDPR**
Children have the same rights as adults to data protection, but how are these exercised especially where parents are living separately, and how should requests be handled? Isabelle Bain and Rebecca Roberts explore the issues.

**Health and safety failings: behind the corporate veil**
A Scottish director's failed appeal against conviction for the death of a worker shows how prosecutors will look behind a corporate structure to prevent it being used to protect responsible officers, as Bruce Craig, Fiona Cameron and Abbie Hunter discuss.

***Fearn* and actions for nuisance in Scotland**
How relevant is the Supreme Court decision in *Fearn v Tate Gallery* to cases in Scotland? Matt Farrell and Anna Bruce identify five key points from the judgment and compare the Scots law position.

**Licensing in the wild: the new schemes**
New licensing schemes for grouse shooting, and for carrying out muirburn, are proposed in the Wildlife Management and Muirburn Bill now before Holyrood. Ashley McCann sets out the key features of each.

OPINION

# Judith Ratcliffe

In this age of drives to digital, we need, written into law, a right for every citizen in the United Kingdom to access Government and local authority services offline (on paper and over the counter)

In spring 2023, those of you who used to fill in "on paper" self assessment tax returns received letters from HM Revenue & Customs, saying: "If you normally receive a paper return, you won't receive one this year, or in future, as you can file online instead".

But it's not just HMRC doing it. A number of other Government departments and their processors also appear to force people to put their most sensitive data online. For example, United Kingdom Security Vetting has, previously, refused to action counter terrorist check forms that weren't submitted online, despite having a paper route available.

Forcing people online appears to break overarching privacy rights, from the European Convention on Human Rights as incorporated into the Human Rights Act 1998. These are the right to personal autonomy which is part of the article 8 right to respect for a person's private life. In my understanding, this means you choose how you live your life, without interference by the Government unless it is strictly necessary *and* there is a specific law in place which sets out the exact measures to be taken to restrict your rights and under what circumstances those measures will be carried out, *and* which must be proportionate to meet the aims of a democratic society. These are three very high bars and I would argue that forcing everyone to do their taxes online, whether they like it or not, fails on all three of those bars.

First of all, it cannot be strictly necessary, because clearly a paper route has been available. Secondly, there is no law requiring that people only do their taxes or counter terrorist checks online, and even if there were, such interference with the right to personal autonomy would, in my understanding, have to be for a set period of time and/or only for specific circumstances.

But the third bar here is perhaps the most important. It is, in my view, disproportionate to meet the aims of a democratic society and, in fact, fundamentally against the public interest, to force everyone to do their taxes, counter terrorist checks, and/ or other interactions with the Government online.

Why is this? Let me explain. It opens the door to you easily having your identity stolen, your money stolen, and even your tax records interfered with and changed by hackers and other cybercriminals. This can be done through a number of ways – malware, their own app or website being taken over, man-in-the-middle attacks, sniffing, DNS cache poisoning, keystroke logging, spoofing websites, phishing or even just hacking into your wifi, or attacking your password multiple times until it breaks. Arguably forcing people to do their taxes and/or counter terrorist checks online may be considered to facilitate fraud.

Communications that would ordinarily happen through the post, are received and sent by email. Emails are known to be easily interceptable and, famously, even the director of the CIA has had his emails hacked.

It should be remembered that Government departments are often a primary target. Added insecurities come from things like the demand, with counter terrorist checks, for date of birth to be at the top of every email – for "verification" purposes. This, arguably, breaks data protection rules around confidentiality and excessive data collection, and breaks the UK Government's own service manual guidance for planning and writing text messages and emails: "avoid making requests for personal information, like a user's date of birth".

It can be harder to check what organisations are doing/have done with your data through online services and harder to hold them to account, complain, and get problems quickly resolved. A lack of physical paper trail can leave you without evidence. Teams can be difficult to reach by telephone, and "support" services often can't help (in my experience) with problems other than perhaps lost passwords/software issues. They demand more personal data and cause risks of further harm and inappropriate overexposure of your data, to fix a problem that their organisation arguably caused.

Automated responses and "ticketing" systems in offshore countries can make matters worse.

What can we do about it? Sign my petition, which asks the UK Government to grant every UK citizen the right to keep every interaction with Government (national and local) offline (on paper and over the counter): petition.parliament.uk/petitions/635527

I'm not saying that everyone must do things offline. Accessibility issues necessitate online activities, for some, but those who do things online should be doing it freely, without being forced, pressured or tricked into it, and they should be told about all of the risks and issues first, so they can make informed decisions.

**Judith Ratcliffe is a member of the Honourable Society of the Inner Temple, a data protection officer, and author of *Privacy and Data Protection in Your Pocket: Data Protection Breaches***

VIEWPOINTS

# About that pilot...

Selected reactions, from Twitter and otherwise, to the proposed judge-only pilot trials for serious sexual offences. See also the feature on p 16.

"My business partner... and I will not be party to this reckless "pilot". Removal of safeguards against #miscarriageofjustice seeking to increase convictions screams out the risks here." **(@IanMoir5)**

"An ambition to secure more convictions, rather than a higher degree of justice, is a dubious basis for legal reform." **(@LivBrown Crime)**

"My Firm will not be accepting instructions in any case that forms part of this pilot. No client of **@mcgovernreid** will be ever exploited as part of a social experiment to satisfy the demands of the Special Interest Groups. This pilot is not in the interests of justice." **(@mcgovernlawyer)**

"Matthew [above tweet] speaks, as always, with sense and passion. But, more prosaically, which accused would *ever* be happy to be part of a pilot scheme, much of the point of which is to increase conviction rates?" **(@RoddyQC)**

"Completely agree. Lawyers must never be complicit in unfairness, or injustice. I will not be accepting instructions in any judge-only trials. I call upon all my colleagues to do the same." **(@StephClink)**

"The Executive Committee of the Glasgow Bar Association are opposed to the proposed pilot... The proposed reforms raise significant concerns regarding fairness and transparency within the criminal justice system. These proposals seek to dismantle a jury system which has worked for centuries.

"GBA President Michael Gallen said: 'An accused is prevented by law from representing themselves in cases of this nature. Given the strength of feeling on this issue we intend to ballot our members on whether they are prepared to accept instructions in any case forming part of the pilot scheme.'" *(Press release, 28 April)*

"Judge only trials for very serious sexual cases is an alarming development that we can see absolutely no justification for. No other civilised country dispenses with juries in such cases. The suggestion that juries are routinely misguided in their verdicts and in some way conviction rates need to be corrected for such offences is frankly an affront to justice and should be opposed. It is likely the SSBA will require to ballot its members on whether or not we should take part in any such pilot." *(Scottish Solicitors Bar Association statement, 28 April)*

"We're supportive of these plans and think they could have a positive impact for survivors.

"Already, we have heard some misleading rhetoric on this plan that does not reflect what is being proposed. It's very important to remember that the removal of a jury is not a breach of the right to a fair trial.

"A highly trained legal expert is still in place in these cases who is accountable for their decisions. A full range of evidence would be considered...

"A pilot would give time for the effectiveness of these trials, and the experience of survivors, to be considered before they are fully rolled out." **(@rapecrisisscot)**

"We do not believe the current system of trial by jury is suitable for the prosecution of serious sexual offences. The Mock Jury research highlighted it is difficult for a jury to understand complex legal arguments and matters of law. We would support the recommendation of a pilot for single judge-led trials, and have the confidence that the knowledge and experience of the judiciary will lead to a more just outcome for survivors". *(Victim Support Scotland, 27 April)*

BLOG OF THE MONTH

## ukconstitutionallaw.org

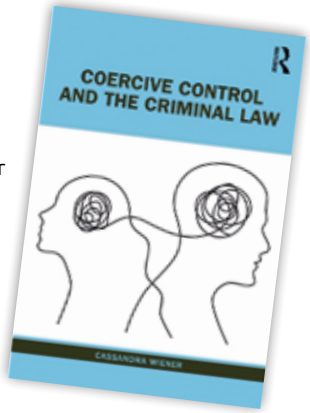
With the judicial review of Alister Jack's s 35 order to block the Gender Recognition Reform Bill pending, Chris McCorkindale and Aileen McHarg assess the Scottish Government's tactics, and prospects of success.

There is an arguable case, they suggest, for a standard of review requiring "anxious scrutiny" rather than "mere rationality", with weight being given to considerations of democratic support behind an *intra vires* bill. Whoever wins, however, "the way in which this dispute is resolved could well represent a watershed moment in the history of devolution".


BOOK REVIEWS

## Coercive Control and the Criminal Law

CASSANDRA WIENER
PUBLISHER: ROUTLEDGE
ISBN: 978-1032422879; £34.99




Cassandra Wiener is a senior law lecturer at The City Law School. In this thesis, at its simplest, she contrasts the policy development of the criminalisation of coercive control between England & Wales and Scotland. Her short conclusion is that the Domestic Abuse (Scotland) Act 2018 allows for an "all of a piece" approach for police and prosecutors, enabling prosecution for all aspects of coercive control, whereas this is denied in England which sees coercive control as a "bolt on" to substantive crimes.

Wiener considers the way in which the legislator and practitioners might approach the proof of a course of behaviour, saying: "this is the only aspect of the [2018 Act] I think that is actually less progressive than its English/Welsh equivalent". The author notes it would be left to the courts to determine what constitutes two incidents. The recent decision *HM Advocate v CA* [2022] HCJAC 33 answered that question and held that the Act created a new offence, namely "a separate crime known as a course of conduct... it is the proof of a course of conduct which constitutes the relevant essential element of the offence".

Apart from a thorough, thoughtful and careful analysis of the law, the author also offers insight into the impact of coercive control. She draws on a diverse range of sources and the contributions to policy development. This book merits a wide readership.

***David J Dickson, solicitor advocate.***
***For a fuller review see bit.ly/3HGfoNU***


## The Empire

MICHAEL BALL (ZAFFRE: £20; E-BOOK £9.99)

"Michael Ball clearly loves the theatre and the life associated with it. That shines through in this, his first novel".

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

***The book review editor is David J Dickson***

# Bone to pick

A diner sues because his dish turned out not to match its description. Fair enough? How about the defence (or defense, since, surprise, it's in the USA), "Of course it ain't, and everybody knows it"?

Such is the issue in the Indiana class action (no less), *Aimen Halim v Buffalo Wild Wings Inc*. Halim is affronted that the defendant restaurant's "boneless chicken wings" are no such thing but – shock horror – "slices of chicken *breast meat* deep-fried like wings" (italics as in the summons). "Consumers value actual wings, and Defendant has no valid reason for misleading consumers, other than to promote a cheaper product", his suit fulminates.

What has Defendant to say? "It's true. Our boneless wings are all white meat chicken. Our hamburgers contain no ham. Our buffalo wings are 0% buffalo." (Careful, someone else might sue.)

But chicken wings were really a thing in the 2008 recession, due ironically to their cheapness – so much so that they rather than breast meat became the upmarket delicacy. Other eateries switched the meat but renamed their dishes; Buffalo only did the first. Halim wants a jury trial. Will his case fly?

PROFILE

# Adrian Ward

Adrian Ward, convener of the Mental Health & Disability Subcommittee, highlights its work in light of Mental Health Awareness Week (15-21 May)

**1 Can you tell us a bit about your career?**

I qualified in 1967; in 1968 I became junior partner to my mentor Adam Turnbull. Expectations of his guidance were cut short by his death in 1969, following which I learned – if nothing else – the sheer hard work in meeting client expectations! A willingness to learn law and practice relevant to particular needs, led to a practice in mental health and the new subject of adult incapacity, and in time to an extensive international role. A simple favour in 1976, preparing a talk for parents of children with learning disabilities, has swept me into a major part of my professional life, and all the work which continues in my retirement.

**2 You are stepping down as convener after 34 years. How would you outline the committee's work in that time?**

The trajectory from early formulation of relevant law and practice, with constantly shaping new law, including major Acts in 2000, 2003 and 2007; always seeking fairness for disabled people right across law and practice, through to currently urging overdue reforms, and preparing for fundamental reorientation following the Scott report.

**3 What has working on mental health and disability issues meant to you?**

The remarkable, perhaps unique, experience of seeing a new legal subject emerge and develop, becoming the first major legislation of a new Parliament; achieving real improvements in the lives of our most vulnerable citizens; working with many outstanding professionals; and developing further roles and collaborations worldwide.

**4 What main issues should the Society/ profession be tackling at the moment?**

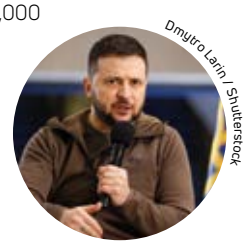
The serious recent threats to basic and inalienable human rights, the rule of law, the independence of the judiciary and legal professions, and resourcing of access to justice for all, on which our freedoms and our way of life depend. History tells us that it is the most vulnerable who suffer soonest and most. The Society and every member must be rigorous in identifying and resisting any erosions of our status as a free and democratic society.

***Go to bit.ly/3HGfoNU for the full interview***

WORLD WIDE WEIRD

## 1 Handsome fine

A Russian woman aged 70 was fined 40,000 roubles (£400) for "discrediting the Russian military" after she was overheard calling Ukraine's President Volodymyr Zelensky "handsome".

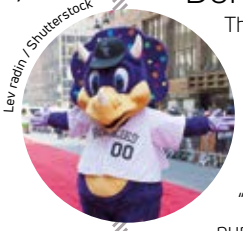


Dmytro Larin / Shutterstock

**bit.ly/3Hx1FbW**

## 2 Done his Dinger

The Colorado Rockies baseball team mascot, Dinger the triceratops, was attacked by a fan while dancing on a dugout during a game. "Let's just not beat up the purple dinosaur, please", he tweeted pleadingly.



Lev radin / Shutterstock

**bit.ly/3LQEllR**

## 3 Stuff of nightmares

A hotel guest in Tibet who complained of a funny smell and got moved to a different room, found himself being questioned by police after a corpse was discovered under the bed.

**bit.ly/3VryvAE**

TECH OF THE MONTH

## Heartfulness

**Apple and Google Play: free**

If you're stressed out and struggling to sleep at night, then try Heartfulness. It's an app that promotes inner calm and better rest through just 15 minutes of meditation a day. And it's free. Guidance for novice meditators included.

# Murray Etherington

The final weeks of an eventful year have seen two major bills introduced, containing matters of great concern to the profession, and the Society will be seeking significant improvements

It has been quite the finale to my time as President with not one, but two new bills of deep significance for the profession in my final few weeks.

The Victims, Witnesses and Justice Reform Bill introduced in late April has caused huge concern within the profession. Its proposals present huge risk to the fundamental principle of a fair trial, and of miscarriages of justice. We are deeply concerned by the prospect of a judge-only pilot, seemingly based on the dubious premise that jurors are returning the wrong verdicts in sexual offence cases.

Important and substantial improvements can and should be made to ensure that complainers are treated with sensitivity and respect. We support the overall aim to deliver a more person-centred approach within the Scottish criminal justice system, but fundamental changes such as judge-only trials, changes to jury sizes and abolition of the not proven verdict must not put at risk the right to a fair and just trial.

The Regulation of Legal Services Bill also serves up some extremely worrying proposals. One of the most important roles we play as solicitors is to challenge Government on behalf of clients and hold it to account. A proposed new power allowing ministers to intervene directly in regulation risks seriously undermining the independence of the legal profession from the state.

However, the bill still presents an important opportunity to bring about real, positive and longlasting change for the profession and those who depend on our services. In some aspects the bill could go further, particularly around the way complaints are handled so cases can be dealt with more quickly, improving things for both complainer and solicitor.

We will be doing everything in our power to ensure that the most concerning aspects are removed as the bill progresses through the Parliament, as well as focus on where it can achieve most benefit.

The end of April also marked the new legal aid regulations coming into effect. While the £11 million increase in funding is a much-needed step, it by no means addresses the many years of underfunding. There remains much to be done, most importantly a fee review mechanism as a longer term solution. Legal aid is a crucial part of our justice system, designed to ensure that anyone regardless of financial circumstances can uphold their rights. We cannot afford further delay without a high cost not just to the profession, with the ongoing decline in legal aid solicitors, but to our wider society.

## Not so quiet

So it has been an eventful few weeks to finish off an incredible year.

When I started in the role, people would ask, what do you want your year to be, and my response was always "uneventful". Well in addition to new legislation, I can count two monarchs, three Prime Ministers and two First Ministers, so it seems I didn't manage that.

But the turmoil, political upheaval and constitutional challenges were not just felt here at home. Across the world, the saddest and most significant of these has been Russia's illegal invasion of Ukraine, now over a year ago.

The legal profession has a special duty to stand up for the rule of law. I was very proud therefore that earlier this year, the Society's Council passed a motion reaffirming its condemnation of the invasion and expressing profound sympathy with the people of Ukraine. We can be proud too of our legal sector in welcoming and providing a sense of community to more than 80 Ukrainian lawyers who have sought refuge in Scotland. I have many incredible memories of my time as President, but possibly none more so than the very humbling experience of being made an honorary member of the Ukrainian National Bar Association alongside other members of the Society and Faculty.

Getting out to meet many of our members in person and listen to issues or concerns was a priority for me from the outset. These past 12 months I have been reminded so many times that however specialised we may be, whether we work in the country, the city, at large or small firms or in-house, as solicitors we are bound by common principles, the importance of the rule of law and the independence of the profession. On each visit I saw the huge commitment our members have to their clients and organisations, and learned what you are seeking from the Society to help you in your work.

I have been immensely privileged and hugely proud to represent our members as President. It has very much been a team effort and I have been supported by Ken Dalling as Past President and my Vice President Sheila Webster, who will bring her trademark energy and humour when she takes up the role at the end of the month, as well as of course Diane McGiffen and her whole team at the Society.

I've reached the end of my term with a fairly hefty baton to pass on, but I know Sheila is most definitely up to the task and will do an incredible job in steering the Society throughout the next 12 months.

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

gunnercooke

# gunnercooke making waves in Scotland with new partner appointments

International law firm gunnercooke launched in Scotland in 2021. Two years on, gunnercooke is making waves in the market as the first international fee share to open an office in Scotland, attracting great legal talent and clients.

The firm was set up in 2010 with a purpose of delivering a positive impact for its clients, providing a better life for its people, and to leave a better world than it found. As the fastest growing law firm in the UK, gunnercooke now has over 400 lawyers across the UK, Germany and US, 57% of which come from a Top 50 law firm and 21% who are ranked in legal directories. With over 70 award nods and a leading Net Promoter Score of +89, the firm can certainly demonstrate the quality of its advisers.

In recent months, the offices in Glasgow and Edinburgh have welcomed new faces, now with six dual-qualified lawyers covering multiple practice areas. Katy Wedderburn joined in February as Employment & Discrimination partner, closely followed by Banking & Finance partner Alex Innes. Last year saw the arrival of Corporate & Commercial expert Bill Fowler and Corporate partner John McMuldroch, who specialises in renewable energy.

So why are some of the legal industry's best talent moving to a fee share model?

The firm's first Scottish based partner Simon Etchells, who joined from Dentons, shares his insights: "If you have grown up in a traditional legal environment you are institutionalised, but you do not know it. I didn't. Every day when I now put down my virtual legal pen, client work done for the day, my day is done. Your time is free of what seemed like the essential layers of the business of law, but which now seem like clogs on productivity."

Speaking of the firm's annual Symposium in Oxford, he acclaims: "I have attended partner conferences and team days for 30 years. Many had elements of fun, but none ever focused on the people, their needs and the health of the internal business community in the way gunnercooke does."

Offering advice to those considering joining the model, Simon says: "Just ask. We are very open about how gunnercooke works. You can be in Scotland, but you don't need to be a Scottish lawyer. You have the benefit of living where you like.

"To me, gunnercooke has the fleet of foot ethos of a small dynamic firm within a collegiate environment running the infrastructure of an international firm. It's as big scale or as small scale as you choose to make it, and that in my view is a true USP of choice."

Real Estate partner Rachel Dunn rejoined Simon from Dentons in 2022. "What surprised us was the huge number of internal referrals. These mean that our client base has changed and grown, and we've had the chance to work with other gunnercooke partners," Rachel adds.

The best part of the model for her is the flexibility: "My team and I moved from a large, traditional firm with strict targets and working hours. Now we have moved away from that and have a huge level of flexibility. It just feels entirely different to a traditional law firm."

With the firm rapidly expanding internationally in Europe and the US and attracting some of the best quality lawyers and clients, now is an exciting time to join.

If you'd like to find more about the model or have a conversation with the team, visit www.gunnercooke.com/join-us/ or email Head of Recruitment, Chris Ball, at chris.ball@gunnercooke.com

# People on the move

BALFOUR+MANSON, Edinburgh and Aberdeen, has appointed partner **Graeme Thomson** as head of Private Client with effect from 6 April 2023, succeeding **Shona Brown**, who continues as a partner. **Amy McKay** has also been promoted to senior associate in the Private Client team, while **Debbie Fisher**, who joined as a trainee in the team in February, qualifies in May.


Graeme Thomson

BRODIES LLP, Edinburgh, Glasgow, Aberdeen, Inverness and London, has promoted five new partners: oil and gas lawyer **Laura Petrie**, personal and family solicitor **Jessica Flowerdew**, corporate and commercial lawyers **Grant Strachan** and **Robert Ross**, and real estate lawyer **Danny George**.


Brodies: Danny George


Grant Strachan


Laura Petrie


Jessica Flowerdew


Robert Ross

BTO SOLICITORS LLP, Glasgow and Edinburgh, has promoted solicitor advocates **Mark Hastings** to partner and **Alistair Barbour** to senior associate, both in its Personal Injury Defender team, and **Lauren McFarlane**, dual qualified in England & Wales, to associate in Intellectual Property and Dispute Resolution.

BURGES SALMON, Edinburgh and UK wide, has promoted Edinburgh-based dispute resolution lawyer **Gregor Hayworth** to partner along with 10 colleagues in the firm's Bristol headquarters. Burges Salmon has also appointed **AJ Venter** as a partner in its Corporate and M&A team, based in Edinburgh, with effect from 1 May 2023. He joins from TRAVERS SMITH, where he was senior counsel in the Corporate M&A and Equity Capital Markets Group.


