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Journal

Journal of the Law Society of Scotland

Volume 67 Number 2– February 2022

New face at the top

CEO Diane McGiffen tells the Journal about her experience and her vision for the Society

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Editor

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Rights of others

The widening gap between rich and poor in our society is well recognised, and successive Governments pursue schemes (or is that just slogans?) to do something about it. But it appears to me that there is another widening gap which is less commented on, though its manifestations certainly are, when they come to light.

These days, far more than just a few decades ago, many people and organisations devote time and effort to making us aware of the effects of our words and actions on those we come into contact with, particularly those in Equality Act protected groups defined on the basis of race, disability etc. And many businesses and other organisations now have people and policies dedicated to ensuring that these groups are given equal opportunities, are treated fairly and respectfully, and so forth. In all walks of life they should feel treated better than in the past.

Yet almost daily we are presented with evidence, via the news, that hateful and sometimes quite appalling behaviour is prevalent, if not endemic, and as likely to be on the rise as on the wane. Whether it is misogynistic (or worse) comments among police officers, disabled people left feeling that no one cares about them, or racism or homophobia blighting our sports, to give just a few examples, it often feels as if those promoting a better way to live are fighting a losing battle. And that is before we even take account of the vitriol that is spread so easily on social media.

Politically, we are said to live in a post-truth society, a term that reflects the cynical manipulation of the news, and even of the way we view past events, that has regrettably also become a feature of today's world. It would be wrong, I think, to view either of these trends as the cause of the other, but looking at the wider picture perhaps makes it more understandable why we are where we are.

Can anything stem the tide? It is important that those who wish to promote respect and equal treatment do not give up in the face of setbacks or hostility. And if individuals remain the target of the ill-intentioned, it is equally important that there is a legal profession committed to helping them if they cannot secure redress by other means. Just as lawyers stand up for the poor who have no other remedy, so we prize our role in standing up for protected groups. That is why, particularly for our profession, it is so important that our own ethics and conduct meet the best standards. It is also why all in the profession should read, and take to heart the lessons from, initiatives such as the recently published Racial Inclusion Group report on how we treat minorities in our own midst.

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

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In practice

ONLINE INSIGHT

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

A less travelled route to the law

Jo Dance tells the story of her alternative route to qualification, a demanding but achievable combination of full-time work and part-time study, which she believes shows that such non-traditional routes should be encouraged.

When COVID met Brexit

COVID-19 travel restrictions have added to the scope for EU nationals to claim settled or pre-settled status despite an extended absence from the UK, as Clara Smeaton explains.

Putting consumer interests first

Lily Braunholtz outlines the content of, and outcomes to be realised by, the proposed new consumer duty now out to consultation from the Financial Conduct Authority.

Message on a bottle

Martin Sloan and Grant Strachan highlight how the Advertising Standards Authority is taking a rigorous approach to marketing claims that a product or its packaging is environmentally friendly.

Journal index 2021

The annual index for 2021, covering published articles in the paper and digital issues of the Journal magazine, is annexed to the digital versions of this issue and also www.lawscot.org.uk/members/journal/

OPINION

Barbara Bolton

UK Government plans for a new Bill of Rights would weaken the protections in the Human Rights Act and put the UK in breach of its international obligations, which should be of grave concern to all

The UK Government's plan to replace the Human Rights Act ("HRA") with a new Bill of Rights signals an intent to water down human rights protections, erect additional barriers to accessing justice and equivocate on compliance with decisions of the European Court of Human Rights ("ECtHR") involving the UK. If passed, these proposals would be deeply regressive, undermining 20 years of human rights law and policy development across the UK, making it harder for people to enforce their rights, and putting the UK in breach of its international law obligations. This should be of grave concern to us all.

The central aim of the HRA was to bring the protections of the European Convention on Human Rights into domestic law, making them directly applicable to public authorities (and others providing public services), and enforceable in our national courts. Under the UK Government's proposed Bill of Rights, that objective would be severely undermined.

Interpretation of Convention rights by national courts would be explicitly decoupled from that of the ECtHR. National courts would be required to interpret Convention rights in a restrictive manner: abandoning the ECtHR's "living instrument" approach, which ensures that rights keep pace with societal progress; removing the requirement to take into account decisions of the ECtHR; restricting positive obligations, such as the positive duty to properly investigate deaths involving state entities, which the ECtHR interpreted as part of the right to life; and applying an alternative interpretation of specific rights, including the rights to freedom of expression, private and family life.

Convention rights may technically remain incorporated into national law if listed in a new Bill of Rights. However, if national courts must interpret them distinctly from the ECtHR, the result will be legal conflict, confusion, uncertainty and a likely increase in successful referrals to the ECtHR. The additional proposal of a "democratic shield", expressly permitting the UK to decline to implement ECtHR decisions against it, would put the UK in clear breach of the Convention and undermine the rule of law.

If the proposals were implemented, people would once again have to pursue claims all the way through the national courts and on to the ECtHR, only for the UK to potentially decline to implement a decision against it.

Additional proposals would add a number of significant hurdles to accessing justice, compounding existing barriers related to the complexity of law and procedure, the cost of securing legal advice and the lack of legal aid. First, a permission stage, requiring pursuers to establish that they had suffered "significant disadvantage" before they could proceed with their claim. Secondly, a requirement to exhaust other potential legal claims before raising a human rights claim. Thirdly, a requirement to demonstrate "clean hands", where past conduct could be used to preclude someone from accessing a remedy for a breach of their rights, which would undermine a central principle of human rights law – that rights are universal.

It's important to note that there is little consistency between the proposals and the conclusions, published at the same time, from the Independent Human Rights Act Review (IHRAR), set up by the Secretary of State for Justice in December 2020. Indeed, much of what is now proposed was not put to the IHRAR for consideration nor covered by extensive evidence provided to it during its 12-month review. Other proposals were rejected by the IHRAR, in light of overwhelming evidence that the HRA works well and there is no case for change.

A key concern flagged by many organisations during the IHRAR process was the additional complexity arising from the interrelationship between the HRA and devolution. The HRA is embedded into the Scotland Act, including in relation to limits on the competence of the Scottish Parliament and Scottish Government. Over 20 years of jurisprudence and practice has evolved in Scotland on the basis of that legal underpinning. Precisely how the HRA could be replaced without unsettling current devolution arrangements is unclear.

Detailed analysis of the UK Government's wide-ranging proposals is underway, and responses to its current consultation will be forthcoming. However, it is already clear that what is being mooted should be of real concern for all who value human rights and the rule of law. Defending the Human Rights Act will require concerted efforts involving civil society, grassroots communities and the legal community. As an initial step, responses to the current consultation can be submitted until 8 March.

Barbara Bolton is Head of Legal and Policy at the Scottish Human Rights Commission

The consultation is at consult.justice.gov.uk/human-rights/human-rights-act-reform/

VIEWPOINT

Baronies: the 2021 picture

An abridged version of the first annual report on the Scottish Barony Register (SBR), received as a letter from the Custodian

This is the first annual report the SBR has attempted, the idea being to give interested parties some idea of SBR activity during 2021. I intend to publish it on the SBR website.

Eight "new" (not previously known to the SBR) baronies were registered in 2021, and two baronies known to the SBR were registered following assignation. These include one "Lordship" and one "Earldom". 2021 was a relatively quiet year, but not the quietest. [A table of registrations per year shows a total of 215 since the SBR opened in late 2004, with annual totals ranging from four in 2006 to 26 in 2019, most years being in double figures.]

A new feature of the SBR is the website **www.scottishbaronyregister.org**. It appears to have worked well, directing emails to the SBR from third parties, and providing basic information on the registration process to both solicitors and members of the public.

Over the year, I have issued two opinions and answered numerous queries, mainly from existing or prospective barons via the website.

I was asked if a barony could be "extinguished" by me. The background was the death without issue of a baron whose family had held the barony in question since granted by Robert 1. I said I could not; that would be a Crown prerogative, but I did suggest an assignation to an offshore company that could be allowed to wither on the vine. An alternative would be to specifically exclude the dignity when conveying the estate in question to a third party. Clearly, Registers of Scotland would ignore any such exclusion (or indeed inclusion), but the third party would find it hard to prove valid assignation of the dignity. Perhaps a unique case due to the family circumstances and I am unaware of any developments.

The second opinion related to a conjoined barony; in this case, the interested party gave me clear evidence that the two baronies had originally been separately granted, and I saw no reason not to permit a registration of one of the baronies concerned. However, I will treat any other requests on the merits of the case presented to me.

Currently, a registration costs £700; a re-registration £350; a certificate of registration £100; and a letter of comfort £50. I do not intend to increase the fees in 2022 but will probably do so from 1 January 2023, and interested parties are therefore warned!

Certificates of registration are issued to barons on request and payment of the appropriate fee, and have proved reasonably popular although not mentioned on the website.

It occurs to me that an article in the Scottish legal press highlighting the existence of the SBR might be advantageous. It does concern me that barony titles are being missed during the executry process and in subsequent conveyancing. I would happily cooperate with any volunteer for this task. Any practitioners wishing to contact me can do so at custodian@scottishbarony register.org

Alistair K Shepherd WS, Custodian

BOOK REVIEWS

Criminal Evidence and Procedure: An Introduction (4th edition)

ALASTAIR N BROWN
PUBLISHER: EDINBURGH UNIVERSITY PRESS
ISBN: 978-1474494663; £28 TO PRE-ORDER USING COUPON NEW30 BEFORE PUBLICATION ON 28 FEBRUARY 2022, OTHERWISE £39.99

It has been 12 years since the previous edition of Sheriff Brown's book. Over that period there have been significant developments in criminal evidence and procedure. As previously, the author clearly identifies the principles, drawing attention to case law and how the practical application of those principles has developed.

The work follows the structure of the Criminal Procedure (Scotland) Act 1995 and takes us through the framework of the courts, jurisdiction, solemn and summary procedure and sentencing. For students, the end of each chapter has a recap of the main points.

There are three areas that merit particular reference: applications under s 275; the new provisions on arrest; and the special measures available to vulnerable witnesses. The first of these is an example of the clarity that Brown brings to better the practitioner's understanding.

While Brown makes clear this is not a book about advocacy, he makes frequent reference to why poor advocacy and a lack of understanding of what the advocate seeks to achieve through questioning, diminishes the assessment of the evidence elicited. This book should be in the pocket of everyone who appears before the court.

David J Dickson, solicitor advocate and review editor. For a fuller review see bit.ly/3GjYqRK

The Scorpion's Head

HILDE VANDERMEEREN
TRANSLATED BY LAURA WATKINSON
(PUSHKIN PRESS: £9.99; E-BOOK £5.39)

"If you're thinking this is a load of bunkum, I couldn't disagree; however, it is the most exciting, fast-moving and enjoyable bunkum I have read in a good while."

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

BLOG OF THE MONTH

blogs.law.ed.ac.uk

Posting in the Edinburgh Private Law Blog, Emeritus Professor Hector MacQueen considers the few decided Scottish cases to date on contractual issues arising out of the COVID pandemic. Even then, not all the issues raised relate directly to that; the issues in each are fully discussed.

Perhaps, he concludes, the relative lack of litigation so far is to be explained by most peoples' appreciation that their difficulties "were best resolved by mutual accommodation". Will that remain the case longer term?

To find this blog, go to bit.ly/320hxWk

Pizza the action

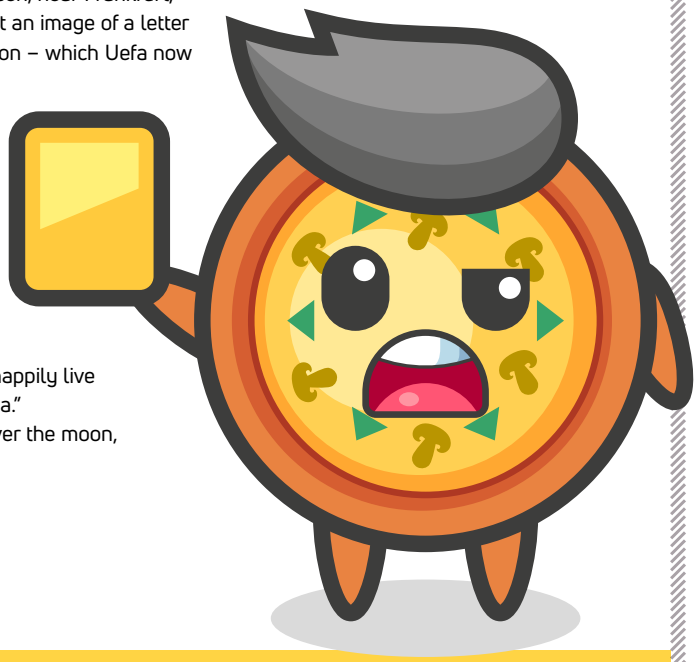
A restaurant in Germany can carry on offering a "Champignons League" mushroom pizza after Uefa, the governing body for European football, backed away from legal proceedings over infringement of IP rights in its Champions League.

The owners of Pizza Wolke, in Giessen, near Frankfurt, had posted on their Instagram account an image of a letter from Uefa which threatened legal action – which Uefa now claims was instigated by an "over-zealous local trademark agent".

Concluding, perhaps after a VAR review, that the witty name is not likely after all to devalue a competition which last season offered prize money alone of up to €85 million, Uefa suggested that "some people are making a meal of this story".

"The Uefa Champions League can happily live alongside this delicious-sounding pizza."

And the restaurateurs? Probably over the moon, or at least on *Wolke* (cloud) 9.



PROFILE

Bob Clark

As the Society's anti-money laundering (AML) certificate submission period opens, we profile Bob Clark, AML risk manager

❶ Tell us about your career so far?

Aimlessly unaware of what I wanted to do, I started with Halifax Bank of Scotland, as it was, in 2007. Only after 14 years would I leave for the Society. In 2011, a mentor encouraged me to join a team covering compliance and AML. I quickly identified this as an area growing in importance and work that I enjoyed.

❷ How did you come to join the Society?

I wanted a new challenge and experience. Thinking of other sectors where I could use my experience, I discovered the Society. A most interesting aspect for me was that I would operate across the entire Scottish legal landscape. It also appealed that I can see more clearly the benefit and impact of my work.

❸ What have you found most interesting so far?

Hard to pinpoint, but it must be simply talking with practices and solicitors. Hearing about their experiences and providing guidance has been as interesting as it has eye-opening. No two members are the same in circumstances.

❹ What main issues do you think the profession has to address at the moment?

From my perspective, it's fair to say that the financial sector is much further on with combating money laundering/financial crime. The Society's work involving an annual AML certificate for in-scope members looks to have gone a long way to enabling a risk-based approach to AML controls, and continues to be our number one tool to help us understand specific risks, trends, or issues for practices. Combined with ongoing engagement, support and training, and a willingness from the profession, it will drive improvements everyone can be proud of.

The Society's AML certificate portal is open for submissions until 30 April 2022
Go to bit.ly/3GjYqRK for the full interview

WORLD WIDE WEIRD

① Game over

Two police officers in Los Angeles were sacked after they ignored a call to assist at a robbery in order to carry on playing Pokemon GO in their squad car.
bit.ly/3rnpF9C

② Street justice

After 20 years on the run, an Italian mafia boss and convicted murderer was found and arrested in Spain after he was spotted on Google Street View, chatting outside a shop.
bit.ly/3L4CsWr

③ Better than a cone

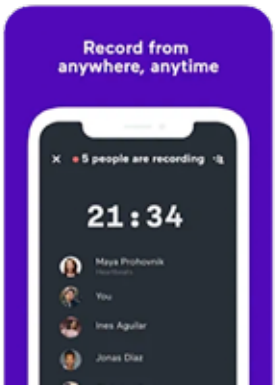
Residents in Adelaide are on the lookout for mysterious pranksters who are sticking googly eyes on statues, billboards and other places around the city.
ab.co/3IWCJsO

TECH OF THE MONTH

Anchor

Free: Google Play; Apple Store

If you fancy making your own podcast about legal issues – or anything else for that matter – then try Anchor. This handy app lets you record by yourself or with friends and build entire podcast episodes entirely from your phone.



PRESIDENT

Ken Dalling

Trainees and new solicitors need encouragement as they seek to develop their legal skills, and as the future of the profession it is in all our interests for more senior colleagues to provide that support

This month I would like to introduce you to Kipper. He is the first addition to our household in 26 years and he has turned our lives upside down – at least a baby can sleep in your bedroom and wear a nappy! Kipper is a four-month-old Australian Labradoodle and when not biting everything and everyone within reach, he is the most delightful bundle of hypoallergenic fun that you could ever want to meet. I'm fairly sure that I smiled spontaneously when looking at my daughters as children – and sometimes still do – but I certainly find myself doing just that when looking at Kipper.

I have lost count of the number of people who warned of the huge commitment that a puppy would require. More, even, than those friends who told us that getting a puppy was a wonderful, life-enhancing thing to do. They were all correct.

Thankfully, there is no end of instructional books and YouTube videos that can prepare the new dog owner, or at least reassure them that control of the dog is possible. No matter which author you consult, positive reinforcement seems to be the key to success. Let the dog know what you want it to do then praise and reward it when it delivers. Don't shout or punish – it won't work because they just don't understand. Distract, divert and give them something that's more interesting.

Support and encourage

So what's the relevance of this to the legal profession? Well actually, Kipper isn't my dog. He is my daughter's dog and, in case you missed it, she is a trainee solicitor. I have previously shared my concern about just how difficult it is for trainees to work remotely. The lack of direct engagement with others, even in the most informal of ways, can only hamper the "learning by osmosis" from which we all benefit.

It is worth remembering that trainee solicitors actually want to be trained and to learn. Their traineeship is the culmination of a formal legal education lasting six or seven years and while at university they will inevitably have incurred significant debt. New solicitors are the lifeblood of our profession, and my plea is that they are nurtured and supported with positive reinforcement, praise and reward. Not unlike Kipper.

I truly believe that the test of a good idea is whether it has merit, both in principle and in practice. In principle, of course, the senior ranks of the solicitors' profession should treat those less experienced with patience and encouragement. Some new solicitors have changed the direction of their careers or their lives to join the profession. They will likely have a wider experience of life, and some of that, at least, may make them better and more productive as solicitors. Those who started the path to qualification at secondary school, like me, have no less drive or focus. And talking of productivity, the practical reason for patience and encouragement is that a wise investment in furthering a colleague's legal training can only add to – not detract from – that person's work output and profitability. They will be better at what they do. That's a good thing, I think. Just like Kipper.

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

People on the move

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

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

BRODIES LLP, Edinburgh, Glasgow, Aberdeen and Dingwall, has moved its Edinburgh headquarters to Capital Square, 58 Morrison Street, Edinburgh EH3 8BP. **Christine O'Neill QC**, chairman of Brodies LLP, has been re-elected to serve a fourth consecutive three-year term in the role, beginning on 1 May 2022.

BTO SOLICITORS LLP, Glasgow and Edinburgh, has appointed **Dawn Robertson**, an accredited specialist and previously a partner with ROONEY NIMMO, as a partner in the Employment team.

BURGES SALMON, Edinburgh, Bristol and London, announces the appointment of **Amy Cornelius**, who joins from DENTONS, as director and **Gregor Hayworth**, who joins from SHEPHERD & WEDDERBURN, as senior associate in the firm's Dispute Resolution team.

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has appointed **Richard Lockhart**, previously general counsel of Scottish Futures Trust, a specialist in public law and net zero policy development, to its Public Law & Regulatory division.

DAC BEACHCROFT, Edinburgh, Glasgow and internationally, has moved its Glasgow office to Sutherland House, 149 St Vincent Street, Glasgow G2 2NW.

DALLAS McMILLAN, Glasgow, announces that **Forbes Leslie** has stepped down as senior partner after 20 years in the position, with head of Litigation **Gordon Bell** taking his place. **David McElroy** has become the firm's managing partner. Mr Leslie will remain a partner and head of the Commercial Property team.

GEBBIE & WILSON LLP, Strathaven is delighted to announce the promotion of **Louise A Arthur** to associate with effect from 1 January 2022.

GIBSON KERR, Edinburgh and Glasgow, has combined its two Edinburgh offices at India Street and Dundas Street in new premises at 6 Randolph Crescent, Edinburgh EH3 7TH.

