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Journal

Journal of the Law Society of Scotland

Volume 68 Number 3 – March 2023

Contest, not combat

Naomi Pryde on the thinking behind the Mindful Business Charter's new guidance for litigators, which she co-authored

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Publishers
The Law Society of Scotland
Atria One, 144 Morrison Street,
Edinburgh EH3 8EX
t: 0131 226 7411 f: 0131 225 2934
e: lawscot@lawscot.org.uk

President: Murray Etherington
Vice President: Sheila Webster
Chief Executive: Diane McGiffen

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Editorial
Connect Publications (Scotland) Ltd

Editor: Peter Nicholson: 07785 460743
e: peter@connectcommunications.co.uk

Advertising: Elliot Whitehead: +44 7795 977708
e: journalsales@connectcommunications.co.uk

Review editor: David J Dickson

Online legal news:
e: news@connectcommunications.co.uk

Other Connect Publications contacts, telephone 0141 561 0300

Head of design: James Cargill (0141 561 3030)
james@connectcommunications.co.uk

Editorial board
Ken Dalling, Past President
Austin Lafferty, Lafferty Law
Andrew Todd, Springfield Properties Plc
Matthew McGovern, McGovern Reid
Kate Gillies, Harper Macleod LLP
Ahsan Mustafa, Nolans Law Ltd

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Editor

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Lawyers right

Dominating the headlines as I write is the UK Government's Illegal Migration Bill, which embodies a flagship policy of the Prime Minister as well as the Home Secretary.

The issues surrounding the treatment of those seeking sanctuary in this country for whatever reason are not new. Nor, sadly, are the questions around the very legality of the Government's approach, not to mention the terms in which the debate is being conducted, including by people in Government who should know better.

Starting with the tone of the debate, we are witnessing once again cheap jibes about "lefty lawyers", not least from the Prime Minister himself. Sitting in the same category as the Home Secretary's gratuitous slur against senior civil servants as well as lawyers, this belittling of the rule of law casts him in as poor a light as his recent predecessors. Members of the profession should continue to make it clear, individually and collectively, that such language is wholly unacceptable.

As respects legality, the Government is clearly determined to test the boundaries. On the one hand Suella Braverman insists that the bill has been "rigorously tested" by her lawyers; on the other, on its face she is "unable to make a statement" that in her view its provisions are compatible with the Human Rights Convention, but the Government wishes to proceed with it anyway.

Rights under that Convention are not the only international obligations at issue. In the words of the UN High Commissioner for Refugees, the disabling of those arriving in small boats from claiming asylum "would amount to an asylum ban – extinguishing the right to seek refugee protection in the UK for those who arrive irregularly, no matter how genuine and compelling their claim may be, and with no consideration of their individual circumstances". That despite the fact that two thirds of those who come in this way have to date been granted asylum.

And what is to happen to these people? Unless another country can be found to which the UK is able to send them, it appears that they will simply be kept in indefinite detention. Through its approach to Brexit the Government has burned its boats (pardon the expression) as regards returning them to an EU member state, and it is not credible, despite the Home Secretary's protestations to the contrary, that arrangements such as the Rwanda deal can cope with the numbers involved, even if they are finally put into operation.

It appears that despite restrictions in the bill, there does remain some scope for a detained migrant to challenge their detention via the courts, and for that reason the Government considers the provisions are compatible with the ECHR right to liberty. This leads commentator Joshua Rozenberg to remark: "If the Government wants this bill to deter illegal migrants, it must hope they won't read the small print."

Lefty or otherwise, the involvement of us lawyers is far from over.

Contributors

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

Naomi Pryde is a litigation partner in DLA Piper Scotland LLP

Marianne McJannett is Head of Employment with Bellwether Green

Stewart Dunbar is a legal director with Gillespie Macandrew

Katy Nisbet is head of Legal Policy, and **Rebecca Scott** managing solicitor, at Clan Childlaw

Elaine E Sutherland is a professor of law and member of the Society's Child & Family Law Committee

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In practice

ONLINE INSIGHT

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

Why property investment schemes are best avoided
A warning to solicitors about becoming involved with property investment schemes has been issued by the Scottish Legal Complaints Commission via a blog by Professor Stewart Brymer, reproduced here.

Knowing your NFTs in a sporting metaverse
Our sport briefing, by Jamie Watt, looks at the growing interest in and use of non-fungible tokens as they become linked to real products such as entertainment and merchandise.

Statutory interpretation: the "always speaking" principle
The "always speaking" principle is used to apply legislation to changed circumstances not envisaged when it was made. Richard McMeeken examines the recent Supreme Court case that declined to apply it.

Open water swimming: landowners' risks and duties
The growing popularity of open water swimming has brought a rise in accidents and injuries. What duties do landowners and occupiers owe? Kate Donachie discusses the key issues.

OPINION

Alison Atack

Reflecting the theme for International Women's Day, the profession is learning what it means to embrace equity, but more is needed and the benefits from the flexible working developed during Covid must not be lost

In the month of International Women's Day ("IWD"), it seems appropriate to discuss the theme for 2023, which is #EmbraceEquity. This is not limited to women – the role of "allies" is very important. Gender equity has to be promoted by all. With the effects of Covid hugely questioning the way we run our firms, there could not be a better time to reassess our business models.

Current figures show the legal profession as represented roughly 65% female to 35% male at law school, and 56% female to 44% male in the profession. I am very pleased to report that the Law Society of Scotland will this year be updating its landmark *Profile of the Profession* survey (last completed in 2018), giving us a much more detailed analysis. Things have certainly come a long way since I was at university, when there were only 14 women in our year (including my twin sister), and very few of them went on to practice.

One of the three challenges the Scottish Government set the legal profession in 2019 was to have a more diverse pool of people apply for traineeships. I think we are well on the way to meeting this. There may now be a general issue in attracting men in proportionate numbers. Women make up around 65-68% of traineeships, and practising certificate renewal for the under 30s stands at 72% women to 28% men. The data we have at present for ethnic minorities are not robust enough, as some population sizes are small, but this year's survey should give us sounder figures.

Data also show that in 17 large firms in Scotland, women have senior leadership roles, a significant step forward in the last few years, but there is much still to do. The early career figures for diversity balance do not follow through to senior positions.

What still needs to be done to improve this situation? It appears that the childcare load still falls more heavily on women, as was apparent in the recent school strikes, with last minute arrangements impacting more on our female colleagues. There certainly has to be an in-depth look at the availability of affordable childcare to enable lawyers to work – we need Government help on this.

However I feel that Covid has changed this scene enormously, and the findings have to be considered carefully. Within a very short time it became evident that remote working had to be embraced. Previously, those in senior positions in firms were absolutely reluctant to even contemplate the possibility of working from home. I believe strongly that these views, usually of men in leadership roles, were based on the premise that people could not be trusted to complete a day's work without being in the office – wouldn't they be much more tempted to play with their children or go to the shops! Even thoughts of them golfing on the sly crept into the heads of those senior lawyers. Very quickly that old chestnut was crushed, and firms provided laptops, remote access and other home kit. It worked, much to the surprise of some antediluvian managers.

Were women disproportionately affected during the restrictions? It did appear that the burden of home schooling fell more on them, but with younger children couples shared the task more. I understand what was seen was senior men being more likely to block out days where they committed to help schooling rather than working, but this wasn't replicated by women – through fear of being accused of not being able to do it all?

After a time, however, there was a feeling of burnout, not meeting colleagues or being able to chat face to face, so hybrid working made a perfect answer for many. There are pluses, including cutting out the commute, saving time and money, but for them the office still has an important function and the hybrid working balance makes sense, hopefully with mutual agreement on the number of days in-office.

So we have come far with #EmbraceEquity: a far cry from my experience when the senior partner in the large firm I worked for told me I had to start calling myself by my married name when heavily pregnant, and alas very much more recently, my fantastic hardworking assistant being stopped from working from home one day a week to suit childcare arrangements, while a female employee without children based in Barcelona was allowed to do exactly that. I could go on with these awful tales.

Things have to remain forever changed. Learn to trust. Please don't let the progress that has recently been made in leaps and bounds be lost. The fact we have IWD is proof that we still have far to go. I understand that many do not celebrate or mark the day for that reason. Also it has been said that some of the firms who shout the loudest about IWD have the furthest to go...

Alison Atack is a former President of the Law Society of Scotland, and a member of the editorial board of Legal Women UK

Possibly a case of social harassment

In the January "Ask Ash" column ("Antisocial behaviour?") a legal professional writes to share their feeling that a new member of their team is being "quite rude" by not agreeing to attend social events. Without a hint of insight, the "complainer" writes that the new employee has been asked repeatedly, despite declining the invitations, but it seems that that is acceptable because "I thought it would be good for him to attend such events".

Ash's advice included "please do not necessarily write him off as rude". At the risk of being rude myself, her correspondent might be invited to "wind yer neck in" and stop harassing their fellow worker. More constructively perhaps, they might be invited to consider their firm's liability under employment law and the Equality Act 2010.

Brian Dempsey, School of Law, University of Dundee

Those trainee quarterly reviews

As well as our Blog of the Month below, we thought it worth highlighting the contribution by the Society's head of Education Rob Marrs on how to get the most from a trainee's quarterly performance review.

Although these take time, he writes, when done properly the time is worth the investment, leading to a quicker, smoother process for the trainee and helping avoid conflict.

Adapting the model for giving effective feedback and applying it to a case study, he suggests how preparing a constructive approach may help uncover any underlying issues behind a matter that is causing concern.

"This approach – preparation, building understanding, evaluation, and then developing a course of action and review – should lie at the heart of quarterly performance reviews", Marrs writes. "A meeting that allows open, fair feedback both ways and is focused on positive development is surely the aim."

While the reviews may seem to a busy solicitor like something that gets in the way of real work, they are important and can be a useful development tool. "The content and tone of the discussion is massively more important than the filling in of the form.

"To trainees they are something that matters a great deal so getting them right, and using them effectively, is important. Many of the issues we see come before the Admissions Subcommittee, or that we discuss with trainees, could have been avoided (and much heartache stopped) if matters had been openly discussed at trainee reviews."

BLOG OF THE MONTH

lawscot.org.uk

For International Women's Day, the Society posted a blog "celebrating Scottish women in law" – profiling six with diverse careers, three of them from ethnic minorities. "The theme of International Women's Day this year is #EmbraceEquity", chief executive Diane McGiffen's introduction notes. "Equality of opportunity doesn't always lead to equity or equal outcomes, and as we make progress we do so knowing that there is #MuchStillToDo." Continuing issues include rates of promotion and the gender pay gap; but such problems "shouldn't stop us... from celebrating the thousands of women in Scotland's legal sector".

BOOK REVIEWS

Redgrave's Health and Safety (10th ed)

JONATHAN CLARKE, MICHAEL FORD KC AND ASTRID CLARKE KC

PUBLISHER: LEXIS NEXIS BUTTERWORTHS
ISBN: 978-1474320382; £334

It is difficult to find a more authoritative text than Redgrave, now in its 10th edition.

The eminent authors bring their experience and knowledge to the page, writing with clarity on the legislation, regulations and case law. The contribution from Astrid Smart KC of Compass Chambers ensures Scottish authorities are incorporated.

The text has a unique approach. It includes the statutes and regulations across almost every conceivable field. Those statutes are then annotated. This book has been well thumbed and is yet to be found wanting.

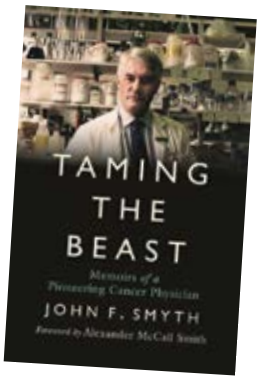
Before delving into distinct areas of health and safety practice, such as transport, manual handling, noise and workplaces, the authors provide an authoritative analysis of the history of health and safety law, followed by a consideration of the general principles. Within the latter section, there is very helpful section dealing with common expressions, with a clear and expansive reference to case law providing interpretation.

Causation is always a factor in health and safety cases, particularly those involving a death. Again the authors provide a comprehensive overview, stating that the question "is not to be decided by any scientific or philosophical theory but by applying common sense to the facts", then exploring that in detail.