BTO: Mark Hastings


Alistair Barbour


Lauren McFarlane

CMS CAMERON McKENNA NABARRO OLSWANG, Edinburgh, Glasgow, Aberdeen and globally, has promoted three Scotland-based lawyers among 65 new partners (16 of them in the UK) in its annual global promotion round: **David Dennis** (Commercial, Technology & Media, Glasgow), **Davinia Cowden** (Energy & Infrastructure, Glasgow), and **Fiona Henderson** (Finance Scotland, Aberdeen).

DENTONS, Edinburgh, Glasgow and globally, has announced the promotion to partner of **Gareth Tenner** (Energy, Transport & Infrastructure, Edinburgh) and **Melanie Martin** (Competition, Glasgow), among 13 new partners in its UK, Ireland & Middle East region, all with effect from 1 May 2023.


Gareth Tenner


Melanie Martin

DICKSON MINTO WS, Edinburgh, intimates that, with effect from 30 April 2023, **Colin James MacNeill** has retired as a partner after a long career with the firm.

**Claire Mary Sutherland** and **Philip Martin McWilliams** hereby intimate that the partnership at will trading as FINNIESTON FRANCHI & McWILLIAMS dissolved with effect close of business on 31 March 2023. Claire Mary Sutherland hereby intimates that she commenced practice with MACRAE & KAUR LLP, Atlantic House, 6th Floor, 45 Hope Street, Glasgow G2 6AE with effect on 3 April 2023. Philip Martin McWilliams intimates that he commenced practice on his own account with effect on 1 April 2023, trading as McWILLIAMS & COMPANY SOLICITORS, Baltic Chambers, Suite 225, 50 Wellington Street, GLASGOW G2 6HJ.


Zaynab Al Nasser

GIBSON KERR, Edinburgh and Glasgow, has appointed **Zaynab Al Nasser** as a senior associate in its Family Law team. She joins from TURCAN CONNELL.

**Euan Gosney**, solicitor advocate, has left THORLEY STEPHENSON, Edinburgh, to begin practice as a director in CSG LEGAL LTD, 10 South Clerk Street, Edinburgh EH8 9JE (t: 0131 225 2759; e: eg@csglegal.co.uk).

JONES WHYTE, Glasgow, has promoted **Chloe Stuart** to senior solicitor.

LEDINGHAM CHALMERS, Aberdeen, Inverness, Stirling and Edinburgh, has promoted partner **Craig Pike** to head of its Private Client team, on the retiral of partner **Douglas Watson**, who continues with the firm on a consultancy basis. Partner **Alasdair MacLure** from the Aberdeen Commercial Property team, who has been with Ledingham Chalmers for more than 30 years, is also retiring but will continue as a consultant. Seven other lawyers have been promoted, five in the Private Client team: **Jenna Hendry**, **James Florance** and **Claire Woodward** to associate, and **Hannah Black** and **Joanna Milne** to senior solicitor, all in Aberdeen; and in Commercial Property, **Mhari Michie** in Aberdeen and **Graeme Myles** in Inverness both become senior associates. Four second-year trainees will stay with the firm when they qualify in October: **Holly Allan-Hardisty** (Family), **Gavin Matheson** (Corporate), **Hannah Patience** (Private Client), and **Jessica Sunassee-Mackey** (Litigation).


Daniel Gorry

LINDSAYS, Edinburgh, Dundee and Glasgow, has appointed **Daniel Gorry** as a director in its Employment Law team. He was previously legal director in Scotland


Chloe Shields

for WORKNEST (formerly LAW AT WORK). Lindsays has also appointed **Chloe Shields**, previously part of the Rural team at BRODIES, as a senior solicitor in its Rural Services department, based in Edinburgh but working with clients across Scotland.

MBM COMMERCIAL, Edinburgh and London, has appointed **Michelle Bush** and **Laura Donald**, two senior US qualified attorneys, to the firm's US Commercial Law team, based in the Edinburgh office. Both have recently moved to Scotland from the USA.


Ryan Macready

MACDONALD HENDERSON, Glasgow, is pleased to advise the promotion of **Ryan Macready** to associate director in the Corporate team.

MILLER SAMUEL HILL BROWN, Glasgow, has appointed partner and head of Private Client, **Edward Laverty**, as chief executive of the firm.

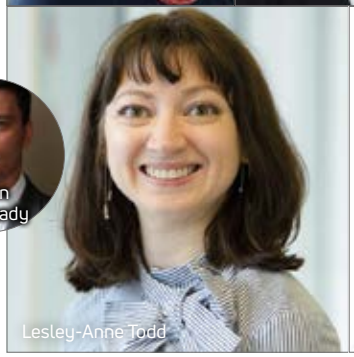
**Margaret Morton**, solicitor, has been appointed by THE ROYAL SOCIETY OF EDINBURGH as director of development. Before moving into fundraising and business development, she practised in commercial property and remains a member of the Law Society of Scotland.

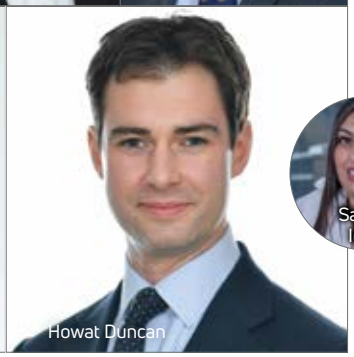
MUNRO & NOBLE, Inverness, Dingwall and Aviemore, has


Pinsent Masons: Susannah Donaldson


Stacy Keen


Ross McDowall


Lesley-Anne Todd


Howat Duncan

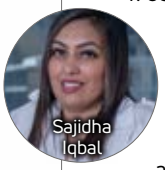
incorporated GEORGESONS solicitors and estate agents, Tain and Wick, from April 2023. It is expected that Georgesons will continue to operate in both its premises. All 11 Georgesons personnel are joining Munro & Noble.

NISBETS, Edinburgh, has appointed **Jacqui Ridley**, formerly of BLACKLOCKS, as an associate from 17 April 2023.

PINSENT MASONS, Edinburgh, Glasgow, Aberdeen and internationally, has promoted with effect from 1 May 2023 five Scottish-based lawyers among 25 new partners (14 in the UK) across the firm's network: based in Glasgow, **Susannah Donaldson**, the firm's co-head of its Equality Law group; **Stacy Keen**, specialist in financial crime, investigations and compliance; dual qualified environmental, planning and property lawyer **Ross McDowall**; and dual qualified commercial real estate lawyer **Lesley-Anne Todd**; along with Edinburgh-based banking lawyer **Howat Duncan**. The firm has also promoted three Scottish senior associates to legal director: **Michael Duffy** (Energy & Infrastructure); **Jennifer Oliver** (Projects & Construction); and **Elaine McLean** (EU & Competition).

LISA RAE & CO, Edinburgh, announces the promotion of **Aimee Tulloch** to senior solicitor.

SHOOSMITHS, Edinburgh, Glasgow and UK wide, has moved its Edinburgh office from Castle Terrace to the new development 9 Haymarket Square, Edinburgh EH3 8RY (t: 03700 863000; f: 03700 868008).


Sajidha Iqbal

THORNTONS LAW, Dundee and elsewhere, has appointed accredited specialist **Sajidha Iqbal** as data protection officer in its Edinburgh office.

TLT, Glasgow, Edinburgh and UK wide, has promoted **Ayla Skene** in its Glasgow office to partner, among 10 new partners across its network.

WORKNEST, Glasgow, Edinburgh, Aberdeen and UK wide, employment and human resources consultants, has promoted **Hussain Kayani** to head of team and employment solicitor, based in Glasgow.

WRIGHT, JOHNSTON & MACKENZIE, Glasgow, Edinburgh, Inverness, Dunblane and Dunfermline, announces the retirement as a partner of **Colin Brass** after almost 40 years with the firm.


Munro & Noble takes in Georgesons

# Vision mission

After a career that wasn't what she intended, Sheila Webster takes over as Law Society of Scotland President believing that you should always keep your eyes open for opportunities. The Journal profiles our next leader

Words:
Peter Nicholson

As someone who thought litigation looked a bit intimidating when she started out, Sheila Webster's career shows that it's worth keeping an open mind about opportunities, whatever you may have in mind as your dream line of work.

Taking up the presidency of the Society at the end of this month, Webster believes she has an opportunity to use the many connections and contacts she has made through her work for firms big and small, to engage with and relate to members across the country.

Head of Dispute Resolution at Davidson Chalmers Stewart, she declares herself "hugely proud" to be a Scottish solicitor and part of a profession "that represents all that is best in the law in Scotland".

## Different track

Her career has not been what she planned. After studying at the University of Aberdeen, in her home city, Webster came to Edinburgh with ambitions to be a "hotshot corporate lawyer", complete with the glamour of midnight pizzas and the like. She didn't even get a sniff. Training at Brodies, she found herself starting in litigation.

"Bizarrely, having really been quite nervous of dispute resolution when I started, I realised during my first seat that I loved it. The thrill of litigation was definitely something that gave me a lot of fun." While she still coveted a corporate seat, fate decreed otherwise: she finished her traineeship back where she started, "and loved it".

The search for qualified positions during the early 1990s recession took her first to small practice Menzies Dougal & Milligan, then on to Dundas & Wilson for a longer spell that included its years as part of Anderson Legal. After a short break when her twins were born, and feeling the urge to return but to a manageable work-life balance, she took charge of property disputes at niche practice Bell & Scott, before joining her present firm.

In complete contrast to outgoing President Murray Etherington, who claims never to have been inside a courtroom until he took up office, every post has been in disputes, which Webster now accepts is the work she loves. "There's an adrenaline rush about appearance in court and doing your best. When you have to think on your feet, and you know you've done a good job, there's a huge feeling of satisfaction – if a judge poses a question and you can answer it you feel great. Probably one of the things I least enjoyed about Covid times was the inability to appear in normal courts. I missed that, just being able to be around the world that I love."

She adds: "I was saying to one of our trainees that if you end up doing something that isn't for you, don't worry, you can change. I wanted to be a corporate lawyer and look at me now. I'd never have dreamed this was what I wanted to practise, but I really enjoy it."

## Society concerns

As someone who now tells new lawyers at every opportunity to check out committee positions and other ways to become involved with the Society, Webster wishes she had done so at an earlier stage herself. Having harboured concerns that big firms were not sufficiently engaged with the Society to support her standing for Council, her views changed when Christine McLintock and then her former colleague Eilidh Wiseman became President in successive years. "They were a bit of an inspiration: partners in big law firms could become heavily involved with the Society and do good, and what they were able to do just seemed to me to be a little different."

Joining Council in 2017, the following year she was on the Professional Practice Committee, "a big part of what I really enjoy", and from 2020 a member of the board. Even so, she needed time to think when approached about putting herself forward for office bearer, but with the strong backing of her partners she decided to have a go.

"The profession has lots of different aspects and I'm very conscious of following Ken Dalling and others who have had fights about legal aid; it's not part of my day-to-day practice but the challenge for not just the profession but the country to have a functioning justice system that's accessible to all, is huge. But I also felt at times that some lawyers particularly in the larger firms have a perception that the Society is really there for the high street firms and doesn't give enough to the big firms, and I felt I have the experience on both sides that I could perhaps bring something to that, and I hope I can."

## Role model

Her career has at least given her a head start in getting to know solicitors around the country. "Murray teases me that I know everybody in the profession in Scotland and I don't, I really don't." But having previously worked at two of the biggest firms, "The inevitable result is you're seeing so many people passing through that you do get a very wide range of friends who now are all across the world. I was on a call earlier today with the faculty leaders across Scotland, and when I looked in advance at who would be attending I realised that I have worked with most of them over the years, which Murray thinks is very funny, but that does give me a little bit of traction sometimes because I can go and speak directly to people who know me and know my commitment to things, and that helps, I think."

Asked about her hopes and aims for her term, she immediately references that she is only the sixth female President in the Society's history. "I'm hugely proud of being number six; I have two daughters and it's always been important to me that I'm a role model for them and for people like them." With a fascination for the equity, diversity and inclusion aspects of the Society's work, she is very keen to find out why, despite the large number of women entering the profession for years now, there is still such a falloff at the senior end.

"Why do people leave? I have some fascinating conversations with my own daughters, neither of whom are following us into law, about why they think people stop doing what they do. It's very easy to slip into a mindset that people have children and they

*"Bizarrely, having really been quite nervous of dispute resolution when I started, I realised during my first seat that I loved it. The thrill of litigation was definitely something that gave me a lot of fun"*

*"The profession has lots of different aspects and I'm very conscious of following Ken Dalling and others who have had fights about legal aid; it's not part of my day-to-day practice but the challenge for not just the profession but the country to have a functioning justice system that's accessible to all, is huge."*

## Life lesson: keep your eyes open

"I'm not from a legal family, but I came from a background where my parents encouraged me to be the best I could be."

Raised and educated in Aberdeen but having spent her working life in Edinburgh, Sheila Webster and her husband, a KC (also from the north) have twin daughters now of student age, not in law, to whom most of her time out of work has until now been devoted. The family enjoys travelling together and Webster is "thrilled" at the fact that her daughters have been looking at educational opportunities abroad – one is to spend a semester at the University of Vermont.

"I just think these opportunities are out there for people to go and experience. What I try to say to the trainees that I interview, that we recruit, is take what opportunities are out there. Life isn't going to come to a shuddering halt if you're six months later in doing something because you went and did something interesting, and you'll probably have a wider mind and a more open mind if you go and do these things, so I love seeing people go and do things like that."

That reflects her top tip for anyone starting in the law today, speaking as someone who ended up doing something completely different from what she wanted when she set out: "Be flexible. If you open your eyes and look around, there are huge opportunities."

just stop working, but I didn't do that and there are lots of other senior women who didn't, so there's more to it than that. We've a couple of discussions ongoing about how we can change that. What can we do as a Law Society? I'm really, really interested in that."

She also hopes to lead a greater outreach to universities and law students. "I'd like the Society to engage with people at the earliest possible stages of their career. Jock Smith, who was President when I was at university, came to speak to my class at Aberdeen University, and I still remember the impact it had on me, being so impressed that he'd reached that position. I was at an admissions ceremony recently and I said to every one of the new lawyers I spoke to, go and look at the list of vacancies about committees, and ask your firm if you can become involved. You will learn so much; you will meet so many people; it's a fantastic experience – go and do it! I wish I had done it earlier, and I see one or two trainees and NQs in my firm who are really enthusiastic about offering what they can to the profession, so the more the Society engages with these earlier stages, the better for the future of the profession. We need our future leaders, and the sooner they start the better."

## About the bill

But much of her year is likely to be taken up with negotiations with Government over the Regulation of Legal Services (Scotland) Bill, newly published when we spoke. Although it takes forward long-awaited reforms to the complaints system and, despite pressures from some quarters, preserves the Society's position as regulator, Webster expresses disappointment at the proposed ministerial powers of intervention, on which the Society focused in its initial response to the bill.

"I entirely agree with Murray's statement. Direct intervention by Government into the profession doesn't seem to sit comfortably with the separation of the legal profession and the state which we would have thought was a pretty basic principle. It's very early days and we're certainly still having discussions about our response, but I'm totally behind Murray – I share the same concerns and will be pursuing a similar line. Obviously we want to work with Government to make this work, but there are undoubtedly some challenges ahead of us."

Is any regulatory role for Government unacceptable, whatever the circumstances and the purported checks and balances such as agreement of the Lord President, as the bill requires?

"It's early days for me to form a final view on that. The Society wants progress; it was the Society that started the whole process. We are not suggesting there is no role, but at this very early stage we have concerns about whether the checks and balances which might be suggested are adequate given the importance of the independence of the legal profession."

Sheila Webster and Murray Etherington

*"We rely heavily on our volunteers; if we didn't have the huge help we get from all the volunteers on our committees and elsewhere, I don't think we could do what we do and we're hugely grateful for all their support"*

## Health check

We turn to the health of the Society itself, given the restricted budget it operated during the pandemic and now the pressures it faces as costs continue to rise. Is that affecting its ability to carry out its role?

"The charges we make to members to fund the Society are lower than many of the other Law Societies that we deal with", Webster replies. "As with every business, we have an increasing challenge in the face of rising costs, to do all that we want to do with the funds available, and it becomes increasingly important that we plan carefully, and make sure that the profession feels it gets good value and is being properly regulated and represented by the Society. But I think it does a great job. We rely heavily on our volunteers; if we didn't have the huge help we get from all the volunteers on our committees and elsewhere, I don't think we could do what we do and we're hugely grateful for all their support."

As for the profession as a whole, she admits to having worries. Although most larger firms have managed the challenges of the last few years perhaps better than expected, problems of recruitment and therefore succession, along with the continuing difficulties of the legal aid sector ("People talk of legal aid deserts and I've seen that for real"), are making life difficult for many others.

"I know in the bigger firms, it's not difficult to attract young solicitors to come and join you, but the salaries that can be offered by the biggest national and international firms at the junior end are just so different to what can be offered by a high street firm, and that problem only gets worse if one takes legal aid into account."

She knows that large central belt firms are in turn suffering something of a brain drain to London or abroad, though doubts if that affects the law more than comparable professions. "The reality is that that's always going to be the case. Plenty of my friends and colleagues have spent some time in London in their career. I think what we have to do is make practising law up here as interesting as it can be. I've certainly enjoyed my career notwithstanding I've never left Scotland. I think there's a hugely good quality of work to be had here. Unlike those living in London I'm sitting here in my study looking out over the whole of West Lothian with fantastic views, and for those interested in outdoor sports and activities Scotland is such a wonderful place to live. Yes, you may have a good salary in London, but it doesn't follow that you have any time to spend it. So there are pros and cons and we just need to remember that we have a fantastic country here and a fantastic opportunity for those who want to work here."

## Agenda for change

A trained mediator and practising arbitrator, Webster is also a believer in finding different solutions for clients, particularly alternatives to the crippling costs of litigation. "We have to find other ways for our clients. I'm an enthusiastic ambassador for the Scottish Arbitration Centre; I'm passionate about that and other forms of what we're no longer calling alternative dispute resolution but effective dispute resolution. How far do we have to go to try and find new ways to solve disputes? Online systems have pros and cons. There's no one answer for everything."

There's so much Webster would like to do, that "Diane [McGiffen, chief executive] is spending time at the moment saying 'You're not going to be able to fix everything in one year. You will have to focus on the things that are most important to you', and that's what I'll be trying to do."

If you don't already know Sheila Webster, there's a good chance that will change over the coming year.

# No cause for celebration – yet

New legal aid regulations have brought significant changes as well as a hard won increase. Ken Dalling assesses the outcome

The coming into force of the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No 2) Regulations 2023 (SSI 2023/135) on 29 April represents the biggest ever fee change in state funded legal assistance in Scotland.

Increases in advice and assistance and civil legal aid rates, as well as a further move of solemn criminal to block charges – with associated increases – are designed both to increase the investment made by the Scottish Government and to simplify further the procedures for claiming fees in the most serious criminal cases. We are assured that this will be to the benefit of the profession.

Access to justice is a cornerstone of any civilised society which values the rule of law. Central to that is a commitment to state funding for those who cannot themselves afford to pay for legal help. It is truly remarkable that there remains a cohort of Scottish solicitors willing to provide legal aid despite the system having sustained a generation of underfunding. The efforts of the Law Society of Scotland, its office bearers, senior leadership team and the conveners and volunteer members of its Legal Aid Committee – supported by the executive and members of the Scottish Solicitors' Bar Association – have been unstinting in trying to deliver the message to Government that a crisis point has been reached.

## Number crunching

In early July 2022 the Government rejected the call for specific fee increases that it costed at £25 million as unaffordable. Having put its hands down the back of the proverbial sofa, the maximum increase was identified as £11 million. With firms and practitioners turning away from legal aid at an accelerating rate, and few new solicitors indicating attraction to that area of work, the Government was asked to implement fee increases that would deliver an additional investment. Nine months later, regulations have taken effect. Broadly, advice and assistance and civil legal aid rates increase by 10%. The core criminal fixed fees in summary increase by 4%; other changes reverse cuts imposed on the basis of austerity years ago.

As for solemn fees, the Government has restructured the system, increasingly using blocks to average out remuneration and work. With the introduction of a more favourable fee for cases that are resolved "early", the perverse incentive to run a case to trial where a plea of guilty would be appropriate is removed. The detail of the revised solemn fee structure, previously rejected, was not the subject of discussion or negotiation. Ultimately, we are left to trust the number crunchers at SLAB that changes will be to the profession's benefit.

## Society engagement

The Society is in a unique position when it comes to discussions with Government over legal aid – some may say unenviably so. The Society is not a trade union. As a regulator of the profession whose members are officers of court and owe duties consistent with obligations higher than to themselves, its place may be seen as a friend to Government, providing sage advice on important matters. It has not always been clear that such advice was heeded. It has been clear that it was not always welcome.

The Society has been careful in the words it has used to acknowledge the fee changes. The increases were not at the level we had sought, nor were they targeted as we suggested. But fees are being increased and restructured. We have been assured that the year-on-year investment will increase by £11 million. In the context of a profession that has been prepared to work tomorrow – and the day after tomorrow – for the fee paid yesterday (and many years ago), an increase is good. Am I wrong? Maybe at these levels not something to celebrate, but certainly something to acknowledge.

As the Society continues to engage with a Government looking to develop a system for regular fee reviews, the profession should be reassured that its aim of ensuring solicitors are properly remunerated for the valuable work they do, and thereby protecting access to justice, remains enthusiastically and realistically pursued.

## Messy process

And with a restructured Government, setting out its stall to the people of Scotland, we have seen a commitment to provide justice organisations with the resources needed to clear the Covid backlogs. Many justice partners, not least the Lord President, have repeatedly acknowledged the need to ensure a balance in funding between Crown and defence. The new First Minister was previously persuaded of the need to provide extra support to legal aid solicitors in the Covid context. It would be good to see him endorse a similarly informed and empathetic approach now. If not, the sums so far committed may be to little effect.