Christine O'Neill QC

Dawn Robertson

Richard Lockhart

Neil Hay

Karen Hunt

Nadine Martin has been promoted to legal director, and **Karen Wylie**, previously with MORTON FRASER, has joined the firm as a senior associate, both in Family Law.

GILSON GRAY, Glasgow, Edinburgh, Dundee and North Berwick, has appointed **Richard Shepherd** as a partner in its Real Estate team. Based in Aberdeen, he joins the firm from JAMES & GEORGE COLLIE, where he was the managing partner from 2014.

KENNEDYS, Edinburgh, Glasgow and globally, has appointed **Gavin Henderson** and **Daniela Fusi**, both formerly partners with CLYDE & CO (SCOTLAND), as partners based in Edinburgh and Glasgow respectively.

LEVY & McRAE, Glasgow, announces the opening of an Edinburgh office at Exchange Place, 5 Semple Street, Edinburgh EH3 8BL, and the appointment of solicitor advocate **Neil Hay** as partner, and **Andrew Heggie** as a solicitor, both formerly with MTM DEFENCE LAWYERS. The firm also announces that **Ray Gribben** has been promoted to legal director.

MACNABS, Perth, Pitlochry, Blairgowrie and Bridge of Allan, has announced the promotion of **Jane McNicol** to senior associate and **Clair Cranston** to associate.

MILLER SAMUEL HILL BROWN, Glasgow, has announced the retirement of founding partner **Michael Samuel** from 31 December 2021, after 50 years in the profession.

NELSONS SOLICITORS FALKIRK LTD are pleased to announce the promotion of their assistant **Mark Fallon** to associate from 1 February 2022.

TLT LLP, Edinburgh, Glasgow and UK wide, has appointed commercial property specialist **Karen Hunt** as a legal director in Scotland. She joins from PINSENT MASONS and is based in Glasgow.

WEIGHTMANS, Glasgow and UK wide, has appointed **Joanne Farrell**, a specialist defence personal injury solicitor previously with BTO SOLICITORS, as a principal associate in the firm's Insurance Litigation team; and **Livia Ziegelmeyer**, previously with MACROBERTS, as an associate in the Commercial Real Estate team.

ELIZABETH WELSH FAMILY LAW PRACTICE, Ayr, intimate that founding partner **Elizabeth Welsh** has retired with effect from 31 October 2021. The remaining partners, **Carolyn Paton** and **Penelope Galloway**, wish Elizabeth a happy and healthy retirement.

WRIGHT, JOHNSTON & MACKENZIE, Glasgow, Edinburgh, Inverness, Dunfermline and Dunblane, is in the process of moving its Glasgow headquarters to St Vincent Plaza, 319 St Vincent Street, Glasgow G2 5LD.

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I can guess where you don't want to be at 7pm! Just like everyone else, you don't want to be in the office. So, while working on our software we're acutely aware that it must solve challenges in your everyday practice. We know you often have to work late... it's because you're busy. If we can help you save time on legal work and help you leave at 5.30pm instead of 7pm, you might just buy our product.

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Making the running

A career background at Audit Scotland makes taking up the post as the Society's chief executive not such a radical departure, Diane McGiffen tells the Journal, as she sets out her aims for the Society and its members

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How do you set a course for the Law Society of Scotland, at a time when its role may be cut back and the justice system faces serious pressures? That is the not inconsiderable challenge facing Diane McGiffen.

The Society's new chief executive arrives from a long-term stint at Audit Scotland. In fact, she was present at its birth, with the advent of devolution itself, and served successively in the Management Services Unit, as director of Corporate Services and from 2010 as chief operating officer. "I did it for so long because it is so fascinating and I had so many opportunities to grow and develop there," she tells me.

There are more parallels with the Society than might appear at first. For one thing, Audit Scotland's work ensuring the best use of public money involves questions of good governance. "Auditors work to international standards of auditing and financial control, and public sector, as opposed to private sector audit, covers a very wide range of issues including conduct and governance," McGiffen explains. "Audit Scotland reports widely and regularly on any issues where conduct and governance were not up to scratch. And we take part in developing frameworks and promoting good governance."

Not only that; it too works with counterparts in other jurisdictions to ensure consistency of approach and adoption of best practice and standards, "so that we would be seen as an exemplar".

She continues: "Both organisations are aiming to be world class and measure themselves on how others are doing across the globe. I think it's really important, isn't it, to look outside borders and learn from the best everywhere."

Another crucial point is its independence. Asked what sort of relations she had with Government, McGiffen replies: "Part of our role was to audit Government and report on its performance to Parliament, so our relationship with Government was one of respect – it's very important for auditors to understand the business and to remain independent, so there are strong similarities in that aspect also. It's important to be part of the conversation, and it's important to know where the boundaries are."

Shared commitment

What attracted her to make the move? "When the opportunity arose, I started thinking about what I would do at this point in my career. It's such a fantastic opportunity to join the Society – a lot of the same things are important, the purpose of the organisation is a really clear one and a really valuable one, promoting access to justice, the rule of law and the independence of the legal sector, and protecting the public interest; that's a place I feel comfortable to operate in and I think all those things are really important for the quality of the civic society that we have.

"I saw an organisation committed to doing the very best that it could for its members and for society, and passionate about its profession, looking to learn and grow its expertise and I found a lot that chimed with Audit Scotland."

Our interview has a strange, almost post-apocalypse feel to it. After a week in post, it's McGiffen's first day in the Society's HQ; it's my first time there in nearly two years; and what is her first face-to-face meeting (all COVID protocols were followed) takes place in an almost deserted office. Despite all that, she has felt welcome.

"I have to say that the Society and its members and my new colleagues are among the friendliest people I've ever met. I've had a really lovely warm welcome from colleagues. Because we're in lockdown and working remotely, I'm having to do Teams calls to get to know people and it's just been fascinating to feel the passion for the legal sector that comes across on screen."

She adds: "The range of things the Society does is huge and I feel that it's one of Scotland's gems. The expertise the Society has, the commitment of its members, the way members give their time to the various committees and practice of the Society, the way the Council operates, the board – people give so much to ensure that Scotland has a really strong and independent legal sector and the more people I meet, the more commitment I see to that."

Carry on building

What does McGiffen believe she brings to the chief executive role? "I've got lots of experience from Audit Scotland of leading an organisation, understanding how things work, looking to improve continuously and make the most of everything. So I'll bring real commitment and – I don't want to use the word passion because I think that's overused – a real energy to that."

At this point, she pays tribute to Lorna Jack, "because I didn't know her before and she has been so kind and gracious in the time she spent with me in the run-up to taking on the role and in demonstrating really clearly her personal commitment to the Society".

More than likely she will find herself compared. How would McGiffen like to be seen? "As someone who is building on Lorna's fantastic legacy. And I'd like Lorna to be proud of where the Society gets to and I think – I hope – I'll be able to do that. I'd like to be seen to pick up the baton and help us move on in the post-pandemic context."

Interestingly, there are parallels here too. When Jack joined the Society in 2009, the country was coming out of recession, and looming on the horizon was legislation to change the shape of the Scottish profession – some of it only now coming into force.

Present challenges

Added to that, the Society's future as regulator is again in question. How does the uncertainty affect setting goals or a strategy at the present time?

Here McGiffen is fully on board with the Society's response to the recent consultation. "I think the independence of the legal sector from Government is a fundamental principle. The International Bar Association and the judiciary have now made public their views on some of these matters and the critical importance that they have, and it's so important to get this right, to make sure there's a proportionate response to the issues raised in the Roberton review.

"There is a huge commitment to work on improving the complaints process. I think everyone has recognised it could be speeded up; we need some legislative change to do that, but beyond that, I think the Society has a fantastic heritage, more than 70 years of co-regulating legal services, of bringing together all that expertise and commitment to the profession. How does it affect us in setting goals? I think it has helped to remind everyone of what really matters and how we need to evolve and adapt."

What other issues are currently at the top of her list? "The Scottish Parliament's Justice Committee has just produced a big report on the current state of play in the justice sector, and it's a very comprehensive picture of many areas that need addressing, including legal aid services, and access to justice.

"These have been very difficult times for everybody. The legal sector is no different from that, and making sure we have a vibrant and sustainable profession with people wanting to practise across all areas of law is going to be really important. And there are concerns now that some parts of the profession are not as attractive as they might be."

In addition, environmental goals need much more emphasis today; IT developments constantly bring opportunities and challenges; and, of course, looking at legal aid, court recovery and access to justice, "there are some very big pressures in the system, some of which need immediate resolution and some of which are for the longer term".

Member engagement

If she were able to come in with a completely blank sheet without these urgent matters going on, what would McGiffen be looking to do?

"It would be to enhance the Society's work across key areas: the services we offer to members, the ways we support members, the voice the legal sector has in all the legislation and policy changes that are affecting people's lives and business; and also to make sure we continue to bring people into the profession and support them as a profession that is still seen as attractive and viable." Here she commends the Lawscot Foundation, which has done "some brilliant work to support access to the profession, for people who might not normally be able to become lawyers".

Answering to a large, diverse membership that provides most of the Society's funding will be one big difference from Audit Scotland. Or will it?

"That's an aspect of the role that is different, but in Audit Scotland we were funded from fees, two thirds from fees and a third by parliamentary funding, so being conscious that people expect good quality services and good value for the contributions they make, whether that's through membership fees, practice fees and so on, that is key. I think the Society's actions at the beginning of the pandemic, of reducing fees by 20% was a bold move and indicates its commitment to helping the profession come through, so there is a lot there to build on.

"We're about to embark on the next five-year strategy and to consult with members on that, and I'm hoping that process in the early part of 2022 will really help hear the voices of members and what they feel the Society should focus on.

"As soon as it's safe I'll be out and about meeting members and listening to their concerns, and I can't wait. In the meantime, I'll be doing that online. So I'm very much in listening mode. We have great research at the Society as well: I've been reading all the research we've done over the last few years, into the impact of COVID on members, for example, surveys on what stakeholders think; we're doing some member research at the moment, so I'll be listening to all those voices in lots of different ways."

Similarly, McGiffen is no stranger to the needs of privately owned businesses. "Public bodies work in partnership with private businesses all the time, and the public body working well is part of what creates the conditions for private businesses to thrive and to work in partnership, so although my previous role was looking at public money, as a business ourselves at Audit Scotland we would employ private organisations to do different parts of our work, so I'm very used to working with private firms."

Use what we've learned

In her welcome message in last month's Journal, McGiffen referred to wanting to help the profession thrive at the heart of a free and fair system of justice – "goals that matter now more than ever". Does she see these values as under threat?

"There is an issue here about making sure we don't go backwards as a society. What the pandemic has illustrated is the huge inequality that exists. We've all been through the same experience, but it hasn't impacted us all in the same way. Those of us able to work at home, for example, have been very fortunate in comparison to those who have had to continue working in different ways.

"One of the odd things about remote working has been that in some ways it's more inclusive, because everyone is on the same platform, so although there are lots of aspects of that working which you wouldn't want to continue, one question is how do we continue to offer flexibility and inclusion. There are lots of issues about how to ensure that court recovery and justice recovery take place in a way that is fair and equitable, and treasure what works well in the system of justice, so it's making sure we are focused on the things that matter to us."

She concludes: "This has been a wearing and demanding couple of years for everybody, but as well as the pain we've also learned lots of things, haven't we, about how we might do things differently. And as we start 2022, although there is still uncertainty, I'm hoping that we can really strengthen the Society's impact and influence and the support it provides for its members to make sure the legal sector can thrive and make the most of the opportunities and the learning that we have."

Diane McGiffen in profile

Born in Cumbernauld, she studied at Glasgow University and also holds a Master's from Edinburgh University in social and public policy. Pre-pandemic she was studying at Cranfield University part-time, looking at the retention of women over 50 in health and social care.

A long-time yoga practitioner, she is also qualified to teach it. Pre-pandemic, she became a fan of commuting by e-bike; during it she started open water swimming, which she now does at least once a week near her Portobello home, and has developed an enthusiasm for weightlifting.

At home with her husband and 18-year-old son, she also enjoys baking, and – yet another lockdown pursuit – has built up an impressive streak learning French on Duolingo. *Cela suffit, non*?

Is your website doing the business?

No legal practice can market itself effectively nowadays without a website. The question is, how do you get yours to do the business? Let's take a look at a few of the key considerations.

IN ASSOCIATION WITH LAWWARE

We really do live in the age of the magpie mentality. Internet searching for legal services is the norm and, no matter how near the top of the search engine rankings your practice is, the back button is just one click away. If your website doesn't engage viewers instantly or is difficult to understand, they're gone. So, consider the following:

Make it easy to contact you.

It sounds obvious but you'd be surprised by how many legal websites don't do this. The basic rule is to place your telephone number and email address prominently - preferably at the top of all pages on the site.

The call to action or contact form should also be prominent. You can do this easily with a contact button which leads to a short form. Short is of the essence - long forms deter visitors from completing them.

Ensure your site is mobile friendly.

Well over 50% of all visitors to your site will be using a mobile device. That means it has to work just as well on a phone as it does on a desktop PC. That can be achieved relatively easily with modern web design software and templates. It's also well worth the effort as non-mobile friendly sites deter visitors and do not rank highly in Google's search engine.

Content.

Your first consideration for content is your home page. The better ones tell visitors they are in the right place and provide clear information on the legal services you deliver in down to earth language rather than "legalspeak".

Always try to write your content from the point of view of a client. So, it might be better to use descriptions for your services like dispute resolution or property rather than litigation or conveyancing. That done, don't forget the LSOS price transparency guidance to publish your prices on your site.

Look and feel.

I've lost count of the number of law firm websites I've seen that look tired and uninspiring. Images of gavels and bookshelves filled with tomes of case law may be relevant to you, but are they to your clients? If you use imagery, make it relevant.

Speed.

Too much imagery can slow your site down. How quickly the pages of your site load is really important for two reasons. Firstly, a slow site will put off visitors. Secondly, Google penalises slow loading sites and that will dramatically affect your search ranking.

Google tests the speed of your site using a simulation of an old 3G mobile device as its benchmark. Test your site using Google's own "PageSpeed Insights" (https://pagespeed.web.dev/). If it scores less than 90% for mobile load speed, you are less likely to appear on page 1 of a search.

SEO.

Search Engine Optimisation is the technical bit. In simple terms, it means the process of improving your site to increase its visibility when people search for your services in Google and other search engines. It involves key phrases, titles, slugs, meta descriptions and much, much more.

If this terminology means little to you, you need help from a specialist. A good SEO developer will be able to manage your site efficiently, tailor it to your audience and speed it up to ensure you remain visible.

Having recently rebuilt the LawWare website to accommodate Google's latest SEO changes, it is now starting to rank higher and load much faster. So, if you'd like an honest appraisal of your website's performance, please give me a call.

Mike O'Donnell.
0345 2020 578 or
innovate@lawware.co.uk.

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Climate change: where do we go now?

Emma Dixon reflects on what has been achieved to date by the Society's Climate Change Working Group, the priorities for the profession in the wake of COP26 and the group's continuing role

It is now more than 18 months since the Law Society of Scotland's Public Policy Committee established a COP26 & Climate Change Working Group. When we convened our first meeting, little did we know how much work would be undertaken nor how much more there is to do.

The membership of the working group was formed from a number of the Society's committees with interests including environmental law, energy law, marine law, technology law, equality and diversity, finance, planning law and criminal law. This, in and of itself, demonstrates the cross-cutting nature of the climate crisis and the relevance across all aspects of legal practice.

Although initial proposals for the establishment of the working group had been framed before the publication of the IBA (International Bar Association) Crisis Climate Statement in May 2020, the statement sets the backdrop for the work which has been undertaken by the group since its creation. In the statement, the IBA asserts that: "the legal profession must be prepared to play a leading role in maintaining and strengthening the rule of law and supporting responsible, enlightened governance in an era marked by a climate crisis".

It sets out a number of calls on lawyers and on bar associations and law societies in relation to the climate crisis. These include matters such as urging lawyers to consider taking a climate-conscious approach to their work and advising clients of the potential risks arising from activity that negatively impacts on the climate; education for law students on the legal elements of the climate crisis and its impact on human rights; developing practical educational tools for qualified lawyers; encouraging lawyers and legal practices to actively support, engage with and record their efforts in combating the climate crisis; and supporting positive changes in the workplace through the adoption of more sustainable practices.

Mindful of that appeal, the work undertaken by the Group has been varied – from starting with surveying the profession on COP26 and climate change, through engaging with a wide range of stakeholders including in relation to the practical arrangements for COP26 being held in Glasgow, producing principles on climate change for use by the Society's policy committees, and holding a virtual round table on the theme of COP26, Climate Change and Human Rights, to launching a student essay competition and co-editing last October's climate-themed Journal.

Call to action

The calls to action at the Society's own COP26 conference, "Lawyers and climate change – leaders or followers?" in October 2021, stress the importance of the profession taking action and showing leadership in this area. Mary Robinson (see Journal, November 2021, 5) noted that it is particularly important that lawyers engage with the mindset of being in a climate crisis because of their potential to be effective and influential in so many ways – in advising clients, litigation, and policymaking. Professor Paul Watchman reflected on how social activism and geopolitical change, compounded with climate change and the demand for equity, equality and transparency within corporations, have accelerated the calls to significantly address ESG (environmental, social and governance) issues, observing that law firms can respond not only by serving clients but must ensure that their own ESG house is in order.

From feedback sought from those in attendance at the conference about climate change and their business, 83% said they or their business were actively thinking about climate change and the steps they might take to reduce their business emissions, and 28% reported that they had been approached by clients for advice on climate issues.

The conference provided a platform for the Society and its members to engage with some of the key issues for the profession, including lawmaking and litigation, ethical issues for the profession associated with climate change, the relevance of gender to the climate crisis, and the role of climate change in legal education. We, as a profession, will need to grapple with these and other issues as we address the climate crisis.

Beyond Glasgow

Reflecting on COP26 itself, while the Glasgow Pact fell short of delivering the national commitments that would together limit warming globally to 1.5°C, there were also major steps forward

"Turning words into action is our priority. There is a business, and societal, necessity for individuals and businesses to urgently take ownership. If you aren't already doing so, now is the time to undertake meaningful action"

on several key climate issues. Significantly, public recognition that climate change is the challenge of our time is beyond doubt. That understanding will influence everything across our society and economy. Temperature rises above 1.5°C put parts of the world in danger of being left functionally uninhabitable, due to sea levels rising or extreme weather conditions.

The prominent role played at COP26 by business and finance shifted the focus beyond action by governments and onto the steps being taken by industry and wider society. Indeed, the run-up to the event built tremendous momentum, with considerable media coverage around the climate crisis and COP26 itself, organisations and civil society engaging in climate debate and action, and a number of businesses, including law firms across the UK and beyond, making net zero commitments.

The full implications of COP26 will play out in the coming months and years, but its clear message is that turning words into action is our priority. There is a business, and societal, necessity for individuals and businesses to urgently take ownership and the rapid action necessary to tackle the climate crisis. If you aren't already doing so, now is the time to undertake meaningful action.

Lawyers are well placed to play a key role in helping to address the climate crisis – as trusted advisers to their clients, lawyers often have a significant role in the business decisions taken around boardroom tables. Lawyers' skills in analysis, creative problem solving, communication and adaptability will stand the sector in good stead to drive forward change. As clients look to their advisers for solutions, solicitors working across a growing range of sectors will need to develop their own knowledge and understanding of the issues involved so that they can advise clients appropriately.

Growing scrutiny of businesses' sustainability practices will continue apace in a post-COP26 world. Businesses and public sector bodies are taking a growing interest in the environmental footprint of those they are employing to provide services, and this will almost certainly be felt by the legal services market in the years to come. It will impact on a business's ability to secure clients, obtain funding, and tender for work, particularly where it is publicly funded work. Employees and prospective employees, notably those at the junior end of the profession, are scrutinising the actions of their firms and organisations and so there are concerns around attracting and retaining the best talent. In short, there are weighty business risks in not taking significant action on climate change.