Everything is here that the practitioner requires. Pocket sized it is not; comprehensive and comprehensible it certainly is. This is an increasing area of practice in Scotland. Given the wide range of liability which can accrue under the legislation, this book is invaluable.
David J Dickson, solicitor advocate. For a fuller review see bit.ly/3YxvHHC

Taming the Beast

JOHN F SMYTH (MACLEAN DUBOIS: £12.99)



"The first of many fine things about this autobiography is that no lawyers are involved."
This month's leisure selection is at bit.ly/3YxvHHC
The book review editor is David J Dickson

Jaws of controversy

A great white shark in sparkly rainbow lycra? That became the unlikely (unofficial) symbol of the World Pride Festival in Sydney, which ended on 5 March.

"Progress Shark" found itself in the jaws of viral sensation status after the Australian Museum decided to adapt the 10m long model outside its doors to celebrate the LGBTIQ+ event. It is now wrapped in the colours of the Rainbow Flag and the Progress Pride Flag – a challenge in itself, its "swimsuit" having to be sewn on with the creature suspended 5m in the air.

Labelled both "ridiculous" and "brilliant", the creation's future is now a matter of controversy as the model itself was only intended as temporary and is due to be taken down at the end of April, but some Pride supporters are pleading for it to become a permanent fixture.

Progress Shark's thousands of followers on Instagram look like having to make do with its virtual future, however.

PROFILE

Sarah Gilzean

Following International Women's Day on 8 March, we feature Sarah Gilzean, specialist employment and discrimination solicitor, who convenes the Society's Equalities Law Subcommittee

1 Tell us about your career so far?

I have been very lucky. I was always interested in equality issues, and with a traineeship at Mackay Simon, real trailblazers in employment and discrimination law, I specialised in these areas from the start. I qualified into Maclay Murray & Spens; after 10 years I joined the Equality & Human Rights Commission, becoming involved in test cases, CJEU and Supreme Court litigation. I returned to private practice at HBJ Gateley, and in 2017 Morton Fraser.

2 What motivated you to join the Equalities Law Subcommittee?

Society still has some way to go in terms of equality and I was keen to contribute to the work in this area. The Law Society has put an emphasis on improving equality and diversity in the profession for some years and I have tried to ensure that the committee has a diverse membership with different voices.

3 The theme for International Women's Day is "#EmbraceEquity". How can the profession support this?

#EmbraceEquity is about recognising that women should be equal in all spheres, but may have different needs in order to achieve that. The legal profession can do a lot in terms of looking at continuing inequalities and barriers in pay and progression – and at how to support all parents, as until fathers can participate equally in raising families, the "motherhood penalty" in terms of pay and progression will persist.

4 You've done a lot of work on menopause. Do you think employers need to do more?

Supporting women through menopause is a no brainer for employers and makes perfect business sense. Society cannot afford to lose their talent. Breaking down the myths and taboos and giving men and women the tools to discuss menopause more easily at work without jokes or stereotypes is a great first step.

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

WORLD WIDE WEIRD

1 Foiled egg plot

A man has admitted stealing a lorry trailer containing 200,000 Cadbury's Creme Eggs. Police caught up with him shortly after he raided an industrial unit in Telford.

bit.ly/3L556v2

2 Facing a red light?

Amsterdam's mayor, Femke Halsema, wants to build a multi-storey "erotic centre" to replace its central red-light area. Objections have come from neighbours – in the form of the European Medicines Agency.

bit.ly/3L6taeY

3 Born again

An 83-year-old woman, a former "eccentric street preacher", who was declared dead after vanishing 30 years ago in Pennsylvania has been found in care in Puerto Rico.

bit.ly/3TffLqE

TECH OF THE MONTH

Historic Scotland

Apple and Google Play: free

If you enjoy exploring Scotland and finding out more about our nation's history, the Historic Scotland app is well worth downloading. Packed full of information about places of interest around the country, the app will give you lots of ideas for fun and fascinating days out over the spring and summer months.

PRESIDENT

Murray Etherington

This month we again highlight threats to the rule of law at home and abroad, renewing our support for the people and lawyers of Ukraine and with the ongoing need to call out inflammatory language against our own profession

Spring is here. It's a time of renewal and regeneration – we in Scotland look forward to what are quite literally brighter days ahead – but the changing weather has very different connotations on the other side of Europe. In war the main word associated with spring is offensive.

Last month we marked one year since Russia first launched its illegal invasion of Ukraine. The death and destruction that have resulted have been nothing short of horrific, and the economic and geopolitical impact has also been felt here and around the world. Those horrors continue to unfold daily, as we have seen with the fighting around Bakhmut that has levelled a city that used to be home to 75,000 people.

The war is an attack on the people of Ukraine but also on the international rule of law. As solicitors we have a special duty to stand up for the rule of law here and around the world. That's why at our last Council meeting a resolution was passed reaffirming our condemnation of the invasion, while expressing sympathy for the people of Ukraine and, importantly, pledging our ongoing commitment to helping Ukrainian lawyers who have sought refuge in Scotland.

The Law Society of Scotland, along with the Faculty of Advocates and the legal sector as a whole, have done an amazing job providing support and a sense of community for more than 80 Ukrainian lawyers in Scotland. Rob Marrs from the Society deserves special mention for his tireless efforts helping this inspiring group of individuals. Ukrainian lawyers are making a contribution to Scotland's legal sector, but also harnessing the expertise they have found here to ensure that justice, human rights and democracy continue to be protected in Ukraine.

Threats at home

The rule of law here at home also needs close attention at times, and we must never take for granted the value of living in a society with a robust and independent justice system and legal sector. We must stand together on this important issue, supporting each other and standing up for what matters. We won't shy away from calling out anyone who uses derogatory and inflammatory language when talking about lawyers standing up for the rule of law.

One of the most important acts of our Council during my time as President was the motion we passed last year condemning violence, threats of violence and abuse of solicitors. The motion was in response to the sickening and cowardly racist death threats directed at our colleague Aamer Anwar. We made it clear that we stood with Aamer, and that no solicitor should ever have to put up with threats for doing their job.

Standing together against threats to members of our profession was among the key themes when I spoke recently at our annual dinner in Edinburgh. The event was a great success and we were honoured by the presence of many champions for the rule of law, including Scotland's Minister for Community Safety Elena Whitham. The minister thanked the entire Scottish legal profession for our work serving the community, and said she is committed to a constructive relationship with the sector.

Working constructively to ensure the legal sector continues to grow and thrive is of course always important, but perhaps even more so this year as we prepare for reform of Scotland's legal services regulation and for what continues to be a desperately needed long-term solution to the crisis in legal aid. We are working hard to ensure that by December we won't be talking about a winter of our discontent.

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

People on the move

ABERDEIN CONSIDINE, Aberdeen and elsewhere, has promoted to associate **Erin Shand** (Corporate) and **Natasha Day** (Corporate Property Services), both based in Aberdeen, and **Lynne Thomson** (Private Client), based in Glasgow; and to senior solicitor, **Ruhel Ullah** (Corporate), **Lindsey McDiarmid** (Commercial Real Estate) and **Claire Munro** (Residential Property), all based in Aberdeen, and **Euan Forbes** (Dispute Resolution) and **David Murdie** (Private Client), both based in Edinburgh. **Gary McAdam** (Lender Services, Glasgow) and **James McKay** (Estate Agency, Perth) have been promoted to associate director.

ANDERSON STRATHERN, Edinburgh, Glasgow and Haddington, has made the following director appointments. **Chris Weir**, previously acting director of Regulation and head of Fitness to Practise at the SCOTTISH SOCIAL SERVICES COUNCIL, joined the Professional Regulation team from January this year. Agricultural law specialist **Tim Macdonald** joined from LINDSAYS in December 2022. Earlier last year **Lorraine Currie**, an accredited specialist in freedom of information and data protection law, joined the firm from the SCOTTISH INFORMATION COMMISSIONER'S OFFICE; and **Caroline Pringle**, previously with MURRAY BEITH MURRAY, became a part time director in the Private Client team.

BALFOUR+MANSON, Edinburgh and Aberdeen, has appointed consultant and former ROYAL BANK OF SCOTLAND manager **Scott Foster** as its new chief operating officer, from 3 April 2023.

BURGES SALMON, Edinburgh and UK wide, has named **Claire MacLean** (Real Estate, Edinburgh) among five newly promoted partners across the firm.


Morton Fraser l-r Alastair Johnston, Emma Wright, Chris Clarkson, Alan Burns

CONNOR MALCOLM, Edinburgh, intimates that **David Devlin** has retired from the firm, after more than 30 years' service, with effect from 31 December 2022. Property manager **Barbara Gordon** also retires after more than 20 years' service. The partners would like to express their thanks to both David and Barbara and wish them both a well earned retirement.

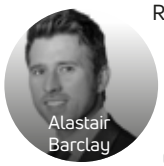
DICKSON MINTO WS, Edinburgh and London, intimates that, with effect from 28 February 2023, **Christopher William Barron**, **Paul Buchan**, **James Andrew Marr McClymont**, **Ajal Notowicz**, **Andrew David Nuthall**, **Jordan Keith Simpson** and **Lara Katie Watt** resigned as partners of the firm.

GILSON GRAY, Glasgow, Edinburgh, Dundee, Aberdeen and North Berwick, has acquired THE LAW PRACTICE, Aberdeen. **Lesley McKnight**, principal of The Law Practice, and her team will join Gilson Gray at its Blenheim Place office.

HODGE SOLICITORS LLP, Blairgowrie, has merged with WATSON + LYALL BOWIE, Coupar Angus, from 1 February 2023. The merged firm continues to operate from its offices in Blairgowrie and Coupar Angus. The partners are **Ryan Aitken**, **Alison Hodge**, **Andrew Hodge**, **Steven Lafferty**, **Kevin Lancaster** and **Michael Tavendale**.

HOLMES MACKILLOP, Glasgow, Giffnock, Bishopbriggs and Johnstone, has appointed **Craig Donnelly** as a senior associate. He joins from BRODIES, where he was part of its Debt & Asset Recovery team.

KEEGAN SMITH CRIMINAL DEFENCE LAWYERS, Livingston are pleased to announce the return of their founding partner **James D Keegan KC**, as consultant.



KERR STIRLING LLP, Stirling and Falkirk, are delighted to announce the promotion of their senior associate **Alastair Barclay** to partner. Alastair heads the firm's Falkirk office and specialises in both corporate and commercial matters.

MORTON FRASER, Edinburgh and Glasgow, has appointed **Chris Clarkson**, a commercial real estate specialist formerly with BURNESS PAULL, as a legal director; **Alastair Johnston** (formerly with HARPER MACLEOD) and **Sofia Crolla** (formerly with ANDERSON STRATHERN) as senior associates in its Litigation division; **Alan Burns** as an associate in the Agricultural & Rural Property team; and **Emma Wright** (formerly with BTO SOLICITORS) as a senior solicitor in the Private Client division.

THORNTONS LAW, Dundee and elsewhere, has appointed two new partners to its Commercial Real Estate team: **Paul Haniford** and **Jayne Macfarlane**, who both join from DENTONS and will be based in the firm's Glasgow office.

Thorntons has also appointed **Jacqueline Moore**, former head of Immigration at SHEPHERD AND WEDDERBURN and an accredited specialist in immigration law, as immigration consultant.

TLT, Glasgow, Edinburgh and UK wide, has appointed **Douglas Roberts**, previously a corporate partner at LINDSAYS, as a partner in its Corporate team in Edinburgh.

denovo

Leading by listening

treating lawyers as the innovators to shape their business success

Denovo has seen a resurgence over the past few years, with hundreds of Scottish law firms turning to the Glasgow-based software provider to help them run their business more efficiently. We reached out to Grant Yuill, Denovo's Head of Marketing, to find out why he thinks so many solicitors are choosing Denovo over other legal tech providers.

Can you give us a bit of background about Denovo's journey to where you are today?

Sure. It's been quite a long journey, but I'll keep it as concise as I can. I'll start by explaining what we do, just in case there are still some people out there who aren't quite sure who we are. In short Denovo Business Intelligence are a legal software company who are all about working with lawyers to provide them with the tools to ultimately make their lives easier. We encourage the Scottish legal community to be the innovators, to help us push the boundaries of how technology can make them more efficient. That's our goal, our purpose, that's what we exist to do.

Our founder, George Blair, set out to achieve that goal nearly 40 years ago. The journey began in the early 80s, providing law firms with legal accounting machines, printers, and personal computers. The business expanded into software solutions exclusively built for law firms in the early noughties, and then moved to full cloud-based software solutions from around 2011. Step forward into 2023 and we continue to help lawyers innovate and drive efficiency within their businesses through the diligent use of technology. Nowadays we believe CaseLoad is the most customisable legal case management and accounts software platform in the market, which we developed right here, in Scotland.