It is said that the making of laws, like sausages, is a process that should not be exposed to public gaze. In my experience legal aid discussions are just as messy. I have every confidence that those who are taking these matters forward, in both the Society and the SSBA, are not diminished in their enthusiasm to make a difference, both for their fellow solicitors and for the clients they represent. J

**Ken Dalling** is Past President of the Law Society of Scotland and, as President, led discussions with the Scottish Government over increases in funding

# Justice without juries?

Three criminal justice researchers offer an overview of the far-reaching proposals in the Justice Reform Bill, and consider the case for special treatment for sexual offence trials

On 26 April, the Scottish Government published its Victims, Witnesses and Justice Reform (Scotland) Bill, without doubt one of the most significant pieces of criminal justice legislation in the history of the Scottish Parliament. It primarily addresses the prosecution of sexual offences, although some provisions have wider effect.

Most of its content stems from the recommendations of the Dorrian review, *Improving the Management of Sexual Offence Cases*. This was set up to address two issues: evidence that sexual offence complainers are severely re-traumatised by their experiences of the criminal justice system, and low conviction rates in such cases.

## The background

The *Justice Journeys* research (Scottish Centre for Crime & Justice Research) shows that those who engage with the criminal justice system after making an allegation of rape or serious sexual assault find the experience extremely distressing. Complainers reported feeling abandoned after reporting the offence to the police, and that there was no one who kept them informed or prepared them for what would happen next. Many experienced lengthy delays before the case came to court (cf *Journey Times in the Scottish Criminal Justice System*, published April 2023), and found the experience of being cross-examined traumatising. These issues can arise even where conviction results.

Regarding outcomes, the *Criminal Proceedings in Scotland: 2020-2021* statistics show that the conviction rate in rape/attempted rape prosecutions was 51%, lower than for any other crime. Even this paints too positive a picture. In the *Scottish Crime and Justice Survey 2019-20*, only a minority of those who stated they had experienced forced sexual intercourse had reported it to the police. And only a minority of reports will result in a prosecution. Taking the year immediately before the pandemic, 2,343 rapes/attempted rapes were reported to the police (*Recorded Crime in Scotland, 2019-2020*), and there were 130 convictions (*Criminal Proceedings in Scotland, 2019-20*), just 5.5% of reported cases.

This would be less concerning if we could be confident that this conviction rate was the appropriate one. But in the Dorrian review, High Court judges who preside over sexual offence cases reported acquittals being returned "even in cases with ample evidence of high quality", where it was "difficult to understand the rationale" for this.

*"Part 4 abolishes the not proven verdict, as the Government had committed to. Alongside this, it reduces the size of the jury from 15 to 12"*

## The bill

The bill has six parts. Parts 1 and 2 contain provisions aimed at improving the way victims of sexual offences are treated within the criminal justice system, creating a Victims and Witnesses Commissioner for Scotland (Part 1) and embedding a commitment to trauma-informed practice across criminal justice agencies and personnel (Part 2). Part 3 makes changes to rules regarding vulnerable witnesses in civil cases, extending those to hearings where no witnesses are giving evidence, and enabling courts to prohibit individuals from conducting their own case and carrying out personal cross-examination in certain cases.

Part 4 abolishes the not proven verdict, as the Government had previously committed to. Alongside this, it reduces the size of the jury from 15 to 12 and requires eight of those 12 jurors to vote in favour of conviction for a guilty verdict to be returned, abolishing the current "simple majority" verdict. Anything short of this would be an acquittal: a "hung jury" would still be impossible in Scotland.

The remainder of the bill concerns the manner in which sexual offences are prosecuted. Part 5 establishes a specialist Sexual Offences Court. Part 6 proposes three changes: a legal right to anonymity for sexual offence complainers (currently this is a matter of media practice alongside specific orders in individual cases), independent legal representation for complainers in respect of applications to admit certain types of evidence, and a pilot of single judge trials in sexual offence cases.

These provisions, if implemented, involve substantial change to many features of the Scottish criminal justice system. The not proven verdict, for example, has existed for centuries. Indeed, a lengthy blog could be written on almost any one of the bill's provisions. But perhaps most attention will be directed towards the proposed pilot of single judge trials.

## The single judge pilot

The pilot was one of the recommendations by the Dorrian review. At present, all serious sexual offence cases are determined by a jury. The review's concern was that juries may not decide cases based on an objective view of the evidence, and that their judgments may be distorted by false beliefs about what they think a "genuine" rape looks like.


These false beliefs are often referred to as rape myths. They include the beliefs that an absence of extensive injuries and/or a "failure" to shout for help is indicative of consent, that women frequently make false rape allegations, and that even a short delay in reporting suggests that it is fabricated. The review cited the *Scottish Jury Research*, a project that we were involved in along with researchers from Ipsos MORI Scotland.

This research was funded by the Scottish Government to examine the difference that the key features of the Scottish criminal justice system (the not proven verdict, 15-person juries and simple majority verdicts) make to jury decision making. We ran 64 mock juries and recorded their deliberations and, because 32 of these involved a trial for rape, we were able to gain an insight into the way jurors discuss such cases. We found that mock jurors regularly expressed these false beliefs during deliberations, and that they placed an unjustified barrier to conviction. This is not an isolated finding. There is, as Leverick's evidence review demonstrates, "overwhelming evidence that prejudicial and false beliefs held by jurors about rape affect their evaluation of the evidence and their decision making in rape cases".

The pilot of judge only trials was proposed, then, to see if this might be a fairer way of determining rape cases. It is indeed a radical suggestion. But the Dorrian review did not arrive at it lightly. It took into account the weighty arguments in favour of juries, such as their life experience and the "democratic benefit of community involvement". Against this, however, the review argued that the evidence that jurors are influenced by rape myths "cannot be left unexamined and ignored".

Why has the Scottish Government pursued this option rather than less radical measures (such as juror education) first? One issue is that it is very difficult to think of a way to address juror prejudices efficiently within the confines of a criminal trial. It has been suggested, for example, that false beliefs might be countered through judicial directions or a short video before the trial commences. There is some evidence that such measures might help, but there is also evidence that they are unlikely to be wholly effective in changing deep seated prejudices. Psychological research tells us that such beliefs can be very resistant to change – little is likely to be achieved, for example, by an authority figure such as a judge simply telling jurors their beliefs are wrong. Evidence from a systematic review suggests that attitude change is most likely to be achieved via educational programmes that are longitudinal, contextual and participatory. This is near impossible where jurors sit only on a single case.

## Objections

There will, of course, be those who object to the idea of the pilot, and it is only right that such a radical proposal is subjected to thorough scrutiny and debate.

One objection might be that judges are just as likely as jurors to hold false beliefs about rape. Under the proposed pilot, cases would be heard by a single judge, whose views would not be challenged in the way they might be in a jury of 12 or 15. In response it might be said that judges have to give reasons for their decisions; there is certainly some evidence that written judgments can reduce the effect of bias in judges. False beliefs are also more easily addressed in judges than in jurors, especially in the context of the new Sexual Offences Court, where in-depth training should be feasible.

A second objection might be that the evidence of a problem is unconvincing, given that it comes primarily from research with mock juries. It has been argued, for example, that there are "fundamental differences" between real jurors and those who volunteer for mock jury studies. As we have argued elsewhere, however, "real jurors" and those who participate in mock jury studies are not two entirely different populations. Those who participated in the Scottish jury research, for example, were all eligible for (compulsory) jury service. If research with voluntary participants demonstrates that a significant number subscribe to rape myths, those participants do not disappear from the jury pool merely because they are compelled rather than volunteers.

And while research with real jurors in England & Wales has purported to show that jurors do not believe rape myths, this was not undertaken exclusively with those who had sat on sexual offence trials, and the methodological weaknesses of this research limit its usefulness. Research undertaken in Australia and New Zealand, where jurors were interviewed after determining real sexual offence cases, found considerable evidence that misconceptions about sexual violence were present in jurors' discussions.

Finally, it might be objected that – actually – if rape complainers can put their evidence to a jury, they have a good likelihood of securing a conviction, as has been suggested in England & Wales. But setting aside any questions about applicability to the Scottish context, with its potentially soon to be abolished availability of an additional acquittal verdict and different structure for jury decision-making, this neglects the fact that only the strongest cases ever reach a jury in the first place. This particular research has also relied on a method of counting charges rather than trials in calculating conviction rates, which may mask the scale of the problem in relation to the single-complainer trials that were a particular concern for the Dorrian review. When all this is taken into account, a 51% conviction rate starts to look less reassuring.

It remains to be seen whether single judge trials are the best way forward for prosecuting sexual offences. But the evidence to justify a pilot is there. Juries have many strengths. They represent the community and bring common sense and life experience to decisions that have weighty consequences for complainer and accused alike. But if they are making their decisions through the lens of false and prejudicial beliefs, these advantages fade away. It is perfectly possible to hold the view that juries are a valuable component of our criminal justice system, but might not be the most appropriate way of determining sexual offence cases. Finally, it is worth bearing in mind, as debate on this proposal gets underway, that the pilot is exactly that: a pilot, intended to open up the question of how best to ensure justice for all parties in sexual offence cases to further, evidence-based scrutiny that can inform future criminal processes.

**Professor James Chalmers** and **Professor Fiona Leverick** (University of Glasgow); **Professor Vanessa Munro** (University of Warwick)

***This is a slightly edited version of a post on the University of Glasgow Law School blog***

denovo

# Denovo and Property Searches Scotland join forces

PSS search capability integrated into Denovo case management software


Denovo Business Intelligence, a leading Glasgow-based software company specialising in fully customisable legal case management and accounting software, is excited to announce its integration with Property Searches Scotland, the fastest growing search company in the Scottish market. This integration is expected to provide a seamless and efficient property search experience for Denovo users.

The integration will allow anyone using Denovo's case management system, CaseLoad, to leverage Property Searches Scotland's extensive suite of reports, which includes automatic property risks checks, such as coal mining risk detection, with this then offered to add to your order. With over 30 available reports to select, on completion the reports are downloaded straight to the matter. Case and order costs are automatically retrieved and show, for use with Cashroom posting requests. In addition it offers the ability to upload supporting documents where applicable. All of this can happen from within the case management system.

"We are thrilled to be integrating with Property Searches Scotland", said Denovo Operations Director, Steven Hill. "We are committed to providing our law firm partners with the most comprehensive and efficient tools possible, and this integration will deliver just that. Our clients will benefit from a new way of ordering their full suite of reports with Property Searches Scotland. This partnership will enable us to offer our customers a more streamlined property search experience through our seamless integration with the PSS platform. We believe that this integration will be a significant value-add for our customers and law firms across Scotland."

## Faster results

The integration will also enable Denovo to provide its customers with an exceptional integration experience. By leveraging data from PSS, Denovo will be able to dramatically reduce the time spent producing reports.

"We are excited to partner with Denovo to provide their customers with the most comprehensive property search experience possible", said Property Searches Scotland's Managing Director, Michael Tolland. "We are now able to provide Denovo users with a flexible approach to delivering fast, reliable property information, supported by both organisations' renowned friendly and approachable customer service teams. Our proven track record of delivering reliable information efficiently and effectively is why we are now one of the most successful search companies in the Scottish property market. Our goal with this integration is to make it as simple as possible for conveyancers to access our full suite of reports without ever leaving Denovo's case management system. This integration with Denovo is a significant step forward in making lawyers' lives a whole lot easier."

The integration is expected to roll out in the coming weeks, and Denovo customers can look forward to an enhanced property search experience that is both seamless and intuitive.

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# Life is getting longer

Increasingly long punishment parts mean that the average time served by prisoners given a life sentence has doubled in recent decades. But has society benefited? Nigel Orr questions the trend

If your memory stretches back to the 1980s, you may well remember the controversy surrounding the licensing and subsequent ordination as a Church of Scotland minister of the late James Nelson, convicted in 1969 of the murder of his mother.

Nelson served some nine years before his release on life licence. He later served for many years as minister at Chapelhall and Calderbank. It is a sobering thought to reflect on what might have happened to him were he to be convicted today.

## Life sentences prior to 2002

As many practitioners will recall, at the time Nelson was sentenced, and for many years thereafter, the sentencing court did not impose any minimum term to be served in a life sentence. In rare cases the judge might recommend such a minimum term, but this was advisory only. At the time of Nelson's release, responsibility lay with the Secretary of State for Scotland, on the advice of the Parole Board for Scotland, to determine if and when the release of any life sentence prisoner on licence should take place.

Figures published by the Parole Board in its 2017-18 Annual Report, on the release of prisoners serving life sentences, reveal that in 1978, about the time of Nelson's release, five of those prisoners had served 8-9 years, four prisoners 9-10 years, one 10-11 years, two 11-12 years, and one over 14 years. While it is not possible to be precise, since neither the exact length of each sentence nor the time served by the longest serving prisoner is known, this equates to an average of about 10 years.

## Changes in sentencing practice

In 2002 legislative changes came into force in Scotland which were considered necessary to ensure compliance with the European Convention on Human Rights. The sentencing judge would henceforth fix what was termed a "punishment part", defined as "the part of that period of imprisonment which the court considers would satisfy the requirements of retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public)": Convention Rights Compliance (Scotland) Act 2001, s 1. At the conclusion of that period the Parole Board would be responsible for determining whether the prisoner should be released or whether they continued to pose such a risk to society that detention should continue. Similar reforms took place in England & Wales.

## Recent trends

Parole Board statistics suggest that the average time served by life sentence prisoners has increased inexorably since the 1970s. Its 2013-14 Annual Report reveals an average for those released in 2013-14 of around 13.8 years (using the same basis for calculation as with the 1978 data), the range being from 7-8 years to over 30. The increase in the average period in custody compared with those released in 1978 is therefore in excess of 35%.

More recent published data do not provide a breakdown of the length of time spent in custody by those serving 14 or more years, so the same calculation cannot be made for later years. But other data demonstrate further increases. Figures kindly supplied by the Scottish Courts & Tribunals Service for punishment parts imposed in life sentences for murder from 1 January 2010 to March 2018 reveal a range from 8 years 9 months to 37 years, with an average of 16.7 years. And published material from Scottish Government puts the average punishment part imposed in 2018-19 at 18 years, having increased from 14.3 years in 2004: *Experimental Statistics on the Length of the Punishment Part of Life Sentences and OLRs.*

Those figures of 16.7 years and 18 years represent a further significant increase on the 2013-14 figure of 13.8 years – about 21% and 30% respectively. But of course the latter figure, which is for time actually served, is not directly comparable. The punishment part is the *minimum* time that will be served. There is no guarantee of release at that stage. When the Parole Board for Scotland considers the release of prisoners reaching the end of the punishment part of their sentence, a significant proportion will be deemed unsuitable for release at that stage, and will be detained for longer on the ground that they still present a risk to the public.

In fact, the great majority of life sentence prisoners will not be granted immediate release at the end of the punishment part. As disclosed in its 2020-21 Annual Report, of the 494 life sentence cases considered by the Parole Board in 2020-21 (all of which must involve prisoners who have reached, or are about to reach, the end of their punishment part), release was directed in just 37 cases: 280 were not recommended for release, 167 were postponed or adjourned, and 10 were withdrawn. Given those statistics, the sentence actually served by most prisoners will be considerably longer than the punishment part. Some are unlikely ever to be released. It is therefore reasonable to assume that the average time spent in custody by those upon whom a punishment part was imposed in 2018-19 (average length 18 years) will exceed 20 years – double the 1978 figure.

## Views from the court

What has the Appeal Court said about the length of punishment parts in recent years? In *Walker v HM Advocate* 2002 SCCR 1036 it was said that "In the absence of significant mitigation most cases of murder would, in our view, attract a punishment part of 12 years or more... However, there are cases – which may be relatively few in number – in which the punishment part would have to be substantially in excess of 20 years."

*Walker* was in addition interpreted as concluding that 30 years was the maximum for a punishment part. In *HM Advocate v Al Megrahi* (24 November 2003, unreported) the court, having referred to *Walker*, said: "While it is not said in terms, the implication is that 30 years should be regarded as virtually the maximum that should be imposed as the punishment period."

In *HM Advocate v Boyle* 2010 SCCR 103, however, the court gave the following guidance for the fixing of the punishment part on a conviction for murder:

"[13] In our view there may well be cases (for example, mass murders by terrorist action) for which a punishment part of more than 30 years may, subject to any mitigatory considerations, be appropriate. In so far as *Walker* and *Al Megrahi* may suggest that 30 years is a virtual maximum, that suggestion is disapproved".

In *Smith v HM Advocate* 2011 SCCR 134 a punishment part of 35 years, reduced to 32 due to a plea of guilty, was held on appeal to be fully justified, in a case described as "truly exceptional". Commenting on this in *McDonald and Anderson v HM Advocate* [2011] HCJAC 71, the court noted that "there has clearly been a tendency for the length of punishment parts in all murder cases to increase with the passage of time..., and more generally we find it hard to imagine a punishment part as high as that in the recent case of *Smith* being imposed, or being affirmed, even eight to 10 years ago".

In *Wade and Coats v HM Advocate* [2014] HCJAC 88, punishment parts of 30 and 33 years were upheld on appeal. And in *Sinclair v HM Advocate* 2016 SCCR 209 a punishment part of 37 years was upheld, the court observing: "What may be regarded as an appropriate punishment part may vary from era to era."

## Pressure for more severe sentences

Whatever the reasons behind the increasing length of determinate sentences in life sentence cases, there is little doubt that pressure from the media and the public generally for longer sentences in all serious cases has grown. These days almost any high profile case seems to lead to a clamour for an appeal against the sentence as unduly lenient, whether from the media, from victims or from relatives.

Judges do, it must be said, sometimes get it wrong, but in most instances there is no prospect of successfully appealing a sentence, whether as excessive or as unduly lenient. In my capacity as head of the Crown Office Appeals Unit for over six years I reviewed every request by the Crown for consideration of such an appeal. The number with any prospect of success was small, given the range of sentence open to the judge in the exercise of their discretion.

Despite that, it was not uncommon for pressure groups and special interest groups to deluge the Crown with letters urging an appeal. Pressure on the Lord Advocate for an appeal of this sort also frequently came from MSPs representing the victim or his or her family. I can recall numerous examples of MSPs publicly criticising a sentence as "too soft". I do not at any time recall an MSP ever publicly decrying a sentence as too severe. Is this because they perceive no political advantage to be gained in supporting the rights of convicted prisoners?

Why, then, do we appear to consider as a society that long and longer prison sentences are a solution to crime? The view extends well beyond homicide cases. To exemplify the level of obsession and even vindictiveness that can arise over such matters, in one case some years ago involving animal cruelty the Lord Advocate was deluged with hundreds of letters purporting to support an appeal. On enquiry, the majority were found to be forgeries, part of an orchestrated campaign, and not emanating from the people bearing to have signed them.

## The purpose of sentencing

I am not starry eyed about offending or offenders. I spent much of my professional career prosecuting, and I am well aware of the horror

of a life taken violently. In the course of many homicide investigations I have attended crime scenes, autopsies, interviewed distressed relatives and witnesses, spent many weeks painstakingly preparing a case for court, and been satisfied to see justice done in the resulting conviction. But I also believe in the possibility of redemption, repentance, forgiveness and rehabilitation.

For a number of years I was a member of a subcommittee forming part of the Church of Scotland's Safeguarding Service. Drawing on a variety of professional backgrounds, we examined every application for employment or for a voluntary post within the church (including many posts working with those suffering from drug and alcohol abuse) where a check with Disclosure Scotland revealed a previous conviction or some other relevant piece of information.

Each case was assessed on its merits, and there were times when an applicant was considered unsuitable for appointment because of their criminal record. But one of the most encouraging and inspiring aspects of the work was the frequent example of people with quite appalling records, often linked to substance abuse, where the offender had completely changed their life and after a number of years of recovery wished to assist others with similar problems.

## Public attitudes to sentencing

Sadly, such considerations seem far from the minds of most citizens. I am driven to the conclusion that we are simply becoming a more retributive society, and that our criminal justice system is reflecting that. It is not difficult to see whence a significant amount of the pressure in this direction comes: one only has to look at the extraordinary length of custodial sentences often imposed in the United States. Much (although not all) of the pressure for a Crown appeal against the 27-year punishment part imposed on Al Megrahi, the Lockerbie bomber, came from that quarter. So did much of the criticism of the Justice Secretary's decision, on compassionate grounds, to release the terminally ill Megrahi from custody. But I search in vain for any evidence that Scotland is safer or in any other way a better place because the average time spent in custody by convicted murderers will be double the average period in the 1970s.

That lack of evidence should not be surprising. However the matter may sometimes be portrayed, the length of punishment part of a life sentence has nothing to do with public safety – anything but. First, none of the increase in time spent in custody by life sentence prisoners in Scotland appears to have any basis in research demonstrating that society is safer because of it. And secondly, that is not what the punishment part is for. Bear in mind that the "punishment part" is just that – punishment (and deterrence). It takes no account of risk, which falls entirely within the remit of the Parole Board for Scotland. That body will determine whether, if ever, a life sentence prisoner should be released, but only once the punishment part is served.

**Nigel Orr** is a retired solicitor advocate. He was formerly district procurator fiscal at Dundee, and head of the Crown Office Appeals Unit.

## Reasons for the increase

Why, then, are judges imposing increasingly lengthy punishment parts? Societal pressure aside, the introduction of the punishment part itself may be a significant factor. Its length will always be the figure that has greatest prominence in media reporting. Is there an element of double counting here? Are judges tending to identify the figure they feel is the appropriate *total* time that should be served, and selecting that as the punishment part, regardless of the role of the Parole Board?

Whether or not there is such an element of double counting, when one reaches the upper end of the scale the length of the punishment part can be little more than arbitrary. It is simply not possible to look 20 or 30 years into the future and forecast what factors may come into play during that period. Is locking someone up for 30 years without the prospect of earlier release, no matter what evidence of remorse, rehabilitation or other changes might become available during that period, therefore ever justifiable? Nor does the practice take account of changes in the approach to offending, or sentencing, that might take place during that period – and there will inevitably be changes, for better or worse. On the other hand, if any determinate part of a life sentence were to be subject to review, for example after a proportion of it had been served, or a minimum period such as 10 years, the sentencing judge, or another judge, would have the opportunity to consider whether the determinate part remained appropriate.