Continuing role

So, what now for the Society's working group? The group was established as a medium-term project and now that COP26 has passed, it has been considering the legacy of its work. Much work has been done by the group over the last 18 months; however there is much more to do to ensure that the Scottish legal profession is delivering not only thought leadership but impactful, rapid action.

There will continue to be a role for the consideration of the climate crisis in the context of the Society's policy and law reform work. The all-encompassing nature of climate change is such that there is a need for those working across all subject areas to consider climate change matters within their areas of focus.

More broadly, the group is contributing to the work to develop the Society's next strategy. As we look to the years ahead, sustainability will play an increasingly significant role in the legal services market and this strategy provides the opportunity for the Society to demonstrate its commitment to lead the profession in this area by putting sustainability at the very centre of its work.

Emma Dixon is a senior in-house lawyer, and convener of the Law Society of Scotland's Climate Change Working Group

Women in Law: an appeal

The Women in Law project is appealing for more personal stories from women working today – and especially for stories from ethnic minority women in law, past and present

In 2017, I first heard the story of Madge Easton Anderson. Born in Glasgow in 1896, she grew up in a southside tenement in Kenmure Street (the site of last year's Home Office protests).

It seems safe to assume that Madge was always determined, enrolling to study law at the University of Glasgow and starting her apprenticeship with Maclay Murray & Spens before the passage of the Sex Disqualification (Removal) Act 1919, when the barrier to women becoming lawyers was removed. In 1920, she made history when she became the first professional woman lawyer in the UK.

I grew up in the southside; studied at the University of Glasgow; trained at Maclays. How had I never learned about this remarkable woman? Were there statues, paintings and exhibits that I had missed in my ignorance? I had so many questions. What was she like? Was she the only woman in her class? Where did her career take her? What was it like, being the first?

It soon became clear that it would not be possible to get quick answers. There were no statues, paintings or exhibits, and there was actually very little information available. Fortunately, brilliant work has been done, in *Women's Legal Landmarks* (Bloomsbury), by Alison Lindsay, of the National Records of Scotland, who generously shared her knowledge, and I have since had the privilege of working with her, with Professor Maria Fletcher of Glasgow, from whom I first heard the story, and with colleagues Dr Pat Lucie, Dr Charlie Peevers, Dr Rachel McPherson and Marie-Claire Boyle to uncover more.

We found quite quickly that traditional archival research was limited, given that very little information was recorded about the early pioneers at the time. But using feminist research methods and relying particularly on oral history, we have been able to build a fuller picture. In particular, former neighbour Flora Douglas, who knew Madge Anderson when she ran a B&B just outside Bankfoot, gave me a sense of her as a woman that a matriculation record never could: a generous woman who would lend young

anon. ref's Glasgow Times

Madge Easton Anderson graduating

Flora her bicycle, but who never spoke of her professional achievements. She was fiercely independent, until towards the end of her life.

Looking for more stories

Our work has not just been about recording Madge's story, however. There are so many stories missing from the record, not just in relation to the historical pioneers, the "first" women. We felt it important to record the voices of women in law today, so that future generations are not left asking the questions about today's women in law that we ask about the pioneers. To that end, we have been gathering a collection of personal stories: see bit.ly/34rCkks. We now have more than 100 voices and are keen to see this grow and grow.

But there are still significant gaps in our knowledge, particularly around ethnic minority women. We don't know who the first ethnic minority lawyer (man or woman) in Scotland was. There are no statues or paintings or exhibits about what it was like to be one of the first, and significant data gaps in the archives lead us repeatedly to dead ends. Data gathering is getting better, and important work is being done by the Law Society of Scotland's Racial Inclusion Group, which published its report in January 2022 (see p 39).

It is important to remember that a lot of what we learned about Madge Anderson came from people like Flora Douglas sharing their stories and knowledge. We are very lucky to be working with Naeema Yaqoob Sajid of Diversity+ (diversityplus.info), herself a pioneering woman in the Scottish legal profession, to learn about and share the stories of ethnic minority women in law. In the coming months, we have events and collaborations planned, which we will share through the Society and via social media channels.

We are asking the Scottish legal profession for support with this project. First, we are asking you to please share your own personal knowledge of pioneering ethnic minority women in law that you know or knew; and to share our call with your friends and families, who may themselves have stories to share with us of people they knew. These stories don't need to be about women you think were the "first" – they may never have gone on to practise law having studied the LLB. All these individual stories are important.

Secondly, if you are an ethnic minority woman in law today and want to share your story, please do get in touch. The project is open to all women, including trans women, in and of law – you don't need to be qualified or practising. We would love to hear and share your voice as part of our project, so that future generations know what it was like to be an ethnic minority woman lawyer in 2022.

If you would like to share a story or provide information to assist us, you can contact us at Seonaid.Stevenson@gcu.ac.uk (Seonaid Stevenson-McCabe), or Diversityplusinfo@gmail.com (Naeema Yaqoob Sajid).

Seonaid Stevenson-McCabe is a lecturer in law at Glasgow Caledonian University

BRAEMAR FINANCE

Business lending: a human process

Every stage of a request for funding involves a member of the team

At Braemar Finance, our legal clients are more than just a credit score and we base our lending decisions on the overall health and plans for a practice. The human component of our business is core to our success – every stage in the lending decision-making process involves a member of our team.

We explain more about what we can fund and the application process...

Stage 1

Typically, new enquiries come either from new or existing clients contacting us directly, from introducers such as a customer's accountant or from the many equipment supply companies we have a working relationship with.

Existing customers tend to email or call one of our sales team directly because they will remain their contact throughout their time with us.

In the early stages, most communication is conducted by email or phone calls, or a mix of the two. However, they're also happy to meet clients face-to-face if that's their preference. We are very flexible and adapt to clients' needs – we understand they're busy during office hours, and we're happy to speak or pick up messages and texts at a time that suits them.

We are able to accept requests to fund a wide variety of activities, including:

- Tax loans;
- VAT loans;
- Consolidation loans;
- IT equipment;
- Business loans;
- Refurbishments;
- Capital injections;
- Buy-in/buy-outs.

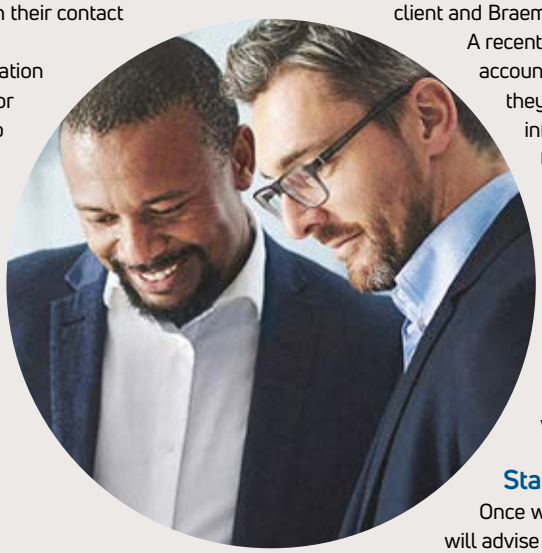
Stage 2

When the team receives an enquiry, they'll listen to what a client is looking to achieve and then provide their recommendation on the best finance solution for their needs, whether that be hire purchase, lease or loan.

Something to note is we aren't afraid of tailor-made deals – it's what sets us apart. If the client's request is unusual, we talk it through with them before we put an application together to determine whether they want to proceed, or maybe work it in a different way.

At this stage we look for the client to provide information to support their application. Understandably, and given the tough trading conditions that COVID has brought, some clients have been known to withhold what they feel could be perceived as negative information, thinking it will lead to their application being declined. This is not the case in Braemar Finance, because we make decisions based on the overall health and future plans for the legal practice.

Knowing everything upfront means we can address any queries and explain the situation to our in-house team of underwriters, helping them to reach the right decision for the client and Braemar Finance.



A recent example involved a client's accountant who had contacted us because they were late filing shareholder information in 2019, which showed on the client's credit file. The accountant accepted this was their oversight, although in reality, it's a very minor issue. However, this had caused a vehicle funder to decline the client's finance application because the automated system they used picked this up. In our application, we explained what had happened and it was approved within hours.

Stage 3

Once we are set on a plan, our team will advise on the information we need and, once received, we will submit the proposal to the underwriters. If there are any questions from the underwriters at this stage, we will then feed this back to the client, obtaining answers to allow a speedy decision to be made.

A decision is then reached and, if approved (which nine out of 10 applications are), we let the client know, after which the documentation is raised for signing and the payout arranged.

We hope we've been able to demonstrate that not only is the application process straightforward, but that real people are responsible for making the decisions.

For more information visit www.braemarfinance.co.uk/legal

Inquiries: addressing some questions

Ahead of the COVID-19 inquiry, Nigel Orr, a former solicitor to a public inquiry, considers the working of inquiries under the 2005 legislation in relation to public expectations of results

According to the *Scotsman* on 15 January, Liberal Democrat leader Alex Cole-Hamilton wants "a ruthless and thorough public [coronavirus] inquiry that can go anywhere, speak to anyone and demand answers", and he wants it to deliver its interim findings within a year of starting. All very commendable, no doubt, but in practice can he reasonably expect such a timetable? Would it actually be a good thing?

These are my own reflections, based on the Vale of Leven Hospital Inquiry in which I took part, and not necessarily shared by anyone else involved. But my experience does lead me to believe Mr Cole-Hamilton's remarks to be unfortunate and ill-informed. In order to assess why inquiries often take so long, let me begin with the basics.

What is a public inquiry?

Public inquiries are a creation of statute. Their establishment and their conduct are governed by the Inquiries Act 2005 and rules made under that Act. Much of the procedure followed by an inquiry is therefore not a matter of choice; it is an essential requirement in law. That is a matter politicians would do well to bear in mind before they complain about the conduct of an inquiry. *They* – that is, Parliament – made the rules.

A public inquiry is independent. While it is established by and its terms of reference are set by Government, either UK or devolved, its conduct is under the control of the chair. That is vital if it is to be transparent and reach conclusions not influenced by ministers or others with a vested interest in the outcome.

Time limits

Any ministers tempted or pressured to set a time limit on an inquiry would do well to reflect on the experience of Nicola Sturgeon. With the Vale of Leven Hospital Inquiry, as Cabinet Secretary for Health and Wellbeing she announced publicly that she had set a time limit of 18 months. That was pointless. For one thing, it eroded the independence of the inquiry. For another, it was impractical, and she had been told so. Furthermore, it was impossible to enforce. The minister simply provided a stick for opposition MSPs to beat her with, having to insist to the Parliament in the face of inevitable delays that the conduct of the inquiry was the chair's responsibility. But in addition there are sound practical reasons for not setting a rigid timetable. Quite simply, until a public inquiry embarks on its task of gathering evidence, it is impossible to predict what it will find or how complex or far-reaching its investigation will need to become in order to fulfil the terms of reference imposed on it.

What is involved?

So, what does a public inquiry entail? Why does it take so long? And why are public inquiries so expensive? Well, first of all there are many stages to go through, all of which take time.

The first task of a newly appointed chair is to put together an inquiry team, perhaps a panel of assessors to assist them, but certainly counsel to the inquiry, solicitor to the inquiry, secretary, and often their deputies. Often the solicitor, secretary and administrative staff will be made available on secondment from the Civil Service, but the ultimate choice lies with the chair.

Independence of the inquiry

This method of staff appointment does give rise to potential difficulties over the independence of the inquiry. I was seconded to the Vale of Leven Hospital Inquiry as a senior civil servant, under the chairmanship of Lord MacLean. But I did not come from the Scottish Government Legal Department, and to that extent could claim a certain independence in my dealings with it.

Certain tensions soon arose because Scottish Government not only played an important supporting role in the running of the inquiry, but was itself going to be an active party. Those two roles rapidly became rather blurred, and my arm's length position was something of a comfort when I had to insist to the head of the Legal Department that strict separation and confidentiality must be maintained between those in his department acting in the two different roles.

The late Murray Sinclair, to his credit, readily agreed that that should be done, but in this and later dealings with Government lawyers I would have been concerned about my professional position had I been seconded direct from Government with the prospect of pursuing my career there once the inquiry was concluded. That is in no way to impugn the integrity of solicitor colleagues who might find themselves in that very position, but it is in my view unfair to subject them to such potential pressure. Nor is it a reflection on senior personnel in Scottish Government. But there is a risk that such a close professional relationship will raise doubts in the mind of the public as to the inquiry's independence of Government.

As an indication of such independence in practice, when I retired from the Civil Service I was invited to remain as solicitor to the Vale of Leven Hospital Inquiry. The chair's response to Government attempts to replace me was: "I appoint the solicitor to the inquiry, not Scottish Government."

Setting up the inquiry

Once the team is in place, a database must be established to process the documents that will be recovered. This will in most

instances have to be tailored to the particular needs of the inquiry. Furthermore, as public money is involved, Government tendering processes must be adhered to. It will at best be several months before the database is in place.

A public inquiry is not just for those who have lobbied for it to be set up, whether they be victims of abuse, former hospital patients, or those suffering the effects of infected blood products, to take a few examples. The chair of the Vale of Leven Hospital Inquiry raised a few hackles at an early meeting with patients and next-of-kin when he declared: "This is not your inquiry; it is mine." But it was an important point to make: the interests of all parties must be respected and all must have a proper hearing. Ultimately, no single group, no matter how much sympathy one might have for them, can be allowed to dictate the path of the inquiry. Nor can any persons or group expect of right to have their evidence preferred to any other evidence. Fairness and impartiality must be maintained throughout.

It is for such reasons that the Inquiries (Scotland) Rules 2007 provide for the designation as "core participants" of persons who:

"(a) played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;

(b) have a significant interest in an important aspect of the matters to which the inquiry relates; or

(c) may be subject to significant or explicit criticism".

A range of interested parties are therefore likely to become core participants, and are entitled to be legally represented throughout the inquiry. The inquiry team must therefore consider applications and make recommendations to the chair, who will determine which parties have the necessary level of interest in the proceedings.

In the case of some core participants it will be appropriate for the inquiry itself to fund legal representation, which along with the inquiry's own legal costs can form a considerable proportion of its budget. Given the procedures laid down by the Inquiries Act, legal costs will always form a substantial part of the final bill for an inquiry.

"A public inquiry is not just for those who have lobbied for it to be set up, whether they be victims of abuse, former hospital patients, or those suffering the effects of infected blood products, to take a few examples"

The investigation

Next, and no doubt while a database is being set up, the inquiry will set about recovering the documents it requires to fulfil its terms of reference. These will inevitably run into thousands, perhaps hundreds of thousands. Some holders may be less willing than others to disclose them. It can be a lengthy process. If witness statements are to be taken (as is normally the case), it will be necessary to trace witnesses, arrange to see them, and if numbers are large to engage additional staff to undertake the work.

As the documents and statements arrive they are copied on to the database, and then must be scrutinised by members of the inquiry team. Sometimes it is only at this stage that the scale of the task becomes apparent: in the Vale of Leven Inquiry the number of infected patients (and indeed of deaths) turned out to be far higher than originally anticipated, and on top of that it was realised that expert reports on the treatment of each patient would be essential in order to assess whether treatment had been appropriate. Finding those suitably qualified as well as willing to carry out the work again took time, and it was many months before the reports (some 200 in all) were completed. None of this could reasonably have been foreseen at the time the inquiry was established.

Public hearings

Most inquiries hold public hearings of oral evidence. For these a suitable venue is required, and its nature will depend to an extent on the number of core participants and legal representatives to be accommodated. There are few such places available for months or even years on end, and one may need to be constructed or at least adapted for the purpose, as with the ICL Inquiry held at Maryhill. The Vale of Leven Inquiry was fortunate to be able to use the same premises, at a considerable saving of both time and cost to the public purse.

Public hearings cannot for logistical reasons be sustained for weeks on end. Evidence will generally be divided into "chapters", perhaps lasting two to four weeks, following which the inquiry team will assess the transcripts and decide on the future course of evidence. But other work continues both during and between hearings, such as statement taking and recovery of further documents.

Once public hearings have been completed, the inquiry team embarks on a comprehensive assessment of all oral evidence, statements and documents and devises a structure for its final report (it may even at some stage have issued an interim report). The drafting of different sections of the report may well be delegated to team members in the first instance, but the final version is of course the responsibility of the chair. Once more this part of the inquiry process will take many months.

Warning letters

The Inquiry Rules provide that an inquiry's report "must not include any significant or explicit criticism of a person in the report (and in any interim report) unless –

(a) the chairman has sent that person a warning letter; and

(b) the person has been given a reasonable opportunity to respond to the warning letter".

Each warning letter must in addition:

"(a) state what the criticism or proposed criticism is;

(b) contain a statement of any facts that the chairman considers may substantiate the criticism or proposed criticism;

(c) refer to any evidence or documents which may support those facts;

(d) invite the person to make a written statement if the person wishes".

This is a long drawn-out process, but a statutory requirement and unavoidable. What is more, there is little point in even beginning it until the inquiry report is in final draft form. At that stage it will be necessary to go through the entire report identifying such potential criticism. In the Vale of Leven Inquiry the senior members of the team met once that had been done to examine every such entry in the report, assess whether it indeed amounted to significant or explicit criticism, and decide whether it was justified by the supporting evidence – again a lengthy process but an essential one.

That completed, drafting the warning letters themselves could begin. The longest of these in the Vale of Leven Inquiry ran to 60 pages, given the statutory requirement for supporting evidence and documents, and once more it was a time-consuming process.

Time must be allowed for a response. Where a response was received, again the Vale of Leven team met to discuss every detail of that response, considering whether to amend the report in the light of it and minuting reasons where it declined to make amendments. Such a record would be essential in the event of an attempt to judicially review the inquiry's findings.

The entire warning letter process in the Vale of Leven Inquiry on its own lasted over six months, and could not reasonably have been shorter while complying with legislative requirements.

Proofing and publication

The final report then required to be proofread in-house for grammatical and other errors as well as for internal consistency. When the French Consulate took over the building following our departure, I wonder what they made of the pile of discarded commas in the corner of my office! A professional external proofreader was engaged. Only when that task was completed could the report be sent to the printers.

Once a publication date can be fixed it is usual practice to give advance notice to interested parties. With the Vale of Leven report this was restricted to access on the morning, with strict confidentiality, the formal public event taking place later that day.

Final thoughts

Every public inquiry must be assessed on the quality of its report. And I believe we did a good job. More than 60 recommendations were made to Government, all of which were accepted. It appeared to me, too, that the former patients and their families were on the whole content with the chair's findings, although some of the evidence must have been harrowing for them.

It appears that everybody these days wants a public inquiry, and a short one. Only it doesn't work that way. There are shorter, and cheaper alternatives, if you are prepared to be satisfied with them. An inquiry under the 2005 Act, on the other hand, is a complex judicial process; it can be cumbersome, but when well conducted it is extremely thorough and it is fair to those concerned in it. But it will take a long time to pass through all the required stages, and given the level of legal representation involved it will be expensive.

Next time you hear a politician complain about how long it takes, please point out that they made the rules. We lesser mortals just comply with them.

Nigel Orr
was solicitor to the Vale of Leven Hospital Inquiry from 2009 to 2015

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Legal rights and grey areas

Executry disputes relating to legal rights are on the rise, Sarah-Jane Macdonald believes, and the situation is not helped by the lack of clarity in the law and its application

"I want to challenge the will" – something many private client practitioners have heard in recent years.

Contentious executries are increasing in number. This has perhaps not been helped by the pandemic, which has heightened emotions and, in turn, tensions around settling estates. At the forefront of many of these disputes are issues around legal rights.

These issues are not confined to calculations, but spill over into questions of executors' duties and professional negligence. I have seen complaints about failures to take proper steps to identify or advise potential claimants, and legal rights "schemes" that have failed resulting in unwanted taxes being triggered and solicitors being left in a sticky situation.

From my experience, these issues tend to fall under one of three broad headings – who is claiming, what is included in the net moveable estate, and how legal rights are dealt with.

Who is entitled?

With family structures slowly evolving, and the relevant law constantly changing, these are areas in which we may see further developments. That said, in the past year, I have had numerous unusual issues arise. These have included a pre-2006 cohabitant considering a court action for marriage by cohabitation with habit and repute, disputes over paternity, and queries over posthumous children. Each of these can cause issues for executors in identifying the correct parties entitled to legal rights.