Our market leading legal software and outsourced cashiering service is the now considered to be the operating system of choice of hundreds of law firms across the country. Our efforts of listening, working, and innovating with law firms, particularly over the past four or five years, mean we have integrated our technology into the DNA of practices in ways that sometimes even surprise the law firms we partner with.

Why has Denovo become so visible and popular more recently?

In the past, the business has always spent the majority of its time working with firms in Scotland to improve our core case management and legal accounts software. They didn't leave much time to shout about how great the software actually is. Up until, I guess 2019, Denovo grew mainly on a referral basis. Our reach through traditional and digital marketing was very limited.

When we launched CaseLoad, we were so proud of it we decided we wanted to shout about it and so a larger investment in marketing was agreed, and as a result we have grown very quickly. Word is spreading across Scotland and further afield. Firms from all across the UK are now using CaseLoad, so we know we must be doing something right.

What's different about Denovo?

At the risk of repeating myself, I believe our approach of developing software that is very much solicitor led, meaning we collaborate with solicitors to design and develop innovative solutions and services for law firms. This is our biggest differentiator.

We have built a software platform that is dynamic, fully customisable and ever evolving. We're really proud to say the time spent listening to our law firm partners and their support teams is paying off as we now have thousands of solicitors across Scotland and the rest of the UK using our platform successfully. We truly listen, and just as importantly, we act on what we are told.

For us, the most interesting thing is that users of other platforms have been approaching us and joining the Denovo community. None are going in the opposite direction: that's really testament to our team and how much time they spend ensuring our law firm partners get the most out of our software.

Moreover, the feedback that we're getting is not all about the software, our continual innovation, and our kaizen approach. What is most prevalent when firms are telling us why they eventually moved to Denovo from other providers is that we treat the lawyers as the innovators – they tell us what they want and what they need. We then work in partnership with them to get the software platform that works for them and their firm.

We build bespoke cloud-based servers for every firm, so issues with the system are extremely rare. Each feature is tested by experts (the lawyers!) hundreds of times before it is finally approved to be released to users.

We rarely hear of typical "tech" complaints such as applications crashing, malware attacks, or frequent, annoying

connectivity issues. That's because our operations and development teams work tirelessly to keep every system operating to the highest possible standard.

Technology moves at a rapid pace. How do you manage to stay ahead of the curve?

Well observed. Legal technology is moving at pace. We believe we are at least 3.5 years ahead of the market in Scotland, and our platform, CaseLoad, released in 2019 has started to take significant market share as a result.

Our main objective for our software is functionality and simplicity. Aside from our familiar user interface, it is paramount for us that the software should be simple to use for all work types and audiences. We also have a healthy obsession with perfecting real life functionality.

We keep up to date with what is going on in the world of technology, but it's collaborating with our partner lawyers on how the technology could be best used to help their businesses that keeps us ahead.

What's your ambition for working with lawyers in Scotland in 2023?

The tech world is evolving. It's only a matter of time before everyone adapts and uses new tools. Legal tech is no different. As client needs change, law firms need a partner who is flexible. We know that the legal market is adopting tech at pace. We genuinely believe that we are well placed to ensure that we help law firms in Scotland keep up with this pace, innovate, and provide an infrastructure that is built for the future. With CaseLoad, we'll ensure your legal practice is never left behind.

How would people get in touch?

Our website is denovobi.com. There is a lot of info on there about our software, ourselves, and some of the law firms we partner with. If anyone reading this has a spare five minutes, I would encourage them to jump onto the site and have a look around. They might just find the system they've been searching for! And if anyone would like to reach out to me directly for a chat, my email is grant@denovobi.com.

Visit denovobi.com and start making your life easier

Litigating the mindful way

Adversarial litigation is better conducted without causing unnecessary stress by aggressive behaviour towards an opponent. That's the thinking behind the newly launched Mindful Business Charter guidance for litigators, as co-author Naomi Pryde explains

I read Edward Gratwick's opinion article last month with interest (Journal, February 2023, 5). It was a timely piece, as it has coincided nicely with the launch of the Mindful Business Charter's *Guidance for Litigation Professionals*. Subtitled "Rehumanising Litigation", the guidance seeks to address exactly the type of behaviour addressed in the article.

Litigation is, by its nature, contentious and adversarial. However, it is the view of the taskforce of senior litigators who prepared the litigation guidance (Huw Jenkin, James Boon, Katie Byrne, Luke Maunder, Mani Gupta, Richard Martin, Stephanie Lee, Stephen Innes and myself), that this need not preclude co-operation.

Litigation can be stressful, and emotionally charged, with tight court deadlines and clients who are keen for their legal representative to adopt an "aggressive" approach. However an aggressive, or robust, strategy to resolve a dispute does not mean that a litigator needs to adopt aggressive conduct.

I am fascinated by psychology and neurobiology and the effect that our thinking can have on our mental and physical wellbeing. In the MBC *Guidance for Litigation Professionals* we touch on the amygdala (the part of the brain that regulates our approach to threat). Litigation, given its adversarial nature, is arguably more prone than other legal disciplines to involve behaviour that we are, often unconsciously, likely to perceive as a threat.

Years ago, it was seen as a badge of honour to be described as a "rottweiler" or an aggressive litigator. I had it said to me, on more than one occasion, that I'm too "nice" to be a litigator. However, time has moved on, and more and more clients are seeking to adopt a more collaborative approach to litigation. This approach preserves not only the sanity of those involved, but indeed important commercial relationships between the parties in dispute.

Framework of principles

The Mindful Business Charter is a permissive framework to guide individuals and organisations to work in more mindful ways, so as to reduce the unnecessary stress experienced in work and promote healthier and more effective ways of working. Our guidance applies that approach to the conduct of litigation.

Made up of eight statements of principle for practitioners to keep in mind, it provides a series of example scenarios which explore the application of those principles to a range of commonly experienced circumstances in litigation. The guidance is not mandatory, nor does it seek to prescribe particular actions or behaviours, but rather to encourage mindful consideration and good practice, to help improve wellbeing and indeed mindfulness in the legal profession.

Set out more fully in the panel opposite, its principles centre around the nature of litigation, and our role and duties as practitioners, behaving objectively and dispassionately, behaving with respect, and being mindful of our own impact. The principles discuss strategy versus conduct, and encourage reflection. The guidance is effectively a call to arms for the profession, encouraging everyone to take responsibility to effect meaningful change for the better administration of justice.

We of course recognise that sometimes long and unsociable hours are required in law, and that some level of stress is inherent. However, we recognise that stress can diminish not only the quality of our thinking and communication, but also the quality of our lives. The purpose of the Mindful Business Charter is to reduce the unnecessary elements of that stress.

Application and examples

Within the guidance we have posed some questions for people to ask themselves on certain situations that the taskforce discussed as being particularly stressful – for example, late service of documents on a Friday afternoon or over a weekend. We have deliberately not provided answers to the questions or situations. As experienced practitioners, we recognise that some of the situations are unavoidable: the questions are simply to prompt reflection and consideration of what could be considered to be best practice.

Most of the guidance is equally applicable to private practice and in-house solicitors, but we have sought to set out where the perspectives might vary.

Further, the guidance is not jurisdiction specific. At the launch I described the guidance as "jurisdiction agnostic". Although several of the taskforce practise in England & Wales, and so it was prepared with the professional obligations of practitioners in England & Wales in mind, we strongly believe that the guidance is applicable across jurisdictions (perhaps with some adaptations). The intention of the charter is to be inclusive and cross jurisdictional. The taskforce had input from myself and also from Mani Gupta. While I am English as well as Scottish qualified, I practise in Scotland, and Mani works in Singapore and India. As stated within the guidance, and as I confirmed at the launch, the taskforce would be delighted to assist with adapting the guidance to other jurisdictions if that would be helpful.

Judicial buy-in

The guidance was reviewed by Leigh-Ann Mulcahy KC, Deputy High Court Judge from 2016-2022, and by His Honour Judge Richard Hacon. The judiciary are taking more note of conduct and penalising firms for unnecessarily aggressive conduct. In *Pisante v Logothetic* [2022] EWHC 2575 (Comm) the judge held that costs should be awarded on an indemnity (effectively a punitive) basis due to the way the defendants had conducted an action, including the letter of response to the claim which was described as having been drafted in an "intemperate and intimidatory manner".

The launch

The well attended launch of the charter took place on Tuesday 7 March, hosted in DLA Piper's London office but streamed virtually for reach and to promote inclusivity. It was opened by Judge George Strathy, a retired judge based

Naomi Pryde is a litigation partner in DLA Piper Scotland LLP. The full Guidance for Litigation Professionals can be found at bit.ly/3mDyZZQ

in Ontario. The taskforce was delighted by the turnout, which included MBC member firms, litigation practitioners, the judiciary and legal press. The event received good publicity on social media and the mood in the room was very positive about the impact that the guidance might have.

It is our hope that, in time, all litigation practitioners will have regard to the content of the guidance and the best practice that it seeks to set out. It is intended to be a living document and we invite feedback. The taskforce hopes that the Litigation Charter is seen as a call to arms to those responsible for the training of the next generation of litigators, and indeed the judiciary, to play their part in modelling and reinforcing best practice. After all, as stated at the launch, we want to help build a legal profession we would be happy to encourage our children to be a part of.

Statements of Principle

1. The nature of litigation

Litigation is necessarily contentious and adversarial. However, this need not preclude cooperation. In fact, in some jurisdictions (including England & Wales) there are specific obligations placed on parties to co-operate and to assist the court. Even so, as a process ultimately controlled by a court or tribunal, practitioners should recognise that parts of the process (for example as to timetabling) are not always within their control, but are ultimately for the court or tribunal to decide, and that it is not the fault of their opponent when those aspects do not go the way the practitioner would have liked.

2. Our role and duties

Our role as practitioners is to understand the issues in dispute, identify those which are capable of resolution through litigation and assist in that resolution. Alongside our duties to our client, we will also owe duties to the court or tribunal (including to uphold the rule of law and the proper administration of justice). We should conduct ourselves at all times with these different duties in mind.

3.Objectivity and dispassion

Disputes can be emotionally charged between the parties, which can inhibit their resolution. Part of our role is to seek to address the dispute in a dispassionate and objective manner, to aid its successful resolution, and not to contribute to the emotional charge. For those in private practice it is helpful to keep in mind that the dispute belongs to your client – and that how you report to your client on the conduct of your professional counterparts may unintentionally create and/or escalate the emotional charge.

4. Humanity and respect

Our opponent(s) are human beings with feelings and personal lives outside work, just like us. They are worthy of our respect. Advancing our client's case robustly does not require us to act disrespectfully or harmfully towards them. Just as we are seeking to act and carry out our client's instructions in accordance with our professional responsibilities, we should start from an assumption that (i) our opponents are doing the same, and (ii) that their actions are well intentioned. Direct criticism of an individual, and/or calling into question their professionalism, should be done only extraordinarily and after careful thought and consideration, and with a proper basis.

5. Intent versus impact

There is a difference between intent and impact. We should be mindful of the impact of our own actions regardless of our good intent. Equally, we should be mindful that our opponent may not have intended the impact upon us of their actions.

6. Strategy versus conduct

Aggressive or robust strategy to resolve a dispute does not require us to adopt aggressive conduct. Causing unnecessary stress to our opponents will often be counterproductive given the likely impact upon them and their response and upon the effective management of the case and the proper administration of justice [further explained in a note on the amygdala].

7. Reflection

A measured, mindful, response, having given ourselves the time to think and reflect, and to engage our conscious thinking, will likely be more helpful than an immediate or kneejerk reaction which will often be informed by our automatic, unconscious, thinking.

8. Collective responsibility

We can expect to be treated with the same level of courtesy and respect as we treat others. As practitioners engaged in this area of work, we, along with the judiciary and others involved, all have a collective responsibility for how litigation is conducted and we have the ability, if we so choose, to take deliberate steps to effect meaningful change for the better administration of justice, the better advancement of our clients' interests, the mechanism for the resolution of their disputes and the wellbeing of all those involved in the litigation process.

Hybrid working: a permanent change?

The benefits of hybrid working have become apparent to many more people since the pandemic, but it gives rise to some practical and legal issues that still need to be addressed, Marianne McJannett writes

As we continue to see the continued use by firms of hybrid working models, it's good to take a moment and consider whether this model, alongside other forms of flexible working, is bringing benefits to the workplace, or whether it is becoming a hindrance to employers and employees alike.

Before the pandemic, remote and hybrid working had been increasing gradually. Between January and December 2019, around 12% of the UK workforce worked at least one day a week from home. As expected, this grew considerably, and at the peak of the pandemic almost half of workers worked at least one day a week from home. Since restrictions eased, around 22% of the UK workforce have worked at least one day a week from home since September last year.