For some years there has been considerable pressure on courts not to impose short sentences of imprisonment, but to select non-custodial alternatives on the ground that research has demonstrated these to be more effective in preventing reoffending. In the light of that research the Scottish Government introduced a presumption against the imposition of sentences of under three months, subsequently increased to 12 months: Presumption Against Short Periods of Imprisonment (Scotland) Order 2019. It is ironic, therefore, that custodial sentences for the most serious crimes are increasing at such a rate without any evidence of the effectiveness of *that* policy, and indeed without any apparent consideration of the rationale behind the increase.

I do not regard this perspective on sentencing as based on a particular religious, moral or political position. But more than 25 years in Scotland's criminal courts taught me that those caught up in the criminal justice system, whatever they have done, are frequently among the most vulnerable in society. Media reporting of court proceedings focuses on the offence, and increasingly on victims, but seldom on the circumstances of the offender, thus presenting a skewed picture to the public. Judges, of course, require to take all such matters into account when determining sentence, but the pressure on them is great. Victims must have a voice, but balance needs to be maintained, and I fear we are losing that balance.

Do we want to follow the transatlantic pattern of absurdly long sentences? Or do we as a society want to hang on to such concepts as rehabilitation and forgiveness?

And finally, what of James Nelson? Would he be released today after serving nine years of a life sentence? And would he, or would Scotland, be any better for more time spent in custody?

***I am grateful to the Scottish Courts & Tribunals Service for providing some of the data upon which this study is based.***

# Tense, nervous headache?


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# Wagatha Christie and Blue Murder at the Tesco Express?

While a long-running drama has brought headlines for trade marks, a recent case has highlighted a changing approach which could lead to an increase in claims for alleged breaches where logos or branding look sufficiently similar.

While the curtain may have fallen on one of the most captivating legal disputes in recent years, it will soon be "curtain up" for the play which recreates the famous "Wagatha Christie" dispute. The producers faced an unexpected stumbling block after it was revealed that Rebekah Vardy's application to trademark the popular pun had been accepted.

Following the conclusion of her high-profile litigation against Coleen Rooney, Vardy took the commercially savvy decision to seek to trademark the phrase which had, due to the power of social media and the extensive public interest, became synonymous with the court proceedings. It is certainly thought that merchandise which makes use of the iconic pun might allow Vardy to recoup some of the legal fees she has to pay to Rooney, which are estimated to exceed £1,500,000.

Alexandra Glen / Featureflash / Shutterstock

Intellectual property can be a key asset, so it is vital to ensure that it is properly protected. Although the law of passing off can provide some limited protection, it is much better to register a trade mark to avoid having to try to prove that passing off has occurred.

Trade marks are governed by the Trade Marks Act 1994. In terms of this legislation, the holder of a registered trade mark has an exclusive right to use that registered mark in the UK in respect of the goods and services which are protected. Trade marks will often apply to only certain types of goods and services – the "Wagatha Christie" trade mark does not cover certain clothing or household items as opposition was lodged to the application by Welspun UK Ltd, which owns towel and bedding brand "Christy".

## Discount wars

One of the main purposes of a trade mark is to avoid any such brand confusion. It is generally accepted that the public should be able to identify different brands easily and distinguish between them without confusion which could be caused by similar names or branding. The recent decision in *Lidl Great Britain Ltd v Tesco Stores Ltd* [2022] EWCA Civ 1433 highlights the obligation on companies to ensure that their branding is sufficiently distinct.

In 2020, Tesco began using a new logo to display its Clubcard price promotions. This logo consisted of a yellow circle on square blue background with the words "Clubcard Prices" within the yellow circle. Lidl alleged that the use of this logo infringed its trade mark. The two logos are clearly similar in nature, with Lidl's main branding making use of a yellow circle (albeit trimmed in red) placed on a blue background. In addition to Lidl's logo containing its name, it also has trade mark rights in respect

*"Trade marks will often apply to only certain types of goods and services – the 'Wagatha Christie' trade mark does not cover certain clothing or household items"*

of the same logo with its name removed, which was referred to in these proceedings as the "wordless mark". Tesco's position, which was set out in a counterclaim, was that Lidl had never made genuine use of its wordless mark, therefore it should be revoked on the basis of non-use. Tesco also argued that Lidl had registered a trade mark in respect of the blank blue and yellow logo as a defensive step to attempt to create a monopoly over the branding and prevent any third party from using it.

Lidl made an interim application to the High Court to have Tesco's counterclaim struck out on the basis that Tesco had not done enough to overcome the presumption that Lidl had acted in good faith when registering the trade mark. However, Tesco successfully appealed the initial decision in Lidl's favour. As a consequence, Lidl was required to provide sufficient evidence to show that it had not acted in bad faith.

This ruling certainly seems to suggest that the bar for bad faith allegations is significantly lower than had previously been thought. Smith J had ruled in the original decision that the allegation that the applications for the "wordless mark" had been used solely as an attempt to prejudice third parties was "no more than an assertion". On considering the appeal, Arnold LJ instead found that this was a permissible inference from the facts pleaded. The Court of Appeal also held that a claim which asserts that another party has sought unjustifiably broad protection which could constitute an abuse of the trade mark system must be properly considered on its facts. Accordingly, it was held that Tesco's counterclaim did in fact have a real prospect of success and so should not be struck out.

*"Ultimately, Tesco was unable to establish reasonable grounds for making the bad faith allegation"*

## Surveys less popular

Another interesting point considered in these proceedings was the use of survey evidence. Parties in trade mark disputes often rely on surveys taken from the public to demonstrate the strength of their trade mark. Although the courts tend not to rely too heavily on these, they will often find them a useful indicator of the extent to which a trade mark is recognised. Recent decisions however have suggested that the courts are taking a stricter approach and are less keen to consider evidence produced by way of public surveys.

This was first properly addressed in *Interflora Inc v Marks & Spencer plc* [2012] EWCA Civ 1501. M&S purchased the rights to the advertisement word "Interflora" from Google. This meant that when anyone searched for Interflora, the M&S flower delivery webpage would appear as one of the sponsored links. Interflora objected to the use of its name, for which it had obtained a trade mark, on the basis that there was a high chance that customers would confuse the two brands. The court ordered that neither party could produce survey evidence without first obtaining leave to do so. Although the court originally accepted Interflora's application to refer to information gathered from surveys, the Court of Appeal overturned this decision on the basis that evidence should only be admissible if valuable. Interflora had failed to demonstrate properly the value of the evidence.

Returning to Lidl's claim against Tesco, Lidl sought to use survey evidence to show what the customer perception of their "wordless mark" was. Tesco objected to this on the basis of (i) the value to the court; (ii) reliability; and (iii) the fact that Lidl had carried out these surveys without first seeking leave of the court. The court held however that the survey evidence was likely to be of real value to the court in assessing the extent of recognition of the trade mark.

Ultimately, Tesco was unable to establish reasonable grounds for making the bad faith allegation. The court was also satisfied that Tesco was guilty of "copying with a view to enhancing the value perception of Tesco's own Clubcard Prices offering by adopting a getup, in the form of a blue background and yellow circle, which already had a proven association with a strong value proposition (i.e. the Lidl logo) in the minds of consumers".

## Claims outlook

These proceedings highlighted the difficulty in proving an allegation of bad faith, with the court noting that any such claims must be "distinctly pleaded and distinctly proved". The case also provides interesting commentary on survey evidence, reaffirming the position that requests to lead such evidence must be considered on a case-by-case basis and in light of the facts in dispute. Tesco has advised that it intends to appeal the decision on the basis that there was no deliberate intent on Tesco's part to copy Lidl's trade mark, and that while the logos are similar there is a clear distinction between the two. Unless Tesco is successful in appealing the decision, it is anticipated that there will be an increase in claims for alleged breaches of trade marks where the logos, products or branding look sufficiently similar.

Trade marks are crucial for providing brands with protection and are also a valuable marketing tool. Anyone wishing to use the Wagatha Christie phrase commercially in the UK will either have to have permission from Rebekah Vardy or risk a claim for breach of her trade mark. Given the continued interest in the case, and the fact that the play is to start touring later this year, there is potential for there to be significant commercial value in this decision.

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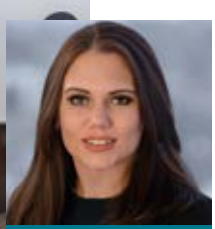

**Erin Grieve** is managing associate and a solicitor advocate in the Commercial Disputes team at Addleshaw Goddard

# Sky's the limit?

The space industry is gaining momentum in jurisdictions including Scotland, bringing a need for clarity as to the respective application of (non-uniform) national laws, and international treaties. Anna Jaconelli and Jamie Watt explore the boundaries

Land ownership in Scotland traces back to Roman law, where the *ad coelum* doctrine suggested that the owner of a property had rights "all the way to Heaven and all the way to Hell".

Whilst this may imply that a property owner has all the rights to the airspace above it, the concept is more nuanced. Property owners have the right to peaceful enjoyment of their property, including their airspace, and entering another's airspace through signs, wires, or cranes without permission can be trespassing. Furthermore, specific regulations apply to certain sectors – for example, drone operators should not fly their drones within 50m of people or property without their consent. To do so may be considered a violation of Civil Aviation Authority ("CAA") regulations, alongside constituting a breach of the right to peaceful enjoyment of property or even trespassing.

Yet these rights and prohibitions are often qualified. Aircraft have the right to fly over land at a reasonable height, subject to certain restrictions and regulations. Moreover, planning regulations may limit the height of tall structures to avoid interfering with the rights of neighbouring landowners. Additionally, it is clear from *Bernstein v Skyviews & General Ltd* [1978] 1 QB 479 (an unsuccessful damages claim for trespassing in airspace) that rights in airspace extend only up to a height necessary for ordinary use and enjoyment of land. Ownership does not extend to the "Heavens".

## Who "owns" the airspace above your property?

Under the Chicago Convention on International Civil Aviation 1944, which has been ratified by 193 countries, including the UK, each state has exclusive sovereignty over the airspace above its territory and is responsible for regulating air traffic within that airspace. Defining territorial extent is important for this reason, alongside many other airspace related reasons, including the levying of charges and taxes, and implementing national security measures. However, there is no international agreement on the exact boundaries of a state's airspace.

- **Horizontal** airspace generally aligns with the state's territorial waters, extending 12 nautical miles (22.2km) from its baseline. However, the precise boundaries may vary depending on several factors such as the state's geographical location, historical claims, international agreements, and specific circumstances.
- **Vertical** limits refer to the altitude above the mean sea level that a state controls. This limit determines the extent of a state's control over its ability to regulate and control air traffic, conduct surveillance, and enforce national security measures. Additionally, the vertical limit has implications for international air travel, as it determines the extent to which a state can restrict or regulate the overflight of its territory by foreign aircraft. Most countries claim sovereignty over the airspace up to a certain altitude above their territory, with the altitude limit varying depending on the country and the purpose of the airspace regulation.

In the UK, the CAA regulates civil aviation within legal and policy frameworks set out by Parliament and the Secretary of State. Airspace is divided into different classes based on altitude limits and regulations. Controlled airspace is designated airspace where air traffic control services are provided, while uncontrolled airspace has no air traffic control. The highest level of UK airspace is class C, extending from FL (flight level) 195 to FL 660 (i.e. from 19,500 up to 66,000 feet).

Elsewhere specific limits can vary depending on the country and the type of airspace involved, such as controlled airspace, uncontrolled airspace, or special use airspace. The process for defining airspace boundaries may involve coordination and negotiations with neighbouring countries in cases where the respective airspace overlaps or borders other countries' airspace. Furthermore, national laws and regulations may play a significant role in determining a state's airspace boundaries. For instance, in the United States, the Federal Aviation Administration (FAA) has established regulations that govern the use of airspace within the country. These regulations include restrictions on flying over certain areas, such as military installations and national parks. Overall, determining the boundaries of a country's airspace is a complex process that involves a combination of international agreements and conventions, as well as national laws and regulations.

## Unauthorised use of airspace

When an airplane or other airborne vehicle enters a country's airspace without permission, it could be deemed a violation of that country's sovereignty and territorial integrity, potentially creating disruptions to air traffic control and posing a risk of collisions. Moreover, it could be perceived as a threat to national security. Hence, most nations have established strict regulations that govern and monitor the entry of airborne

vehicles. These regulations play a vital role in protecting national security and guaranteeing the safe operation of authorised vehicles.

The Royal Air Force is responsible for intercepting and identifying unauthorised vehicles in UK airspace. International law prohibits the use of force against civilian aircraft unless the aircraft poses an imminent threat to human life. Therefore, before using force, the country must take all necessary steps to identify the vehicle and communicate with the pilot to attempt to resolve the situation peacefully. The use of force must be a last resort when all other means of resolving the situation are exhausted. Similarly, the use of force against military or government aircraft is subject to the principles of proportionality and necessity.

An instance of an unauthorised plane occurred in December 2020 when a small airplane entered restricted airspace around London without authorisation, prompting the RAF to deploy fighter jets to intercept the plane. The pilot did not respond to attempts to contact, raising concerns, and two Typhoon jets were launched from RAF Coningsby, intercepted the aircraft and escorted it to Stansted Airport where it landed safely. This highlights the importance of having regulations and protocols in place to address potential security threats in a country's airspace.

## The boundary between airspace and outer space

Most countries claim sovereignty of their airspace up to a certain altitude, but the transition between airspace and outer space is not universally defined. The Kármán line, at an altitude of 100km (62 miles) above sea level, is the most widely used definition, but it is not officially recognised by the United Nations. While NASA defines the US boundary of space as 50 miles (80km), the UK and Russia adopt 62 miles (100 km) and proposed this for international recognition.

The emergence of private space exploration and tourism has highlighted the need to define the boundary between airspace and outer space. Different definitions of outer space can arise depending on the context. For instance, NASA and the UK Space Agency have differing criteria for defining an astronaut, based on their respective definitions of outer space. This discrepancy can cause confusion and complications in international cooperation and regulation of space activities, and has led to various interpretations and disputes regarding the legal status of objects in space and the rights and responsibilities of space-faring nations.

*"The emergence of private space exploration and tourism has highlighted the need to define the boundary between airspace and outer space"*

## Who "owns" space?

Under international law, outer space is considered the "common heritage of mankind" and cannot be claimed by any one person or nation as their territory. The Outer Space Treaty of 1967 prohibits any country from asserting sovereignty over any celestial body, including the moon, and ensures that space is free for exploration and use by all nations.

However, as both the human population and the demand for resources grow, the availability of resources becomes increasingly limited and exhaustible. This has led to the search for alternative sources beyond the Earth's surface, including the ocean floor and outer space. As previously mentioned, there is no clear definition of what constitutes "outer space", and this ambiguity has become more significant in recent years, following a shift towards commercial space activities. Private companies have begun to explore space, seeking to exploit and "own" its resources.

While the Outer Space Treaty prohibits national appropriation of celestial bodies, it is unclear whether private entities are also prohibited from claiming ownership over the resources that they extract. This has led to a debate about how to regulate private space exploration and resource exploitation, and whether new international agreements are needed to clarify the legal framework for these activities. Some countries, such as the United States, have taken steps to encourage private space exploration and development, including the 2015 Commercial Space Launch Competitiveness Act. This Act allows US citizens to engage in the commercial exploration and recovery of space resources, which are defined as any non-living resources extracted from asteroids, the moon, or other celestial bodies.

The issue of private ownership and exploitation of space resources is likely to be the subject of ongoing debate and discussion among international organisations and governments in the coming years. In 2020, the UK signed the Artemis Accords, a set of principles proposed by the United States for the exploration and use of outer space, which include responsible extraction and use of space resources and the preservation of heritage sites and artefacts in outer space. However, some experts and organisations have raised concerns that the Accords may not be compatible with existing international space law and may prioritise the interests of spacefaring nations over the wider international community.

*"Russia and other countries have proposed an international agreement to address the issue of space resource ownership, but no such agreement has been agreed yet"*

Currently, there is no consensus. Russia and other countries have proposed an international agreement to address the issue of space resource ownership and exploitation, but no such agreement has been reached yet. The issue of private ownership and exploitation of space resources is likely to be a subject of ongoing discussion and debate among international organisations and governments in the years to come.

## "NewSpace"

***Space tourism***

Asteroid mining is an industry within "NewSpace", the emerging private space industry that is distinct from traditional government run space programmes. The NewSpace industry also encompasses other activities including space tourism, satellite operations, and more. This rapidly evolving sector is likely to play an increasingly important role in coming years. Since the Ansari X Prize in 2004, demonstrating the feasibility of commercial spaceflight, interest has been sparked in a new era of space tourism. This raises legal questions about licensing and safety oversight, liability and insurance implications, and passenger rights as regards consent, privacy etc. Leading companies in this field include Virgin Galactic and Blue Origin, both of which have completed successful projects.

As long as suborbital flights take off and land in the same state, that state's national law will apply. The US and the UK have developed specific rules for suborbital flights. The US grants power for regulation and licensing to the Federal Aviation Administration's Office of Commercial Space Transportation, while the UK's CAA is responsible for licensing suborbital flights.

When a flight involves more countries, international law will apply, but it is uncertain whether this would be aviation law or space law.

The legal status of suborbital flights remains uncertain due to their position at the boundary between the Earth's atmosphere and outer space, and this leaves them within the remit of both air law and space law regulations. Initially marketed for space tourism, suborbital flights have gained traction in recent years as a viable means of launching small satellites into space, leading to the emergence of new companies. For example, Virgin Orbit used a modified Boeing 747 to launch small satellites into space, further blurring the line between air law and space law regulation. The system launched from an altitude of roughly 35,000 feet, within the Earth's atmosphere. However, its payload was designed to reach orbit, which is typically governed by space law. As technology and business models for suborbital flights continue to evolve, the legal status of these flights will remain a subject of ongoing discussion.

**Satellites**

While it is true that the Outer Space Treaty prohibits national appropriation of outer space and celestial bodies, it does not prohibit the ownership of artificial objects such as satellites. Countries and private companies can claim ownership and use of objects that they launch into space. Satellites may also be "owned" on a *de facto* level by obtaining the right to use the specific radio frequencies that are used to communicate with the satellite. To obtain this right, one must go through the frequency allocation process established by the International Telecommunication Union ("ITU"). The ITU allocates frequencies to different countries and organisations for use in satellite communications, and satellite owners must comply with international regulations and standards to ensure the safe and responsible use of the radio spectrum.

Small satellites are one of the best examples of new space activities. Scotland has emerged as a prominent player in the global satellite industry, producing more satellites than any other location outside California. This can be attributed to its well established aerospace sector and advantageous geographic location. Local manufacturers such as AAC Clyde Space have been instrumental in this growth. Additionally, with companies like Spire Global now choosing to design, build, and test their satellites in Scotland, it is rapidly becoming a key hub for the satellite industry.

Small satellites are considered space objects, and as such, states have rights and obligations regarding them. As per article VI of the Outer Space Treaty, state responsibility applies to any space activity that can be linked to a certain state or nationality. However, national space laws may also provide liability arrangements related to small satellites, and some jurisdictions may mandate third party liability insurance as a requirement for launching activities.

The Outer Space Act 1986 and the Space Industry Act 2018 are the principal instruments regulating activities carried out in the UK. Any individual or organisation that seeks to engage in such activities must first obtain a licence. Under s 34 of the 2018 Act, operators have strict liability for injury or damage caused by their activities, and by s 36 anyone conducting spaceflight activities must indemnify the Government or a listed person or body against any claims for loss or damage resulting from those activities, subject to limits applied pursuant to s 12(2). However, regs 218 and 219 of the Space Industry Regulations 2021 exempt certain persons from benefitting from strict liability and describe situations in which the limitations on indemnification may be disapplied. There are also requirements relating to insurance, principally in the licensing regime referred to in the 1986 Act and s 38 of the 2018 Act.

## Search for clarity

With the increasing commercialisation of space and growth of new industries, there is a need for ongoing international cooperation and collaboration to address these complex issues and ensure that the use and ownership of airspace and outer space are managed in a way that promotes safety, security, and sustainability for all. For those operating in the sector, obtaining a clear picture of rights, responsibilities and likely upcoming changes in regulation is key.

**Anna Jaconelli** is a trainee solicitor, and **Jamie Watt** a partner and head of the Intellectual Property & Technology team, at Harper Macleod

# Bullying: a curse on working life

In the wake of high profile cases of bullying and harassment at work, Marianne McJannett outlines the types of behaviour that may constitute such conduct, and how employers should respond to allegations

One might be naive in thinking that the tactics of bullies are confined to the school playground, and once you reach the ripe age of adulthood and working life, you'll never be faced with incidents of bullying again. Sadly, as many employees and all employment solicitors can attest, bullying remains a prevalent workplace issue, and as we have now seen, remains an issue even in the highest positions within Government.

Last month the investigation report into Dominic Raab upheld two complaints of bullying against him; a week later more emerged on the toxic, bullying culture at the CBI, following the dismissal of its former director general. Most recently, we've seen reports of a culture of misogyny and bullying at Police Scotland, showing that an organisation can have all the right policies in place, but these are not worth anything if they're not applied and enforced. Here we look at the legal position around bullying in the workplace and what steps employers should be taking to address this.

## What behaviour counts?

Harassment is any unwanted physical, verbal or non-verbal conduct that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. A single incident can amount to harassment. Bullying is harder to define than harassment, as there is no specific legal definition or prohibition, which is a difficulty we have seen commented on in relation to the Raab investigation and resignation. Bullying can be defined as offensive, intimidating, malicious or insulting behaviour involving the misuse of power that can make a person feel vulnerable, upset, humiliated, undermined or threatened. It can take the form of physical, verbal or non-verbal conduct.

An employer may be liable under the Equality Act 2010 if it fails to protect its employees and other workers from harassment in the course of their employment. This includes harassment by members of staff and, in some cases, by third parties. In addition, employers have several implied duties in the employment contract, including a duty to provide a safe and suitable working environment, a duty not to destroy mutual trust and confidence, and a duty to provide redress of grievances. The law does not require an employer to have a written policy on bullying and harassment, although many do have such a policy in recognition of the sensitivity and seriousness of such issues, and these policies should dovetail with disciplinary and grievance policies in place as well.

In addition, an employer could be faced with grievances or constructive dismissal claims by employees who feel they have not been protected or had any complaints addressed seriously.