It is always important for practitioners to pause and think about not only who is potentially entitled, but what happens if such parties don't have capacity, or cannot be located. Where capacity is an issue, this can be further complicated if the guardian or attorney is conflicted due to their own interest in the estate. I was recently involved in the succession to a farming business, where the executors were not only the residuary beneficiaries but also the guardians for an adult son with an entitlement to legal rights. In that case, we sought directions for the sheriff to agree the distribution from the estate in a manner that would benefit the adult (bearing in mind care costs and deprivation of capital issues).

Where a party cannot be located, so often practitioners will calculate the legal rights and put a sum on deposit – but is that enough? What if that party comes forward and seeks to apply collation (where gifts in life come off a legal rights claim)? If the executors have not made provision for this and have overdistributed, what then? There will be a loss to make good and a question over liability between the executors and the solicitors.

What is included in the net moveable estate?

The net moveable estate is possibly one of the most contested areas of legal rights, particularly when it comes to the intricate issues around when heritable property may be moveable.

In recent months, however, I have found many of the issues have been around gifts made by a deceased. There is often a misconception that because an asset is no longer in the deceased's estate, either because it was apparently gifted, or because it was transferred to a trust, it will not form part of the legal rights calculation. That is not the case. I have been involved in various disputes around whether transfers were intended as gifts or loans, and likewise, whether gifts to trust have been effective in order to escape legal rights, particularly if the settlor has retained an interest.

In order for assets to be outside the scope of legal rights, the donor must have fully divested themselves of the benefits from that asset, much like avoiding a gift with reservation for inheritance tax purposes. While gifts with reservation bear their own tax (if due), it is not quite clear-cut with legal rights how a claimant is to be paid if the assets are outwith the control of the deceased, which makes for difficult conversations with the trustees.

How to deal with legal rights?

Unfortunately, it is not as straightforward as getting legal rights accepted or discharged:

there are further nuances to be considered. The main problems seem to arise around the concept of forfeiture and the revocability of any elections made between the terms of a will and legal rights. As the use of trusts in wills is becoming commonplace, it is key that those entitled to legal rights understand exactly what they are electing to receive – if it is a liferent interest, do they know it can be revoked at any time, for instance?

Tax is often not at the forefront of anyone's mind when negotiating a legal rights calculation. Yet, as unwanted taxes could be triggered, it must be factored in. An example that comes to mind is where there is an interaction with agricultural or business property relief and s 39A of the Inheritance Tax Act is triggered. Often it may be better to vary the terms of the will to agree assets to pass to legal rights claimants instead, to secure a more favourable tax position.

Why are legal rights cases on the rise?

Legal rights are something of a minefield and there are a number of common pitfalls practitioners should be aware of. To further complicate matters, there are many quirky aspects that arise in practice that are not widely known.

"It has never been more important to be mindful of these legal rights issues and to seek advice"

Despite these challenges, there is no source currently available to practitioners in the form of a checklist of the common issues to be wary of. Instead, the law relies on practitioners having the knowledge and expertise to identify issues and points of law, and then researching how that applies in their circumstances. More often than not, legal rights issues are overlooked because of that old adage "you don't know, what you don't know", and it is not until something goes wrong that an issue comes to light.

The biggest issue for practitioners, however, is that there is often no clear or definitive authority on many of the issues. Instead, it is for practitioners and our clients to come to an agreement.

The costs involved in raising a court action are prohibitive, which together with the uncertainty of the outcome results in many legal rights disputes being settled outside of court. Practical solutions are often needed. I have had a very positive experience with mediation in executry disputes, which has, in every case, resulted in agreement being reached and has cut out a lot of the protracted correspondence we often find ourselves in.

Given the contentious climate we now find ourselves in, it has never been more important to be mindful of these legal rights issues and to seek advice or take action early to avoid complications later.

Sarah-Jane Macdonald is an associate in Private Client at Gillespie Macandrew LLP, and is the author of the recently published *A Practical Guide to Legal Rights in Scotland*, Law Brief Publishing (2021).

Lawyering naked and alone

Last year Edinburgh Law School, with the Society, ran an essay competition for students to commemorate a seminal 1968 Journal article on The Future of the Profession, by alumnus Sir Charles Fraser. This winning entry by Alexander Kerr Alvarez considers the potential effects of homeworking on new lawyers

COVID, for its obvious and grossly negative consequences, has sped up the ongoing revolution in legal affairs, causing its speed to multiply as the adoption of new legal tech becomes more profound and widespread across the sector. This paradigm shift will have a profound effect both on how legal work is done and what it means to be a lawyer, in both structural and existential senses.

Interestingly though, COVID has given a microcosmic window of what a potential future of the coming decades may look like. This future may be one of profound psychological changes in the life of a lawyer, as COVID suburbanised and isolated the legal profession from itself, deconstructing traditional legal culture. This essay will explore what changes occurred to the legal profession during the pandemic, and what its future may be if it continues down this path.

Remote work: freedom or oppression?

Robert Putnam, in his book *Bowling Alone: The Collapse and Revival of American Community* (2000), wrote that at the start of the millennium American civil society was in engulfed in a crisis of aloneness. Where there had once been a healthy civil society that brought people together through activities such as bowling clubs, unions, the Boy Scouts, and churches, society had begun to fragment. This aloneness led to political disengagement, alienation from one's neighbours, and a generalised decrease of trust within society. He argues that this was, in part, driven by the suburbanisation and individualisation of the American experience, brought by the mass movement of people into the suburbs in the 1950s: leisure activities became "personalised", no longer requiring socialisation.

The most lasting effect of COVID will be that remote work will become a viable option for the totality of a person's work experience. The political economy of large firms is such that they will remain permissive of, encourage, or switch fully to a remote work model. This, on some level, is good: a permissive structure towards remote work is clearly important for those with disabilities or parents with younger children, providing them the option to engage in remote work. Further, it has proven to be liberative, allowing some to work several jobs simultaneously, and has had the effect of freeing the profession from its traditional metropolitan core to allow for more permissive and personalised work experience.

However, this freedom is paradoxical. In its totality remote work is oppressive. It is an invasion of the sacrosanct. It is the smashing of the already weakened lawyer's work-life dynamic and the reconstruction of them as one. It is much harder to walk away and call it a day when there is no threshold to pass through. The deconstruction of this started with email, which brought the office into the home, and has now insidiously morphed. The adoption of keystroke loggers, monitoring software, and other surveillance tools on company computers now brings the spectre of workplace surveillance into the home, at levels possibly beyond those which exist within an office. The ever-present necessity to meet and surpass billable hours becomes entwined with and consumes daily life. When the work becomes ever present, so too does the pressure to complete it.

Remote work also suburbanises the work experience. The traditionally collaborative process of legal work that demands the interaction and collaboration of trainees, paralegals, advocates, and partners throughout a firm, is now experienced in an individualised, atomised setting. Remote work, therefore, is a simulacrum of real work. Co-workers are reduced to faces or, if unlucky, a black screen on a computer. The firm is dematerialised into databases, emails, an app running in the background while you work, and reminders on a schedule. The clients transform into an amorphous nebula of workflow tasks. The physicality of the legal experience is deconstructed, and interpersonal bonds are severed.

"Remote work, therefore, is a simulacrum of real work. Co-workers are reduced to faces, or, if unlucky, a black screen on a computer"

This then alienates the lawyer, in both the literal and Marxian understandings, removing the emotional, tactile and human touches. The collective experience of exuberating completion is stripped away. The pats on the back, the shaking of hands, the exhausted sighs, and end of week celebrations are gone. The lawyer becomes a nihilistic suburbanised cog in a distant ethereal machine. The lawyer is now *Lawyering Alone*.

Effect on performance

The suburbanisation of the legal profession also leads to deconstruction of the lawyer effect and limits a lawyer's capacity for performance. The sociologist Erving Goffman argues that many modern professionals, when in practice,

construct a "personal front" to project and express their own competence, authority, and expertise. This he, and others, compare to a performance where things like uniforms, learned knowledge, and jargon are central in the construction of the personal front: E Goffman, C C Lemert and A Branaman, *The Goffman Reader* (1997), 98-100. Therefore, the practice of lawyering requires both technical knowledge and the performance. Peter Lyons, in his *Advocacy: A Practical Guide* (2019), is explicit about this, stating that an effective "performance of competence" is just as important as technical competence.

However, COVID has had a significant impact upon the performance of lawyering. The construction of an apparatus for virtual legal work was necessary during the pandemic as in-person interaction was forbidden, but much was lost. The performance became less than what was there prior. Gone was the office, replaced by a kitchen or bedroom. Gone was the flair for the dramatic, as the ability for the traditional theatrics of the courtroom/boardroom became replaced with awkward, stilted Zoom calls, tyrannised by the questions "How close should I be to the camera?", and "What do I do with my hands?"

The Zoom call also distorts the performance of a caretaker, a lawyer's ability to read a client's emotions, as they no longer can see body language and thus may fail to comfort a client in need or understand when they are reaching a sensitive topic. Therefore, technology distorts the lawyer's presentations of competence into something less; the lawyer is *naked*.

The question becomes, what happens when the proverbial emperor has no clothes? Can Atticus Finch stop the lynching of a young black youth without the high drama of the courtroom? What happens to the *Suits*-esque "power lawyer", whose *effect* relies upon bespoke suits, a glitzy office in the City, and who takes their clients to the best restaurants to discuss negotiations, when they are reduced to working in a plain button-down shirt, in their kitchen with their children running around them, trying to fix difficulties on a Zoom call with a client. Or worse, what happens to one's ability to engage in impression management when they unintentionally turn into a cat? (D Victor, "'I'm not a Cat,' Says Lawyer Having Zoom Difficulties" (2021) *New York Times*, available at nyti.ms/3res4DH)

A tool to be used properly

In a practical sense, Eric Grossman, chief legal officer of Morgan Stanley, stated frankly in a letter to outside law firms that legal performance has gone down, with work becoming shoddier, stating that he has a "grave concern that our profession cannot longer endure a remote work model" and noting specifically that the firm's work output has become more fragmented and disjointed, a product of a group of individuals and not of a team (D C Weiss, (2021) *ABA Journa*l, available at bit.ly/3AHJZG1).

At the same time, new trainees have stated they are isolated, struggling to find purpose and a sense of oneness with a foreign-feeling firm. They lament the loss of education via osmosis, as they are no longer being exposed to the legal world in its fullest capacity. And they are struggling to determine when to log off, as the delineation between when work ends and life starts is a matter of feet, and the pressure to perform is Damoclean (L Barr and R Simmons, "A broken cycle: How coronavirus is affecting the qualification of lawyers" (2020) *The Lawyer*, available at bit.ly/3s2s8p9).

What, then, shall become of the legal profession? My whiggish sensibilities and techno-optimism lead me to believe that the future will likely bring about a new paradigm to accommodate the change in affairs. I am confident that remote hearings will become a common occurrence, at least for procedural matters, and that a new norm of conduct during such environments will become widely accepted, leading to a recalibration of standards in the performance, and expectations of those watching the performance. Further, I am confident that remote work will remain as a valuable tool-in-the-kit for those that need it due to personal circumstances such as disability or childcare.

This said, it is a tool, and it is imperative that firms and those at the top of the legal hierarchy respect it and do not use it as a tool to further deconstruct the work-life balance, thus making the doing of legal work an all-encompassing task. Further alienation and isolation are possible outcomes from legal technology that are often underdiscussed effects of technology; therefore, it is now necessary that firms seek to reconnect their staffs and construct future cultures of inclusion and oneness.

Alexander Kerr Alvarez is an Honours LLB graduate and current LLM student in international economic law at the University of Edinburgh

New year, familiar issues

This month's criminal court roundup features some recently published appeal decisions, publication of which was delayed pending trial

Criminal Court

FRANK CROWE,
SHERIFF AT EDINBURGH

Happy new year from s 275

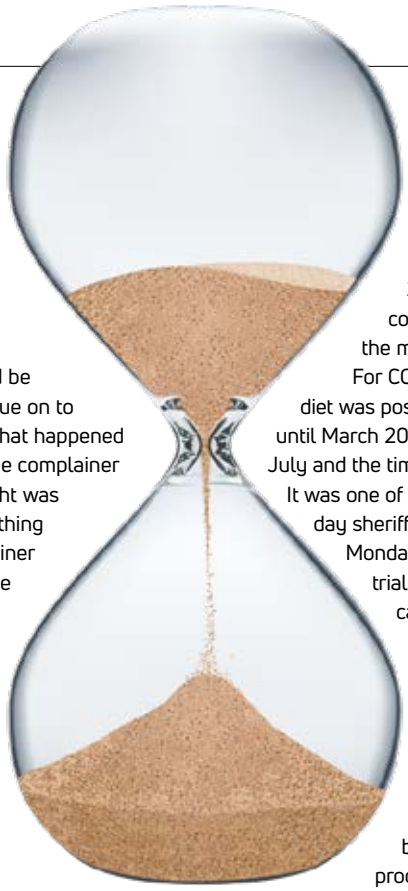
It may sound – and feel – like Groundhog year, but now the festive season is behind us and we are back to work in some shape or form the main topic for consideration is, as is often the case, s 275 of the Criminal Procedure (Scotland) Act 1995 and the shield legislation devised many years ago to stop intrusive questioning into a complainer's sex life.

What is different about *XY v HM Advocate* [2022] HCJAC 2 (12 January 2021, but published a year later on 19 January 2022) is that it contains a dissenting judgment. The accused was in his 70s when prosecuted and the indictment contained eight charges alleging various sexual offences against five children and young persons in the 1980s and 1990s over a period of 18 years when he was aged between 33 and 51.

The application involved two of those charges and one complainer, said to have occurred when she was between 13 and 15 years old. The charges involved lewd and libidinous practices contrary to s 5 of the Sexual Offences (Scotland) Act 1976, and rape when the complainer was aged 14 or 15.

The s 275 application sought permission to lead evidence that the accused was in a consensual relationship with the complainer in 1985 when she was 17. The preliminary hearing judge refused the application, taking the view that the evidence sought to be elicited was irrelevant at common law, so the statutory scheme under ss 274 and 275 was not engaged. He took the view that if the Crown could not prove the conduct took place between the dates libelled, the accused would be acquitted.

The defence argued that they would not be seeking to open up details of collateral matters but simply to put to the witness that what she spoke to happened at a later date consensually when she was not a child. It was argued that this evidence was verifiable; the Crown replied that the line was disputed and would draw the case into a collateral argument.



Lords Pentland and Turnbull held that to admit the proposed line of defence, there would be a serious risk that the attention of the jury would be deflected from the real issue on to the contentious issue of what happened or did not happen when the complainer was 17. The evidence sought was irrelevant in that it told nothing about whether the complainer was abused as libelled. The accused would be able to give evidence that the conduct libelled did not occur, but he could not divert the focus to whether there was a consensual relationship between the parties some years later.

Lord Malcolm dissented and expressed his concerns by positing the hypothetical example of where a complainer said she was sexually abused in 1983 when a child, and the defence line was that the conduct was consensual and occurred in 1984 when the complainer was 16. He also drew support from the concession by the Crown in argument that although charge 2 was libelled as rape, it was likely that it would be seeking an alternative verdict of unlawful intercourse with a child. He saw the argument as about the date of the incidents only and doubted if the Crown response was an accurate view of the law.

Dissenting judgments should always be borne in mind going forward, but this is no more than a footnote. In the event, the accused was found guilty by a majority on charges 1 and 2 and was convicted of five of the six other charges. He was sentenced to eight years' imprisonment. It is doubtful that even if the application had been successful it would have made any difference to the outcome, given the number of complainers and the significant age difference between the accused and his victims.

Time limits in these COVID times

It is understood that the COVID case backlog will be overcome by 2026. That aspiration must be borne in mind when reading *HM Advocate v Graham* [2022] HCJAC 1 (17 September 2021; published 6 January 2022).

The respondent had appeared on petition on 1 October 2019 when he was granted bail. The 12-month time limit was extended by six months under the Coronavirus (Scotland) Act 2020 to 1 April 2021. He was cited to a first diet in September 2020 on two charges alleging sexual offences occurring in 2011 and either 2016 or 2017. One of the two complainers had been eight at the material time.

For COVID-related reasons the first diet was postponed on three occasions until March 2021, when trial was fixed for 20 July and the time limit extended until 23 July. It was one of two priority trials in a four-day sheriff and jury sitting following a Monday public holiday. Three other trials including a multiple accused case were set down for this sitting. On the first day of the sitting, the older complainer failed to appear and the case could not call for trial as she was an essential witness, the matter proceeding on a *Moorov* basis. The Crown decided to proceed with the other priority trial, one of serious domestic assault. Late in the afternoon of Friday 23 July, the Crown moved to adjourn the respondent's trial until 6 September and to extend the 12-month time limit until 10 September.

The sheriff was given a convoluted history of the citation of the missing witness and gained the impression that the depute fiscal had not been aware that the respondent's trial was a priority one for the sitting. He could not produce an execution of citation but had information that the complainer was a hostile witness and would not attend. The sheriff was concerned that the fiscal did not understand the two-stage test set out in *HM Advocate v Swift* 1984 SCCR 216 and *Early v HM Advocate* 2007 SCCR 50. He was not satisfied that the Crown had shown a reason sufficient to justify an extension of time and considered that the failure to commence the trial timeously had been the fault of the Crown.

Had the sheriff proceeded to the second stage he would have exercised his discretion to refuse an extension, having regard not only to the serious nature of the charges but to the consideration that the accused should not be deprived of an important right under the prevention of delay regime.

At the appeal hearing, a fuller explanation was offered that postal citation of the witness had not been effective. A request for personal service should have been actioned by the police and returned to the fiscal by 5 July, but last-minute efforts by the police around that date had been unsuccessful as the witness had moved address. She was cited on 16 July but indicated she did not intend to attend the trial as she was fearful of "repercussions". The execution of service was not sent to the fiscal

with this explanation. The Victim Information & Advice department had tried to keep the complainer up to date with progress in the case by letter on six occasions. While she had failed to attend for precognition, she had told police in July 2020 she was continuing to cooperate with the prosecution. Insufficient weight had been given to the serious nature of the charges and the extension sought was a moderate one. Much of the delay had been attributable to the COVID-19 pandemic.

The Appeal Court referred to *Uruk v HM Advocate* 2014 SCCR 369 at paras 10 *et seq*, which noted that earlier cases predated court reorganisation which placed the fixing of trial diets in the hands of the court itself. It also noted that the execution of a warrant to arrest a complainer in a sexual offences case should not be regarded as a satisfactory solution. Problems could have been avoided if the Crown had sought to take the witness's evidence on commission.

The position in this case can be contrasted with those I have seen where the "complainer" has never cooperated with the police or provided a statement and refused medical treatment at the outset. Furthermore, in the present case the absence of the complainer had implications for another complainer and not just herself.

The case proceeded to trial in December 2021, but after three days of evidence the accused was acquitted following a submission of "no case to answer". We are beginning to appreciate the effect of trauma on parties caused by COVID delays and in other cases witness attrition. Taking evidence on commission at an early stage of the proceedings has much to commend it.

A sad and unsatisfactory outcome

It is worth mentioning in passing the murder in May 2002 of Louise Tiffney, who was last seen at her home in Edinburgh. Her son, known as Sean Flynn, stood trial in March 2005 at Perth High Court but was acquitted. The case was based on circumstantial evidence that inquiries failed to show any trace of Ms Tiffney being alive after 27 May 2002, as crucially the victim's body had not been recovered at that time. So called "body-less" murder cases can be problematic, e.g. the Nat Fraser case in which there was a retrial.

Ms Tiffney's skeletal remains were discovered by a cyclist near Longniddry, East Lothian on 2 April 2017. The cause of death was unascertainable. Soil samples recovered near the remains matched debris recovered in 2002 in the wheel arch of a car to which Flynn had access. This evidence coupled with CCTV and telephony evidence suggested Flynn had made two trips to East Lothian on 28 May 2002. The Crown contended the first trip was to dispose of the body and the second to check that it was not visible in daylight.