Ultimately, comparison of data is quite difficult at this stage, due to the fact that it is all either pre-, during or post-pandemic, so it will be interesting to see how these numbers shift as we move forward with this way of working.

Plus points

People often speak about the personal benefits of hybrid working, and there are some data coming out highlighting the positives of homeworking.

Offering hybrid working has allowed employers to widen the labour pool, tapping into talent that previously hadn't been available to them. This has allowed individuals to apply for roles where they might not have done so previously. An interesting recent development has come from Zurich UK, who introduced a policy which requires the company to advertise every vacancy with the option of applying on a part time, flexible (including hybrid working) or job share basis. The policy has seen a 16% increase in the number of women applying for jobs, and in the 12 months to January 2023, Zurich hired 45% more women into senior roles. While not solely looking at hybrid working, policies such as this are going to bring greater diversity to the workforce.

Hybrid working has allowed employees going through various health conditions such as fertility treatment or the menopause, or those struggling with mental health difficulties, to carry on working but in an environment that is more comfortable for them at potentially challenging times. Previously, people might have had to phone in sick, or take unpaid leave if they felt they couldn't face coming into an office, so this change to work has really benefited these groups.

The recent report from The Female Lead, *The Hidden Risks of Hybrid Working*, published in November 2022, provided a really interesting insight into the highs and lows of hybrid working. Among other things, hybrid workers feel trusted and respected and are able to adjust working style to suit their personality and environment and improve productivity.

Some issues

However, we are increasingly hearing about the difficulties some employers and employees are facing with hybrid working. KPMG's recent CEO Outlook survey found that more than three in five (62%) of UK CEOs predict that, over the next three years, employees whose roles were traditionally office-based will be back in the workplace full time.

There is also a changing attitude to hybrid and remote workers, with the number of fully remote jobs advertised in the UK falling for the eighth month in a row in December 2022, reflecting employers' determination for staff to be in the office for at least some of the week. Tony Danker, the (now former) director general of the Confederation of British Industry (CBI), said on the BBC's Political Thinking podcast that "most bosses secretly want everyone to come back to the office". While I wonder whether this is more hopeful thinking than anything, it's an interesting position to be aired and certainly aligns with the findings within the KPMG CEO Outlook survey.

Another problem which has been highlighted is that of proximity bias, which is when those who are physically closer to company leaders enjoy greater influence and advancement opportunities relative to those who are hybrid or fully remote. Research has shown that employers often give preferential treatment to those that they see and have contact with most regularly.

We can all remember the fun days of our

"...we're also seeing some legal issues arise at the end of employment where an employee has worked in a hybrid way."

traineeships and the importance of being around our peers as well as more experienced solicitors. Without effective mentorship programmes and plans, hybrid working could have a negative effect on those early in their career.

As there is increased movement in the job market, we're also seeing some legal issues arise at the end of employment where an employee has worked in a hybrid way. Issues such as ensuring restrictive covenants are up to date for a changed working pattern (if contracts were drafted prior to the pandemic and a hybrid working model), as well as employers protecting confidential information and business contacts, are matters that need to be considered. Employers may wish to utilise garden leave at the point at which an employee submits their notice (checking that they have the contractual right to do so within the employee's contract first), and remove access to systems and collect hard copy documents shortly after garden leave commences, to minimise risks of employees copying confidential documents. As companies potentially have less oversight of their employees while they work from home, they might want a signed statement that all confidential information has been deleted from any personal electronic systems.

Looking ahead

Going forward, hybrid working is here to stay. Upcoming changes as part of the Employment Relations (Flexible Working) Bill will see the right to request flexible working, which would include hybrid working, being a day 1 employment right, with people being able to make two requests a year instead of the current one request. This rightly cements flexible working in our overall working practices.

The KPMG survey found that "a hybrid approach benefits recruitment, retention and engagement by giving employees the flexibility they want and that they grew accustomed to during the pandemic. And it doesn't negate having time together in the office for collaboration, learning and teambuilding, and for employees' mental health". I would say that this is a key starting point to take, reminding employers to consider the whole suite of benefits that hybrid working brings when contemplating making any changes to traditional models.

We are seeing certain gaps in the management of hybrid and remote workers, given that a lot of managers have never been trained on how to manage staff remotely, and unless this is addressed it will cause potential issues in the future. We will also continue to see data coming through around the benefits and challenges of hybrid working, which will no doubt help to shape employment practices going forward.

Marianne McJannett is Head of Employment with Bellwether Green

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Trusts: reform at last

Substantial reforms to trust law recommended by the Scottish Law Commission in 2014 are finally before the Scottish Parliament. Stewart Dunbar highlights the main features for practitioners

In the early 2000s, the Scottish Law Commission ("SLC") undertook an extensive review of trust law and produced various discussion papers, reports and consultations. This led to its comprehensive *Report on Trust Law* of 2014 (Report No 239) setting out the SLC's recommendations, followed by an initial draft Trust Bill.

The Scottish Government's response in 2015 confirmed it would give the report "full consideration", when priorities allowed. In October 2021, the Minister for Community Safety notified the SLC that the Government would begin work on the SLC's proposals. Responding to that news, Lady Paton (chair of the SLC) predicted that there would be "considerable rejoicing and relief amongst the legal community who deal with clients and find the 100-year-old law a major handicap". Lady Paton was referring to the Trusts (Scotland) Act 1921, which recently marked its centenary.

The Trusts and Succession (Scotland) Bill was introduced to the Scottish Parliament on 22 November 2022. The first part of the bill focuses on trusts, and the second (shorter) part on succession. The bill presently sits at stage 1 of the legislative process, and so practitioners will need to remain patient for a while longer. However, this programme of reform has been gestating for some time, and it is worth practitioners being aware of the main features of the bill. Here follows a summary.

Removal of trustees

The "Resignation and removal" section of the bill (ss 5-8) appears to be welcome news for practitioners, in that it simplifies the process for removing trustees under various circumstances.

A trust deed may occasionally (and fortuitously) provide a mechanism for removing a trustee; however that is very often not the case. In the absence of such a provision, it is necessary for an interested party to take court action in terms of s 23 of the Trusts (Scotland) Act 1921, which enables the court to remove a trustee who has become "insane or incapable of acting by reason of physical or mental disability or being absent from the United Kingdom continuously for a period of at least six months". Such a solution is difficult and expensive.

"For the first time,... protectors are given formal recognition within Scots law. This is a useful step: protectors are a common feature of trust practice in other jurisdictions, and thus appear commonly in practice"

The bill seeks to address this point in a number of ways:

- A trustee can be removed from office by a majority of their co-trustees in the event that they are mentally incapable or are convicted of an offence involving dishonesty or are imprisoned. This power would be available irrespective of when the trust was created, which may be useful for existing trusts where the administration is being hampered by a trustee who has become incapable.
- A trustee can also be removed from office by decision of all the beneficiaries of a trust, though only where all beneficiaries are absolutely entitled to the trust property, and all have attained the age of 18 and are mentally capable. The power is therefore limited to cases where vesting has already occurred, and so would not be available to beneficiaries where, for example, the trust fund is still subject to discretionary terms. It may be useful in cases where an absent or intractable trustee is preventing the timely resolution of an age-based trust where all beneficiaries have come of age.
- The court retains power to remove a trustee on a variety of grounds, including mental incapacity; unfitness to carry out the duties of a trustee; carrying out of duties in a way that is or may be inconsistent with the fiduciary duty; neglect of duties; or the trustee having become untraceable. Applications on these grounds would become a resolution of last resort, given other mechanisms that the bill creates as above. There may be no other option in instances such as a sole trustee who has become incapable.

Appointment of additional or new trustees

- By s 3 the current trustees are given the power to assume new trustees unless the trust deed provides otherwise. This does not directly address the situation whereby a truster has reserved for themselves the power to appoint trustees during their lifetime, but with no provision for incapacity.
- The truster is given power (s 2) to appoint a new trustee where no capable trustee exists or is traceable.
- Under s 1 the court is able to appoint an additional trustee where it is "expedient to do so for the administration of the trust".
- While beneficiaries would have a certain power to remove trustees as mentioned above, there is no corresponding power for beneficiaries to appoint a new trustee. In cases where there are no surviving or capable trustees, in the absence of the truster the beneficiaries are left with no option than to apply to the court for appointment of a new trustee.
- In cases where there are no surviving trustees, the workaround of using the Executors (Scotland) Act 1900 would still be available to allow executors of the last-deceasing trustee to append details of the trust fund to the inventory of the estate. That option is only available where there are no remaining administrative acts required other than paying over to the beneficiaries, and also involves waiting until confirmation is granted in the estate, which could take time.

- The appointment or assumption of new trustees would operate as a general conveyance of the trust property in favour of the new and existing trustees: s 4. This would align Scots law styles more closely with English law styles.

Protectors

For the first time, by chapter 7 protectors are given formal recognition within Scots law. This is a useful step: protectors are a common feature of trust practice in other jurisdictions, and thus appear commonly in practice within trusts created using pro forma deeds, or with trusts which have come to conduct some or all of their affairs in Scotland.

Trustee decisions

The current default position is that trustee decisions are made by quorum, defined as "a majority of the trustees accepting and surviving". That does not exclude trustees who become mentally incapable. Section 12 of the bill addresses this by providing that a decision is binding when it is made by a majority of the trustees "for the time being able to make it".

Trustee duties

The bill gives a statutory basis for trustee duties, while also effectively restating and expanding on the existing defences available.

- On the duty of care, s 27 specifies the standards of care which are to apply irrespective of when the trust was created, though these standards apply only in respect of management of trust affairs after the section comes into force. Trustees are required to exercise "such care and diligence as any person of ordinary prudence would exercise in managing the affairs of another person". Further, and of particular interest to those in the profession, the bill imposes a higher standard of care for trustees who are in the business of providing professional services in relation to trust management, and where they have been appointed or assumed as a trustee and are remunerated on that basis. Those trustees are required to exercise "such skill, care and diligence as it is reasonable to expect from a member of the profession in question". This will doubtless cause a ripple of action in the field of risk management, as lack of oversight and/or involvement in the affairs of trusts where a professional is named as trustee could become sources of liability.
- On the fiduciary duty, the bill includes several sections specifically on breaches of duty, although it does not define "the fiduciary duty" itself. Section 30(2) confirms that the statutory position is to apply "without prejudice to any provision of a trust deed which authorises a particular transaction, or a particular class of transactions, which but for that authority would constitute a breach of a fiduciary duty". This should therefore mean that provisions in trust deeds allowing conflicted parties to participate in such decisions will continue to be permissible, albeit the section refers only to "transactions" rather than trustee decisions.
- On the duty to supply information to beneficiaries, there has long been debate within the profession as to what trustees are required to provide and when. The bill does not provide a list of documents that ought to be given, other than trustee names and contact information. Instead, s 26(1) states that trustees have a duty to disclose "information requested by the beneficiary… unless the trustees consider it would be inappropriate, in all the circumstances". This leaves the onus on the trustees, though beneficiaries may seek a direction from the court if they do not consider that the trustees have fulfilled this duty. Helpfully, the bill does go on to confirm that certain information can generally be excluded, including information on other beneficiaries, reasons for decisions and letters of wishes which are relevant to the exercise of the trustees' discretion.

Trustee powers

Chapter 3 sets out the powers and duties of trustees in one place. Chapter 8 also consolidates the provisions from the 1961 Act on variations, together with some, but not all, of the common law principles, to assist where the chapter 3 provisions cannot be used.

Succession

Aside from a self-explanatory amendment to the Succession (Scotland) Act 2016, the bill makes only one change of note, to the order of succession to the free estate in an intestacy. In short, the surviving spouse or civil partner of a deceased person is "promoted", such that they will now rank second only to the children and remoter issue of the deceased. Previous Law Commission reports have recognised that the present order of succession is now out of step with public expectation, and so on that basis alone this reform is welcomed.

At time of writing, there is no word on further reform of succession law on the lines suggested in the SLC's *Report on Succession*, where broader changes to the systems of legal rights, prior rights and financial provision for unmarried cohabitees were at issue.

Stewart Dunbar is a legal director with Gillespie Macandrew

Endless **possibilities**

Organisers of the first Festival of Legal Possibilities tell how it highlighted the ever more varied legal career options while calling for the legal sector to pick up the pace on diversity

Recruitment in the legal sector keeps developing and changing. Large, commercial firms are naturally driving change, increasingly pushing for more interaction with law students. This definitely helps those from outside the traditional legal background understand about a commercial or corporate law career. But what resources exist for those who do not see themselves following such a career, and/or do not feel represented by mainstream legal recruitment?