## Guidance on investigations

Where an allegation of bullying has been made, an employer should investigate this in line with the appropriate policy.

At the outset, the terms of reference of an investigation should be set out and agreed by everyone involved so that the investigator's role and purpose are clear. Acas guidance on workplace investigations suggests these terms should factor in the following:

- what the investigation is required to examine;
- whether a recommendation is required;
- how the findings should be presented – for example, an investigator may be required to present their findings in some form of investigation report;
- who the findings should be reported to and who to contact for further direction if unexpected issues arise or advice is needed. This might be HR or a similar experienced and informed source.

An internal workplace investigation should ideally be conducted by someone independent to the allegations with sufficient skill and experience. Where there is not someone independent internally to carry out the investigation, external help can be sought from HR professionals or solicitors. It is also important to think about the wider process that the investigation might lead to, and if it could result in a disciplinary hearing and appeal, having someone independent to deal with the investigation could be important. The timeframe in which an investigation will be carried out is crucial, and from experience, these tend to take longer than originally intended. Employers should consult their policies to see whether any specific timeframes are set out there, and inform those affected if the timeframe may not be met.

## Outcomes

Once a workplace investigation has been completed, the outcome is usually presented in a report that sets out both the findings and recommendations. This may lead to further action being taken, for example under the organisation's disciplinary policy, or you may have an employee who resigns following release of the report.

Ultimately, the main takeaway from this and the recent public cases about bullying is that an employer should do all it can to try to prevent bullying happening in the first place.

Ensuring that staff are aware of their legal obligations, and putting in training about these issues, are key to clamping down on bullying behaviour – as is, in the event of an investigation being needed, taking steps to ensure that those carrying it out know what is required of them.

**Marianne McJannett** is Head of Employment with Bellwether Green

# Briefings

Our latest roundup focuses on recent Sheriff Appeal Court decisions, covering a wide range of issues of procedure and practice

## Civil Court

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

I thought it would be interesting to concentrate principally in this article on recent judgments from the Sheriff Appeal Court – and there are many. The cases I have selected are quite varied and some deal with areas of substantive law as well as fundamental issues of procedure and practice.

The SAC has been sitting now for seven years. Over its first five years there were on average about 280 appeals per year, but in the year to December 2021 (the first Covid year) there were only 132 cases. I suspect that the numbers have increased to former levels now, but unfortunately there is no public information about this, nor about the types of cases and the basis of appeals, so it is not possible to analyse its current workload in any meaningful way. It certainly seems to be serving the purpose for which it was introduced, if these decisions are anything to go by.

### Prescription and *res judicata*

In *Beattie v Gloverall plc* [2022] SAC (Civ) 33, a commercial agent sought compensation for damage suffered as a result of the termination of his agency. For reasons I do not fully understand, he raised multiple sheriff court actions. An action in Jedburgh was dismissed on a plea of no jurisdiction on 8 January 2020. He then raised an action in Kilmarnock on 15 January which was ultimately settled by tender and acceptance. On the same day he raised an action in Ayr which was ultimately remitted to Kilmarnock under OCR, rule 26.1(3) on the basis that Ayr had no jurisdiction. By the time the case was transferred to Kilmarnock the quinquennium had expired.

At first instance, the sheriff took the view that the action was not time barred and that it was not subject to *res judicata*. The SAC held that in terms of rule 26.1(7), a "transferred cause shall proceed in all respects as if it had been originally brought in the court to which it is transferred", and accordingly the claim had not prescribed. However, relying heavily on *Smith v Sabre Insurance Co* 2013 SC 569, it held that the claim was *res judicata* and the previous action in Kilmarnock had resolved the issue between the parties.

### When application "made"

Section 28(2) of the Family Law (Scotland) Act 2006 provides that any application for a capital sum made by a cohabitee must be made not later than one year after the parties' separation. In *Knight v Henderson* [2023] SAC (Civ) 2, the question was whether such an application should be treated as having been made on the date when the initial writ containing such a crave was lodged for warranting or when it was served on the defender. The sheriff held that it was the former and the application was accordingly timeous. The SAC disagreed: "in respect of actions initiated by summons or initial writ, there is no conjoining of the parties... until the defender has been cited by service". That is the date on which the application should be treated as having been made. Interestingly, the SAC sanctioned the employment of senior counsel for this appeal.

### Notes of appeal

In *Anderson's Trustee v Anderson* [2023] SAC (Civ) 3, Sheriff Principal Turnbull, as procedural appeal sheriff, had to consider arguments from the respondents under rule 6.9 of the Sheriff Appeal Court Rules 2021, directed to the terms of the note of appeal lodged. Rule 6.2(2) provides that the note of appeal in form 6.2 should, amongst other things, "state the grounds of appeal in brief specific numbered paragraphs setting out concisely the grounds on which it is proposed that the appeal should be allowed".

On the basis of the written submissions advanced by both parties, the sheriff principal decided that (1) the detailed criticism of the precise terms of the note of appeal did not raise a question of competency; (2) the appellant's attempt to open up prior interlocutors to the one against which appeal had been taken, was not permitted: this would only be allowed if it was required "for the purpose of doing justice between the parties in respect of the decision which has been appealed"; and (3) each statement in a note of appeal does not need to narrate an error of law.

### Right of rejection

In *King v Black Horse Ltd* [2023] SAC (Civ) 4, the pursuer and appellant was the hirer of a Jaguar under an HP agreement. He alleged that the car was defective. He purported to reject the car but continued to use it, and continued to make payments under the agreement, tax it, insure it, and drive it. The pursuer claimed that he was entitled to rescind the contract, but the sheriff granted the defenders' motion for summary decree and dismissed the action. The SAC refused the pursuer's appeal, and the judgment contains a handy summary of the law on contract and rejection. The post-rejection use of the car was sufficient alone to enable the SAC to decide against the pursuer. There is a hint in the judgment that the pleadings may have had some part to play in the outcome. The court refers to the appellant's failure to lodge an intelligible record, but the judgment does not elaborate on this.

### Appealing refusal of recall of decree

*Bell v Farmer* [2023] SAC (Civ) 6 was decided by Sheriff Principal Anwar, who posed this question: "Is there a right of appeal against the refusal to grant an application for recall in simple procedure actions?" In a claim for damages by a householder against a tradesman, the defender/respondent failed to lodge a response to the claim form (apparently an oversight by his solicitor) and decree was granted. He applied for recall and, after a "fraught" hearing on the application, the summary sheriff refused to recall it. The same sheriff ruled that an appeal against that decision was incompetent. The respondent appealed, and, somewhat confusingly, became the appellant, with the claimant becoming the respondent.

The latter first argued that, on interpretation of the legislation, no right of appeal existed. After considering the statutes and their procedural context, the sheriff principal held that Parliament could not possibly have decided to exclude such a right. A decision to refuse an application to recall fell within the definition of a "final judgment in a simple procedure case" in terms of s 82(1) of the Courts Reform (Scotland) Act 2014. As for the refusal to allow an appeal to be made, she said that once an appeal has been lodged, the sheriff is *functus* and cannot "entertain questions about the competency of the appeal", which is solely a matter for the appeal court.

### Title to sue

In *McGarrigle v UK Insurance* [2023] SAC (Civ) 7 the pursuer made a claim for damages following a road accident. He was a self employed private hire driver, driving a leased vehicle. He was unable to lease a replacement vehicle and obtained one under a credit hire agreement for 81 days at about £100 per day. He sued for the credit hire charges. Dismissing the claim, the sheriff said he had no title to sue. The SAC overturned this decision.

It commented that "The sparseness of the appellant's pleading has... obscured analysis of his claim." I have observed elsewhere that while an overemphasis on the formality of pleadings can lead to injustice, a disregard for the basics of pleadings can have a similar effect. The obligation to plead a coherent and relevant case necessarily involves a proper consideration of the legal rights and obligations arising in a particular set of circumstances. This should be done at the outset before the pleadings are drafted, rather than during a debate when a discussion of the pleadings may expose inadequate preparation. While the SAC did not consider that the claim should be dismissed on the grounds of no title to sue, it emphasised that this was a distinct plea in law. It did not "endorse the present claim as relevant or fully specified", and remitted to the sheriff to proceed as accords.

### Summary application decision

In *Miller v Miller* [2023] SAC (Civ) 8 a summary

application hearing concluded on 25 October 2021. On 21 July 2022 the sheriff assigned a hearing to issue an *ex tempore* judgment. The court made the point – as has been stated in a number of cases recently – that this was not an *ex tempore* judgment. Furthermore, s 50 of the Sheriff Courts (Scotland) Act 1907 provides *inter alia* that, where a hearing is necessary in a summary application, the sheriff "shall give judgment in writing".

The SAC made it clear for future reference that "what a sheriff cannot do (in either an ordinary action or in a summary application) is reserve judgment and subsequently purport to pronounce an *ex tempore* judgment. Providing to parties on request a transcript of the *ex tempore* judgment (as happened in the present case) is not giving judgment in writing.

"...In our view, in a summary application, where evidence has been led, it is incumbent upon the sheriff to issue a written judgment incorporating findings in fact and law; and including the reasons for their decision on any questions of fact or law or of admissibility of evidence".

## Is simple procedure fair?

In *Doran v SC Causewayside* [2023] SAC (Civ) 10 the party appellant appealed to the SAC against what happened in his claim, the details of which are immaterial. He argued that the proceedings had not been conducted in a fair manner and in breach of the Simple Procedure Rules. Four specific grounds of appeal alleged bias on the part of the sheriff, an unfair request on the appellant to lodge documents in support of his claim, the use of unless orders, and unfair conduct of the evidential hearing, each one of which was dealt with succinctly by Sheriff Principal Ross, who considered that the sheriff did exactly what the rules required him to do. The sheriff was mindful that, although a party litigant may be assisted to understand proceedings in general, a court cannot assist a party to win his case (*Barton v Wright Hassall* [2018] UKSC 12): "The appellant demands too much of the sheriff, and too little of himself."

## Dissolution of partnerships

*NHBC v Henderson* [2023] SAC (Civ) 11 involved a complex dispute centred on partnership law in Scotland. The court set out in simple terms the legal effect of a subsequent dissolution of a partnership on the rights and obligations of those concerned in a contract to which the partnership was a party. I recommend copying paras 37 to 42 of the judgment, and the cases referred to there, for future reference.

## Specification and fair notice

In *Goldsmith & Co Estates v Scaliscro Estates* [2023] SAC (Civ) 13 the pursuer raised a commercial action for payment of £90,000 for work done under a contract for provision of estate management services. After procedure intended to cure the inadequate specification of the claim, following debate the court refused to allow most of the heads of claim to go to probation. The SAC substantially agreed with the sheriff's decision.

It said: "In any litigation, the pursuer requires to give sufficient notice of the essentials of its claim to allow the defender a fair opportunity to understand the claim, and to prepare any available defence. The degree of specification required will vary... Parties agreed that the test for specification was as set out in Macphail, *Sheriff Court Practice* (4th ed), at para 9.32...

"In a commercial action, fair notice may be based on a combination of relatively brief written pleadings together with productions such as affidavits, a Scott schedule, timesheets or other sources of evidence. That flexibility does not, however, relieve the pursuer from giving fair notice.

"...What is required will depend on the nature of the case but regard must also be had to whom the pleadings are primarily addressed: the other party, and what the other party may be taken readily to understand... An argument on specification is not an arid pleading exercise, because it foreshadows the practical preparations necessary for proof, and focuses the issues on which evidence will be led. A loosely-specified claim, or defence, can lead to an unduly lengthy, wasteful, poorly-focused proof, and may on occasion serve to obscure that the claim is not relevant, or capable of being proved."

## Dispute resolution: arbitration

Three cases from the Court of Session involving major contractual disputes highlight different ways in which parties have tried to resolve them without following traditional adversarial litigation to the bitter end. However, procedural issues associated with them did cause some problems.

In *Briggs Marine Contractors v Bakkafrost Scotland* [2023] CSOH 6 the parties had entered into a written salvage contract which included an arbitration clause providing that "any dispute arising out of or in connection with" the contract should be referred to arbitration. After work commenced, complications arose, and the parties continued their existing working relationship but on informal and different terms. The pursuers sought payment of the work that they had done under these new terms. The defenders took a preliminary plea that the courts had no jurisdiction because the parties were obliged to arbitrate.

A debate centred on the meaning of the phrase quoted above and it was interpreted broadly. The plea was sustained, the court following the reasoning that the parties "as rational business people must be taken to have intended that a dispute so closely connected to the [contract] as the present one – even if they could not have foreseen the precise nature of the dispute, or the circumstances in which any second agreement might be entered into – would be resolved by arbitration, in order that all disputes be dealt with under the 'one-stop' approach".

## Dispute resolution: adjudication

In *Atalian Servest AMK v BW (Electrical Contractors) Ltd* [2023] CSOH 14 a decision by an adjudicator in relation to claims under a construction contract was challenged on various grounds. As might be expected, the sums of money involved were substantial, the facts of the case complex, and the adjudicator's general approach to his task was criticised in numerous ways. It is interesting to observe that the court was referred to no fewer than 30 cases on adjudications, all decided in the last 20 years. The Lord Ordinary upheld the adjudicator's decision.

As I was completing this article, the decision of the Inner House refusing the appeal from the Lord Ordinary's decision was published: [2023] CSIH 18. The Lord President reviewed earlier decisions in English and Scottish cases and highlighted certain basic features of adjudication that must be borne in mind: "'The purpose of the scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional basis and by requiring decisions by adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether these decisions are wrong in point of law or fact, if within the terms of reference. It is a robust and summary procedure...'

"...Having cut to the chase, the adjudicator used a broad axe with a blunt edge to reach a robust and summary conclusion."

## Commercial action inspiration

Finally, in *Hill v Apleona HSG* [2023] CSOH 15, a commercial action, Lord Braid took the seemingly enlightened step of remitting certain aspects of a dispute about dilapidations to a reporter. He oversaw the preparation of a joint remit at a procedural hearing. From then on, however, things went off the commercial rails. In a masterpiece of understatement, he observed: "Unfortunately, the remit has not turned out to be the speedy panacea that the court had envisaged."

There were delays in instructing the report, delays in providing information, and uncertainty about what the reporter's task, authority and powers actually were. The reporter produced a draft report many months later (the delay was not his fault), but this, "rather than simplifying matters, has fanned the flames of the dispute". I suppose this just goes to show that even in commercial actions, as someone once said, the best laid schemes "gang aft agley, and leave us nought but grief and pain, for promised joy". Perhaps that could have been inserted into the interlocutor somewhere.

# Briefings

## Employment

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In the last couple of months, the Equality & Human Rights Commission ("EHRC") has entered into s 23 agreements with McDonald's and IKEA UK. Each attracted significant press coverage. In this article, we discuss the legal context of this type of agreement.

The EHRC is a regulatory body which oversees and ensures compliance with the Equality Act 2010. Its responsibilities comprise "reducing inequality, eliminating discrimination and promoting and protecting human rights". It has various enforcement powers at its disposal, including investigatory powers; the ability to impose unlawful act notices and action plans and to apply for injunctions or interdict; as well as litigation powers, such as providing legal assistance or intervening in legal proceedings brought by others. The EHRC can also enter into voluntary binding agreements with employers. These are known as s 23 agreements as they are based on the powers in, surprisingly enough, s 23 of the Equality Act 2006.

### Section 23 agreements

Under s 23, the EHRC may request that an organisation which is suspected of having committed an unlawful act, enter into a voluntary binding agreement not to commit further unlawful acts. In exchange, the EHRC agrees not to pursue enforcement action. Where there are concerns about the possibility of the EHRC taking more stringent action, this route can be seen as a helpful compromise. However, even with a s 23 agreement in place, it is still open to the EHRC to apply to a court for an interdict, or to commence a formal investigation. Entering into a s 23 agreement saves an organisation from the cost of facilitating a formal investigation or preparing for litigation.

When an organisation enters into a s 23 agreement, it does so with a view to working collaboratively with the EHRC, on a no admission of liability basis, minimising the chance of more formal action being taken. That said, the prospect of entering into such an agreement can still be very unattractive for businesses. Details of the agreement are published on the EHRC's website; this tends to attract adverse publicity. Sometimes it can be possible to reach agreement with the EHRC to follow an alternative action plan that remains confidential, particularly where genuine improvement steps have already been taken.

The agreement will generally include an "action plan" for the organisation, to address issues related to the suspected unlawful conduct. The organisation commits to implement this plan over a set period. If the EHRC suspects that an organisation has failed, or is unlikely, to comply with its obligations under the agreement, it may apply to the court for an order requiring compliance.

### The McDonald's agreement

In response to concerns from the EHRC about how sexual harassment complaints made by UK McDonald's staff had been handled, on 9 February 2023 McDonald's signed a s 23 agreement. While the total number of complaints made against it in the UK is not known, in 2019 the Bakers, Food & Allied Workers Union suggested the number of reported cases might exceed 1,000.

McDonald's has committed to communicating a zero-tolerance policy towards sexual harassment; launching an anonymous survey about workplace safety; and enhancing its policies and procedures which seek to prevent sexual harassment (including improved response procedures on receipt of any complaints). Specifically, McDonald's has committed to implementing anti-harassment training for all employees, specialised training for managers to help them identify risk areas within individual restaurants, and practical support for franchisees through provision of training materials, as well as actively monitoring progress to ensure a safe and inclusive working environment is achieved.

### The IKEA agreement

More recently, IKEA signed a s 23 agreement with the EHRC on 23 March 2023. Unlike the McDonald's agreement, IKEA's followed its handling of only one complaint which it received from a former employee. This related to sexual harassment and assault.

Under its agreement, IKEA will be obliged to express to all employees a zero-tolerance stance towards sexual harassment; review its sexual harassment policies, processes and complaints procedures in conjunction with an external specialist law partner; and deliver training on its new processes to all HR staff and line managers. The agreement is expected to be in place until August 2025 and the EHRC has noted that it will be continually monitoring IKEA's compliance.

### Looking ahead

A private member's bill is being considered which would impose a duty on employers to take "all reasonable steps" to prevent sexual harassment of their employees. If the Worker Protection (Amendment of Equality Act 2010) Bill is enacted, it would place a greater proactive duty onto employers to ensure their employees are not subject to sexual harassment, including by customers and others outside the organisation. At the time of writing, the bill has progressed through the House of Commons and is now at committee stage in the House of Lords.

Whether or not the bill becomes law, all businesses should actively promote a no-tolerance approach to sexual harassment and take a proactive and strategic approach to any enquiries from the EHRC.

## Human Rights

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In *Procurator Fiscal, Perth v ZA* [2023] SC PER 11 (14 February 2023), the court required to consider the lawfulness of detaining an accused for an extended period, pending mental health assessment, against their right to security and liberty as protected by article 5 of the ECHR.

### Background

ZA, charged with racially aggravated assault and racially aggravated harassment, first appeared in court on 30 August 2021. The case called on several occasions with ZA placed on bail. At an intermediate diet in December 2022, the court adjourned *ex proprio motu* for a report with a view to making an assessment order, concerns having arisen over ZA's mental health. On 28 December ZA was remanded in custody.

The court may impose an assessment order in respect of a person charged with an offence where those proceedings remain live. On receiving evidence from a medical practitioner and being reasonably satisfied that the person has a mental disorder, it is necessary to detain the person for assessment, and there would otherwise be a significant risk to the health, safety and welfare of that or any other person, the court may make an assessment order. A medical practitioner should satisfy the court that the proposed hospital is suitable for assessment, having regard to conditions in the Criminal Procedure (Scotland) Act 1995, s 52D(7). There also requires to be a suitable facility available, including an available bed to accommodate the accused.

Throughout January and February 2023, soul and conscience letters were submitted, attesting that ZA was unfit to attend court by reason of mental disorder. On 13 January a forensic psychiatrist concluded that a psychiatric assessment would be in ZA's best interests.

On 3 February the case called for a notional trial diet. At this stage, ZA had been in custody for the 40 day statutory maximum in summary proceedings. No hospital bed was available to facilitate the assessment.

ZA being unfit to participate meant starting the trial was not an option. The court had to consider whether to extend the 40 day limit for detention. Refusal would have resulted in the unattractive consequence of ZA being liberated without assurance of welfare support. Granting an extension would encroach on ZA's article 5 right.

The sheriff extended the period of detention by seven days, this being deemed "the least bad option" (para 5), and required the Crown to intimate the proceedings on the law officers and Scottish ministers, since a compatibility issue might arise. On 10 February, still no bed was available. A further extension was granted to 14 February; by that date it was known that a bed would become available within seven days. The time bar was extended to facilitate the assessment.

## Legal framework

The court faced the predicament of balancing ZA's article 5 right with the state's obligation to protect both her and the wider community, absent a suitable bed to facilitate assessment. Article 5 is a qualified right with exceptions including the lawful arrest or detention of a person for the purpose of bringing them before the competent legal authority, and the lawful detention of persons of unsound mind (article 5(1)(c) and (e) respectively).

Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a court (a public authority) to act in a way incompatible with a Convention right. Accordingly, continued detention of an accused requires specific authorisation, otherwise the action could be deemed arbitrary. Section 6(2) qualifies subs (1) in that if a public authority has, by virtue of primary legislation, no alternative but to act in an incompatible way, it is lawful so to act.

The court considered authorities from the Strasbourg court, including *Saadi v United Kingdom* (2008) 47 EHRR 17. Here, the court observed that "detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person be detained" (para 70). The court also recognised the point made by Lord Reed in *Brown v Parole Board for Scotland* 2018 SC (UKSC) 49 at para 3: "detention of a person as a mental health patient will, however, only be 'lawful' for the purposes of article 5(1)(e) if effected in a hospital, clinic or other appropriate institution", echoing *Hutchison Reid v United Kingdom* [2003] ECHR 94 at para 48.