On 9 January 2020 the Appeal Court considered the new evidence "substantially strengthened" the case against Flynn and granted authority for a new prosecution under the Double Jeopardy (Scotland) Act 2011 – see [2022] HCJAC 4 (published 24 January 2022).

Following this ruling, and after COVID delays, Flynn was indicted for his mother's murder in January 2021 and was due to stand trial at Livingston High Court in October last year, but failed to appear and a warrant was granted for his arrest. A few days later, it was revealed that Flynn, who had been living in Berlin, had been found dead in Peniscola near Valencia in Spain having apparently taken his own life.

As a lawyer, you can get frustrated when the law is not able to take its course one way or another. We are just left with a much stronger circumstantial case than before.

Meanwhile in the Sheriff Appeal Court

There were two new cases to consider for this briefing. To provide an insight into the court's work I have selected *Singh v Procurator Fiscal, Dumbarton* [2021] SAC (Crim) 8 (6 October 2021, published 21 December 2021).

An extempore opinion was provided by the court in this appeal. After trial in May 2021, the appellant was convicted under s 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010, for causing fear and alarm by following a woman outside Asda at Bearsden in April 2019 and making sexually inappropriate remarks towards her. No appeal was taken in respect of the fine of £1,000 which was imposed, which also resulted in the appellant becoming subject to the sex offender registration requirements for a five-year period. The question for the court was, was there a significant sexual aspect to the offending?

The evidence was that the appellant followed the complainer through the shop, making remarks about her removing her feet from her high heel shoes. He then offered her £70 to take off her shoes for him in the car park. The complainer refused but the appellant persisted.

The Sheriff Appeal Court concluded that the circumstances were suggestive of sexual deviance, soliciting a lone female in a supermarket for fetish prostitution. It was not suggested that the appellant acted in the manner as a joke or a prank. The sheriff was best placed to make the assessment that the conduct was significantly sexual and there was no basis to consider that there was anything other than a sexual motivation.

Employment

ALISON WEATHERHEAD, PARTNER, DENTONS UK, IRELAND & MIDDLE EAST LLP

In December, the Scottish Government committed to undertaking "meaningful discussions" on providing its employees with a "right to disconnect". The announcement comes at a time when the boundaries between work and home life have become blurred or, in some cases, feel like they have almost disappeared.

The link between this blurring and "burnout culture" is being made, as well as the detrimental impact on mental health and wellbeing. Many have reported that as their home has become their office, they have struggled to truly "disconnect" outside their work hours. This issue is unlikely to disappear, assuming of course that working from home remains a feature in Scotland even as we move beyond the pandemic – and all the signs are that where jobs can be done remotely, there has been a permanent transition to hybrid working in some shape or form.

The Scottish Government's announcement follows a number of governments and employers around the world, who have placed increasing focus on implementing successful "right to disconnect" policies.

What is the "right to disconnect"?

This right focuses on enabling workers to disconnect from their jobs effectively outside their contractual working hours. A key feature is giving employees the right not to engage with work correspondence (including emails, telephone calls and instant messaging) outside these hours. The right not only removes the need for an immediate response to communications outside contractual hours but also protects employees from being subjected to detriments by their employers for exercising this right.

Different countries have taken different approaches on implementing "right to disconnect" policies even before the pandemic. In the past five years, France, Italy and Spain have all introduced legislation that grants workers the right not to respond to work-related communications after their core hours. Interestingly, this applies to both the public and private sectors. Last year, Ireland brought in a specific legislative code to protect all workers, including those who work remotely.

In February 2022, Belgium will become the latest country to follow their lead, legislating that civil servants may only be contacted "in the event of exceptional and unforeseen

circumstances requiring action that cannot wait until the next working period". Taking a different tack, in Germany companies rather than government have implemented changes, with stakeholders of several key German companies proactively looking at policies that support and safeguard an employee's ability to disconnect.

The Scottish Government made its commitment towards the "right to disconnect" in its public sector pay policy document for 2022-23. Within this policy, it introduced a "requirement for all [public sector] employers to have meaningful discussions with staff representatives about the Right to Disconnect for all staff, discouraging an 'always-on' culture". The policy frames this as "providing a balance between the opportunities and flexibility offered by technology and our new ways of working to support the need for staff to feel able to switch off from work".

For now, this is confined to Government employees, and employment law is, of course, a reserved matter under the Scotland Act 1998. The UK Government has not given any indication that it plans to legislate in this area. However, the Trades Union Congress included a call for a statutory right to disconnect in its 2021 manifesto. The topic is therefore likely to remain on the agenda, especially in the current climate.

What should employers do?

The Government's announcement is one for clients and practitioners alike to watch with interest. Pending any formal legislative change, proactive employers may wish to take the lead of German businesses and consider their own approach to the "right to disconnect". There is a particular incentive to do so in the current context of mass burnout and the "Great Resignation" placing increasing strain on employment relations. Many have attributed these issues to an increasing decline in work-life balance as a result of hybrid or homeworking.

This is particularly pronounced in the legal industry. In a survey of 1,700 legal professionals in the UK and Ireland by LawCare last year, 69% of participants said they had experienced mental ill-health in the previous 12 months, and just under 60% reported suffering from anxiety, fatigue and depression.

Employers could consider proactively engaging with employees' feelings on the "right to disconnect" and agreeing boundaries as part of their general wellbeing efforts. The "right to disconnect" presents advantages to employees and employers. Establishing a clear work-life balance can increase employee satisfaction and reduce staff burnout, which can in turn aid productivity and the retention of talent. Employers could engage with this by reviewing current policies and practices on communications outside work hours. They could also gauge employees' experiences through informal feedback to evaluate whether employees would welcome such changes.

As we continue to transition towards hybrid working models, employers could also consider reviewing their employee welfare support programmes and communications to ensure that employees feel adequately supported when working remotely. This proactive stance will also put employers in a good position should any legislative change later follow.

Family

ELLEN CROFTS, SENIOR SOLICITOR, MORTON FRASER LLP

Due to a systemic shortage of secure accommodation in England, the English courts have increasingly been using their powers under their inherent jurisdiction to authorise the deprivation of liberty of children in residential children's homes throughout the UK.

The inherent jurisdiction of the English High Court is a description of the court's common law powers, insofar as they have not been removed or replaced by statute. The inherent jurisdiction of the High Court to make orders in relation to a child derives from the right and duty of the Crown *parens patriae* to take care of those who are not able to take care of themselves.

Lack of provision

The practice of using the inherent jurisdiction to deprive children of their liberty was recently brought before the Supreme Court in *T (A Child) (Appellant)* [2021] UKSC 35. Lord Stephens in his judgment noted the context of "the enduring well-known scandal of the disgraceful and utterly shaming lack of proper provision for children who require approved secure accommodation. These unfortunate children, who have been traumatised in so many ways, are frequently a major risk to themselves and to others... This scandalous lack of provision leads to applications to the court under its inherent jurisdiction to authorise the deprivation of a child's liberty in a children's home which has not been registered, there being no other available or suitable accommodation".

The appeal raised important questions about the use of the inherent jurisdiction to authorise a local authority to deprive a child of their liberty in accommodation that is not a secure children's home. There is no statutory provision which authorises deprivation of liberty ("DOL") in residential as opposed to secure accommodation in England or Scotland. Despite this, the Supreme Court unanimously dismissed the appeal. It held in particular that the use of the inherent jurisdiction to authorise DOL is permissible, but expressed grave concern about its use to fill a gap in the childcare system caused by inadequate resources.

It was difficult to envisage another outcome in the case. Had the Supreme Court held the use of inherent jurisdiction was unlawful, that would have resulted in hundreds of DOL orders relating to highly vulnerable children becoming unlawful overnight, with these children having nowhere to go.

Alongside the lack of secure accommodation, there is also a lack of residential provision in England, resulting in English local authorities relying on Scottish residential placements for children in their care. There is no automatic recognition of an English order made under the inherent jurisdiction authorising the deprivation of a child's liberty in Scotland, regardless of whether the order refers to the child being placed in accommodation in Scotland. Unless the English local authority takes affirmative action to have that order recognised by the Scottish courts, any deprivation of the child's liberty in Scotland will not have the appropriate legal authority. At present, the English local authority requires to petition the Court of Session under the *nobile officium* on an urgent basis once the child is in Scotland. The effect of obtaining an order under the *nobile officium* in these cases is to have any DOL order granted by the High Court treated as if it was an order made by the Scottish courts, thus giving it immediate recognition and, with that, the ability to enforce it, which is crucial to each placement.

Scottish developments

Due to the increasing number of petitions seeking recognition of DOL orders, the Inner House recently issued a note, delivered by Lord Menzies ([2021] CSIH 59),

setting out guidance to Scottish and English practitioners as to the appropriate procedure. Lord Menzies clearly set out that the function of the Scottish court is not to "rubber-stamp" High Court decisions, and that what is appropriate by way of care provision and deprivation of liberty will differ from petition to petition as each child has their own particular needs and problems.

Serious concerns have been raised relating to the lack of safeguards and parity of service provision for English children in Scotland. In a note issued towards the end of last year ([2021] CSIH 69), Lady Paton set out that the court required to be satisfied with regard to the rudiments concerning the child's access to health care, schooling and family to enable the court to properly exercise its *parens patriae* jurisdiction.

There has been increasing pressure towards the Scottish Government to legislate in this area. On 6 January, the Government issued a publication confirming that it intends to legislate in spring 2022 to remove the need for individual petitions to be raised. The Scottish Government asked for views on its plan, to have DOL orders have effect in Scotland as if they were compulsory supervision orders, to be submitted by 28 January 2022.

Human Rights

JAMIE DEVLIN, SENIOR SOLICITOR, ANDERSON STRATHERN LLP

In *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 (15 December 2021), the appellant argued that the policy operated by the UK Government in respect of passport applications contravenes articles 8 and 14 of the European Convention on Human Rights. The appellant contended that a passport application should include a non-gendered ("X") marker as an alternative to the male ("M") and female ("F") markers.

Background

The appellant was born female, but subsequently underwent several operations to achieve the status of "non-gendered". The appellant had campaigned for recognition of a non-gendered category of individuals. A key part of this campaign had been for the inclusion of "X" passports.

In 1995, the appellant contacted the United Kingdom Passport Authority ("UKPA") to ascertain whether it was possible for a passport to be issued without the binary declaration of being male or female. UKPA stated that a declaration of gender was mandatory. The appellant continued to engage with UKPA,

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Accessing healthcare

The Parliament's Health, Social Care & Sport Committee has instigated an inquiry into changes in how patients access, or are expected to access, healthcare services. See parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-health-social-care-and-sport-committee/business-items/alternative-pathways-into-primary-care
Respond by 22 February.

Equality duties

Apparently research has shown that improvements might be made to the Scottish Specific Duties in respect of the UK-wide Public Sector Equality Duty. Views are sought on a range of detailed and broader proposals. See consult.gov.scot/mainstreaming-policy-team/public-sector-equality-duty-review/
Respond by 7 March.

Not proven again

The Government seeks views on whether to accommodate misguided demands for the abolition of the not proven verdict and what remedial measures might be needed should it do so. See consult.gov.scot/justice/not-proven-verdict/
Respond by 11 March.

Driving and parking on pavements

The Transport (Scotland) Act 2019 gives powers to ban driving along, and parking on, pavements which, if used, will disappoint many drivers. The Government seeks views on its directions to local authorities regarding possible exemptions and the procedures to be followed to allow exemptions. See consult.gov.scot/transport-scotland/scotlands-pavement-parking-prohibitions/
Respond by 11 March.

Additional dwelling tax

The Government would like to hear views on the operation of the land and buildings transaction tax additional dwelling supplement. See consult.gov.scot/taxation-and-fiscal-sustainability/additional-dwelling-supplement/
Respond by 11 March.

Non-domestic rates

The Government seeks views on the decapitalisation rates to be applied in the forthcoming revaluation of non-domestic property which is due to take effect from 1 April 2023. See consult.gov.scot/local-government-and-communities/non-domestic-rates-2023/
Respond by 13 March.

Registering for tax

The UK Government seeks views on proposals to simplify income tax self-assessment registration for the self-employed and landlords, in pursuit of its "vision for a modern tax administration that works closer to real time to deliver the flexible, resilient and responsive tax system the UK will need in the years ahead". See gov.uk/government/consultations/call-for-evidence-income-tax-self-assessment-registration-for-the-self-employed-and-landlords
Respond by 22 March.

Intellectual property

Following Brexit, the UK Government seeks views on "how to make the designs framework" – including registered designs – better to encourage creativity, innovation and give the UK a competitive edge". See gov.uk/government/consultations/reviewing-the-designs-framework-call-for-views
Respond by 25 March.

Removing and recalling MSPs

Graham Simpson MSP seeks views on his Proposed Removal from Office and Recall (Members of the Scottish Parliament) Bill. The proposal would extend current rules to include where an MSP does not participate in parliamentary proceedings for a given period without valid reason. See parliament.scot/bills-and-laws/bills/proposals-for-bills/proposed-removal-from-office-and-recall-scottish-parliament-bill
Respond by 13 April.

and latterly HM Passport Office ("HMPO"), up until 2016 but received the same response.

In June 2017, the appellant sought judicial review of HMPO's passport policy in the High Court. The appellant claimed that the policy, *inter alia*: (1) breached the appellant's right to private life under article 8; and (2) breached the appellant's right not to be discriminated against on the basis of sex or gender under article 14 taken together with article 8. The High Court and Court of Appeal dismissed the proceedings. Both courts recognised that HMPO's policy did engage the appellant's article 8 rights, but held that there was no unlawful breach. The issue of whether and how to recognise non-binary genders was within the state's margin of appreciation, and there was no violation of the appellant's article 14 rights.

On the appellant's further appeal, the Supreme Court required to determine:

1. Whether article 8 of the Convention, taken in isolation or read with article 14, imposes an obligation on a contracting state, when it issues passports, to respect the private lives of individuals who identify as non-gendered, by including a non-gendered ("X") marker?

2. If not, is such an obligation nevertheless imposed on the Home Secretary by the Human Rights Act 1998 ("HRA")?

Decision

The Supreme Court unanimously dismissed the appeal.

The court identified that there was no preceding judgment of the European Court of Human Rights ("ECtHR") which established an obligation on a contracting party to recognise a gender category other than male or female. Given ECtHR case law concerning transgender individuals, however, it was recognised that the appellant's identification as non-gendered was an aspect of private life within article 8 (para 30).

By applying established principles of ECtHR jurisprudence, the Supreme Court determined that there had been no violation of the appellant's Convention rights. The court identified that the matter in dispute was limited solely to HMPO's policy on issuing passports.

Considering the degree of prejudice to the appellant, the court recognised that the width of the margin of appreciation varies depending on the circumstances (para 56). Two important factors were (1) whether a particularly important facet of an individual's existence or identity was at stake, and (2) whether there was a consensus within the Council of Europe member states.

The court determined that any prejudice would be limited to the appellant's passport. This was not considered a particularly important facet. The court identified there was no consensus on the issue among the member states (para 59).

The appellant's alternative argument based on the HRA was rejected. The appellant relied on comments made in *In re G (Adoption: Unmarried Couples)* [2008] UKHL 38. The question posed in that case was whether an act that does not result in a violation of the Convention can nevertheless be incompatible with Convention rights, within the meaning of the HRA. Following a review of domestic jurisprudence and parliamentary intention when drafting the HRA, the Supreme Court disapproved the dicta in *Re G* (para 108).

Commentary

This judgment is of significance not only to human rights lawyers but to practitioners involved in public law. It highlights the consequences were the separation of powers in the United Kingdom not adhered to.

The decision reiterates that article 8 is a qualified right and subject to the limitations set out in article 8(2). When assessing a state's obligations, regard must be had to the fair balance between the competing interests of an individual and the community as a whole. The court recognised that where there was no consensus among the Council of Europe member states, the margin of appreciation afforded to states would be wider.

It emphasised that were the HRA interpreted as giving the judiciary the right to find breaches of Convention rights in instances where the ECtHR would hold domestic legislation in conformity to the ECHR, it would result in a substantial expansion of the power of the judiciary at the expense of Parliament.

Pensions

JUNE CROMBIE, HEAD OF PENSIONS SCOTLAND, DWF LLP

Changes to pensions always have implications for workers. The increasing volume and scope of recent and upcoming changes, however, have far-reaching implications for employers too, not only in terms of a better-informed workforce able to better plan for retirement and to challenge employers, but also in terms of compliance requirements and getting ready for sales and funding negotiations so as to avoid delays and potential negative impact. Employers are really being challenged to help deliver positive outcomes for workers and punished where not on top of requirements.

ESG and climate change factors

Increased scrutiny of businesses and reporting obligations for pension schemes under the Taskforce on Climate-related Financial Disclosures (TCFD) recommendations (June 2017) on pension investments will result in increased specific focus on ESG (environmental, social and governance) and climate change, and how companies are futureproofing in terms of change so that they survive and thrive. "Adapt or die" has never been a truer mantra. Pension scheme trustees and providers are looking for confidence on the future for businesses and improved investment returns. Not only that, but there will be impact on covenants monitored by business funders, potential investors, and pension trustees and providers. Businesses that delay understanding these obligations and taking steps, do so at their peril.

Stronger nudge for saver guidance

The DWP's "Stronger Nudge" to pensions guidance, and through that protection against pension scams, has resulted in regulations, the Occupational and Personal Pension Schemes (Disclosure of Information) (Requirements to Refer Members to Guidance etc) (Amendment) Regulations 2022 (SI 2022/30), amending the Disclosure Regulations from 1 June 2022. The new requirements apply to members of occupational pension schemes with defined contribution ("DC") benefits. Trustees and managers must facilitate access to pensions guidance, including offering to book appointments when these members wish to put benefits into payment or to transfer them.

Free guidance will be supplied via the Government service Pension Wise, to help members consider the options for accessing their DC pension, taking into account their overall financial situation when they retire.

Trustees will also have to keep records confirming whether members actually took or opted out of receiving guidance.

Pensions dashboards

The principal of the statutory Pensions Dashboard Programme stated that "Pensions dashboards will enable individuals to access their pensions information online, securely and all in one place, thereby supporting better planning for retirement and growing financial wellbeing". Originally planned to go live in 2019, this is a massive data-gathering undertaking. The first data delivery date has been delayed until 2023. Pension providers and administrators are working on arrangements to provide the data required. They will need input from employers and for them to ultimately meet the costs.

Higher minimum age to take pension payments

Under the current Finance Bill, the age at which workers can put pensions into payment is to rise from 55 to 57 from April 2028. However,

some schemes may allow members who meet qualifying conditions to retire at an earlier protected pension age without the need for consent. This can have implications for securing pension benefits with insurers, tax consequences and also in corporate transactions.

Auto-enrolment non-compliance penalties

Within five months of the start date for compliance with auto-enrolment duties, an employer must submit a declaration of compliance to the Pension Regulator ("tPR") setting out prescribed details. Failure to do so can result in a compliance notice from tPR, then a fixed penalty notice for £400 followed by an escalating penalty at a daily rate from £50-£10,000. This will apply even for startup businesses, as in the recent decision by the First-tier Tribunal, *Pelaw MOT Ltd v The Pensions Regulator* [2022] UKFTT PEN-2021-0179 (GRC) (11 January 2022). Dismissing an appeal, it was found that the employer had no reasonable excuse for non-compliance with the compliance notice. While acknowledging that the penalty was more significant for a small, new business, the tribunal was not persuaded by the argument that the £400 penalty was unaffordable.

Defined benefit schemes

In good news for defined benefit schemes, the Pension Protection Fund has announced a one-off limit applying to the risk-based levy for 2022-23, which means that 82% of schemes can expect to pay a lower risk-based levy for that year.

Conclusion

Steps to promote a better-informed workforce should deliver benefits for workers and employers, but employers need to act now to become better informed, plan and execute change to maximise opportunities to recruit and retain workers, and optimise covenant impact and business funding opportunities and corporate deal outcomes.

Succession

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A client will receive her full legacy from the estate of her late partner of 20 years, following a successful application for rectification of his will under s 3 of the Succession (Scotland) Act 2016.