To help provide such a resource, Edinburgh Law School hosted the inaugural Festival of Legal Possibilities on 21-23 February 2023, generously sponsored by Diversity+. Thought to be the first of its kind in Scotland, it was supported and welcomed across the sector. Creating a "safe space", the sessions allowed the speakers to share their own frank and honest advice – offering students an abundance of valuable, usable takeaways.

Attendees were offered a feast of refreshingly heartfelt advice from the very top of the profession. Speakers advised students to remain flexible and "embrace the unpredictable" in their careers, while telling of the challenges they had overcome along the way. The event was peppered with powerful personal stories from leaders and early talent in the industry, who offered their testimonies to the power of saying "yes" to unexpected opportunities.

The clear message to students was that in choosing a career path, the possibilities have never been more varied and interesting. Several speakers offered that students who felt they were different from the mainstream should see this as their "superpower". Across the three days, panels covered underrepresentation, diversity and intersectionality; women in law; ethnicity and culture; LGBTQ+; judicial, tribunal and mediation careers; becoming an advocate; Edinburgh Law School's LawPALS programme; in-house solicitors; and public and third sector careers.

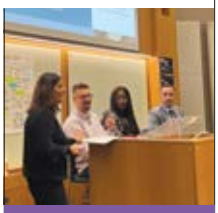
Pushing for faster change

The event called on the sector to focus on several actions, including developing more relatable role models, and promoting family-friendly career structures to raise awareness that the profession is welcoming of all backgrounds. It's vital to create safe places of work for that to happen, and have decision-makers in the room when discussions are taking place about increasing diversity: that is how we can change to keep up with the demands of the society we serve.

A key conclusion of the Festival was that the speed of change to a more diverse and inclusive sector has been too slow. While the profession has seen some increases in diversity in student and entry-level roles, it lags behind the population at large and at more senior level – something that sponsors Diversity+ aim to change.

With 38 speakers, the event gelled the hopes, thoughts and plans of the sector. While there was recognition for how far the sector has come, there was clear mandate for more progressive change.

Lindsay Jack, Director of Student Experience at Edinburgh Law School, said: "A big part of the experience of students at university is thinking about where their law degree might take them. We're always looking for ways to enhance the LLB, and represent the interests of our diverse cohorts of students. The Festival gave us a chance to provide something unique that tapped into feedback students have been giving us; simply, they want to know what opportunities are out there for them, and how their specific experience, background, and identity can help them to make the most of these."



Interested in learning more and joining the conversation? Please contact:

Dr Jonny Hardman, Co-director of Advancement at Edinburgh Law School: jonathan.hardman@ed.ac.uk

Lindsay Jack, Director of Student Experience at Edinburgh Law School: Lindsay.jack@ed.ac.uk

Naeema Sajid, Founder and Director of Diversity+: Hello@diversityplus.info

"Be yourself"

Brianella Scott described the challenges she experienced when starting her career. Armed with a first-class law degree, for two years she applied for traineeships across Scotland, before finally receiving two offers together. Excitement and relief soon gave way to the pressure to fit in, and not bring her true self, in an effort to blend into an environment where she saw little of her own ethnicity mirrored back at her at any level.

Brianella, who is now assistant solicitor to the Sheku Bayoh Public Inquiry, commented: "It's fine to stand out. You need to celebrate your uniqueness. Be yourself and don't compare yourself to others. See that what you bring is different from other trainees and capitalise on that. Don't feel like you can't take up space in a corporate situation."

Naeema Sajid, director at Diversity+ identified with this advice. She added: "Throughout the event, speakers with diverse backgrounds talked about feeling they needed to fit with the typical image of a solicitor or advocate, while minimising their true selves.

"Some shared their experience of founding their own firm to use their 'difference' to help others – which has also been my own personal path.

"To quote something I heard at the event, leaders frankly need to get better at recognising the talent they already have in the door. That will pay dividends in bridging the gap we have at more senior levels.

"The underlying message throughout the event was about being alive to opportunities that match with your true self, and your strengths, and creating networks to enable that."

Commitment Matters

With so much turbulence in the legal software market at present, you could be forgiven for wondering who will own your supplier next. Will you be facing yet another "sunsetting" of your product with the decline in service and upheaval that involves?

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Needs not deeds

Does the Children (Care and Justice) (Scotland) Bill pass the Kilbrandon test of providing care and protection for young people involved in offending behaviour? Clan Childlaw believes it contains positive changes, but significant omissions regarding rights to legal advice

The Children (Care and Justice) (Scotland) Bill was introduced into the Scottish Parliament in December 2022, following a consultation on its principles which took place last year.

Its provisions make changes to the way in which children are treated in both the care and criminal justice systems. As a consequence, the way in which the two systems interact is also impacted. The new measures are taken with the objective of ensuring children are treated in the most appropriate, trauma informed and rights respecting way when they come into conflict with the law and are in need of care and protection.

This interaction between the two systems is hugely important to get right, particularly for children and young people involved in offending behaviour. Since the Kilbrandon report was published in 1964, the welfare principle has been central to the way in which Scotland responds to children and young people in conflict with the law. The children's hearing system ("CHS") was established to remove children under 16 from adult criminal procedures, with the exception of extremely serious offences. Within the CHS there are a range of measures that can be used to ensure that children receive the right level of support. While our understanding of the drivers of offending behaviours in children and young people has come a long way since 1964, the core Kilbrandon principle that children involved in offending are in need of care and protection should be as relevant a policy objective today as it was 60 years ago.

The changes

This article focuses on three of the most significant changes the bill proposes to the CHS and considers whether they reflect its policy aim. However, before doing so there is also a broader issue to reflect on. The bill proposes incremental changes to how Scotland responds to children and young people in conflict with the law, but focuses primarily on the CHS and pays little attention to what happens where children and young people come into contact with the courts or the wider criminal justice system. It is questionable whether the adult criminal justice system can ever ensure a child centred, trauma informed environment, and the limited attention paid to it impacts the ability of the bill to achieve its policy aim. Thus, what is not in the bill is potentially as significant as what is in it.

There are also issues in relation to the extent of ministerial power. The bill grants framework powers to the Scottish ministers in relation to secure care and cross border placements, probably so that ongoing policy reviews can feed into ministers' decision making at a later date. Nonetheless that has the potential to cede too much power to the Scottish Government in areas where there can be significant scope to impact rights.

1. UNCRC compliant age of child

The Bill is split into four parts. The first part includes one of the most significant changes to the current system, to bring the definition of "child" in line with the United Nations Convention on the Rights of the Child. To this end, the definition in the CHS increases from up to the age of 16, to under the age of 18. Access to supervision and guidance is also extended up to the age of 19. Prior to this change, young people aged 16 and 17 who have been arrested for offending behaviour, and are not already in the CHS, cannot be referred to the children's reporter as an alternative to prosecution under the joint referral process.

For many children and young people this change will undoubtedly be positive; however, at the same time as placing more children within the CHS, part 1 increases the power of the children's hearing to place limitations on the movement, and behaviour (in relation to a specified person or persons), of children referred to it. These restrictions can be used as a consequence of behaviour that would not meet a criminal standard in court. When you consider that children and young people in a children's hearing are less likely to be offered legal representation than those appearing in court, this seems a significant risk to children's rights. These orders may also impact their future prospects through disclosure requirements. It is Clan's view that the expansion of automatic access to legal advice in children's hearings is of such importance in the context of these changes that this needs to be reviewed as part of this bill and not deferred to the wider review of the CHS.

2. Movement restriction conditions and the test for "harm"

Part 1 also extends the circumstances in which a movement restriction condition ("MRC") can be imposed. At present it is aligned to the secure care criteria, as an option to be considered prior to a secure care order being made. As it has only been considered in this context, a child has access to automatic legal aid to instruct a lawyer and be offered a duty lawyer to consider the merits or otherwise of having their liberty restricted in this way. By uncoupling it from the secure care criteria, automatic legal aid and a duty lawyer may not be provided to advise the child or young person at a hearing where such an order is being considered unless secure accommodation is also being considered. Given its potential to significantly restrict a child's liberty, this is of serious concern, requiring amendment to the legal aid regulations.

Prior to the bill, an MRC can only be imposed to protect a child and others from harm or where there is a risk to the

child's psychological, physical, mental or moral welfare. If those circumstances are met, a child can be prohibited from approaching, communicating with or attempting to approach or communicate with a named individual, or have their access to certain places restricted. As an alternative to secure care there also need to be measures put in place to support the child while out in the community.

The new test for an MRC focuses on two criteria: "that the child's physical, mental or moral welfare is at risk", or "that the child is likely to cause physical or psychological harm to another person". The extension of harm in this context to include psychological harm is concerning. The definition section states that this includes "fear, alarm and distress", but unlike in other areas of civil and criminal law there is no objective measure of what might constitute those elements of the test. There is therefore a risk that this could be interpreted widely and become a catch all for behaviour that may not have fallen under the test for MRCs previously.

Additionally, there is a risk that without supports to enable compliance with the restrictions, vulnerable children and young people will breach these orders. There is no clear guidance in the bill as to what the consequences might be, but there is a concern that a breach itself could result in an offence having been committed. In essence this net widening on low level behaviour could end up criminalising children and young people for behaviour that poses no risk to the public.

This definition has also been included in other remedies available to the children's hearing, including in the secure care criteria: the test for ordering a medical examination on a child and to obtain a warrant to secure attendance at a children's hearing. Again this represents a worrying uptariffing of children's behaviour, and in none of these instances – bar applications for secure care orders – is there an obligation to provide legal advice or representation to the child or young person before these orders are granted.

3. Ban on children in young offenders' institutions

Part 2 fulfils one of the Scottish Government's commitments to the Independent Care Review, to stop the imprisonment of children and young people. The bill makes provision that children under 18 will no longer be able to be placed in young offenders' institutions. Where they have to be detained this will happen in a secure care setting where they will have access to support. The bill also makes it clear that all children and young people who are detained in secure care will be considered to be "looked after" and entitled to access aftercare on their release. This is a significant and important commitment that will improve outcomes for children who have been convicted of an offence.

"It is questionable whether the adult criminal justice system can ever ensure a child centred, trauma informed environment"

Concluding remarks

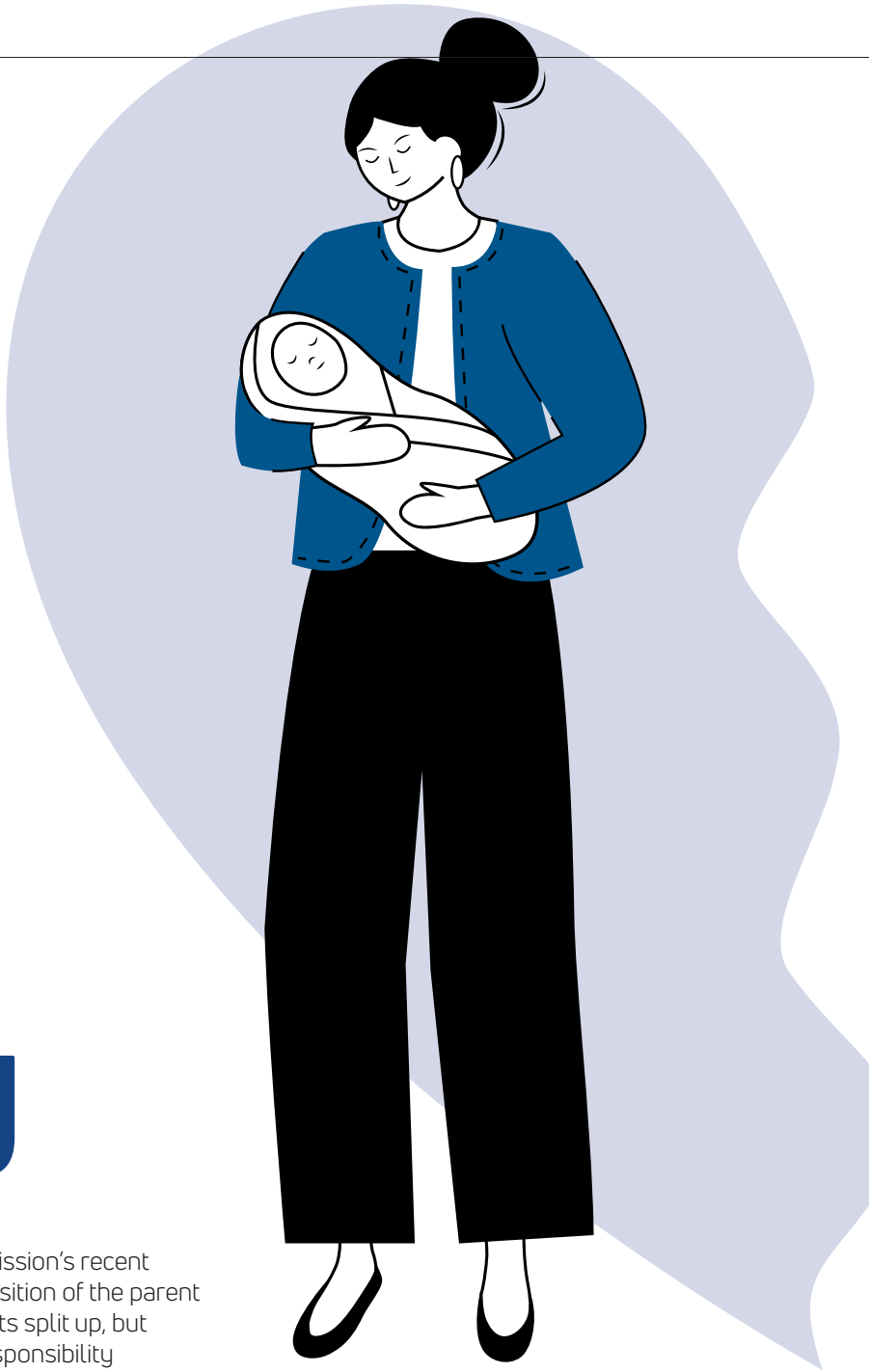
Overall, there are positive changes in the bill in relation to achieving a child focused, rights respecting justice system for children in line with Kilbrandon principles. It contributes to a harmonisation of the definition of child in Scottish legislation in line with the UNCRC, and bans the practice of imprisoning children – which is a huge step forward.