IN FOCUS

# ...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

## National wellbeing framework

Views are sought on Scotland's National Outcomes, which are laid out in the National Performance Framework and subject to quinquennial review. There are currently 11 outcomes covering Culture, Education, Environment, Fair Work and Business, Health, Human Rights, International, Poverty, Children, Communities, and Economy. See consult.gov.scot/national-performance-framework-unit/call-for-evidence

**Respond by 5 June.**

## Income tax services

HM Revenue & Customs has issued a discussion document relating to "modernising and simplifying" income tax services, as part of the Tax Administration Framework review. See gov.uk/government/consultations/simplifying-and-modernising-hmrcs-income-tax-services-through-the-tax-administration-framework

**Respond by 7 June.**

## "Cash basis" tax returns

HMRC also seeks views on options for extending the income tax cash basis for self-employed businesses, which would allow more businesses to use the simpler regime. See gov.uk/government/consultations/expanding-the-cash-basis

**Respond by 7 June.**

## Low pay

The Low Pay Commission seeks evidence to inform its recommendations on minimum wage rates in 2024 and beyond. See gov.uk/government/consultations/low-pay-commission-consultation-2023

**Respond by 9 June.**

## Minimum annual learning hours

The Scottish Government seeks views on its plans to set a legal minimum number of hours of school education that school pupils should receive each year. See consult.gov.scot/learning-directorate/learning-hours-consultation

**Respond by 13 June.**

## Artificial intelligence

The UK Government's stated aim is to develop "a pro-innovation national position on governing and regulating AI". It has now issued a white paper setting out its proposals for implementing "a proportionate [and] future-proof" framework. See gov.uk/government/publications/ai-regulation-a-pro-innovation-approach

**Respond by 21 June.**

## Empty homes and council tax

The Scottish Government seeks views on whether councils should have additional powers giving them discretion to charge up to double the rate of council tax for second homes and more than double for empty second homes and other long-term empty homes. See consult.gov.scot/local-government-and-housing/council-tax-second-and-empty-homes/

**Respond by 11 July.**

## ... and finally

As noted last month, following Baroness Kennedy KC's report on Misogyny and Criminal Justice in Scotland, the Scottish Government seeks views on the introduction of new, gendered, criminal offences to address the problem of violence against women and girls (see consult.gov.scot/criminal-justice/reforming-the-criminal-law-to-address-misogyny and **respond by 2 June**).

## Application to the case

The court was not satisfied that an assessment order could be made absent confirmation of an available place: the terms of s 52D appeared to "hard-wire" the need for an available bed (para 20). It identified that the Strasbourg court affords a margin of appreciation to national authorities and that the accused's article 5 rights do not exist in isolation. In the circumstances, the court was satisfied that the detention was not arbitrary, contrasting *Brand v Netherlands* (2004) 17 BHRC 398 and *Mocarska v Poland* [2008] MHLR 228, which held respectively that delays of six and eight months were not reasonable (and thus incompatible with the Convention). Accordingly, it was lawful to extend ZA's detention period.

## Commentary

This case illustrates the systemic issues that are affecting health boards in treating those suffering from mental health issues. The judgment contains observations on how similar cases might be addressed in future. This includes, *inter alia*, regular and informed oversight by the court in instances whereby a person may continue to be detained in custody while an assessment order is made in a Convention compliant manner.

It will be interesting to observe (1) whether similar cases come before the court in future; (2) whether the observations made by the court will be followed in practice; and (3) the resultant impact on court business.

# Pensions

COLIN GREIG,
PARTNER, DWF LLP

On 15 March 2023 in his spring Budget, the Chancellor of the Exchequer, Jeremy Hunt, announced significant changes to the tax regime applying to UK registered pension schemes.

In summary, those key changes (subject to various transitional protections and reliefs) are:

- Lifetime allowance (the overall lifetime allowance on savings across an individual's registered pension schemes) is to be abolished. This is to be achieved in two steps. Step 1 is the disapplication of the lifetime allowance charge from the start of the 2023-24 tax year. Step 2 will be the removal of the lifetime allowance itself (in the 2022-23 tax year the standard lifetime allowance was £1,073,100) from pensions tax legislation from the start of the 2024-25 tax year.
- A new cap of £268,275 on the maximum pension commencement lump sum (commonly referred to as the tax free lump sum), reflecting 25% of the standard lifetime allowance of £1,073,100.
- Taxation at an individual's marginal rate of certain authorised payments subject to lifetime allowance charge.
- From the start of the 2023-24 tax year, disapplication of the triggers for losing enhanced or fixed protection from the lifetime allowance charge.
- Increased annual allowance, i.e. the yearly restriction on tax-privileged contributions or accruals in registered pension schemes (from £40,000 in 2022-23 tax year to £60,000 in 2023-24 tax year).
- Increased money purchase annual allowance (from £4,000 in 2022-23 tax year to £10,000 in the 2023-24 tax year).
- Increased tapered annual allowance (with the maximum extent of the taper applying to the annual allowance for high-income individuals rising from £4,000 to £10,000 and the income level at which the taper starts to apply increasing from £240,000 to £260,000, in the respective 2022-23 and 2023-24 tax years).

## The rationale

These changes were explained as reflecting among other reasons the wider Government policy to retain workers in the workplace and attract retired workers back into the workplace, particularly those in the NHS. It remains to be seen whether that will be effective, but irrespective of that there are a number of arguments as to why compounding annual and lifetime restrictions on tax efficient pension savings (with all the complexity that results) is

**Pension tax relief allowances (£)**

| | Standard lifetime allowance | Standard lifetime allowance | Tapered annual allowance minimum | AA tapering threshold income | AA tapering adjusted income | Money purchase annual allowance |
|---|---|---|---|---|---|---|
| 2006/07 | 1,500,000 | 215,000 | – | – | – | – |
| 2007/08 | 1,600,000 | 225,000 | – | – | – | – |
| 2008/09 | 1,650,000 | 235,000 | – | – | – | – |
| 2009/10 | 1,750,000 | 245,000 | – | – | – | – |
| 2010/11 | 1,800,000 | 255,000 | – | – | – | – |
| 2011/12 | 1,800,000 | 50,000 | – | – | – | – |
| 2012/13 | 1,500,000 | 50,000 | – | – | – | – |
| 2013/14 | 1,500,000 | 50,000 | – | – | – | – |
| 2014/15 | 1,250,000 | 40,000 | – | – | – | 10,000 |
| 2015/16 | 1,250,000 | 40,000 | – | – | – | 10,000 |
| 2016/17 | 1,000,000 | 40,000 | 10,000 | 110,000 | 150,000 | 10,000 |
| 2017/18 | 1,000,000 | 40,000 | 10,000 | 110,000 | 150,000 | 4,000 |
| 2018/19 | 1,030,000 | 40,000 | 10,000 | 110,000 | 150,000 | 4,000 |
| 2019/20 | 1,055,000 | 40,000 | 10,000 | 110,000 | 150,000 | 4,000 |
| 2020/21 | 1,073,100 | 40,000 | 4,000 | 200,000 | 240,000 | 4,000 |
| 2021/22 | 1,073,100 | 40,000 | 4,000 | 200,000 | 240,000 | 4,000 |
| 2022/23 | 1,073,100 | 40,000 | 4,000 | 200,000 | 240,000 | 4,000 |
| 2023/24 | — | 60,000 | 10,000 | 200,000 | 260,000 | 10,000 |

Source: House of Commons Library Research Briefing CBP 5901, *Pension tax relief: The annual allowance and the lifetime allowance* (30 March 2023).

no longer necessary or efficient. If one considers how the current position has developed (see table), it seems clear that the huge reduction in the standard annual allowance since its introduction in the 2006-07 tax year, and introduction of the taper, already significantly (and arguably sufficiently) limits the extent to which tax relief is available.

## Tax free cash restriction

Interestingly, the changes will not mean payment of any additional amount of tax free lump sum will be possible.

The new cap is also significantly less than that which would have been possible where based upon 25% of some of the more historical standard lifetime allowance amounts (which amounts had been as high as £1.8 million).

It also remains to be seen whether the new cap will be frozen in amount or be indexed in some way. To the extent that there is no increase or indexation, that will mean a real terms reduction. One wonders whether this restriction (indexed or not) rather than the often debated abolition of tax free cash strikes an appropriate balance (see table opposite).

## Consequences

Pension scheme administration and communication issues arising from these changes will of course require to be considered by employers and pension trustees/providers, with appropriate action then being taken.

Alternative pension and other arrangements put in place by employers for employees impacted by lifetime and annual allowance issues should also be reviewed. In particular, alternative payment arrangements in lieu of pension contributions (such as cash and share award plans) and the use of excepted group life policies/unregistered pension schemes for the purposes of providing death-in-service benefits should be reviewed and consideration given as to whether they remain fit for purpose.

## Party politics

Following the budget, the Labour Party indicated that it intends to reinstate the lifetime allowance if it is elected to government. Such reinstatement could be very complicated, with further transitional protection likely required in relation to the period prior to reinstatement.

Uncertainty and frequent changes (highlighted in the table) make retirement planning and advising on retirement provision extremely difficult. Given its importance, it would be helpful for this issue to be depoliticised and to the extent possible dealt with on the basis of cross–party consensus. It is suspected that may be wishful thinking. J

# Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

## Daniel Anthony McGinn

A complaint was made by the Council of the Law Society of Scotland against Daniel Anthony McGinn, solicitor, Motherwell. The Tribunal found the respondent guilty of professional misconduct in respect that: (1) he took instructions from the secondary complainer to act on her behalf in relation to a medical negligence claim and ceased to act without just cause; and (2) he failed to advise the secondary complainer that he was ceasing to act on her behalf.

The Tribunal ordered that the name of the respondent be struck off the Roll of Solicitors in Scotland.

The respondent took instructions from the secondary complainer in April or May 2016 to act in a medical negligence claim. He applied for legal aid. He wrote to Central Legal Office for the National Health Service. He closed his business around October 2016 and did not renew his practising certificate. He effectively disappeared without communicating with his client. The complainer's enquiries in November 2016 revealed that the respondent had vacated his office premises and they were empty. In the first quarter of 2017 the triennium expired in relation to the medical negligence claim.

Solicitors must act in the best interests of their clients (rule B1.4.1). They must communicate effectively (rule B1.9.1). They must not cease to act for clients without just cause and without giving reasonable notice or in a manner which would prejudice the course of justice (rule B1.12). By his conduct, the respondent breached all of these rules. The Tribunal was satisfied that the respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors. His conduct was deplorable and is precisely the kind of behaviour that gives the legal profession a bad name. Solicitors cannot abandon a solicitor-client relationship without reference to their professional responsibilities. There is a well-established process for winding down a legal practice which protects clients and keeps them informed. The respondent's serious and reprehensible departure from the standards of competent and reputable solicitors meant that the secondary complainer was deprived of very important information relating to her claim when the time for raising it was close to expiration.

## Damien Tonner

A complaint was made by the Council of the Law Society of Scotland against Damien Christopher Tonner, having a place of business at Clyde & Co, Edinburgh. The Tribunal found the respondent guilty of professional misconduct in respect of his breach of rules 3 and 9 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 and rules B1.4 and B1.9 of the Law Society of Scotland Practice Rules 2011. The Tribunal censured the respondent.

The respondent failed to provide the secondary complainer with the summons and defences lodged in her personal injury action. She was therefore unaware of the defence and the likelihood that her case would fail. The respondent failed to tell the secondary complainer about the potential conflict of interest or her right of action against the firm. She was not told that she might wish to take independent advice.

Solicitors must act in the best interests of their clients. They must be fearless in defending their clients' interests, regardless of the consequences to themselves (rule 3 of the Solicitors (Scotland) (Standards of Conduct) Rules 2008 and rule B1.4 of the Law Society of Scotland Practice Rules 2011). Solicitors must communicate effectively with their clients and others. They must provide any relevant information which is necessary to allow the clients to make informed decisions. Information must be clear and comprehensive and where necessary or appropriate, confirmed in writing. Solicitors must advise their clients of any significant development in relation to their case and explain matters to the extent reasonably necessary to permit informed decisions by clients regarding the instructions which require to be given by them (rule 9 of the Solicitors (Scotland) (Standards of Conduct) Rules 2008 and rule B1.9 of the Law Society of Scotland Practice Rules 2011).

Having regard to all the circumstances, which included the respondent's inexperience in this area of law, and the involvement of his supervising partner once the error was discovered, the Tribunal was satisfied that the respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors. While not every communication has to take place in writing, the respondent ought to have communicated these issues in writing to the secondary complainer at a much earlier stage. There was a continuing failure for a lengthy period to communicate with the client properly and to act in her best interests. The secondary complainer was not kept informed of major developments which affected her.

The Tribunal declined to award compensation to the secondary complainer. J

# The slide rule of grave risk

An Inner House decision under the Child Abduction Convention has clarified the proper approach to the assessment of a defence of grave risk

Family

FIONA SASAN,
PARTNER,
MORTON FRASER LLP

The Inner House recently clarified the defence under article 13(b) of the 1980 Hague Convention on Child Abduction, incorporated into our domestic law by the Child Abduction and Custody Act 1985.

In *AD v SD* [2023] CSIH 17 the mother, SD, was a Scottish and US citizen who married a US citizen, AD, and moved to Illinois, having two children of the marriage now aged seven and four. In June 2022, with AD's consent, she travelled to Scotland for a holiday. A return booked for August did not occur, SD stating that she could not return for fear of her safety and that of the children. Both children were habitually resident in Illinois. It was accepted that there was a wrongful retention in terms of the Convention.

First, AD raised proceedings in the US for dissolution of the marriage. He sought orders including the majority of parenting time and that SD should not receive temporary or permanent maintenance. He subsequently also sought an emergency order seeking the children's return through the Illinois court under the Convention.

The Illinois court found that SD had abducted the children and ordered their return. On her failure to comply, AD sought indirect civil and criminal contempt findings, and penalties including imprisonment. The request for criminal contempt was subsequently withdrawn. In October 2022 AD raised a petition in Scotland under the Convention for return of the children.

## Outer House procedure

Such petitions should proceed expeditiously and on affidavit and documentary evidence only. A second hearing was fixed for January 2023. SD advanced an article 13(b) defence that there was a grave risk to the children should they return to Illinois. She produced screeds of text communications from AD dating from a previous visit in 2021 and continuing right up to date. These messages were said to support psychological, physical, sexual and financial abuse at the hands of AD. Affidavits from SD were lodged alongside an electronic diary which contemporaneously recorded alleged assaults, including her attempted rape and strangulation by AD. AD accepted that the text messages were his, but disputed that they amounted to abuse. He denied allegations of physical and sexual abuse and contended that undertakings offered would meet any concerns of SD regarding return. SD produced expert evidence that such undertakings were not directly enforceable in Illinois.

The Lord Ordinary made avizandum. Ten days later, she "continued" the second hearing *ex proprio motu*, requesting to be addressed on availability of protective measures in Illinois and inviting AD to lodge further evidence. In a note she stated that the proceedings were not purely adversarial and the court could make its own enquiries regarding protective measures and to receive a full draft of any proposed consent order to be lodged in Illinois. This was not equivalent to reopening the proof.

On 9 February the Lord Ordinary indicated her intention to order the children's return, conditional on AD withdrawing the civil contempt application and parties entering into a consent order in the Illinois court. She accepted that the text messages demonstrated unrelenting harassment and an intention to humiliate, degrade and frighten SD, with AD demanding sexual gratification at his request, and expressing misogynistic views. However such messages did not show that the children would be exposed to grave risk, and although expert psychological evidence indicated that they were adversely affecting SD's mental health, it did not suggest this would impact on her parenting ability. AD's misogynistic views could be considered by the Illinois court; allegations of financial abuse were not clearly controlling in aim, but could be legitimate disagreements about money, and the children were not impacted.

The disputed allegations of physical and sexual abuse raised a strong *prima facie* case for protective measures. While there was no evidence that the children were at risk of direct physical harm in AD's care, they would be exposed to grave risk should they witness abuse of SD. On information from US attorneys, it was recognised that there was little likelihood of AD accessing legal aid funding in Illinois and that she had no resources pay for legal representation, but the Lord Ordinary concluded that she had sufficient legal remedies available. The correct approach was to assume that the requesting court could protect the children in its jurisdiction unless there was compelling evidence to the contrary. Temporary protective measures were available, and the courts could order AD to fund her attorneys' fees (though he now claimed to be impecunious).

Although standard orders granted by the Illinois court when the original actions were

raised, preventing unacceptable conduct by either party, had been breached through the abusive text messages, the Lord Ordinary considered AD would be motivated to comply with future orders in his home country while the parenting of his children was being litigated. The focus of Hague Convention proceedings was to have children brought back before the courts of their habitual residence swiftly. The consent order would regulate matters meantime. The medical evidence did not support the proposition that the indirect contact by AD proposed in the consent order would cause any deterioration in SD's mental health so as to place the children at grave risk, and SD could not subvert the operation of the Convention by refusing to agree to the consent order.

## Inner House approach

On appeal, Lady Wise stated that while the abducting party has the onus of establishing the defence, which might fail in the absence of extraneous supporting evidence (*D v D* 2002 SC 33), since the decision of the UK Supreme Court in *Re E* [2012] 1 AC 144, the approach is more nuanced where an article 13(b) grave risk defence founding on domestic abuse is pled. The court must first ask whether, if the disputed allegations were true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk, the answer to which would vary from case to case and from country to country.

At the first stage, the nature and severity of the risk to the children needs to be evaluated. The importance of that analysis lies in determining the relationship between the level of risk and the need for protection. A high risk

*"If the effect on [the mother's] mental health would create an intolerable situation for the children, they should not be returned"*

of severe harm would require to be balanced by more effective protection than a lower risk of either that or of less severe harm (*Re E*, para 52), thus a "delicate slide rule type balance [must] be struck between the assessed risk and the protective measures offered" (opinion of the court, para 27). Furthermore, in principle, where one party's perception of events leads to a risk to mental health, this can establish an article 13(b) defence.

If there is a grave risk of the children being in an intolerable situation as a result of the mother's suffering, that may be sufficient (*Re E*, para 34). The question is not whether her anxieties are reasonable but what would happen if the children returned with her. If the effect on her mental health would create an intolerable situation for the children, they should not be returned (*Re S (a child) (Abduction: Rights of Custody)* [2012] 2 AC 257). The court requires to look prospectively. Any measures designed to protect the returning parent must do more than cover the immediate future.

## Risk assessment

The risks here were established. They were of the most severe type, including physical injury by strangulation in the presence of the children. AD also threatened in the presence of the children to kill himself. SD described a number of sexual assaults, including attempted rape, and numerous verbal and physical assaults in the presence of the children.

Having accepted that there was a strong *prima facie* case, the Lord Ordinary should have assessed the severity of the risk before considering the adequacy of the protective measures. The allegations needed to be viewed with an objective assessment of SD's distress and the undisputed text messages. Could AD be deterred from treating SD in a manner that exposed the children to harm or placed them in an intolerable situation? There was no clear assessment of the nature and gravity of the risk, and no testing of the proposed protective measures against a particular risk at a particular level.

The dispute was not the legal remedies available in Illinois, but SD's access (or otherwise) to legal representation and whether AD could be trusted to comply with orders of the Illinois court. The Lord Ordinary had concluded there was no reason to think that a party litigant would not be dealt with fairly there, but acknowledged that SD would be prejudiced without an attorney. Her conclusion regarding AD's motivation to comply with future court orders was difficult to understand. That issue should have been tested fully and balanced against the severity of the risk posed by the disputed allegations if true, combined with SD's lack of recourse to effective court enforcement in Illinois. The Lord Ordinary had erred in failing to carry out that risk assessment, and the matter was at large for the appeal court.

## Return "inconceivable"

The court concluded that the combination of factors relied on by SD was sufficient to establish the defence of grave risk. The factors should not be considered separately but as a whole. There was objective evidence of a high risk of possibly irreparable harm posed by AD, coupled with his lack of insight and refusal to accept that the messages constituted abuse. He had only offered a 30 day period where the proposed consent order would provide protection to SD, and this was not a case for only short-term measures. The protective measures offered would be unlikely to deter AD. He had persistently breached the Illinois court order throughout the Scottish proceedings and his reluctance to agree to further measures was of additional concern. It was "inconceivable that a return would be ordered given the material before" the court (para 41). Thus the petition was refused.

## Commentary

While this is a case which turns on its own facts and circumstances, the clarity provided in the two-stage process of how to assess grave risk and protective measures should always be at the heart of assessing an article 13(b) defence. Had this appeal been unsuccessful, it would be hard ever to establish this defence in the future. The "delicate slide rule" of level of risk is helpful to determine the level of protection needed and whether that will ever be enough. Evidence requires to be considered in the round to assess risk.

Separately, the appeal had sought to take issue with the competency of the procedure adopted by the Outer House. The court acknowledged that the Hague proceedings were still adversarial, and all the rules of fair notice and fair hearing still applied. Parties needed to know the case against them and to be able to respond to it. The judge was entitled to reach a decision on grave risk and then continue until protective orders were in place, but the court discouraged any procedural route that appeared to disadvantage one side by detailing how one party could make their case stronger.

*Morton Fraser acted for the mother in the proceedings discussed*

# In-house: a route to diversity

How an aspiring black lawyer found training in-house to be the way to support her personal development, and her ambition to become a role model for other black students

## In-house

OLUWAFUNBI SOPHIA KARUNWI, TRAINEE SOLICITOR, AEGON UK

During my LLB, I always thought that the only place to secure a training contract was with a private law firm. My aim was to work in immigration, and during my degree I took up work experience in a private immigration firm to build my legal experience. However, traineeship opportunities in that area were limited at the time, so I began to seek different opportunities. During the Diploma, I attended a careers event where I learned about the opportunity for law students to train in-house, and I was immediately interested.

I was initially intrigued when I learned that training in-house is focused on teamwork, both within the business and with external partners and stakeholders. From then, I was curious to seek in-house traineeships. As a black law student, securing a training contract at the time was a challenging and often discouraging process. I had not seen or heard of any black solicitors in Scotland, and I was one of two black law graduates in my LLB and Diploma academic year. Nevertheless, my passion to pursue a legal career remained.

During my last month undertaking the Diploma, I received an email about an internship programme with an organisation called Black Professional Scotland ("BPS"). I admired the organisation and its dedication to empower black professionals and students who wish to succeed in the professional workplace. I applied for the summer in-house intern role at a company named Aegon, which I was successful in securing. I thoroughly enjoyed the 12-week internship and the vast amount of experience and knowledge I gained at Aegon.