Sheriff Deutsch at Ayr Sheriff Court ordered that the will be rectified in what is understood to be the first defended action of its kind.

Section 3 of the 2016 Act was introduced to allow a person to seek to correct the terms of a will if the court can be satisfied that it fails to reflect accurately the instructions given to a third party drafter, usually their solicitor. That power was previously thought reserved for cases of incidental or typographical error. This action, however, concerned a more substantive mistake.

Misinterpretation of instructions

The testator had a previous will made in 2016, which directed his pensions be left to his partner and the residue of the estate be divided equally between his partner and his two sons.

In 2018, following the purchase of a new property, the testator instructed his solicitor to update his 2016 will to include a liferent in his partner's favour. The testator received a first draft of the updated will. The draft included the liferent but removed the specific bequest of his pensions to his partner. In that draft, the residue of his estate mirrored the terms of the 2016 will and was to be divided equally between his partner and two sons.

The testator replied to his solicitor by email confirming that the draft will was in order with the exception of the removal of the specific bequests of his pension policies in favour of his partner. He had not instructed that change. He instructed his solicitor to include his pensions in favour of his partner. His solicitor accepted his instruction.

The testator received a second draft from his solicitor which now included a clause leaving his pensions to his partner. On seeing the change he instructed, the testator advised his solicitor that the draft was in order. The testator signed his will in those terms around six months later.

However, within the second draft and unbeknown to the testator, a further change had been made by the solicitor. The testator's partner was removed as a residuary beneficiary. The residue of the testator's estate was now to be split between his two sons, only. No written record was ever recovered from or produced by the testator's solicitor instructing that change. The change was not highlighted in the second draft.

The testator died from COVID-19 complications in 2020.

Legal case for rectification

Following the testator's death, his partner recognised the inconsistency between the terms of the will and the testator's instructions to his solicitor. Her concerns having been denied, she instructed that court proceedings be raised to correct the will so that she would receive a one-third share from the residue of the deceased's estate in accordance with her partner's instructions. The testator's sons opposed the application.

After hearing evidence from five witnesses and closing arguments, the sheriff determined that there was ample persuasive evidence that the deceased did not either expressly or impliedly instruct the change to remove his partner as a residuary beneficiary.

No evidence was recovered from or produced by the drafting solicitors capable of justifying the removal of the testator's partner as a residuary beneficiary. It was established that the circumstances and manner in which instructions were given to the drafting solicitors led to the inescapable conclusion that the change was not instructed by the testator.

The sheriff considered it idle to speculate the cause of the error, but the practices of the solicitors that emerged under cross-examination were such as to increase the risk of mistakes in giving effect to instructions from their clients.

This was an interesting case, given there are no reported cases on s 3 of the Succession (Scotland) Act 2016 being used to address a substantive error or omission. The success of the action was of undoubted importance to the client.

When the debtor defaults

The Scottish Law Commission's second *Discussion Paper on Heritable Securities* seeks to simplify the law surrounding default under standard securities, and the remedies available to creditors

Property

REBECCA GALE AND FRANKIE McCARTHY, SCOTTISH LAW COMMISSION

In December 2021 the Scottish Law Commission published its second *Discussion Paper on Heritable Securities*, exploring default and the exercise of remedies under a standard security. This article sets out the key questions asked in the paper, on which comment is invited until 1 April 2022.

Background

The availability of finance secured on heritable property is essential to the economy, facilitating home ownership and growth in the agricultural and commercial property sectors. Figures from UK Finance show that, in 2020, mortgages allowed approximately 300,000 first-time buyers to purchase a home in the UK. In 2020-21, Registers of Scotland counted 108,139 mortgage transactions registered here alone.

The Scottish Law Commission project

The Commission is conducting a major review of the law in this area, the first since the introduction of the Conveyancing and Feudal Reform (Scotland) Act 1970. The project, which began in 2018, will consult on potential reforms to the law over a series of three discussion papers. The first, published in 2019 (Scot Law Com DP No 168), sought views on pre-default issues, including creation and assignation of standard securities. The current paper (Scot Law Com DP No 173) looks at default and the exercise of a standard security post-default, as set out in more detail below. A third paper, due for publication in early 2023, will deal with two complex, technical issues: sub-security arrangements and security over non-monetary obligations. The results of consultation on all three papers will be drawn together in a final report and draft bill, anticipated in 2025.

Overview of the current paper

DP No 173 is made up of 15 substantive chapters, with 69 consultation questions on default, the procedural aspects of enforcement and the remedies available under a standard security. The overall aim is to streamline the process of exercising a security while maintaining an appropriate balance between the interests of the parties.

Ranking

A preliminary issue is how standard securities should rank where more than one has been granted over the same property. Under s 13 of the 1970 Act, a subsequent security holder is able to restrict the priority of an earlier "all sums" security by giving notice. In practice, parties often seek to avoid this outcome. The paper consults on reform, asking if this rule should be retained, and about the legal effect of writing and registration in relation to ranking agreements.

Default

The definition of "default" within the 1970 Act is complex and has given rise to a series of reported cases, most memorably the decision of the Supreme Court in *Royal Bank of Scotland plc v Wilson* [2010] UKSC 50. The Commission suggests a more straightforward approach in future legislation. Consultees are asked whether the security holder should be entitled to exercise the security: (i) where there is a failure to perform the secured obligation; or (ii) in other circumstances as agreed between the parties to the security arrangement. The paper also seeks views on whether further instances of default (such as insolvency) should be set out in statute.

Notices

Under the 1970 Act, exercise of a standard security may (or sometimes must) be preceded by service of one of two forms of notice: a calling-up notice or a notice of default. The Commission explores a more streamlined procedure to avoid the questions which arise at present about when these forms are used and how they are served. The paper suggests replacing the current options with a new "default notice", service of which will be mandatory in every case. Consideration is given to the form and content of the default notice and the methods by which it may be served. The paper also considers the length of time for which an expired default notice should be viewed as providing a valid basis for exercising the security, particularly if the default which led to the notice is later remedied.

Court orders

The circumstances in which a security holder requires a court order to exercise remedies under a standard security are complex, turning on multiple factors such as the nature of default and the notice procedure used. The Commission consults on a simplified regime under which a court order would not be required for the exercise of a security other than in specific situations, including cases where the enhanced debtor protection measures apply, or where ejection of occupants is necessary. It also seeks views on connected matters such as the prescriptive period that should apply to any order obtained.

Enhanced debtor protection measures

When the security subjects are used to any extent for residential purposes, the law places additional requirements on security holders during the enforcement process in order to protect the interests of debtors and certain residents of the property. The regime is complex, with significant amendments made to the 1970 Act by the Home Owner and Debtor Protection (Scotland) Act 2010.

The paper reviews the policy background to these amendments, and suggests that the imposition of the enhanced protection measures in every case where the subjects are used "to any extent for residential purposes" gives the regime a broader scope than was intended by Parliament. Views are sought on a revised approach, in which the measures will generally apply only where the debtor is a natural person and the security subjects are a dwellinghouse. Specific questions are asked about whether and how the measures should apply to buy-to-let properties, and in security arrangements where the debtor and the owner of the security subjects are different persons.

The substance of the enhanced protections can be roughly divided into two key measures: compliance by the security holder with a number of pre-action requirements aimed at resolving default without the need to exercise the security; and the need to obtain a court order, granted only where it is reasonable in all circumstances of the case, before any remedy can be used. The Commission seeks views on whether changes to the content of these measures are required.

Remedies

The following remedies are available under a standard security following default: ejection of the debtor or other occupants; entry into possession of the security subjects; grant and administration of leases of the security subjects, including collection of rents; sale of the security subjects; and foreclosure. Views are sought about whether any changes or additions are required to this selection of remedies, such as the introduction of a form of receivership similar to that available under the Law of Property Act 1925 in England & Wales. The paper also asks about restrictions on the choice between remedies, particularly where more than one security is held in the same property, and considers how the proceeds of any remedy should be applied.

Ejection

A security holder who wishes to sell or let the security subjects will normally require vacant possession. If the occupants do not flit voluntarily, a court decree will be required to dispossess them. The law here is complex, stemming from common law and legislation predating the 1970 Act. The Commission suggests that provision should be made in any new legislation for decree of ejection sought under a standard security. Separately, the paper seeks to clarify the law on eviction of private residential tenants by security holders. It also considers the security holder's duty of care in relation to moveables left in the property after decree of ejection has been executed.

Possession

Under the current law, a security holder "in lawful possession" of the security subjects may exercise various powers of management and maintenance in relation to the property. However, there is a lack of clarity over what is required for "lawful possession": is it sufficient for a security holder to change the locks as a prelude to sale, or is a longer-term interest in the property, usually as the landlord of a sitting tenant, required? The Commission seeks views on a simplified approach to possession and explores the security holder's rights and liabilities once in possession, including in relation to outstanding costs incurred by the owner.

Rents and leases

In some circumstances, a security holder may prefer to generate revenue from the security subjects in the form of rental income rather than the proceeds of sale. The paper asks whether any change is needed to the current rule whereby a lease of up to seven years' duration can be granted by a security holder before the authorisation of the court is required, and seeks to clarify the extent to which a security holder may claim arrears of rent accrued prior to it taking possession as the landlord of the property.

Sale

The Commission reviews the process of sale by a security holder, asking how the duty under s 25 of the 1970 Act to obtain the best price for the property could be clarified in new legislation. It also considers protection for purchasers obtaining title from a security holder, aiming to update the existing provision for good faith buyers set out in s 41 of the Conveyancing (Scotland) Act 1924.

The paper separately asks whether any reform is required to the seldom-used foreclosure process.

Expenses

The costs incurred in the process of exercising a security can be considerable. The extent to which the security holder can recover these costs from the debtor under the 1970 Act is disputed. The Commission asks whether the debtor's liability for expenses should be limited to those "reasonably incurred", and whether litigation costs should be restricted to those awarded by the court or agreed between the parties.

Responding to the consultation

Anyone interested in responding to the discussion paper may wish to register for a Commission webinar, in which members of the project team will go through the key issues in the paper in more detail. Information on the webinars (and links to the discussion papers) can be found at www.scotlawcom.gov.uk/law-reform/law-reform-projects/heritable-securities/. The consultation is open until 1 April 2022.

Scottish Law Commission
promoting law reform

Starting an in-house career, in the house!

We profile the first three trainees at Aegon UK, whose experience to date has consisted almost entirely of working from home, and find out why they chose in-house and how well they feel they are developing

In house

JOHN MORRISON,
VICE CONVENER, IN-HOUSE LAWYERS' COMMITTEE

In 2019, Aegon UK, a financial services company headquartered in Edinburgh, hired its first ever trainee solicitor. Just weeks later, the whole country went into lockdown. Since then, trainees have established themselves as an integral part of Aegon's Legal & Company Secretarial Department. I caught up with the young lawyers who have been part of the programme, to see how they have managed it.

Marion Sweetland

Marion Sweetland studied law at the University of Aberdeen and was the first ever trainee at Aegon UK. She is now a newly qualified solicitor in Aegon's Commercial team.

Tell me a bit about your career history so far. Was it always your intention to practise law in-house?

No, it wasn't my initial intention to work in-house. When I was at university, my aim was to work in criminal defence, but when I was looking for a traineeship, opportunities in that area were limited. This led to me looking for other opportunities. I worked part-time during my degree and diploma, and through that, I came across an opportunity to gain some experience working as a legal intern in the Commercial Contracts department at Aberdeen Standard Investments. The solicitors I worked with there were very supportive and I was able to learn a lot from them. It was this experience that prepared me to embark on a traineeship at Aegon.

Trying to decide where you want your career to go can be very daunting, especially if you are looking at routes that are different to what you previously expected, and I was lucky to have such a supportive experience during my legal internship as it gave me a great foundation for my traineeship. It's good to have a goal in mind, but I think it's equally important to seize and learn from every opportunity.

How did it feel when the "stay at home" order was given, so soon after you had joined the department, and as Aegon's first ever trainee?

I was a little nervous at the beginning. I had always had a job that I left the house for (even at university, I did most of my studying in the library!). Everyone at Aegon was very supportive and, despite having lots on their own plates, continued to check in with me to make sure I was okay, and I feel that I still had access to all the opportunities, experience and training that I would have had in the office environment. It didn't take me long to settle into my home office and I've really enjoyed it.

Almost your entire traineeship was conducted remotely. How did you manage to stay connected to your various teams and colleagues during that time? Is there any one thing that was done which you would recommend to other organisations?

One thing I would recommend is to strive for a culture that encourages openness and

Marion Sweetland

knowledge-sharing from the top down. As a trainee, it can be scary when things are sprung on you, or if you're not clear on how to approach a situation or respond to a question. From day one of my traineeship, I have always felt that I can reach out to anyone in the department if there is something I'm not sure about, no matter how small.

While we were working from home, I had regular catchups with my adviser and other members of the team. Even if I didn't have anything specific to raise or questions to ask, it was a great feeling knowing I had that consistent touchpoint if there was anything I ever wanted to chat about. The frequency of my catchups varied depending on the team, but I never felt alone and always knew there was someone to talk to.

You're also a "culture champion" for Legal within Aegon. Could you tell me a bit about what that entails?

As a culture champion, I work with both the other culture champions and the department Leadership team to develop the legal department's culture and encourage positive wellbeing in colleagues. This involves gathering feedback from colleagues on subjects like inclusion and diversity, wellbeing, and their feelings on the department as well as Aegon as a whole. We work with the Leadership team to put into place initiatives based on feedback, for example, a department newsletter that aims to encourage knowledge-sharing and support people in the department to feel more connected. I've really enjoyed being a culture champion, particularly because I've been able to get to know my colleagues better and have had the chance to improve things for them.


Tom Keddari

Tom Keddari

Tom Keddari completed a law degree at Robert Gordon University and took the diploma at the University of Edinburgh. He is a trainee in his second seat at Aegon's company secretariat.

You joined Aegon in 2021. What were you up to at the start of the pandemic?

When the pandemic first hit, I was still in the second semester of the Diploma in Professional Legal Practice at the University of Edinburgh. We had to complete the diploma remotely, which at the beginning proved to be fairly challenging as it was difficult to focus from home. Nevertheless, the university understood the difficulty of adapting to remote learning and assessed us in ways that permitted us not to have our marks affected as a result of the pandemic.

The search for a legal traineeship mid-pandemic was a very slow process, and there were very few opportunities. I decided to work as a customer service agent in French for Trainline while actively searching for traineeships, in order to occupy myself post-diploma and gain communication skills transferable into a legal career. Since the market for traineeships remained fairly rigid throughout the first half of the pandemic, I found an opportunity to work as a paralegal for HMRC with their International Litigation team, which greatly assisted me in obtaining transferable knowledge on commercial and tax matters, as well as improving my attention to detail. At the beginning of 2021, I finally stumbled on an opportunity with Aegon for a traineeship and I didn't think twice in applying for the role.

What was it like joining Aegon when you couldn't physically meet your new colleagues, and as only the second ever trainee in the department?

Prior to joining Aegon, I had the expectation that it would be difficult to adapt in an actual traineeship, as I would be learning a lot more than in my previous role as a paralegal. Nevertheless, within my first week of joining the company, I was taken aback by how well supported I felt from the first day. I attended a company-wide induction for new starts, which was very helpful for me to find my feet. Being only the second ever legal trainee at Aegon has been a privilege due to the support I've had. I've always been in contact with various members of the team who continue to ensure I am getting what I want from the traineeship.

How is your traineeship going so far?

I am currently halfway through my second seat with company sec, and I can say I am thoroughly enjoying my traineeship overall so far. I was looking for a traineeship opportunity that would give me hands-on experience, with an experienced support network to learn from when I was unsure how to proceed, and that is exactly the opportunity I have found. The learning occasions I have had so far have been very helpful in providing me with a general idea of how an in-house legal department operates. My current seat with company sec has been very interesting, as I get a chance to experience the governance aspect of the company, and how board meetings and more operate.

If you met someone who wasn't sure whether to apply for an in-house traineeship or private practice, what advice would you give them?

Whether to choose an in-house or private practice traineeship isn't an easy decision,

and it is a much-discussed matter today for law graduates. What looks more like the "conventional" option nowadays is to undertake a private practice traineeship, as most of the employers I was able to speak with during my diploma were private practice law firms. The idea of an in-house traineeship wasn't discussed to the great extent private practice traineeships were throughout my law degree and diploma. However, my personal experience of working for in-house legal departments as an intern gave me an overview of what being an in-house lawyer could be like.

From there, I was clear in my mind that I wanted an in-house traineeship since I felt I had great exposure to a variety of matters, I was able to see the completion of projects and tasks I had worked on, and I felt I was gaining commercial awareness overall.

My advice for prospective trainees is to keep an open mind, as being set on one of the two options for a traineeship can be very dependent on the opportunities available in the market. The ultimate goal of a traineeship is to gain knowledge, skills and confidence to become a solicitor, so finding the best environment to learn and develop is crucial.

Ellie Williams

Ellie Williams

Ellie Williams graduated from the University of Aberdeen in 2019 and completed the diploma at the University of Edinburgh in 2020. She is now a first-year trainee in Aegon's Propositions team.

Ellie, you are the latest trainee to join Aegon. How did you hear about the opportunity to train at Aegon and when did you first consider working in-house?

I first considered an in-house traineeship when I was in third year of university, and we were being encouraged to secure vacation schemes and summer work experience. I wasn't completely sure what area of law interested me most, and as such, I looked not just at private practices but also larger organisations that I knew had in-house legal teams. I applied for a summer internship at a large bank, in their Human Resources department, which I was offered and accepted. While on this internship I learned a lot about the financial services industry generally, and I was lucky enough to spend some time with their in-house legal department, which really highlighted the opportunities and benefits of working as part of a legal team in a larger organisation. I spotted the opportunity to train at Aegon on a legal jobs website and knew it was the experience I was looking for.

You completed the final few months of your Diploma at the beginning of the pandemic. Tell me how that went, and did it prepare you well for remote working at Aegon?

I completed my Diploma in summer 2020, so I found myself having to make a very quick adjustment to online learning for the final portion of the year, including remote teaching and online exams. I actually then began working in a high-volume conveyancing firm full time during the pandemic, which was an incredibly different experience: as the industry is still very much paper-based we were still working from the office. As such, I didn't begin fully working from home until I started my traineeship with Aegon. I have been very lucky though, as Aegon has set me up brilliantly for remote working, and all my colleagues have made me feel very welcome and organised regular catchups and team meetings which have helped me feel much less "remote".

What kind of work does a "Propositions" team do? How does it match your expectations of working in the company?

The Propositions team deals with an incredibly wide range of different projects and queries. We are involved with almost every area of the business. We provide legal advice and guidance which may relate to specific products such as ISAs and pensions, but in the few months since I started with the team, I have also found myself involved in queries relating to wills and trusts and other private client matters, equality issues, tax matters and even some family law related aspects.

The team is also responsible for drafting a range of customer documentation including scheme rules, policy conditions, terms and conditions, and declarations. Additionally, we monitor and provide analysis on legislative and regulatory changes which may affect our products or any part of the business. Working with Aegon has far exceeded my expectations of working in-house, as I have built up amazing experience due to the massive variety of work we get involved with.

What would you say to a young graduate thinking of applying for an in-house traineeship?

Absolutely go for it! In-house training contracts often aren't as widely advertised as private practice traineeships are, but there are opportunities to be found. I would recommend keeping an eye out on a variety of different platforms such as Lawscotjobs and Scottish Legal News, but also non-legal recruitment platforms such as LinkedIn and even social media, as well as looking at the websites of individual organisations you think you would enjoy working for and that would suit you.

James Mackenzie, General Counsel and Company Secretary at Aegon UK, comments: "We are delighted to be able to offer a traineeship, and have reaped the benefits of our trainees' skills, dedication and enthusiasm in the department and across the business. A true highlight of 2021 was congratulating Marion on qualifying as a solicitor. We couldn't have been more proud."

Report seeks action on race barriers

The Scottish legal profession is an increasingly racially diverse and progressive sector that wants to do more but is hampered by slow progress, lack of visible minority role models and experiences of bias, a report by the Law Society of Scotland has concluded.