However, the bill does nothing to improve access to legal advice in the CHS. This is despite proposals to increase the scope of the powers open to the children's hearing to restrict the liberty of children. This is a missed opportunity and critical in protecting children's rights. The proposed changes mean that not only are children being asked to agree offence grounds without automatic legal aid to obtain the advice of a solicitor or a duty solicitor being appointed, they may now face having their liberty restricted through the imposition of an MRC without these fundamental entitlements.

While some will justify this approach on the basis that the child is not being prosecuted and will not have a criminal record, as current disclosure rules stand these matters can be revealed when the child is an adult through the "other relevant information" criterion on PVG checks. In our view this is a significant omission that tracks through the bill in all of the proposals that relate to the CHS, and it should not wait for the outcome of a wider policy review before being rectified.

Katy Nisbet is head of Legal Policy, and

Rebecca Scott managing solicitor, at Clan Childlaw



Still left holding the baby

Elaine E Sutherland welcomes the Scottish Law Commission's recent recommendations that would improve the economic position of the parent with greater responsibility for childcare after cohabitants split up, but argues that more is needed to ensure fair sharing of responsibility

Over 30 years ago, the Scottish Law Commission recommended what were then regarded as radical reforms of the law on cohabitation, albeit it was never its intention that non-marital cohabitation should be on a par with marriage.

As its *Report on Family Law* (Scot Law Com No 135, 1992) put it, the law "should neither undermine marriage, nor undermine the freedom of those who have deliberately opted out of marriage... [and]... should be confined to the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair" (para 16.1).

It took 14 years for these recommendations to find their way into statute (Family Law (Scotland) Act 2006), and even then the drafting differed significantly from the Commission's infinitely better proposals. The provisions have been criticised consistently by practitioners and the courts, despite Lord Hope's efforts in *Gow v Grant* [2012] UKSC 29 to inject a degree of clarity. A further flaw in the operation of the law is that there are widespread public misconceptions about its content, with many believing that cohabitants have greater rights than they do.

The Commission reported to that effect when it returned to the subject recently (*Report on Cohabitation* (Scot Law Com No 261, 2022), paras 1.6-1.7). That report sought to address the current statutory shortcomings, proposing many useful and much-needed reforms, both during cohabitation and on its termination (other than by death). However, its recommendations do not seek to place cohabitants in the same legal position as those who have formalised their relationship by marrying or registering a civil partnership.

A common regime?

The first question asked by the Commission in its preceding discussion paper (DP No 170, 2020) was whether a separate regime should be retained for cohabitants. A majority of the 41 responses favoured doing so (2022 Report, paras 2.11-2.21), although a majority of the 241 respondents to a public attitudes survey for the Commission favoured treating cohabitants, spouses and civil partners in the same way, at least in certain circumstances (para 2.23).

"The parent who bears the greater burden of day-to-day care will usually be the mother, so any resulting economic imbalance represents another layer of adversity heaped on the many women who face systemic gender inequality in Scotland today."

Legal consequences matter most when relationships break down. The Commission justified its approach as follows: "in the absence of evidence of clear, unqualified and unequivocal support from a majority of the legal profession, the academic world, equality groups and the general public, it is not possible for us to recommend reform of the law to the extent required to fully align the regimes for financial provision on cessation of cohabitation, divorce and dissolution of civil partnership" (para 2.38).

In the name of full disclosure, I should make it clear that my preference is for the law to treat qualifying non-marital cohabitation in the same way as marriage and civil partnership, subject to giving the parties the same opportunity to opt out of the legal consequences as is currently afforded to spouses and civil partners. That course has been taken in a number of other jurisdictions, with New Zealand's Property (Relationships) Amendment Act 2001 being something of a trailblazer, an approach recently endorsed again by the New Zealand Law Commission (Report No 143, 2019). The Scottish Law Commission, however, has made its policy decision to take the more cautious path, so I will resist the temptation to repeat the case for a common regime. (For a full discussion, see Elaine E Sutherland, *Child and Family Law* (3rd ed, 2022), Vol II, paras 1-122–1-146, summarised at paras 2-018–2-019 and 6-521.)

Present focus

Excellent overviews of the Commission's most recent proposals can be found elsewhere, one co-authored by the lead Commissioner on the project (Kate Dowdalls and Lucy Robertson, "Splitting up: a fairer scheme", Journal, November 2022, 16), and another by a solicitor with considerable experience in the field (Jamie Foulis, "Scottish Law Commission Report on Cohabitation" (2023) 181 Fam LB 1).

This article focuses on one particular aspect of the Commission's recommendations: sharing the economic burden of caring for a child when cohabitants separate. The parent who bears the greater burden of day-to-day care will usually be the mother, so any resulting economic imbalance represents another layer of adversity heaped on the many women who face systemic gender inequality in Scotland today. But this is not only – or even primarily – about adults. If money is tight in the child's primary home, there is an increased likelihood that the child will grow up in poverty with all its attendant disadvantages and lifelong impact.

The current law – and its shortcomings

At present, when cohabitation ends other than by death, in addition to making an interim order (2006 Act, s 28(2)(c)), the court may make an order requiring one former cohabitant to pay the other a capital sum in respect of advantage gained, disadvantage sustained and contributions made (s 28(2)(a)). These orders are not the focus of this article. Rather, our concern is with the additional power to "make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents" (s 28(2)(b)).

For historical reasons relating to child support that need not detain us, that provision does not have its origins in the Scottish Law Commission's 1992 Report, so it bears no responsibility for the provision's many shortcomings.

As s 28(2)(b) makes clear, awards are only competent in respect of the future care of "a child of whom the cohabitants are the parents", and that includes a child adopted by the couple and where one partner is treated as the other parent under the Human Fertilisation and Embryology Act 2008. It does not include a child "accepted" as a member of the family (2006 Act, s 28(10)). Why accepted children are excluded, when they are regarded as relevant to awards under s 28(2)(a) and for the purpose of aliment (Family Law (Scotland) Act 1985, s 1(1)(d)) is unclear.

It will be remembered that, for spouses and civil partners, the 1985 Act seeks to ensure that the economic burden of future childcare is "shared fairly" between the parties, providing the court with a list of "relevant factors" to guide it in its determinations (ss 9(1)(c) and 11(3)). In contrast, s 28(2)(b) of the 2006 Act makes no mention of fairness and there is no list of relevant factors. Instead, in considering any award, the court is directed to have regard to the matters referred to in s 28(3) (economic advantage/disadvantage), but not those in s 28(5) and (6) (offsetting of same). Nor does s 28 as a whole make clear whether parties' resources are relevant to the decision.

The 1985 Act anticipates that an order for payment of a periodical allowance may be made to a former spouse or civil partner in order to effect fair sharing of the future burden of childcare (s 13(2)). Awards to former cohabitants under the 2006 Act, s 28(2)(a) are expressly limited to ordering the payment of a capital sum, albeit the order may provide for payment at a specified date or by instalments (s 28(7)).

There is no similar explicit limitation on orders under s 28(2)(b), and I have argued elsewhere (*Child and Family Law*, *op cit*, Vol II, para 6-511) that a case can be made that the court can order periodic payments. Granted, it is not the strongest of arguments, which may explain why it appears not to have been made to a court (I do wish someone would give it a try). In any event, at present, the courts have often ordered the payment of fairly small capital sums, sometimes in instalments over a much shorter time than the child will require to be cared for. Another consequence of limiting awards to the payment of a capital sum is that, while periodic payments can be varied if circumstances change, there is no such flexibility in respect of capital awards.

"The language has been softened, with 'economic responsibility' replacing 'economic burden', and the goal of fair sharing of the responsibility is made explicit."

What the Commission proposes

The Commission recommends substituting a suite of new provisions for s 28. These bear a resemblance to the well regarded provisions in the 1985 Act, supplying principles to guide the courts when considering what, if any, orders to make and relevant factors in respect of each.

For the burden of future childcare, one principle that the court would apply is that "the economic responsibility of caring for a relevant child after the end of the cohabitation should be shared fairly between the cohabitants" (new s 28B(1)(c)).

The language has been softened, with "economic responsibility" replacing "economic burden", and the goal of fair sharing of the responsibility is made explicit. A number of the other shortcomings in the current s 28(2)(b) are also addressed. Awards would be made in respect of a "relevant child", to be defined as including both a child of whom the cohabitants are the parents and an accepted child (new s 28G(1)). Any award made by a court would have to be justified under the principles and "reasonable having regard to the resources of each of the cohabitants" (new s 28(2)), so the relevance of resources is again spelt out. In considering whether to make an award, the court is directed to have regard to a list of relevant factors, set out in new s 28C(3) and (4). In short, the court's goals and the criteria it must apply are made clear.

So far, so good. Where the Commission's recommendations fall short is in respect of the tools the court is given in order to give effect to the principles. While the list of remedies has been enlarged, with the addition of the power to order transfer of property (new s 28(3)(c)), the making of periodic payments for up to six months to offset serious financial hardship (new s 28(3)(b)), and a number of incidental orders (new s 28(4)), there is no power to order periodic payments in respect of future childcare.

Future childcare represents an ongoing cost to the primary carer, through curtailed opportunity to be active in the workforce and/or the need to pay someone else to provide care for children not in school while the parent is working. That reality is recognised for former spouses and civil partners, who can receive a periodical allowance in respect of future childcare. The Commission rejected the idea of making similar provision for former cohabitants, seemingly seeing it as too similar to aliment (2022 Report, para 5.49). While an award of a capital sum or using the new power to order transfer of property will be helpful in some cases, many cohabitants have no savings or property. At best, many defenders will have an income and, while ordering payment of a capital sum by instalments over a period of years would be possible, the courts have not shown any enthusiasm for making such orders for the length of time a child may require to be cared for.

A better way

The Commission is to be commended for addressing non-marital cohabitation, not least because professional and public opinion is divided on how the legal system should treat it. Many of its recommendations, if implemented, would improve the 2006 Act. When it turned to the issue of sharing the economic burden of childcare, again, what it has recommended would improve the law. The problem is that it has not been bold enough and the courts would still lack the essential tool – the power to order periodic payments – with which to ensure that the economic responsibility is truly shared fairly.

Certainly, there are other sources of financial support available to the parent who has primary responsibility for care, including child benefit, the Scottish child payment, universal credit, a range of grants, aliment (in limited situations), and the user-unfriendly child support system. These, however, are available to former spouses and civil partners, so they are no justification for treating differently parents who simply lived together in the past.

It is to be hoped that the Scottish Government introduces legislation to implement the recommendations more quickly than happened with those from 1992. There were encouraging signs in its *Programme for Government 2021-22* (at p 119). However, there was no mention of legislation on cohabitation in the *Programme for Government 2022-23*.