### Career gateway

I admired the varied work that the Legal department dealt with, and the business knowledge and skills I began to acquire. I was able to work within the Commercial Contracts, Dispute Resolution and Legal Proposition teams over the 12 weeks. I valued the supportive business environment, and the opportunities to connect and build working relationships with colleagues within the business.

As a black aspiring solicitor, the BPS programme significantly helped me gain confidence in my ability to develop and apply my legal knowledge practically. I have been able to connect with black law students who have the same aspirations as myself, and network at different BPS events. I took part in the mentorship programme which supported my career growth. I admired the raw dedication of BPS to provide a gateway for black ethnic minorities to strive in the legal profession, and beyond.

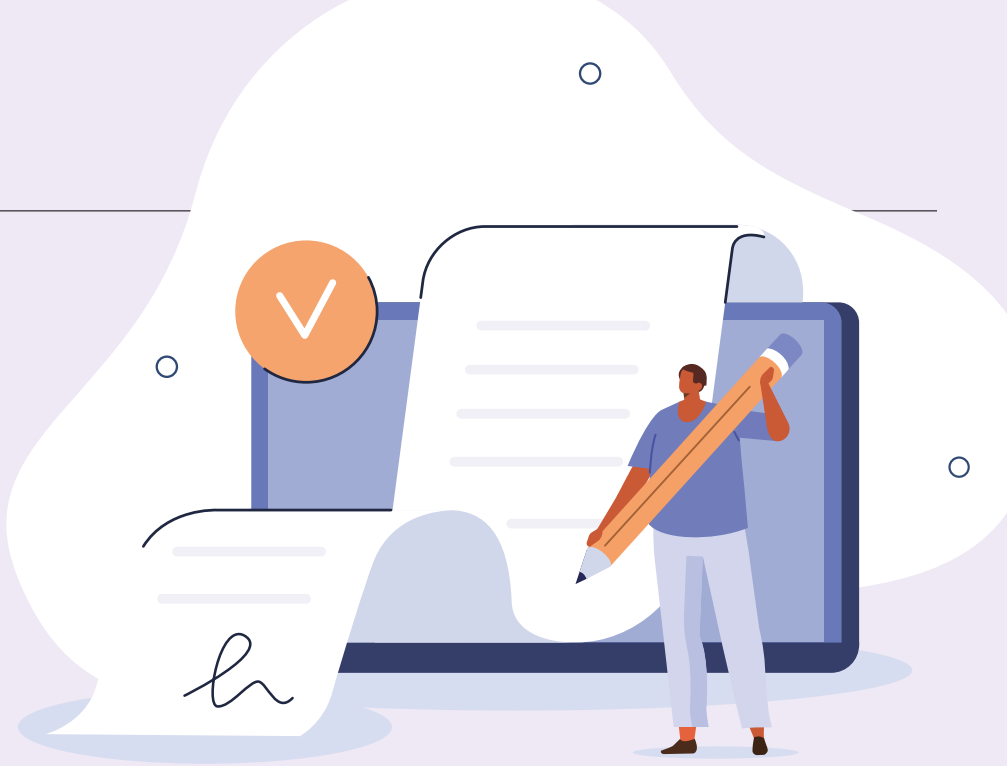
During my internship at Aegon, I was more dedicated to securing a training contract in-house because of the great exposure to a broad range of areas of work, and expand my legal knowledge beyond Scottish law. I was involved in a variety of projects and tasks in the Legal department. I was surprised by the instant support and encouragement I received from the beginning of my internship to the very end. I knew that training in-house was for me. I secured my traineeship with Aegon in October, following a competitive recruitment process with over 100 applicants, and I began my first seat in the Dispute Resolution team. Never would I have thought that I would be training in-house, and with a company like Aegon.

### Discovering potential

In the short space of time that I have worked at Aegon, I feel confident in my growth as a trainee and the work I am continually producing. I would encourage any graduate looking for a traineeship to consider training in-house. In-house opportunities aren't as widely advertised compared to private practice traineeships; however there are opportunities out there to grab. I would recommend attending as many career fairs and workshops as possible. This had a significant influence in my approach to applying to law firms and companies, having learned that training in-house puts you in an environment that is driven by teamwork, a variety of legal work and support.

Ultimately, training in-house is stretching, interesting, and highly rewarding. Training in-house has given me the opportunity to gain a broader perspective and skillset in business and law. I am able to apply my legal mindset to business matters, and take advantage of opportunities to step outside my comfort zone. I have been able to take part in charity events, BPS networking programmes to support black students, inclusion and diversity events, and volunteering. I am also a member of the Legal department's Inclusion & Diversity Group, where I am involved in promoting and providing an environment where everyone feels safe, valued, and empowered to reach their full potential. At Aegon, there is a strong commitment to investing in its people and bringing people together.

Working in-house for a company like Aegon has allowed me to see greater potential in myself than I ever have. I am given challenging and interesting work and I am fully supported by my colleagues and supervisors. I strive to one day be one of many black solicitors in Scotland, and a role model for black law students who have the same passion as I still do.



# Time to check your terms

An SLCC report has recommendations for solicitors' terms of business, following a study

Variable levels of clarity and accessibility in solicitors' terms of business letters have been found by the Scottish Legal Complaints Commission, in a new report.

Taking a sample of 80 letters, the SLCC considered to what extent they complied with Law Society of Scotland rules and whether an average client would be likely to read and understand them. It reports generally good compliance with the basic requirements. However, its sample showed "a real variation in the extent to which firms made their terms of business letters clear, accessible, accurate, and a useful tool for effective communication with the client".

Practice rule B4 says that a firm must provide information in writing with an outline of the work to be done, an estimate of total fees and outlays, the level of any legal aid contribution, the name of the person who will do the work, the person to contact in the firm with any concerns, and signposting to the SLCC if concerns have not been resolved. The report considers each of these in turn, along with other terms found.

## Findings

On work to be done, about 25% of letters had very brief headings such as "Conveyancing", and some contained irrelevant and potentially confusing information about different work. Only 12% "stood out as a comprehensive, well-worded and personalised indication both of the scope of instructions and what was not included".

Most said it would be difficult to predict the final time and cost of legal work. "Even with this rider, we felt that many could have benefitted from including even a ballpark range", the report states. After noting various practices that left matters unclear, it concludes: "The clearest explanations on fees that we saw were also the simplest: 'For this transaction we will charge £x per hour', or 'For emails, correspondence and documents, we charge for each 100 words'."

While legal aid assistance was well explained where relevant, information on legal aid was on occasion included, "often in great detail", though not relevant to the transaction.

With named practitioners, the SLCC suggests that clients might be assured that if another person has to deal with the instructions, they will be fully conversant with the file.

Regarding complaint processes, "It's worth remembering that even if a firm attempts to prescribe that every stage of a complex or lengthy investigation process must be completed internally, a complainer has the right to approach the SLCC if the complaint remains unresolved 28 days after it was first raised to the firm."

Firms "did not do so well on the requirement to signpost the SLCC and give its correct contact details, since less than 15% of our sample had all information both present and correct". The report includes suggested wording, also referring to time limits – which some firms misstate.

Among other terms, several firms used wording "that may not comply with Money Laundering Regulations or that might be inconsistent with current Law Society of Scotland guidance".

## Recommendations

The report urges firms to:

- Ensure that your terms and the standard of work that you do both match up to your marketing. Your marketing, policies and terms should all be treated as living documents, reviewed and revised regularly to ensure they are still relevant to your clients and your current way of working.
- Treat your terms as your first and an ongoing opportunity to communicate well with your client. Use them to set out how you'll work together, and refer back to them when you need to throughout the transaction. Even if something is mentioned in the terms of business, you'd be well advised to explain the full implications at the time it becomes relevant during the transaction, to ensure that you're communicating as well as you could with the client.
- As far as possible, try to make your terms clear, concise and easy to read. Try to imagine a friend or family member without any legal knowledge receiving them, and read them as if through their eyes. Pay attention to wording, spacing, sentence length and logical grouping of information. Personalising your terms to the transaction will help with this.
- Take extra care in explaining fees and charging – many of the complaints we see stem from misunderstandings and miscommunication here. Don't assume your client will understand or be familiar with a charging method not used in many other types of transaction, or know how routine or otherwise their case might be.
- Check the accuracy of references to the right to complain to your firm and to the SLCC. Use our suggested wording to make that straightforward. You should never attempt to restrict the right to complain, to restrict or place conditions on the posting of online reviews, or impose unduly onerous processes. A complaints process that is fully accessible is more likely to lead to amicable resolution of any concerns.

Susan Williams, the SLCC's Best Practice adviser, said: "While some firms had worked hard to make their terms clear and accessible, we felt only about a third of our sample were likely to be easily read and understood by clients. We found the sections on fees and charging were often particularly likely to be confusing for clients."

She added: "We urge firms to look again at their own letters and take the time to update and improve them for the benefit of their clients and their business."

***The report is on the SLCC's website.***

## Faculty seeks pro bono cohesion

Pro bono legal services providers have been invited to an event that aims to clarify how best to address unmet legal need.

The Faculty of Advocates' Free Legal Services Unit ("FLSU") is hosting the event, on the afternoon of Friday 2 June in Faculty's Mackenzie Building. Its aim is to build on discussions held during Pro Bono Week in November 2022, so that individuals' unmet legal need is better understood and the FLSU can help achieve greater access to justice.

FLSU convener Neil Mackenzie KC has spoken of a "patchwork quilt" of pro bono provision in Scotland, with "gaps, overlaps, and friction". He feels there are currently few, if any, ways for pro bono organisations to work together to coordinate how they provide their services.

## Society proposes trainee pay rise

The Law Society of Scotland is recommending a 10% uplift in trainee solicitor salaries from 1 June 2023.

Recommended minimum pay for first year trainees in Scotland will rise by £2,050 to £22,550, and for second years by £2,375 to £26,125. Employers can set their own rates provided these are not less than the living wage set by the Living Wage Foundation. The Society said the uplift reflected the significant continuing cost-of-living pressures.

# "Head in sand" solicitor faces contempt finding

A solicitor is at risk of being found in contempt of the Inner House due to her failure to hand over files to the Scottish Legal Complaints Commission.

The SLCC has reported comments by three judges who heard that the unnamed lawyer had "put her head in the sand" over an investigation into a client complaint.

Lords Malcolm, Pentland and Tyre ordered the solicitor to hand over the files, stating that the court expects early compliance with the requirement to provide a detailed response to the complaint. The court continued the hearing for a month to give the SLCC time to consider the evidence.

The judges indicated they were minded to make a finding of contempt of court. Lord Malcolm stated that the court wished to make clear that in delaying that decision the court is "in no way diluting the seriousness of this matter".

The court was told that the solicitor accepted that her failure to comply was inexcusable. Lord Pentland questioned whether burying one's head in the sand was any different to wilfully ignoring an order from the court, and said the solicitor's actions showed a complete lack of respect to both the court and to the SLCC.

He also noted that there are support mechanisms available to solicitors who are struggling, including the Law Society of Scotland's Professional Practice team and charity LawCare.

SLCC chief executive Neil Stevenson commented: "As we have repeatedly highlighted, this lack of compliance has a significant wider impact, affecting public confidence in regulation and in the legal profession, and increasing the cost of regulation."

The SLCC is consulting the profession on how best to balance contributions from the profession with a "polluter pays" approach.

## Virtual court experience aims to reduce trauma

Victims and witnesses are to be given a virtual introduction to Scottish courts to help familiarise themselves with giving evidence in court.

A Scottish Government initiative to allay fears or discomfort around the process before they have to give evidence in court, the £500,000 virtual court project will allow victims to "walk through" a three-dimensional world, comprising actual videos of the court building where their case will be held. The system uses cutting-edge software to allow victims and witnesses to interact in a virtual environment that includes depictions of the people and objects they can expect to encounter.

They will be supported throughout by Victim Support Scotland ("VSS") volunteers, removing the need to travel to court prior to their hearing date – though they will continue to have that option – while allowing people to familiarise themselves with what may be an unfamiliar, daunting and retraumatising environment.

The project – a collaboration involving VSS, tech provider Immersonal and CivTech, a partnership between the Scottish Government's Digital and Economic Directorates – has delivered a working prototype for the sheriff court and High Court in Glasgow, and will be rolled out more widely over the next year. VSS is working with Immersonal on the first steps towards making the experience available at all 52 criminal courts in Scotland.

## 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.

### Justice Reform Bill

On 26 April the Victims, Witnesses and Justice Reform (Scotland) Bill was introduced. This follows the recent Government consultation on not proven and other reforms, to which the Criminal Law Committee responded in 2021. It highlighted its opposition to changes to the three verdict system at that stage, as well as the introduction of judge-only trials, which the committee had also successfully opposed during the introduction of emergency measures to deal with the pandemic in 2020.

The bill proposes to establish a specialist Sexual Offences Court, to reform the verdicts available to juries – which would be guilty and not guilty, to change the size and majority of juries, and also contains a power to lay regulations, following consultation, to establish a time-limited and evaluated pilot of judge-only trials for serious offences.

The Criminal Law Committee is considering the issues emerging from this legislation as the bill progresses. Fundamentally altering the balance of criminal trials is a great concern, particularly if the aim is to increase convictions in serious cases, risking breach of the right to a fair trial and potentially causing miscarriages of justice.

There are measures in the bill that the Society does support, around the right to anonymity in serious cases, the right to independent legal representation for complainers and the establishment of a Victims' Commissioner. These will undoubtedly improve the treatment of complainers in the criminal justice system. However, resourcing of the system remains critical, particularly with the continuing decline of criminal defence practitioners in the provision of legal aid.

***Read more in the Society's news release.***

### Additional dwelling supplement

The Society responded to the Scottish Government consultation on proposed legislative amendments to the land and buildings transaction tax additional dwelling supplement.

The response welcomed the proposed changes but regretted that they did not go further in some areas, and also called for amendments to be accompanied by clear guidance to assist taxpayers and their professional advisers.

It welcomed the proposal to extend relevant timelines from 18 to 36 months, noting that this would allow many more transactions to be covered by the rules on replacement of main residence, help divorcing and separating couples, and also align with the position in England & Wales.

Practical concerns about the proposals relating to divorce and separation were also highlighted, with a call for clarification and extension of the proposed relief to include termination of cohabitation.

The response set out a number of comments on the proposals relating to inherited property and called for the relief to apply also to properties inherited by other means on the death of a person. It also suggested potential unintended consequences of the proposals relating to small shares and joint buyers/economic unit provisions.

Finally, the response welcomed the proposed new relief for purchases of housing by local authorities and called for this to be extended to other situations where local authorities or their subsidiaries/SPVs buy houses which are to be used to provide affordable housing or accommodation for individuals with disabilities.

***Read more at the Society's tax law page.***

### Data Protection Bill

The Society issued a briefing on the Data Protection and Digital Information (No 2) Bill ahead of its second reading in the House of Commons on 17 April.

Following the United Kingdom's exit from the European Union, the bill seeks to update and simplify the UK's data protection framework under the Data Protection Act 2018 and the UK General Data Protection Regulation. It intends to reduce burdens on organisations while ensuring high data protection standards, and will amend some provisions in the current legislation. It would also reform the Information Commissioner, namely its governance structure, duties, enforcement powers, reporting requirements, complaints processes and its development of statutory codes of practice.

The Society considers that the bill provides the Government with the opportunity to have one single, standalone, and clear piece of data protection legislation, and is concerned that the bill will mean that data protection law in the UK is contained over three main sources, namely the bill, UK GDPR and the 2018 Act, which may cause confusion for parties and organisations.

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

***For more information see the research and policy section of the Society's website.***

## ACCREDITED SPECIALISTS

**Child law**
Re-accredited: DUNCAN MACKINNON, Macnabs LLP (accredited 13 February 2003).

**Commercial leasing law**
Re-accredited: GRAEME BRADSHAW, Burness Paull LLP (accredited 21 December 2017).

**Construction law**
Re-accredited: JENNIFER YOUNG, Ledingham Chalmers LLP (accredited 25 March 2003).

**Family law**
JANE BLACKWOOD, Harper Macleod LLP (accredited 18 April 2023).

**Family mediation**
CRAIG SAMSON, Blackadders LLP (accredited 24 March 2023); DANIELLE STEVENSON, Caritas Legal Ltd (accredited 29 March 2023); EMMA SADLER, Blackadders LLP (accredited 19 April 2023).
Re-accredited: RUTH ABERDEIN, Aberdein Considine & Co (accredited 11 February 2008); SHARON MURRAY, Gillespie Macandrew LLP (accredited 6 February 2020).

**Medical negligence (defender only)**
Re-accredited: MICHAEL STEWART, National Health Service Scotland (accredited 22 August 2012).

**Personal injury law**
Re-accredited: LISA GREGORY, Grant Smith Law Practice Ltd (accredited 4 April 2005); FRASER SIMPSON, Digby Brown LLP (accredited 6 June 2008).

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## ACCREDITED PARALEGALS

**Civil litigation – reparation law**
LYNNE KERR, GILLIAN McCARRON, KAREN MACKENZIE, LAUREN MEEK, DANIELLE SCOLLEY, all Digby Brown.

**Company secretarial**
CORAL WESLEY, Vialex WS.

**Immigration law**
JEMMA SARICA, Drummond Miller.

**Residential conveyancing**
SHANNON McCLUSKEY, Aberdein Considine & Co.

## OBITUARIES

**MICHAEL JOHN HENRY (retired solicitor), Galashiels**
On 16 March 2023, Michael John Henry, formerly employed with Scottish Borders Council, Newtown St Boswells.
AGE: 79
ADMITTED: 1966

**KENNETH JAMES WADDELL, Glasgow**
On 4 April 2023, Kenneth James Waddell, formerly partner of the firm Peacock Johnston, and latterly consultant of the firm Drummond Miller LLP, both Glasgow.
AGE: 63
ADMITTED: 1996

REGULATION

# Fit for the modern world?

Welcome in parts, a cause for concern in others – the first reactions to the bill to reform regulation of the legal profession in Scotland. **Peter Nicholson** provides an overview of its content

Long-awaited legislation to modernise the Law Society of Scotland's powers, and streamline legal complaint handling, was introduced to the Scottish Parliament on 21 April.

However the Society, while welcoming these aspects of the Regulation of Legal Services (Scotland) Bill, warned in its first statement that the proposed legislation "risks seriously undermining the independence of the legal profession from the state". What does it contain, and what are the points of controversy?

## Objectives

The bill's 93 sections and three schedules are divided into five parts, with part 1 setting out the regulatory framework (in three chapters) and part 2 further provisions relevant to the Society.

Chapter 1 of part 1 sets out objectives, principles and key definitions. The regulatory objectives and professional principles in the Legal Services (Scotland) Act 2010, ss 1 and 2 are rewritten, the latter in virtually identical terms but the former more elaborately, as:

"(a) to support the constitutional principles of the rule of law and the interests of justice, (b) to protect and promote the interests of consumers and the wider public interest, (c) to promote – (i) access to justice, (ii) an independent, strong and diverse legal profession, (iii) quality, innovation and competition in the provision of legal services, and (iv) effective communication between regulators, legal services providers and bodies that represent the interests of consumers, and (d) for those regulating legal services to – (i) use and promote best practice..., (ii) adhere to the regulatory principles described in section 3(4), and (iii) promote and maintain adherence to the professional principles".

Section 3 promotes principles regarding consumer access to legal services, and fair treatment of consumers; encouraging of equal opportunities; and exercise of regulatory functions in a way that is transparent, accountable, proportionate and consistent, targeted where action is needed, and exercised where possible in a way that contributes to sustainable economic growth. These reflect key aspects of the Better Regulation Principles, Consumer Principles, and Human Rights (PANEL) Principles.

## Regulator categories

Under chapter 2, regulators will be assigned as either category 1 or category 2. Category 1 regulators are intended to be those with a significant membership or whose members provide largely consumer-facing services. Initially (ministers can reassign a body by regulations) only the Society is in category 1; the Faculty of Advocates, Association of Commercial Attorneys and any other approved body will be in category 2.

Both categories must exercise their regulatory functions independently of any other functions or activities, and "properly in all respects (in particular with a view to achieving public confidence)", with internal governance arrangements designed to achieve that, and must publish annual reports. They must maintain a public register of authorised providers (individuals and business entities), and set professional indemnity insurance requirements.

As category 1, the Society will in addition have its Regulatory Committee made subject to further protections, including the right to appoint its own members, at least 50% of whom are to be lay and with a lay convener, and under a duty to produce its own annual report. The Society also remains under a duty to maintain a compensation fund, currently the Client Protection Fund.

The regime for licensed legal services providers remains separate and governed by the 2010 Act, due to the extra considerations arising from non-legally qualified investors being involved. A category 1 or 2 regulator may also regulate such providers.

## Ministerial intervention

The first of the contentious powers of the Scottish ministers appear in ss 19 and 20. They (or their designated delegate) may review the performance of a regulator in either category on the request of the Parliament, the Competition & Markets Authority or Consumer Scotland, which may be made if there is concern over the proper exercise of regulatory functions. They must publish a report on their review, with findings and any proposed measures. These could include "(a) setting performance targets, (b) directing that action be taken, (c) publishing a statement of censure, (d) imposing a financial penalty, (e) making changes to, or removing some or all of, the regulatory functions exercised by the regulator". Except for (d), the Lord President's agreement is required to any of these steps. There is power to make regulations enabling additional measures, following consultation.

Chapter 3 of part 1 concerns authorisation of new regulators of legal services. An applicant body must draw up and publish a draft regulatory scheme; applications are to be considered by ministers and the Lord President acting together. They may also act together to require a regulator to review its regulatory scheme (failure to implement revisions properly could potentially lead to a regulator's authorisation being revoked). Rights acquired may be surrendered in whole or part on application to both authorisers.

Ministers are further given powers to make provision for "(a) establishing a body with a view to it becoming a category 1 regulator for the purposes of this Part, (b) specifying circumstances under which the Scottish Ministers may directly authorise and regulate legal businesses". This must be done with the agreement of the Lord President, and only if "the Scottish Ministers believe that their intervention is necessary, as a last resort, in order to ensure that the provision of legal services by legal businesses is regulated effectively". This is designed to cover situations where an accredited regulator gets into difficulty in some way.