Produced by the Society's Racial Inclusion Group, launched last year to better understand the lived and professional experiences of Black, Asian and minority ethnic members and future members, the report was published along with a 24-point action plan from the Society in response to 60 recommendations made to the Society, employers and other organisations.

Headline findings include:

• The trend of increased diversity entering the profession continues but is not reflected across all minority ethnic groups. Access to minority role models, mentoring networks and funding opportunities are key issues to be addressed.

• As well as deterring new entrants, the lack of role models places undue pressure on existing ethnic minority members to act as mentors and representatives in addition to their legal careers.


Tatora Mukushi

• There remains a gap between the number of ethnic minority law students and those applying successfully to the largest employers of trainees. Initiatives such as contextualised recruitment and blind recruitment have been shown to have a positive effect.

• Many ethnic minority lawyers have experienced bias, racism or discrimination during or since qualification, whether from overt acts, or omissions such as inconsiderate practices.

• The intersection between ethnicity bias and other biases, such as gender, sexual orientation, age etc, cannot be ignored.

Tatora Mukushi, solicitor and convener of the Racial Inclusion Group, commented: "Our own personal and professional experiences left us under no illusion that there were problems that were not recorded on the face of the data already collected and analysed."

However, the profession was enthusiastic about innovation on this issue.

"Our hope is that this report makes it clear to the profession that our business thrives on meaningful inclusion, and to all else, that we intend to achieve it."

Society President Ken Dalling said the report should be read by all in the profession. There was good news in the report, but parts of it "will shock and upset many members, particularly the personal experiences of ethnic minority members and the many indignities they face at work.

"That shock must turn to action for all in the justice sector, including ourselves at the Society. The group's recommendations are excellent starting points, individually and as organisations, to begin to answer the question 'What will we do to make change?'"

EHRC offers race case fund

The Equality & Human Rights Commission wants to hear from solicitors with clients who have experienced race discrimination but cannot obtain legal aid or other funding.

Following the success of previous funds, which since 2017 have supported discrimination claims by disabled people and people discriminated against by education providers and transport operators, the EHRC has committed £250,000 to fund race discrimination cases across Great Britain.

Running for a minimum of two years, the race support fund can be used for any race discrimination cases that appear to breach the Equality Act 2010, for example in employment; recruitment; housing; services such as shops, transport and leisure facilities; clubs and associations; schools; higher and further education; and public functions, such as the operation of prisons, a local authority social care function or social security.

The types of funding available include frontline legal advice, which may include pre-action work and starting court or tribunal proceedings; legal representation in a court or tribunal; or outlays, for example, counsel's fees or experts' reports.

To find out more and to submit a request for financial support, visit the legal casework page at **equalityhumanrights.com**. All applications must be completed by a solicitor on behalf of their client. Terms and conditions apply. For an informal chat, contact the EHRC Scotland legal team at RaceSupportFund@equalityhumanrights.com, or 0141 228 5924.

In practice

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. For more information, see the Society's research and policy web pages.

Nationality and Borders Bill

Since its introduction last July, the Immigration & Asylum Committee has focused much of its work on this bill and has provided a series of briefings and evidence as the bill has evolved.

Of particular concern is the proposed introduction of a two-tier asylum system, which would differentiate between refugees based on how they arrive in the UK. This provision has been directly criticised by the UN High Commissioner for Refugees and would undermine the 50-year-old Refugee Convention. The committee has also sought to highlight the practical impact of an immigration system structured in this way: reducing the safe and legal methods to enter the UK will result in more perilous journeys across the Channel.

The proposed increased sanctions on those who facilitate these journeys are deeply problematic, in the committee's view, as amending the offence to cover those who do this even if "not for gain" would appear to extend those targeted to all who help an asylum seeker enter the UK. Under the UN Convention of the Law of the Sea, a ship's master is required to render assistance to those in distress, so this does not appear to be compatible. It could also be problematic for organisations like the Royal National Lifeboat Institution.

The committee has other concerns that it has attempted to address by proposing amendments to the bill. Of note are amendments which: counter concerns over raising the standard of "reasonable grounds", which it believes could result in potential victims of modern slavery not being identified by the National Referral Mechanism (NRM); ensure victims of crime are not disqualified from the NRM on the grounds that they have perpetrated another crime, which could lead to further exploitation by criminal gangs; and remove a clause giving the First-tier or Upper Tribunal powers to charge a legal professional who is found to have acted improperly, which is adequately covered in powers of professional regulators. The committee has also raised concerns over how UK citizenship can be obtained under the bill, particularly by children, and opposed the ability of the Secretary of State to charge a fee for processing applications.

This has been a longrunning and controversial bill, and the committee is particularly pleased to see its work recognised in the House of Lords by Baroness McIntosh of Pickering at committee stage and positive feedback from other members of both Houses.

Coronavirus recovery and reform

Society committees have been working on the emergency measures introduced through the pandemic, responded to the Scottish Government's recovery consultation in November, and are now considering the Coronavirus (Recovery and Reform) (Scotland) Bill introduced in January.

The bill proposes to retain a range of temporary justice measures, including remote hearings for criminal and civil cases, the use of electronic documents and extended time limits for criminal cases. The latter extensions would continue until November 2023, though could be discontinued earlier by regulations or extended up to November 2025.

Some of the permanent measures in the bill are supported, such as the use of electronic documents in court proceedings. Others engage more fundamental concerns. Court backlogs and the number of people currently on remand are a significant challenge for the justice system. Electronic tagging and other approaches should be considered to alleviate these issues. There are also wider structural and resourcing demands that need to be addressed in order to eliminate the backlog, of which legal aid is the paramount but not the sole issue.

The bill would also continue the use of remote hearings. The Society's response in November to the Scottish Civil Justice Council consultation suggested piloting as an approach, bearing in mind the uncertainty around whether people are able to participate effectively online and whether the outcomes of remote and physical hearings are similar.

National Planning Framework 4

The Planning Law Committee responded to the Scottish Parliament's inquiry on the draft National Planning Framework 4 (NPF4), with a fuller response to the Scottish Government's consultation on the document to follow in due course.

Greater clarity is required as to the status of the various aspects of NPF4 as forming part of the development plan for decision making. The committee noted the need for cross-consistency within the document and identified a number of areas that would merit greater clarity, particularly in the policies. Scottish planning policy currently has a "right development in the right place" basis; this is not reflected in NPF4 as it stands. The transition from current policy has the potential for conflict between existing and emerging local development plans and NPF4. The extent to which the policies have been "stress-tested" was questioned, including how some policies are expected to work in a planning context, such as that on community wealth building.

In relation to national developments, there is a lack of clarity around how some developments are intended to be delivered. The document could more clearly set out how national developments might interact with regional spatial strategies.

Notifications

ENTRANCE CERTIFICATES ISSUED DURING DECEMBER 2021/ JANUARY 2022

ADAMS, Catherine
ARMSTRONG, Jess
CASSIDY, Rachael Louise
CLARK, Christie Kathleen
CLARKE, Lucy Grace
CURTIS, Lauren
DOCHERTY, Corrie
DONNELLY, Matthew
GOODSON, John Mark
GORDON SMITH, Jeremy
GRAY, Alice Helen
GRAY, Chris
HEER, Sukey Kaur
IRWIN, Amy
KIRIMBAI, Latasha Georgia
KOSER, Atiya
McADAM, Robbie
McEACHEN, Katy Anne
McGURK, Megan
MACKENZIE, Euphemia Jean
MACQUEEN, Andrew William
O'CONNOR, Decla Elizabeth
O'DONNELL, Paddy James
ROSS, Lydia Mackenzie
SINCLAIR, Daniel
SPOWART, Fiona Katherine
STOKOE, Nathan James
TRAINOR, Amie Lauren
TURNBULL, Eilidh Rose Maura
WOOLEY, Alexandra Heather Mhairi

APPLICATIONS FOR ADMISSION DECEMBER 2021/ JANUARY 2022

ADAM, Nathan Cameron Lee
ADAMS, Kirsty
AMBROSE, Sean Patrick
ANDREWS, Jonathan David
ARNOTT, Rachel Alex
ASHFORD, Grant Bennet
BOWES, Abby Catherine
BROWN, Debbie Avril
CHAUDRY, Amen
CHEPNGETICH, Sharon
DEVLIN, Catherine McLean Elizabeth
DOUGLAS, Lucy
DOUGLAS, Molly Fiona
FERGUSON, Evana
FORD, Gareth Peter Ernest
GALLAGHER, Thomas Michael
HAYWARD, Victoria Louise
HERATY, Callum Gerard
HILL, Mhyrin Caitlin
JAMIESON, Sarah Jean
LAING, Ian Ross
LORENZEN, Joanne
LOVELL, Cecilia Charina
McALPINE, Fraser Henry
McBAIN, Nathan Douglas
McLEVY, Leigh Catherine
McPHEE, Jennifer Elizabeth
MALIK, Sabaa
MEIKLE, Ellie Marie
MITCHELL, Dylan Lee
MORRISON, Lily
MURRAY, Rebecca Catherine
NDEGO, Chuks Louis
O'DONNELL, Deborah-Anne
O'NEILL, Megan
PARKER, Lauren Elizabeth
PARTON, Rory William England
PIKE, Emily Anais
PRENTER, Cameron Mark Ross
REED, James Leslie
REILLY, Lisa
RICHARDSON, Jack David
RITCHIE, Claire Lynn
RUNCIMAN, Liam Paul
RUSSELL, Kathryn Helen
SAMSON, James Alexander Ewing
SMITH, Ryan Jason
SORBIE, Kimberley Michelle
WALKER, John Kelvin
WHYTE, Samantha Rachel
WOOD, Abigail Patricia Holly
YULE, Jamie

SLCC proposes 5% levy cut

A 5% reduction in the general levy for solicitors, advocates and commercial attorneys is proposed by the Scottish Legal Complaints Commission (SLCC) its draft budget for the year from 1 July 2022, published for consultation.

The proposed budget shows planned expenditure slightly up, as the SLCC invests in IT and reform which it states should lead to longer-term savings. However, with complaint numbers remaining below the 2018-19 level in 2020-21, and further work to improve efficiencies, it plans to meet the shortfall from reserves.

Under the proposals, principals or managers in private practice would pay £444, down from £467; employed solicitors (or conveyancing/executry practitioners) in private practice £361; solicitors in their first three years of practice £152; in-house lawyers £108; those practising outwith Scotland £118; advocates £171, or £143 if in their first three years of practice; and commercial attorneys £115.

The figures will be reviewed before a final levy is set. The SLCC says that complaint numbers continue to be hard to predict; it currently forecasts complaints rising from 1,054 in 2020-21 to 1,138 in 2021-22 and 1,195 in 2022-23.

Last year, it cut the levy after initially proposing a standstill.

Chief executive Neil Stevenson commented: "Following last year's reduction in the general levy, we are delighted to be in a position to propose a further reduction for all lawyers. Predicting incoming complaint numbers in such a volatile context is challenging, but our ability to respond rapidly to changing circumstances and to continue to deliver efficiencies means we are able to pass on the benefits of this to the sector again this year."

The Society questioned whether the SLCC was going far enough to control costs and provide value for money, with an average cost per complaint of £3,200.

President Ken Dalling commented: "After years of rising costs against fewer complaint numbers, the SLCC has literally been charging more for doing less. The proposed reduction in the general levy is therefore good news and hopefully signals a long-term change in the SLCC's approach. However, it will still leave the organisation with a record budget to spend, despite forecasting fewer complaint numbers than four years ago."

The consultation is at **bit.ly/3L3vvKT**. Responses are due by 12 noon on 17 March 2022.

• A solicitor has escaped a finding of contempt of court but been found liable in expenses, following an Inner House hearing relating to the solicitor's conduct after action was taken by the SLCC to recover a file required to investigate a complaint. Neil Stevenson commented: "At a time when we're consulting on our budget and the levy paid by solicitors, it's important to note the significant staff time and legal costs which we're expending on attempts to access files to which we have a statutory right."

AML portal open

The Law Society of Scotland's anti-money laundering (AML) certificate portal is now open for submissions.

The AML certificate is a crucial tool in the Society's statutory obligation to deploy a risk-based approach to AML supervision, and firms in scope of the 2017 Money Laundering Regulations must submit their certificate by Saturday, 30 April 2022.

To help you comply and complete your certificate on time, the Society's AML team has provided a wealth of online support and guidance including video tutorials: see bit.ly/34r9HTd.

Take a look and get started to avoid a last minute rush, the Society urges.

ACCREDITED SPECIALISTS

Agricultural law
Re-accredited: CATHERINE ANNE BURY, Stewart & Watson (accredited 10 November 2011).

Charity law
HELEN CLAIRE KIDD, Brodies LLP (accredited 8 November 2011).

Child law
DONNA MARGARET ELSBY, Galloway & Elsby Legal Ltd (accredited 7 December 2021).
Re-accredited: SARAH ANN LILLEY, Brodies LLP (accredited 9 December 2016).

Discrimination law
KATHRYN JEAN WEDDERBURN, MacRoberts LLP (accredited 24 November 2021).

Employment law
KENNETH ANDREW SCOTT, MacRoberts LLP (accredited 17 December 2021).
Re-accredited: PAUL JAMES BROWN, Glasgow Caledonian University (accredited 14 June 2001); BARRY CHRISTOPHER NICOL, Anderson Strathern LLP (3 November 2011).

Family law
DONNA MARGARET ELSBY, Galloway & Elsby Legal Ltd (accredited 10 November 2021); ELAINE MARY SIM, Thorntons Law LLP (accredited 24 November 2021); RACHAEL EVALYN NOBLE, Brodies LLP (accredited 7 December 2021); EMMA CATHERINE READING SOMERVILLE, Ledingham Chalmers LLP (accredited 7 December 2021); GARRY JOHN STURROCK, Brodies LLP (accredited 16 December 2021).
Re-accredited: JENNIFER WILKIE, Brodies LLP (accredited 28 July 2016).

Family mediation
Re-accredited: GILLIAN LOUISE BOWMAN, Cairns Brown (accredited 14 August 2018).

Immigration law
Re-accredited: FRASER PATERSON LATTA, Latta Law Ltd (accredited 3 November 2021).

Medical negligence law
ELIZABETH PATERSON ROSE, Levy & McRae Solicitors LLP (accredited 24 November 2021).

ACCREDITED PARALEGALS

Civil litigation – family law
JEMMA WRIGHT, Russel & Aitken LLP.

Residential conveyancing
LLAURA BURTON-PHILLIPSON, Your Conveyancer; JANE RIDDELL, Cullen Kilshaw; REBECCA TELFER, JGW Legal Services.

Wills and executries
LESLEY TAYLOR, Ralstons Solicitors.

OBITUARIES

CAMPBELL COLIN WATSON, Kinross
On 26 November 2021, Campbell Colin Watson, partner of the firm Andersons LLP, Kinross.
AGE: 74
ADMITTED: 1978

IAIN ALEXANDER LESLIE, Edinburgh
On 21 January 2022, Iain Alexander Leslie, sole partner of the firm Leslie & Co SSC, Edinburgh.
AGE: 59
ADMITTED: 1986

WCAC 2022: Edinburgh hosts the world

The World Congress on Adult Capacity, coming to Edinburgh in June, offers a unique opportunity for Scottish practitioners, as Adrian Ward explains

The world is coming to Edinburgh for the 7th World Congress on Adult Capacity, at the Edinburgh International Conference Centre, from 7-9 June 2022.

This presents a once-in-a-lifetime opportunity for Scottish practitioners to attend in their own country – and indeed for only the second time in Europe – the leading global event centred on the subject that we know as adult incapacity law.

More broadly, the event will provide:

- a focus for developments of human rights-driven provision for people with mental and intellectual disabilities;
- a powerful springboard for future research, reform and practical delivery;
- an opportunity to share and discuss worldwide practical experience and initiatives across the huge range and variety of relevant disabilities, in many cultural settings;
- as the first Congress since the start of the pandemic (the 2020 event having been postponed until 2024), a unique opportunity to consider the impact of the pandemic on human rights across the world;
- for practising lawyers, an essential understanding of the rapidly evolving practicalities, possibilities and expectations that now set the standards of best practice; and
- also for practising lawyers, an enhanced understanding of current law, its proper interpretation, and forthcoming developments.

Certificates for CPD purposes will be provided to all who request them.

Wideranging programme

The final report of the Scottish Mental Health Law Review (the Scott review) of mental health and incapacity law has been timed to take full advantage of the interactive ambience of this live event, in which people from all over the world, and from a wide range of backgrounds, can share ideas and experience informally, as well as in formal sessions.

The event comes at a time when countries

WCAC2022
7TH WORLD CONGRESS ON ADULT CAPACITY
Enhancing Autonomy, Support & Protection

worldwide have also been considering further development of their systems, including the ongoing task of giving full effect to the United Nations Convention on the Rights of Persons with Disabilities ("CRPD"). CRPD adopts a social/human rights approach to disability. It gives impetus to the continuing movement away from predominantly medicalising the care and treatment of persons with mental and intellectual disabilities, towards requiring states to remove obstacles to, and to actively support, full rights enjoyment and participation in society by all persons with such disabilities.

As well as an impressive range of prominent national and international speakers for the plenary sessions, the Congress has received well over 100 abstract submissions (several of them multiple submissions by teams) from across the globe, each to be presented personally at the Congress. At latest count the event will have speakers (many of them recognised international experts) from 26 countries – 38 if states and provinces are counted separately – across five continents. In a range of parallel sessions, you will hear their views and have opportunities to discuss, question, and explore the strengths and any challenges of their ideas, existing systems, and proposals. You will have time to chat, and to glean ideas, from likeminded colleagues across the world who often face similar challenges to those for us in Scotland.

Book now

For details of the event, see the website at www.wcac2022.org, and follow it from now on as the outline programme is filled in with speakers and particular topics, as well as the "Congress Themes" already to be found under "Abstract Submission". You will see that the emphasis is on continuing and developing ways to give effect to the paradigm cultural shift required by CRPD, away from systems which emphasise safeguards against unjustified intrusions in the lives of persons with mental disabilities, towards developing ever better ways of actively supporting and protecting the exercise of legal capacity to ensure individual autonomy on an equal basis with others.

Interest has already been expressed from international attendees in the legal, social, health, and academic sectors, as well as from people with lived experience and their carers.

To avoid missing out on this excellent local opportunity to attend a major world congress in person, early booking is advised. Secure your place at www.wcac2022.org.

Adrian D Ward, retired solicitor, is President of the Organising Committee. This article has been written with assistance from members of the committee.

ASK ASH

Missing those holiday spots

I need a break abroad, but worry about booking

Dear Ash,

I have been working throughout the pandemic and like a lot of people have not had a proper holiday abroad. Although I would like to book a break abroad, I worry that things could change in terms of travel restrictions; and that I may have to isolate unexpectedly, resulting in further time off work. I have quite an inflexible manager who has previously warned that anyone taking breaks abroad has to factor in potentially taking annual leave to cover any travel issues! Because of this, a number of us in the department are reluctant to book a break, but this is impacting on my mental health as I'm feeling fed up and trapped.

Ash replies:

The pandemic has resulted in a range of restrictions to our normal way of life, and although life is starting to resume towards pre-pandemic times, unfortunately travel is one aspect of our lives which is taking longer to change.

You are no doubt feeling down due to a lack of a proper break. However, in your current circumstances, even if you do manage to book a holiday abroad you may not be able to relax properly if you are worried about travel restrictions. I therefore suggest that you consider taking baby steps for now. Perhaps consider a long weekend city break in closer jurisdictions such as Ireland or Spain, to allow you to feel less anxious, as rules are hopefully less likely to change drastically over a shorter period of time.

Also, try to have a conversation with your manager, and explain your concerns and the importance for you to take time out to ensure that you can perform effectively in your role. If you do your research in advance and consider a solution to address any potential risks, for example working remotely even if you do need to quarantine unexpectedly, then your manager may be more supportive.

I appreciate that you will be longing for a longer break, but remember there are a number of countries which are still implementing restrictions on travel too, although there is some light at the end of the tunnel – fingers crossed in this year we will have more positivity in the fight against the virus!