Assuming that it does so, our elected representatives will have an input on its content. Perhaps they will add the power to order periodic payments to the tools available to the court when it seeks to ensure that the economic responsibility for future childcare really is shared fairly between former cohabitants.

Elaine E Sutherland is a professor at the University of Bergen; Professor Emerita at the University of Stirling; Distinguished Professor of Law Emerita at Lewis & Clark Law School, Portland, Oregon; and a member of the Child & Family Law Committee of the Law Society of Scotland. The views expressed here are her own.

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No rule against redaction

A party can rely on documents redacted for commercial reasons, though their opponent can request the court to require production in full: one of the decisions highlighted in this month's roundup

Civil Court

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

When I started doing civil litigation some years ago (the precise date eludes me), the rules and forms were the masters, not the servants. The formality and rigidity of pleadings and procedure had their advantages for those who knew the ropes and how to operate them effectively. Deciding cases on what would now be regarded as technicalities, rather than on the merits, was not unusual, and the ability to persuade the courts to do so was the mark of a top litigator. This could undoubtedly give rise to unfairness and, over time, rules, procedures and practices have changed, with legislation also modifying the traditional ways of litigating. Many of the reported cases I have selected here reflect those changes.

Documentary evidence

The sheriff court decision in *Guidi v Promontoria (Chestnut)* was discussed in my roundup at Journal, March 2022, 28. It has now reappeared in the Inner House: [2023] CSIH 4 (24 January 2023). It is worth repeating the basics. The Promontoria group had purchased a large tranche of loans and securities from Clydesdale Bank by a bulk assignation and a sale and purchase agreement. The pursuer was a guarantor of companies who were in debt to the bank and was ultimately sequestrated by PCL, the appellants. He sought recall of his sequestration and, in this separate action, challenged PCL's right and title to proceed against him. He argued that the assignation was invalid, and that PCL could not rely on redacted versions of the relevant documents.

Following debate, the sheriff produced a lengthy judgment including a comprehensive review of the rules and authorities about documentary productions and redacted documents. He held that the assignation was invalid, and that PCL could not rely on redacted documents without leave of the court. PCL appealed to the SAC, which remitted the case to the Inner House under s 112(2) of the Courts Reform (Scotland) Act 2014, being "satisfied that the appeal raises a complex or novel point of law".

In a succinct opinion, the Inner House allowed the appeal and dismissed the action. It found "no merit" in the pursuer's arguments about validity. As for redaction, it said: "There is no absolute duty on a party to lodge all the documents upon which it founds in the pleadings. In a commercial case, it is only under a duty to lodge such parts as are necessary to prove its case: *Promontoria (Henrico) v Friel* 2020 SLT 230. If the other party is dissatisfied, then it can seek to recover unredacted copies by means of commission and diligence. There must, however, be a basis to do so. Supposition is not enough. In the event of opposition, the court can determine the matter."

Although this passage refers to commercial cases specifically, I see no reason to think that the position should be any different in ordinary actions, although the Inner House does qualify the position somewhat with the familiar "Each case will turn on its own circumstances", which may allow enthusiastic and energetic litigants to keep plugging away at similar arguments that bit longer.

QOCS

The revolutionary principle of qualified one way cost shifting ("QOCS") was introduced for personal injury actions by s 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, in operation since June 2021. The main intention was to increase access to justice for PI claimants by removing the risk of an adverse finding of expenses if their claim was unsuccessful. Needless to say, defenders were up in arms about this seismic change to the normal rule that expenses follow success.

QOCS would not apply if the claimant behaved inappropriately. The Act set out three situations in which that could arise: (1) if they were fraudulent; (2) if they behaved manifestly unreasonably; and (3) if their conduct of the proceedings was considered an abuse of process. PI litigators have been anxiously waiting to see how those provisions would be applied by the courts, and the first published decision is by Sheriff Fife in *Lennox v Iceland Foods* [2022] SC EDIN 42 (13 December 2022, ASSPIC). Defenders will have taken no comfort from it.

The 80 year old pursuer fell over baskets stacked on the floor of a store. She gave credible evidence about her accident and was supported by her daughter and some CCTV footage. Ultimately there was a lack of any evidence to support the key averments from which fault might have been demonstrated or inferred, and the sheriff had little difficulty in granting absolvitor. That judgment was not published, so far as I am aware. The defenders moved for expenses under OCR, rule 31A.2(1)(a) on the second and third grounds set out above. The sheriff had as little difficulty in rejecting those arguments as he appears to have had in rejecting the claim itself. His reasoning is confined to the circumstances of this case. He said little by way of general observation about the provisions, except that: "An allegation of abuse of process by solicitors is of a very serious nature, attacking the professional conduct and actions of the solicitors."

I suggest it can now be taken that an honest pursuer, with anything better than an utterly hopeless case (with "no chance or substantially no chance of success"), represented by solicitors doing their best (maybe even their incompetent best) to follow the rules, will be protected. Putting it crudely, a genuine claimant and their lawyers can take a flyer on just about any claim without a risk of being found liable for expenses. Of course, that is what the Act intended, and I see little prospect of the courts watering this down in future.

Pleading medical negligence claims

In *McGraw v GGHB* [2022] CSOH 83 (23 November 2022), a medical negligence case, the defenders attempted to have the pursuer's case dismissed on the grounds of relevancy and lack of specification. In essence it was argued that the wording of the pursuer's pleadings did not follow the "formula" for pleading professional negligence to be derived from *Hunter v Hanley*. Such arguments were common decades ago, and enjoyed a degree of success then, but I thought we had all moved on from there and the decision confirms that we have indeed done so.

The precise form of pleadings is not so important if, on a charitable reading of the substance of the whole pleadings, there is an intelligible basis for the claim. The defenders carried out a thorough and detailed analysis of the precise words used in the pursuer's pleadings, but Lord Clark saw little merit in this approach. "Deviating from the language used in *Hunter v Hanley*, whether in the pleadings or in the expert report, runs the serious risk of not corresponding with its meaning. In this case, however, the relevant test has been expressed in an alternative fashion."

Abuse: the limits on limitation

The Limitation (Childhood Abuse) (Scotland) Act 2017 provides that there is no limitation period for claims based on childhood abuse except in two specific situations, one of which is where it can be established that the defenders could not get a fair hearing. In *B and W v Congregation of the Sisters of Nazareth* [2022] CSIH 52 (24 November 2022), the Lord Ordinary had dismissed two actions alleging abuse on the basis that a fair hearing would not be possible in

the circumstances. If defenders thought that the decision gave them some cause for optimism in the future, this appeal will have stopped them sharply in their tracks.

Broadly speaking, there were historic generalised allegations of abuse against unidentified individuals, although the evidence (by affidavit) spoke to an overall culture of abuse within the organisation. The Inner House had little difficulty in overturning the earlier decision: "a fair hearing is not dependent on each party being able to investigate all that it would wish to pursue, nor on reassurance that all pertinent evidence remains extant and available to the court. In our view if appropriate regard is given to the systematic nature of the allegations and to the numerous sources of relevant evidence still available to the defender, it cannot be said that any hearing would be bound to be unfair. That is the high test presented by s 17D(2). If met it will usually be quite clear that the problems are insurmountable".

In addition, the Inner House knocked another couple of ideas on the head in response to the defenders' argument concerning prejudice. "The other factor mentioned as leading to substantial prejudice was the exposure to significant potential liabilities which would not otherwise have arisen and the cost of mounting a defence. This will be common to all childhood abuse cases which, but for the reforms, would have been dismissed as time barred; and often a large sum will be claimed by way of damages. No doubt all this is prejudicial for defenders, but in our view, it does not amount to substantial prejudice of a kind which would justify stopping proceedings. Were it otherwise, that exercise would be required in most cases, thereby undermining the policy and purposes of the reforms."

Amendment

An interesting illustration of the way the courts now tend to approach the question of a late amendment can be seen in *Asertis v Dunn* [2022] CSOH 87 (2 December 2022), an action by company administrators against the recipient of alleged gratuitous alienations. The procedure followed classical lines, the commercial action being raised in February 2022 and, despite the best efforts of the court to bring matters to a head, the skeletal defences lodged at an early stage remaining unadjusted for about six months – including a period when the defender had parted company with her original agents. On 15 September the court fixed a debate for 15 November; on 11 November (a Friday and, I am guessing, sometime late in the afternoon) the defenders intimated a minute of amendment.

I can certainly remember the days when a court would refuse the receipt of such an amendment out of hand simply on the ground that it was too late, but in these more enlightened times they tend to look at the amendment to see if it says anything significant before deciding whether to allow it to be received. The pursuer opposed its receipt, insisted on the diet of debate and also moved for summary decree for good measure.

Lord Braid considered the proposed amendment at length but was unimpressed by its contents. "I do not doubt that given more time, the defender might be able to address some of [counsel for the pursuer's] criticisms. However,... I do not consider that she is entitled to have more time, and in any event, the fundamental deficiency in her pleadings, even as they would be after amendment, remains that she has not relevantly averred that consideration was given. Accordingly I propose to refuse to allow the minute of amendment to be received."

He continued: "That leads on to... whether the pursuer should be put to proof of the alienations... the defences contain an implied admission that all of the alienations were received. The pursuer has produced vouching that all of the alienations left one or other of [the company's] bank accounts. The majority of the payments... plainly refer to the defender. For those which do not, the defender has had ample opportunity to state what her position is, but she does not."

And finally: "It is therefore strictly unnecessary for me to consider the pursuer's motion for summary decree. However, had it been necessary to do so I would have granted it. In support of that motion, the pursuer has produced an affidavit from Kenneth Craig, one of the joint administrators, along with supporting documentation."

Game set and match, I think!

Foreign law

I referred to *Benkert UK Ltd v Paint Dispensing Ltd* at Journal, May 2022, 28 at 29. At first instance, the pursuers were unsuccessful with their claim for damages of £29.6 million because, although the Lord Ordinary found that the defenders had been in breach of contract, there was a contractual limitation of liability which restricted any claim to the princely sum of £3,225.06. Not surprisingly, there was an appeal but, to add insult to the pursuer's injury, the Inner House decided that there had not even been a breach of contract: [2022] CSIH 55 (9 December 2022). Put simply, it said that the defenders contracted to maintain the machine which caused the fire, and that obligation did not extend to improving or redesigning the machine so as to make it safer.

Part of the judgment concerned the interpretation and application of English law. The contract provided that English law should apply. The relevant sections of the Unfair Contract Terms Act are different in England and Scotland. The Lord Ordinary had applied English law, but the Inner House said that he should not have done so. "Foreign law... is a question of fact, and judicial notice cannot be taken of it in the absence of proof... Proof can take the form of an unqualified admission in the pleadings, but if that is the approach taken, the content of the foreign law must be relevantly set out by means of distinct and pointed averments... There were no such averments in the present case... in the absence of proof or averments as to the content of the foreign law, the presumption that foreign law coincides with Scots law has not been displaced."

The niceties of taxation

In *Aberdeen Computer Services v SLCC* [2023] CSIH 5 (24 January 2023), the party appellant took a note of objections to the taxation of their account, which had been reduced from £47,000 to just over £5,500. The circumstances are fairly unusual, but I mention it for the observations regarding the fee fund dues charged by the auditor:

"In ordinary circumstances the fee charged is payable by the paying party but this is subject to revision if any of the account as submitted is taxed off or disallowed. The allocation of the fee fund dues as between the parties to taxation was explained by Lord Glennie in the case of *Honer v Wilson* 2007 SLT 54... as follows: 'It may be of interest to those who are unfamiliar with the niceties of taxation to note that although the fee fund dues are meant to be calculated on the amount *claimed*, the paying party is only required to pay that part of the fee fund dues which is attributable to the expenses *as taxed and found due*.'"

Joint minutes

Joint minutes are now much more prevalent than they ever were. This is undoubtedly a good thing, but their wording should always be treated with great care. In *Ward v ADR Network* [2022] SAC (Civ) 35 (15 December 2022), a PI case in which the pursuer claimed damages from two defenders and negotiated a settlement with one of them, a joint minute was lodged. Reference should be made to the judgment for the full background; I commented on the case at Journal, January 2022, 34 at 35 (*Ward v Wm Morrison*). The relevant parts of the joint minute read:

"[X] for the pursuer and [Y] for the first defender have concurred and do hereby concur in stating to the court that the action as directed against the first defender has settled extrajudicially and they therefore craved and do hereby crave the court to: (1) Find the first defender liable to the pursuer in the expenses of process as taxed".