## Authorising providers

Part 2 is again specific to category 1 regulators, making provision for their authorisation of legal services providers – or "legal businesses", defined as solicitors or "qualifying individuals" (others who may come to be regulated by a category 1 regulator, such as tax advisers), or businesses wholly owned by such. A regulator must make authorisation rules and practice rules in respect

of legal businesses, with "provision for reconciling different sets of regulatory rules": this is to prevent or resolve regulatory conflicts, and avoid unnecessary duplication.

Ministers have power to specify what rules must cover, and must give prior approval (with the Lord President's agreement) to "any material amendment". There are also provisions for monitoring and review of performance of authorised businesses – and a further "last resort" section allowing ministerial intervention, with the Lord President's agreement, if necessary to ensure efficient regulation.

## SLCC reborn

Part 3, "Complaints", opens by restyling the Scottish Legal Complaints Commission as the Scottish Legal Services Commission. In addition to services and conduct complaints, the Commission may receive complaints that an authorised business has failed to comply with its practice rules or the terms of its authorisation (a "regulatory complaint"), and complaints with any combination of the foregoing.

In future the Commission will be able to initiate a complaint itself, allow regulators to initiate and investigate certain complaints, and allow a category 1 regulator to investigate a regulatory complaint. It will also have more flexibility to develop a proportionate, risk-based and more responsive approach to dealing with complaints, with powers to make rules about how a complaint is to be handled depending on how it is categorised. Conduct complaint investigations will remain with the regulator concerned.

Provision is made to protect legal privilege in documents or information, but documents subject to any other right of confidentiality may be obtained, in line it appears with recent rulings by the Inner House.

Commission levies will be chargeable against authorised legal businesses as well as individuals. Unregulated legal services providers will be able to be entered in a new voluntary register to be kept by the Commission, on payment of an "annual contribution", perhaps to obtain a mark of quality assurance.

The Commission is also given new powers to set and enforce (through the courts) minimum standards in relation to professional organisations.

## Miscellaneous

In other changes, the Scottish Solicitors' Discipline Tribunal will gain the power to impose unlimited fines in conduct complaints, but lose the power to order compensation. The Faculty of Advocates will have to make rules about the publication of decisions on conduct complaints against advocates.

Parts 4 and 5 of the bill contain miscellaneous and general provisions. Law centres can become licensed legal services providers, and are excluded from certain offences in the Solicitors (Scotland) Act 1980 relating to unqualified persons. New offences are created regarding unregistered and unlicensed persons taking the title of "lawyer", and falsely pretending to be a regulated provider or a member of Faculty. Certain individuals may be held responsible for offences committed by organisations.

Schedule 1 makes numerous changes to the 1980 Act to reflect the Society's category 1 status and the move to entity regulation. Schedule 2 makes further provision about ministers' reserve powers. Schedule 3 makes further consequential amendments.

## Society reaction

In an initial statement, Murray Etherington, President of the Law Society of Scotland, commented: "Some aspects of the proposed bill are deeply alarming. One of the most important roles of the legal sector is to challenge Government on behalf of clients and hold it to account. The proposed new power allowing Scottish ministers to intervene directly in regulation risks seriously undermining the independence of the legal profession from the state. This is clearly unacceptable and needs removed from the bill by the Scottish Parliament as the bill progresses."

The President believes the bill can be "a catalyst for real, positive and longlasting change", given that much of the existing legislation on regulation is now over 40 years old and unfit for today's diverse legal sector. "This is why we went to the Scottish Government almost a decade ago, asking for change" – also making the case for a quicker and simpler complaints system and the need to protect consumers from unqualified providers of legal services.

David Gordon, the non-solicitor convener of the Society's Regulatory Committee said the bill provided a chance to build on the "huge progress" made by having an independent Regulatory Committee, by providing a framework to increase the committee's transparency and accountability.

He added: "The legislation is also an opportunity to expand our public interest powers and allow us to step in at an earlier stage when things go wrong. We think the bill could go even further than is currently proposed, especially in terms of how our complaints are handled, so cases are dealt with more quickly for the benefit of all involved. However, we need to avoid hardwiring too much detail into the bill which will only restrict our ability to adapt and evolve as the market changes."

At time of writing we await a call for evidence from the Scottish Parliament in relation to stage 1 scrutiny.

RISK MANAGEMENT

# Death and taxes: the perils of survivorships

The idea of a survivorship destination may seem attractive to clients buying a house, but they can bring hidden pitfalls which could give rise to claims or complaints if proper advice is not given

As Benjamin Franklin (supposedly) once said, nothing is certain except death and taxes. Depressing, perhaps, but possibly true.

Mindful of this certainty, solicitors often have to be that pessimistic voice of "what if", during a happy and exciting moment in their clients' lives – when clients are purchasing a property with a spouse or partner. At that time, the clients will more likely be picturing new bathroom suites and kitchen configurations – not necessarily relationship breakdowns and untimely deaths.

However, at the risk of spoiling the moment, it is important that, when taking the clients' instructions in this situation, and advising them on what might seem to the clients like mundane legal technicalities, the solicitor advises on the options and the potential implications of those options, so that the client can provide instructions that properly reflect their needs and circumstances.

*"Solicitors often have to be that pessimistic voice of 'what if', during a happy moment in their clients' lives"*

Just as importantly, the solicitor needs to be able to evidence that they have done this. Because a rather depressing likelihood (although hopefully not a certainty) is that, if and when a client finds themselves with an unintended or unwelcome title outcome down the line, the decision making which led to it will be looked at in unforgiving hindsight. It will likely not reflect any optimism or lack of interest and concern on the client's part which might have existed at the relevant time.

One such mundane technicality is the question of how the title to the property ought to be taken. The focus of this piece is survivorship destinations.

## Survivorship destinations – the pros and cons

Survivorship destinations may have fallen out of fashion in more recent times. Previously they were inserted into dispositions, perhaps without much thought, and perhaps without specific instructions from the clients. However, they are not necessarily the relic that many consider them to be.

Many couples purchasing a house together, if asked to contemplate the worst case scenario, might say that, in the event of their death, they would want their share of the jointly owned property to pass automatically to their spouse or partner. One obvious advantage to this is the immediate nature of the transfer and comfort in knowing that, if the worst happens, there will be an uncomplicated transfer of the title to the parties' home, regardless of whether the parties have wills in place. In circumstances where the share in the property is the main asset in the deceased's estate, and where it is the specific wish of each party that the other inherits the property, it *might* be suitable for the clients, on the basis that it could reduce estate administrative costs.

Against that, however, when contemplating the use of a survivorship destination, the clients should be considering how this might sit with their other wishes and plans, for example a wish to pass their estate to children (which can be especially relevant where the clients have children from previous relationships). In addition, the clients' IHT planning might be adversely impacted by the use of a survivorship destination. It might also have an adverse impact for clients with concerns about future care home costs, given that the entirety of the property will become part of the survivor's estate.

One of the key factors cited against the use of survivorship destinations is their inflexibility. They can be overridden only in very limited circumstances, such as where the parties agree to evacuate the provision, where the

parties divorce or there is a dissolution of their civil partnership. However, not all parties who separate ultimately divorce and, in many cases, the parties might not be in a marriage or civil partnership. In that instance, the party who wants to evacuate the survivorship clause is prevented from doing so unless the other agrees.

It is likely not for the solicitor to advise on issues of financial or tax planning at the point of acting in the purchase. However, from a risk perspective, it is advisable for a solicitor to flag potential issues with their clients, so that the client can consider what steps they may wish to take, including whether they wish to obtain other advice.

## Evacuate! Evacuate!

It is possible to evacuate a survivorship destination.

It may go without saying that, in the event that a solicitor receives proper instructions from clients to evacuate the survivorship destination, they take steps to carry out that instruction, rather than delay. We have seen claims arising where the instruction was overlooked or else its implementation delayed.

However, by the time it is clear that the survivorship destination is not suitable (or is no longer suitable) for the clients, it may well be too late for it to be evacuated. One party may refuse to the evacuation of the survivorship clause. Take, for example the situation where the request is only made after the breakdown of the relationship. Unless the parties ultimately divorce or dissolve their civil partnership, the wish of one party cannot override the refusal of the other.

There is also the risk that, at the point in time when it becomes clear that the survivorship destination is not suitable, one of the parties may no longer have capacity to evacuate it. The inherent unsuitability of the survivorship destination might only become apparent after one of the parties has died.

From a risk perspective, it is also important to take the title into account when advising clients on the preparation of a will. There is no point in the client setting out wishes and bequests which will never be capable of being implemented, due to the terms of the title. A failure to consider this with clients at the time of will drafting could potentially give rise to a claim, perhaps from a disappointed beneficiary.

## Points to consider

Death and taxes might well be certainties. Claims and complaints don't need to be.

When acting for clients in a purchase, the solicitor should make the clients aware that, far from being a mundane technicality, the way that they choose to take title might end up being very significant for them at a later date. Explain this to the clients, and evidence that you have explained it. File note and follow up.

Ultimately, the decision is a matter for the client. It is not incumbent on the solicitor to unearth every potential consideration in their clients' lives and tell them what to do. However, what the solicitor can do is to try to put this at the forefront of their clients' thinking and give them the information to allow them to make a decision which is suitable for them, or else to allow them to take whatever further advice they consider necessary.

This article was co-authored for Lockton by **Anne Kentish**, partner, and **Colette Finnieston**, legal director, of Clyde & Co

## Notifications

**APPLICATIONS FOR ADMISSION 30 MARCH-24 APRIL 2023**

**ARMSTRONG**, Jessica
**BANNIGAN**, Chloe
**BLAIR**, Karleen
**CALLANDER**, Robert
**CAMPBELL**, Anna
**CAREY**, Rebecca Elizabeth
**CHATIR**, Zara Kirsty
**CHINYANI**, Kudakwashe Paidamoyo
**CROSS**, James Kerr
**DEMPSTER**, Sheryl Linda Margaret
**FRASER**, Eva Margaret
**GRANT**, Ellen
**HARPER**, Kirsty Louise
**HAYWARD**, Zoë
**HUGHES**, Jemma Marie
**McGEORGE**, Ashleigh Mary
**McLAUGHLAN**, Euan Leslie
**MARTIN**, Lucy Jane
**MELLOUL**, Salima
**MWANSA**, Mayawo
**PETERSEN**, Emma
**RODGER**, Alexandra Louise
**SPOWART**, Fiona Katherine
**VARNEY**, Brogan Louise
**WILLIAMSON**, Finlay Wrighty

**ENTRANCE CERTIFICATES ISSUED 18 MARCH-25 APRIL 2023**

**FORSYTH**, Beth
**FYFE**, Michael David
**GRANT-LYFORD**, Gus
**HAIDER**, Muhammad Saqlain
**HAMMOND**, Melissa
**MONAGHAN**, Sarah
**MOUNT**, Tulsi Eleanor
**SAUEROVA**, Veronika
**SIDDIQUE**, Sonia Azam
**SMITH**, Elizabeth Helen

**FROM THE ARCHIVES**

## 50 years ago

*From "This Isle is Full of Strange Noises: The image of the Society", May 1973:* "Mr Keel, a well-known television consultant... emphasised again the opportunities open to the profession to project its image to a massive audience. We must never, he said, forget the merits of television, despite the well known traps and drawbacks. Television scores again and again over the Press by enabling the viewer to form his own direct opinion about the character of the participant. Lawyers skilled in persuasive argument have definite advantages, but often, through no fault of their own, simply do not project sympathetically. Selection and training are an essential first step if the Law Society is to rely on the impact of its spokesmen."

## 25 years ago

*From "Creating our very own history" (the role of the Society when the Scottish Parliament is established), May 1998:* "In my view... there is much work to be done by the Society after the Parliament is established to ensure that all sizes of practice unit within Scotland are served equally... We must bring this expertise to bear on behalf of our membership and indeed the Scottish people, our clients... Whilst we are a body of wide knowledge and expertise, this clearly has resource implications for the Society and for the membership. I mean by this not only questions of finance but a real need to involve more members of the profession in the Law Reform process."

# AML: room for improvement

The Society's Anti-Money Laundering team report on the findings of the thematic review of policies, controls and procedures

Money laundering harms individuals, communities and society. It is central to much criminal activity and is linked to crimes that cause human misery and suffering, from people smuggling and child sexual exploitation to illegal drugs and gun smuggling.

The Law Society of Scotland is a professional body anti-money laundering ("AML") supervisor and we continue to invest in this work to protect the public and ensure our members meet the highest legal and ethical standards in this area. Our focus on money laundering is part of our strategic goal to be a modern and effective regulator acting in the public interest.

## Our work in AML

The sector may be aware that, in order to fulfil our responsibilities as the AML supervisor for Scottish solicitors, we deploy a number of tools and resources. For example, AML inspections, selected file audits, MLRO discussions and the requirement to submit the AML certificate.

Another such tool is sample-based thematic reviews, such as our AML thematic review of PCPs (policies, controls and procedures), which we launched in June 2022. Sample-based thematic reviews are a compulsory exercise for those chosen to participate. These help us to identify and assess specific current and emerging AML risks within the regulated population.

## Why thematic reviews?

Thematic reviews, such as this one, allow us to:

- work collaboratively with our supervised population to gain a better, more detailed understanding of the products and services that may be exposed to use and abuse for illicit purposes;
- gain a greater insight into how the profession complies with obligations under the Money Laundering Regulations and Legal Sector Affinity Group ("LSAG") guidance;
- use the data gathered to provide further information and support to members to mitigate the AML risks inherent in this type of work.

We were keen to obtain further oversight regarding the overall standard of PCPs across the sector, and this review has allowed us to gauge this further oversight and to provide supplementary guidance and support for this critical area of AML compliance.

## Our findings

The AML team was encouraged by some of the data identified through this thematic review, with examples of good and expected practice. However, a number of areas requiring improvement were also highlighted, with several consistent themes of non-compliance coming out of the review.

These included:

- the absence of PCPs that clearly demonstrate that customer due diligence should be holistic in nature and the importance of documenting the nature, background and circumstances of the client/matter;
- inadequacy in documented and practical guidance in relation to record keeping requirements;
- a lack of practical guidance to staff on red flags in relation to the identification of money laundering and terrorist financing;
- an absence of documented and practical guidance in relation to the ongoing monitoring of clients/matters.

The full report, with all our findings and supplementary guidance, can be found at www.lawscot.org.uk/PCPReview.

## Our new PCP template

Given the nature of the findings and the subsequent identified areas to improve, the AML team has also refreshed the AML PCP template, which can be found in our AML toolkit under "Risk and policy templates" at www.lawscot.org.uk/amltoolkit

It is important that practices are mindful that this is a template to *aid* compliance and not be relied upon. While the Money Laundering Regulations provide for compulsory PCP requirements at reg 19, not all aspects of the template will be relevant or applicable.

Practices should tailor their PCPs to be proportionate to their size and nature, and in line with the requirements under the Money Laundering Regulations and LSAG guidance. This template may assist with constructing established, maintained, and written PCPs to help practices identify, manage and mitigate risks identified in their practice-wide risk assessments.

## Next steps and going forward

We recommend that all practices in scope of the Money Laundering Regulations fully consider the findings of this report and that they review their AML PCPs accordingly.

It is our intention to undertake further thematic reviews, the next one most likely focusing on enhanced due diligence and/or politically exposed persons.

As we work with you to develop reviews and reports that help us to be robust in our AML work, we would appreciate your feedback on how we can best support and regulate AML in Scotland. It's never been more important. Please get in contact with us at aml@lawscot.org.uk.

We hope that everyone can learn from the findings of this thematic review and implement changes to their own PCPs as appropriate.

**Dale Trahms** and **Jenni Rodgers** are AML risk managers at the Law Society of Scotland

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

DISCIPLINE TRIBUNAL

# Tribunal aims for efficient justice

The Discipline Tribunal is inviting views on a major revision to its rules, designed to bring them into line with modern practice and technical capability

New draft rules for the Scottish Solicitors' Discipline Tribunal have been published by the tribunal for consultation.

Its current rules date from 2008 and the tribunal believes they are no longer fit for purpose. Some procedures commonly adopted have no provision in the rules. Other rules are ambiguous and have been subject to different interpretations by parties. There are no procedures for some issues which are commonly encountered. Modern technology may be able to provide some solutions, as became clear during the Covid-19 pandemic when much of the tribunal's business moved online.

An initial consultation took place in 2019 on the issues that ought to be addressed, but the draft rules contain more comprehensive changes, with the overall aim of assisting the expeditious disposal of business and avoiding unnecessary hearings, while maintaining the tribunal's independence, impartiality and transparency and the principles of natural justice. The rules are also intended to be user friendly and expressed in plain English.

One inclusion in the new draft is the standard of proof in misconduct cases, which the tribunal recently decided should remain at the criminal standard of beyond reasonable doubt. While this will be kept under review, the tribunal believes it is not yet time to revisit the issue. Although the Law Society of Scotland took the view that an evidential burden had no place in procedural rules, most respondents were in favour of its inclusion and and the tribunal does not believe it would be difficult to change this particular rule if that were felt appropriate in future.

Another new inclusion is a statement of overriding objective – "to deal with cases fairly, justly and efficiently, always in accordance with the law and the rules of natural justice".

The tribunal intends to keep its system of complaint and answers based on the civil pleadings system, but with more guidance in the forms as to what is required in pleadings. As was supported by all respondents, there is significant new provision for case management, including by the chair and vice chairs without a full tribunal.

Electronic service, digital or scanned signatures and remote hearings are all provided for. If service by other means has failed, "deemed service" may be effected by giving notice in the Journal and/or the tribunal's website.

Another innovation is specific provision for compensation hearings, which can take place on the day of the misconduct hearing or at a later date, or on the papers in appropriate cases. (Note however that under the Regulation of Legal Services (Scotland) Bill as introduced, the tribunal will lose the power to award compensation in misconduct cases.)

There is extended provision for affidavit evidence, and a power to direct that a witness be treated as vulnerable, with special measures available. Criminal convictions will be provable by the production of an extract.

A further new rule will apply where a question arises as to the ability of a party to participate in and/or attend a hearing by reason of mental disorder. Questions of capacity as a defence will be dealt with on the evidence in the usual way (including use of new draft rule 17 on expert evidence if necessary).

Numerous miscellaneous changes are proposed. These are set out in the consultation by noting the current and the proposed new rule, and a brief explanation of the changes.

A separate and parallel consultation covers the scale of expenses where an award is made. In a 2021 consultation the tribunal proposed to continue awarding expenses on the agent and client, client paying scale, subject to its discretion to use a different basis, but following concerns raised by the Lord President that this might not be proportionate, and consideration of other responses, the Tribunal proposes that in general it uses the party and party scale. This is a significant alteration to its general practice and before implementing such a decision the tribunal therefore wishes to seek views, including on the financial implications of the change and the broader impact on the profession at large.

Both consultations can be accessed at www.ssdt.org.uk/rules. The closing date for responses is 5pm on 1 June 2023.

ASK ASH

# Heart ruling head?

## My colleague has a crush that I don't think will end well

**Dear Ash,**

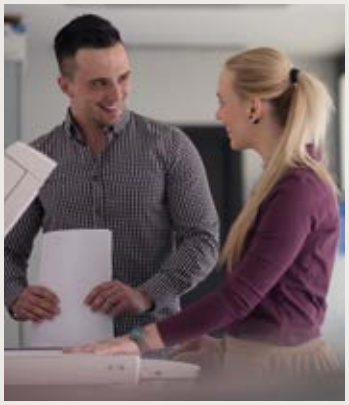
My colleague and good friend has developed a crush on one of our senior managers. I have tried to warn her against pursuing this as the manager in question has a bit of a reputation for being a flirt with everyone. However, my friend seems to think he is her ideal man and that there is no harm in pursuing a relationship. I suspect that the manager just likes having younger female attention and is not the type to settle down, but my friend refuses to listen and seems adamant she will go with her heart on this. I know it's going to end badly and she will get hurt, and I don't want it to impact on her job either.

**Ash replies:**

It's admirable that you are trying to look out for your friend. However, at the end of the day she is going to do what she wants and all you can do is to try to be there for her if and when things don't work out for her.

Relationships at work can be challenging for a variety of reasons, but especially where there is a managerial dynamic involved, as it could risk animosity developing from other colleagues who may perceive some form of favouritism. Also, any relationship breakup in such a dynamic could impact adversely on future career prospects.

You point out that the manager in question tends to be generally flirtatious, therefore your friend is likely to be deluded about the prospects of a full on romantic relationship with this person. Let's just hope that the manager is therefore kind and decent enough to put things right at an early stage by letting your friend down gently, and to save her any prolonged heartache, as well as you any more headache!



### 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).

# Classifieds

To advertise here, contact
Elliot Whitehead on +44 7795 977708;
journalsales@connectcommunications.co.uk



**Marion Colyer – Deceased**
Would anyone holding or knowing of a Will for the above, last known address being Hallhouse Nursing Home, 21 Main Road, Fenwick, KA3 6EH, previously residing at 11 Braehead Court, Kilmarnock, please contact Rebecca Coid of D & J Dunlop, 2 Barns Street, Ayr, KA7 1XD (Email: rebeccacoid@djdunlop.co.uk/ Tel: 01292 264091).

**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



**MRS JEAN COWIE CARMICHAEL, DECEASED**
Would anyone holding or knowing of a Will of the above whose address was 4 Fleurs Avenue, Glasgow, G41 5BE please contact Charles D. Jackson, Miller Beckett & Jackson, 190 St. Vincent Street, Glasgow, G2 5SP (0141 204 2833 or cjackson@mbjsolicitors.co.uk).

**Donald James Mackay (Deceased)**
Would anyone holding or knowing of a WILL for the above of Inverlochy House, Newmarket, Laxdale, Isle of Lewis, HS2 0ED and Leipziger Strasse 46/0608,10117, Berlin, Germany, please contact Derek Mackenzie, Derek Mackenzie Solicitors and Estate Agents, 20-21 North Beach Street, Stornoway, Isle of Lewis, HS1 2XQ or derek@derek-mackenzie.com

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