Send your queries to Ash

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

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

FROM THE ARCHIVES

50 years ago

From "Chairmen's fees – National Insurance Tribunals", February 1972: "Industrial Tribunal sessions last from four to five hours, and chairmen are required to frame three written judgments... From the Spring of 1972 the jurisdiction of the Industrial Tribunals will be greatly extended when the provisions relating to unfair dismissal, workers' rights, and unfair industrial practices are introduced. It is likely that many of the hearings will last longer. For the most part, no prior preparation of the case papers is necessary by the chairmen. Often one or more of the judgments can be dictated... between cases, and certainly all judgments within half-an-hour of the decision in the last case in the session."

25 years ago

From "The Modern Notary Public in Scotland", February 1997: "One interesting area for development of notarial work in the future is the electronic transmission of documents... In the future, it is likely that many commercial transactions will be made electronically without the need for paper. The legal documentation for these transactions must be authenticated in some way and this is where the notary can be involved by authenticating the document electronically, probably using some form of digital signature. This new super-computer-literate notary has been given a name already – the CyberNotary. Despite sounding like a relative of the fictional Robocop, the UK Notarial Forum has formed a company... to promote the introduction of the CyberNotary."

RISK MANAGEMENT

Still time to resolve

Kenneth Law of Lockton suggests some resolutions that it would be worth attempting to keep throughout the year

Now that we are well into the new year and Hogmanay is a distant memory, how are those new year's resolutions going? Even if the new gym membership is still unused or the only "dry" thing about your January was the Sauvignon Blanc you'd opened by the second weekend, there are still plenty of risk management resolutions you can make and stick to this year.

1. Never accept a change of bank details by email

There have been some very substantial thefts by payment fraud reported under the Master Policy in recent years, often running into six figures, and recovery of such payments is very difficult. This issue is not going away, but there are steps that everyone in a firm can take to reduce the likelihood of these attempts succeeding.

Chief among these is that there should be a steadfast policy in every firm that a change in a client's bank details will never be accepted by email alone. Fraudsters are becoming increasingly sophisticated in their ability to hack both email accounts and phones, and to mimic authentic communications, producing highly convincing fakes.

The ideal approach, of course, is to obtain bank details face-to-face early on in the transaction and make clear to the client that those details cannot be changed, no matter the reason. Where that is not possible, carry out your own verification, either by phoning the client on a number you know to be correct, or even better on a video call. If there is not enough time to do that or the client is being difficult about it, should that not be a red flag anyway? Whichever approach you take, keep in mind how easy it would be for a fraudster to intercept the communication and manipulate it to their own end.

Fraud can also be committed against the client themselves, with fraudsters claiming to be calling or emailing from the firm to advise of a change in the firm's client account details. Include your firm's account details in your letter of engagement and make clear to your clients that they will never change in the course of a transaction. Encourage them that they should always feel they can make contact with the firm if they have any suspicions at all.

These types of fraud can cost hundreds of thousands of pounds at a time, so the risk needs to be taken seriously.

2. Commit to monthly file reviews

A week is a long time in politics, but we all know that a month in legal practice can whizz by in no time. You might think it was only the other week that you updated a client or chased the other side, but it could well have been longer. A monthly (or more regular) review of each of your files is a no-brainer for keeping things from being forgotten about and clients from feeling neglected, but to be effective they do actually need to happen and be done properly.

Most firms will have an easy way to print off reports of all the files assigned to you or on which you have recorded time, so put a recurring appointment in your diary for the same day and time each month – the first Monday or the third Thursday or whatever works for you – to run one of them off and go through each file to make sure it is up to date. If reports like these are not easily produced, creating your own running note of work will quickly solve that, and will also be a useful starting point for holiday or handover notes.

Blocking out a specific window and forcing yourself to do the review when you said you would, will keep it from becoming just another item being kicked down your to-do list. And there is no need to worry about an unsightly gap on your timesheet – the time recorded for a few quick chasers or updates to clients will quickly add up to cover the time you spent.

A cursory look through the list to remind yourself will not be enough, however. You really do need to go into the file to see when the last progress was made, what you are waiting for and what upcoming deadlines you have noted.

If you delegate a lot, or your involvement is supervising a colleague, consider having the relevant colleague with you while you are going through the list, or arranging a catchup with them afterwards. The generous thing would probably be to give them some notice you will be doing it – that should save them some fluster and hopefully you some time.

3. Include a proper scope in your letters of engagement

A properly drafted letter of engagement has many benefits, from setting out what a client can expect from you to providing a strong first line of defence in the event of a claim. Rule B4 of the Law Society of Scotland's practice rules sets out the minimum information it should contain, which includes an outline of the work you will be carrying out. Unfortunately, letters of engagement do not always set out a sufficiently precise scope of work. A poorly drafted scope can leave the solicitor open to accusations of failing to carry out work the client expected them to do – however reasonable or otherwise that expectation might have been.

Taking a house sale as an example, simply saying in your letter, "Dealing with the sale of your home" as the scope of work clearly will not be enough by itself. You would probably want to say something more like, "Acting in sale of Three Bears' Cottage, Enchanted Forest, including negotiating and advising on terms of missives, exhibiting title and dealing with any enquiries thereon, preparing necessary conveyancing documents for signature by you, and settling sale", and then adding, "Please note, we will not provide advice on any other matters such as personal tax implications, and you should take such advice thereon as you consider necessary."

Of course, if your firm is capable of carrying out that work then by all means do so, but

only if you have made it clear in your letter of engagement that that will be included. It is always better to be specific than to leave things ambiguous and risk an accusation that you failed to do something the client was expecting you to do. Err on the side of caution.

The Lockton Resource Centre at locktonlaw.scot has a handy guide to letters of engagement, including tips and sample wording that you can use.

4. Stop forgetting to write attendance notes

They are the easiest thing to forget to do after a phone call or meeting when there are instructions to be acted on or other files demanding your attention. However, a good attendance note is one of the best weapons in a professional negligence lawyer's arsenal.

There was an example in an article from Brodies at Journal, March 2021, 44, where an action had been raised against a solicitor claiming that they had failed to follow the by then deceased client's instructions in preparing her will, but was successfully repelled on the basis of a series of well-written file notes. These showed that in fact the testator's instructions had changed without the daughter who made the claim knowing about it, and the note from the final signing meeting showed that the will had been discussed with the testator and that it fully represented her intentions. Without those file notes, though, the claim would have been very difficult to defend.

A good file note should give a reliable and credible representation of what actually happened, and should be produced immediately or as soon as possible after the meeting or call in question. Obvious elements are to note the date and the parties present at the meeting or on the call, but you should also make sure that the note accurately reflects the substance of the discussion, especially any specific advice that you give the client or any concerns you make them aware of.

Find a way of doing it that works well for you, be that dictating it to be typed up by a secretary or typing it yourself so you can edit as you go. Consider investing in proforma telephone notepads with spaces for the date, time, caller, file number and so on, which will allow you to make notes while on the phone which should still make sense afterwards. Make sure to fill in afterwards any extra details and a note of the advice you actually gave, before scanning it or filing it away.

Thinking about the executry example, it pays to imagine while writing or dictating the note that you will later need to rely on it in a claim situation, and think about whether what is being written will be sufficient.

If you have any concerns about the client disputing what has been discussed, send them a follow-up email or letter afterwards.

5. Complete your risk management CPD

Every solicitor is required to undertake at least one hour of risk management CPD per practice year, which can be a verifiable event or private study. The Society defines risk management as "a process of identifying, assessing and prioritising risks, which results in some form of action to control and manage those risks".

Lockton will be looking to engage with solicitors to support their risk management activities. We will, of course, continue to produce relevant risk management content in addition to any targeted material produced in conjunction with the Society. Keep an eye out for risk management events and new online training over the next few months, and contact us directly if you would like any additional information.

There are a number of ways you can satisfy your CPD requirement. However you choose to do so, we hope that you will continue to think about the place of risk management in your practice and how it can help protect you, your clients and the profession from circumstances that might give rise to a claim.

Kenneth Law is a solicitor and risk manager at Lockton

Feedback: find a way to help

Rob Marrs looks at the best way to give effective, constructive feedback to a trainee that not only helps them develop, but fosters a strong learning environment

In a previous blog on training, I spoke about helping a trainee who is struggling. Here I consider the steps to take when you've identified something going awry, and the immediate response.

The starting point has to be that trainees are learning and training.

Mistakes happen, and it is better for everyone if they are highlighted early and dealt with quickly. Sometimes development doesn't happen as quickly as you would like. Things you expect a trainee to be able to do may take longer than you think or... whisper it quietly... maybe you are expecting too much, too soon.

Let's consider a simple example

You are a partner at a large firm, Gage Whitney LLP, and you have a trainee called Sam. A client has highlighted to you that they had emailed Sam on a relatively simple matter and that he hadn't replied, even when chased, after 24 hours.

When you asked Sam about this he acknowledged this was the case. He noted that he hadn't known the answer, was embarrassed about this, and he didn't want to raise it with you. He had hoped to find the answer elsewhere, hadn't done so due to pressure of work and, as time ticked on, he had just hidden the issue.

So far, so reasonably innocuous.

What are the real issues at stake?

1. Sam didn't know the answer to a simple question.
2. This lack of knowledge led to him not raising it with you.
3. There may be an issue in your approachability.
4. There may be an issue with pressure of work.
5. Fundamentally, you've got an annoyed client and that really does matter.

Having answered the client's question, you ask Sam to join you to give him some feedback.

How would you do about that? How many of us think through the feedback we are about to give? How many of us link feedback to performance and development, as well as against whichever issue has occurred?

Before giving feedback, ask two questions

First, quietly to yourself, ask whether you are in the right frame of mind to give quality meaningful feedback that will improve the person?

If the answer to that question is anything other than yes, then wait.

There is no point giving feedback that doesn't help the person improve. In the example above, if the trainee is worried enough about your reaction not to raise an important matter with you, what do you think berating them will do? It is unlikely to lead to a culture of candour or psychological safety.

Secondly, actually ask out loud to the person involved whether or not they are ready to receive feedback?

Build a culture that allows them to say "no". They can't say no forever, but they should at least be able to say "not right now". If they do say no, make it clear that you'll follow up the next day.

There are any number of mnemonics and methodologies for giving feedback. Each is pretty much the same. Here's my attempt.

Why have you chosen to give them feedback?

• "I'd like to talk to you about the issues raised by our client, Eldrick Woods, the housebuilders."

What happened?

• "When dealing with a matter for them, you

were contacted on the Monday with a question and you didn't respond. The client followed up by an email the next day. The client waited another day before escalating the matter to me." This is all factual. You are not judging them or apportioning blame.

Why did it happen?

• "You told me that this was because you didn't know the answer to the question the client raised and you were worried about showing your lack of knowledge to me."

What would you like to happen?

• "In the future, if you are unsure of an answer, it is important that you speak to someone who will know the answer quickly or help you find it. You are training and you won't know all the answers. This will help you learn and develop, and will also mean that we answer clients' questions quickly. If I am unavailable and the matter is urgent, then do speak to another member of the team for help.

"If the client hadn't got in touch with me, this matter could have become a bigger problem.

"It is important that clients get the right answers timeously and that you are giving a good level of client care. If we don't get client care right, there might be ramifications for the firm – losing clients, clients querying their fees because of service or, worst case, a complaint. But more importantly than all of that, we pride ourselves on the service we offer to clients."

If a trainee got feedback like that – and I realise this is a simplistic example – they would know what had gone wrong, why it had gone wrong and why that was important; and they would know how to approach a similar situation differently in the future.

More than that though, you would show yourself to have thought deeply about the matter in a manner that focused on client care and trainee development.

This would help build a stronger trainee/trainer relationship and lead to a better learning environment. Who wouldn't be more open to speaking to a boss about a matter if the boss spoke to them like that?

Rob Marrs is head of Education at the Law Society of Scotland

Don't go venting

We've all seen and received bad feedback. If we are honest, we've given it too (mea culpa!).

At worst, it is about the other person venting or showing off. This sort of feedback makes them feel better and the person they are training feel worse... and doesn't even have the side benefit of improving performance.

At best, and more often, feedback is not thought through with a clear goal in mind. "Don't do it again" is only so helpful (everyone who has ever made a mistake knows that already).

Good feedback should be specific rather than generic, designed to help, and be based on facts rather than opinion. Aim for your feedback to illuminate rather than throw shade and you won't go too far wrong.

Tradecraft tips

Ashley Swanson offers some further practical advice for trainees and the newly qualified, based on many years' experience in private practice

Client anxieties

Next to getting divorced, moving house is the most stressful thing that many people can do, and accordingly, in sale and purchase transactions you have to appreciate that your clients may be in an anxious frame of mind. In the wider context of legal work, in my experience what really petrifies clients is when they get the impression that the solicitor is casting them out into the wilderness.

This is like going to your doctor when you know there is something wrong with you, and being rebuffed. You are asking yourself "What do I do now? Where do I go?" If at all possible you should try to avoid throwing any problem back onto the client if there is any input you can provide.

Someone once said: "No question is stupid if you do not know the answer to it." Clients should be encouraged to ask for guidance or clarification on any point at all relating to the transaction, no matter how trivial. This is all part of the service we should be giving to our clients. In addition, what the clients do not like is last minute surprises, so whatever information has to be imparted in relation to the matter in hand should be communicated to the client sooner rather than later.

Fee charging

If a photographer is taking a picture of a group of solicitors and he wants them to smile, he does not ask them to say "cheese" but "fees".

Many solicitors have a standard narrative for fee notes and this is all very well, but care needs to be taken that when a fee note is issued there is nothing in the narrative that was not actually done in the transaction in question. I had a case once where a qualified assistant had issued a fee note for a remortgage using a purchase narrative, and he left in "delivering keys to you". If your narrative mentions 10 things and two of them were not done the clients will get the impression that they have been overcharged. My narratives are composed from scratch after an examination of the whole file. Everything that is in the narrative of the fee note can be fully substantiated.

Those little extras

So-called "commoditised legal services" have their place in the modern world, where many people have a two dimensional view of certain things to the extent that price is the only determining factor in making a choice from what is available.

I was once in another solicitor's office waiting for a closing date and a man was there collecting a schedule of particulars for a property. He said to the receptionist: "I am very keen on this property. I will have to get a solicitor to put in an offer. I suppose one solicitor is much the same as another." It was on the tip of my tongue to say "Yes, that is correct, just as one football team is the same as another."

How do you counter an attitude like this? You have to demonstrate to your client that you are taking an interest in their work and it is not just something that is moving along a production line. One way to do this is to try to put things into emails that go beyond your remit.

A client resident in England was buying a rather unusual building out in the country. I sent her a copy of pages out of a book from the early 1950s giving comprehensive information about the locality, which included a brief mention of the building in question. The client appreciated this. On another occasion, a client from the north of England was buying a house in the Western Isles with a Gaelic name. I worked out what the name meant in English and passed on this information.

I preface extra items like this with the words "At no cost to anyone", just in case an unappreciative client gets the impression that I am trying to generate extra fees by involving myself with what they regard as trivia.

Sources of information: 1

The Bible tells us "Seek, and ye shall find." Clients were offering for a house with a conservatory, but there was no indication of when this had been built. I went onto the

database at the Aberdeen Solicitors Property Centre to see if I could find the schedule of particulars for the previous sale – if it did not mention the conservatory then obviously it would have been added by the current owners.

The schedule had a photograph of the house and there was a car sitting in the driveway surrounded by tall weeds. This raised my suspicions and I then dialled the address into YouTube and up came film footage of people going into the house in white boiler suits to carry out a forensic examination of a crime scene. The previous owner had been murdered and his body had been in the house for a number of weeks before being discovered. By the time the executors were in a position to advertise the house for sale the car had been sitting in the driveway for a considerable time, but nobody had thought to tidy up the garden and driveway before the photographs for the schedule were taken.

The clients were informed and they instructed us to withdraw the offer immediately.

In another case, a title deed from the late 19th century mentioned a property called Spring Garden Cottage, but the current map and indeed the second edition Ordnance Survey map from 1902 only showed a house called Springbank. Going back to the first edition OS map from the late 1860s indicated that the house at that time was called Spring Garden Cottage, so the mystery was solved.

Sometimes a little bit of detective work is required to gain a better understanding of the matter you are dealing with, and knowledge of what sources of information are available is the key to this. Such sources can be old Ordnance Survey maps, local authority archives for valuation rolls and building warrant plans, and local authority websites for planning applications, etc. If you are acting in a purchase, do not rely on the selling solicitor doing the research. They may not have as much enthusiasm as you have and they may not know as many potential sources of information.

Sources of information: 2

When the distinguished 19th century scientist Lord Kelvin wanted to address a particular matter, he first gathered together all the available information on the subject and then sat down and studied it.

There is a wealth of knowledge and informed commentary on a whole spectrum of legal matters in the pages of the Journal, but if you do not keep back issues and have them bound every year, then to an extent that information is either forgotten about or not readily accessible. A few years ago, I was dealing with a matter and remembered that I had seen an article on the subject in the Journal a couple of years previously, but on making enquiries it turned out that the article had appeared about 11 years before, so memory is not always an accurate guide. I then decided to prepare a home-made cumulative index to all Journal articles which had any relevance to the type of work I do.

At the present time, this index covers 49 years and extends to 64 pages, and if there is any relevant article or mention of the particular matter in hand, instead of having to look at 49 individual indexes I look at the cumulative index and hit the entry in about 15 seconds flat. A similar index exists for the *Scottish Law Gazette* commencing in 1984, and a digest for conveyancing cases subdivided into categories, such as execution of deeds, leases, standard securities, etc.

Many solicitors would consider that they have far better ways of spending their time than laboriously preparing guides to such sources of information, but I take the view that few things are more wasteful of time and money than having to deal with a negligence claim, and the more information I can gain access to, the lesser is the possibility that I will make a mistake which might result in a claim on the Master Policy.

These indexes are "Aberdeen" type systems, where the cost is nothing at all but the value in certain circumstances is considerable. In my time in the law things have not become any simpler, and nowadays you need to be firing on all cylinders as regards available sources of information.

Time to say goodbye

Groucho Marx once said: "I'm not afraid of dying. I just don't want to be there when it happens." If you have a client who is behaving in a reckless manner and who refuses to accept what you know to be good advice, you may eventually have to contemplate resigning agency.

A client was buying a new house in a small development and I spotted what could have been a ransom strip between the development and the public road. The developer knew that my client was very keen on the house so my negotiating position was compromised accordingly. There were other aspects of the transaction where there was a measure of slackness in the situation, but there was little prospect of me being able to do anything to make the client's position safer. As the client was determined to go ahead with the purchase we simply resigned agency. The transaction had considerable potential to go horribly wrong, and if it did, another firm of solicitors would have the job of trying to sort out the mess.

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

Classifieds

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Sheridan Barnett
Would anyone holding or knowing of a Will by Sheridan Barnett, late of 1/1, 67 Ibrox Terrace, Glasgow, G51 2TB (DOD11/11/2021) please contact Pattison and Company Solicitors, 19 Glasgow Road, Paisley, PA1 3QX (bridget.mclaren@pattisonandcompany.com)

Iain Charles MacLean (Deceased)
Would anyone with knowledge of a Will of the above named who formerly resided at Flat ½ 42 Bellwood Street, Shawlands, Glasgow, G41 3ES and who died on 19 December 2021 please contact Frank J. Irvine at Frank Irvine Solicitors, 63 Carlton Place, Glasgow, G5 9TW on 0141 375 9000.

Iqbal Singh (deceased) –
Would anyone holding or having knowledge of a Will by the late Mr Iqbal Singh (DOD: 6 March 2021) of Little Castle, Off Carlisle Road, Lesmahagow, Lanark ML11 0HS please contact Justine McCluskey of Shepherd and Wedderburn LLP at justine.mccluskey@shepwedd.com or 07880479850.

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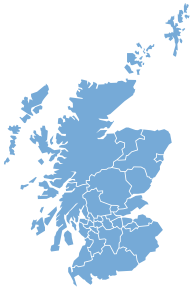

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For more information or a confidential discussion, please contact Frasia Wright (frasia@frasiawright.com) or Cameron Adrain (cameron@frasiawright.com) on email, or by telephone on 01294 850501.

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