The sheriff's reading of the joint minute was reviewed on appeal. The SAC said: "The sheriff's conclusion that the paragraph within the joint

minute... that dealt with expenses was 'a clear agreement to pay the whole expenses of the action, as taxed, not simply the expenses *quoad* the first defender' is one we cannot support. On any view (quite understandably) that paragraph did not address the expenses of the respondent. The whole expenses of the action were not, as a matter of fact, provided for."

I have to agree with that conclusion, and it does illustrate how the terms of a seemingly straightforward joint minute can be open to misinterpretation.

Corporate

EMMA ARCARI, SENIOR ASSOCIATE, WRIGHT, JOHNSTON & MACKENZIE LLP

Recent decisions have focused on legal professional privilege ("LPP") and confidentiality, and the circumstances in which these can be overcome.

In *Scottish Legal Complaints Commission v Murray* [2022] CSIH 46, the Inner House held that the SLCC (and indeed any regulator) is not allowed to recover information covered by LPP within a file, except within strictly defined circumstances. In a further opinion in the same case ([2022] CSIH 54), the court confirmed that confidential information is treated differently to LPP, and that where a statutory notice is issued by a regulator, the solicitor is obliged to provide information which is confidential (and not covered by LPP). The court agreed with the English case *Three Rivers District Council v Bank of England* [2005] 1 AC 610, highlighting a dictum that "confidentiality in the general sense is a prerequisite for the claim of privilege, but of itself it is insufficient to give rise to it".

The case concerned files in divorce proceedings, sought because a third party complained against her estranged husband's solicitors. The SLCC applied under s 17(1) of the Legal Profession and Legal Aid (Scotland) Act 2007 for delivery of the file; the solicitors refused, advising that their client was maintaining confidentiality. They were additionally advised by the Law Society of Scotland not to release the material as it was covered by LPP. The Society, along with the Faculty of Advocates, intervened in the case given the importance of the issues raised.

Parties were agreed generally as to the situations in which privilege could be overcome, but disagreed as to what constituted being overridden by statute (in this case, s 17(1)). One question was whether it could be necessarily implied from the 2007 Act that it would override privilege. After examining the 2007 Act the court concluded that LPP was in fact preserved by the Act. A client who wished to proceed with a complaint under the Act would need to waive privilege in their information, which was their prerogative, therefore it did not make sense that a third party would be able to circumvent that right, that choice and remove the LPP "by inference".

Rights of trustee

Two recent English insolvency cases have also provided further insights on the treatment of LPP, particularly where it is mixed up with the rights of others. In *Glasgow v Ames* [2022] EWHC 2834 (Ch), a foreign insolvency representative had been trying to access documents relating to Harlequin Property (SVG) Ltd, acknowledged to be part of the "Harlequin Group", run by the sole director David Ames across different companies incorporated in different jurisdictions (and not through the topco/subsidiary structure). The servers where the documents were stored were owned by a different Harlequin company, still under the control of Ames (who by the time of this case, had been imprisoned for 12 years for fraud), but a copy of the servers had been taken for the purposes of Ames' trial.

Ames argued that the majority of the documents were subject to LPP resting in others than the company, and the remainder related to his family's personal affairs. However the court ordered disclosure: although some of the documents might not be related to the company's business, the court and others involved had not been able to identify what could be excluded.

In examining the "mess of contractual affairs", which involved over 40 companies, the court agreed with the insolvency trustee's multi-step approach. This involved, for example, applying negative keyword searches to some 64 million items stored on the server data, to exclude results which could at first appearances be subject to others' privilege (including a number of legal advisers); and applying a positive search term to the balance (provided privileged documents would be disregarded).

LPP held jointly

Another recent insolvency case, *Re Kwok* [2023] EWHC 74 (Ch) concerned privilege held jointly by the bankrupt, Kwok, and two other parties, on a foreign insolvency trustee's application to obtain documents under the Insolvency Act 1986. The bankrupt was a party (alongside two others) to a potentially lucrative claim against UBS for some $500 million; however the trustee had seen no documents pertaining to the case. One of those other parties sought to exercise LPP against the trustee, citing concerns of conflict of interest. The trustee argued that Kwok's interest in the UBS claim should vest with him due to the application of the UNCITRAL Model Law, and the court agreed that it had a discretionary power to make orders under the 1986 Act.

The High Court determined that although the joint engagement between the three parties in relation to UBS meant that each party had a joint interest in the privileged file, access should be granted to the file. LPP could not be asserted against those with whom they shared that privilege, or therefore to resist an application under the Insolvency Act by one party's trustee in bankruptcy to access that material. A trustee in bankruptcy would have power to see documents over which the bankrupt exercised privilege (1986 Act, s 311), but the trustee would not obtain said privilege, nor have power to waive it without permission of the court (and in granting access to the trustee, the court noted favourably that the trustee proposed to deal with the documents in a manner consistent with the other parties' privilege).

These cases are useful in assessing the extent to which LPP applies, and in planning how information is dealt with (especially when considering entering into a joint retainer or using a shared server). Confidential information is not always privileged, and even where LPP exists, insolvency can throw up some curveballs in terms of who is allowed access to see what.

Intellectual property

ALISON BRYCE, PARTNER, DENTONS UK & MIDDLE EAST LLP

The end of 2022 and beginning of 2023 brought some interesting cases and lawsuits for intellectual property lawyers, from trade mark infringement in both the physical and virtual world, to potential copyright infringement by artificial intelligence. In this article, we consider some of the most recent decisions and how they impact on current IP law.

UK: *Getty Images v Stability AI*

The impressive nature of generative AI has been hard to escape recently, with new applications being released almost weekly. From the furore surrounding the potential use cases for ChatGPT, to Google's new tech "Bard" answering a question incorrectly on its launch, AI has given businesses much to ponder, with the legal considerations not far behind.

Notably in the UK, we recently saw Getty Images moving to sue Stability AI in the High Court for copyright infringement. The allegations surround the processing by Stable Diffusion, a text-to-image AI system, of various images, proprietary to Getty, without a licence. The

decision is likely to provide a useful analysis of copyright in the context of generative AI, and confirmation as to whether generative AI can freely learn from content online or whether this use is considered copyright infringement, something which is currently uncertain.

This dispute comes against a background of several other AI and copyright-related developments in the UK. With further considerations on reforms to copyright law for musicians, and the recent House of Lords discussion on data mining, it will be interesting to see whether the court will take the same pro-artist stance. The UK's position on copyright is notably restrictive, so there is no doubt this one will be watched with keen eyes.

EU: *Amazon v Christian Louboutin*

In December 2022, we saw the EU Court of Justice open the floodgates regarding Amazon's potential liability for trade mark infringement. While on the face of it departing from previous case law, the decision may not come as a shock given the EU's longstanding approach to big tech.

In a judgment concerning Louboutin's iconic red soles, the CJEU held that where a marketplace sells its own products and third party products, it may be liable for trade mark infringement by third party sellers if a "well informed and reasonably observant user of that site establishes a link between the services of the operator and the sign at use". In other words, that liability may be imposed where the observer believes the operator is itself marketing the goods which infringe the trade mark. The CJEU helpfully listed several instances where this may be the case:

1. The marketing and presentation of the operator's offers and goods are uniform to those of third parties. An example given is where the marketplace is describing the products as "best seller" without being explicit as to who is actually providing the product.
2. The operator's logo "as a renowned distributor" is displayed on the ads.
3. The operator provides services to third party sellers. This may include storing and shipping the goods, as well as dealing with customer queries.

While we await the final decisions in the national courts, there is no doubt that this case will impact on the way many marketplaces operate. The CJEU's ruling may lead to brands seeing this as an opportunity to finally enforce their IP more strongly (and much more easily) in similar settings.

US: *Hermès International v Mason Rothschild*

With growing interest in the metaverse, we continue to see brands filing trade marks and taking enforcement action to protect their brand in a virtual world. Notably, we saw Hermès protecting their Birkin bag and a US court consider the applicability of trade mark law in the metaverse.

At the root of this case was the extent to which the NFTs could qualify as artistic works, and the extent to which Rothschild, the creator, could therefore rely on the US First Amendment to prevent liability. While the judge held that the NFTs did constitute artistic works, the jury found that the "incidental" artistry of the NFTs did not bar liability for trade mark infringement, dilution and cybersquatting, suggesting that evidence demonstrated that the BIRKIN mark was used intentionally to confuse consumers into believing the collection originated from Hermès – arguably a logical decision.

The decision indicates that the US approach is that a trade mark registered for physical goods can be enforced against their virtual counterparts, at least insofar as that mark enjoys a reputation (as BIRKIN does). The question as to similarity in the context of non-famous marks, however, remains unknown, as does that of whether this approach would be followed closer to home. While the decision may provide comfort to brands, owners should consider following Hermès' lead, in extending their trade mark filings to expressly cover "virtual goods".

Conclusion

With the *Getty* case yet to be heard, the *Amazon* case still ongoing and the *Hermès* decision likely to be appealed, it is exciting to see how IP law will evolve and adapt to meet the legal challenges that this new technology presents.

Succession

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

At the start of the Covid-19 pandemic, solicitors quickly adapted to holding online client meetings over Zoom and other video platforms. The lockdown rules also presented practical challenges when witnessing or certifying deeds. Thankfully such burdensome restrictions are no longer in place, but situations may still arise where it might be necessary or sensible for solicitors to take instructions or execute deeds without meeting a client in person.

The Guidance on non face-to-face will instructions has been reviewed and updated, and readers are advised to read this in full. The Vulnerable Clients Guidance may also be relevant.

The former reiterates that it will rarely be appropriate to delay the completion of a will. It provides advice and information on how to comply with your professional obligations when it is not possible to meet your client in person.

Taking instructions remotely

1. Existing clients

You can act on the instructions of an existing client, but you should ideally have a video call to satisfy yourself that the client has capacity and there is no concern over undue influence or circumvention. When there is any doubt over any of these factors, a meeting in person and/or further investigations should be carried out before proceeding.

2. New clients

Refer to the Guidance on non face-to-face identification and verification. It will be more difficult to assess capacity of a new client and check for undue influence, and this should not be done solely over the telephone. As above, if there is any doubt, instructions should be declined unless and until you can meet in person and/or investigate further.

3. Instructions where no visual contact is possible

This would severely limit the actions you can take. You could advise the client that they can write out their own will or codicil. You could explain the requirements of formal validity, although subscription alone will generally create a valid testamentary writing. There are obvious risks with DIY wills, but in some instances (or as an interim measure), it could be better than nothing.

Execution of wills

1. In-person witness available

The will can be posted or emailed (preferably in a format which cannot be altered) to the client for signing. The client can then sign and have the will witnessed in the usual way.

2. No in-person witness available

If a suitable person is not available to be physically present at signing, the solicitor or another suitable person can act as witness by video call.

Steps to take:

- Provide the client with the will in advance of the video call, either by post or email.
- The video call should be used as a further opportunity to assess the capacity of the client and, using their professional judgment, the solicitor can consider whether any undue influence is being exerted on the client.
- The client should not sign the will in advance of the meeting.
- The client should show the unsigned will to their camera for the solicitor and/or other person to see on their screen(s).
- The client should sign the will, then add the place and date of signing on the last page

where indicated. The client should then show the solicitor the signed will.

- The client should be instructed to return the signed hard copy promptly to the solicitor or send it to the other person who has witnessed signing. The Society considers that the witness, as long as they are satisfied that the client has actually signed each page, can on receipt of the signed will, legitimately sign and add their full name and address. The witness should add their signature as soon as is reasonably practicable. It is considered that this may be deemed to form *one continuous process*, as required by the legislation, although there is no authority on this point. If it were held in the future that this is insufficient to constitute one continuous process, the key point is that the client will have signed a fully valid will, which can then be "set up" as part of the confirmation process if required.
- If another person has acted as witness, the will should be sent to them to sign in the first instance and thereafter return it to the solicitor after the witness has completed their signing formalities.

3. No witness available

Where no witness is available to be physically present and there are no video facilities, the client's signature alone is effective to make a valid will. However the will would need to be "set up" as part of the confirmation process. The need for this additional step should be explained to the client and the solicitor should note on file that this advice has been given. If there is an opportunity to replace the will or codicil with a witnessed version, that should be done at the earliest opportunity.

Where video calls are used, it is possible to record the call and store it. However, you will need the client's consent to do so, and you should consider data protection implications.

Commissary issues

The Scottish Courts & Tribunals Service has reported that the return rate for confirmation applications has been particularly high recently, averaging 24-30% across the busier courts.

One of the most common reasons relates to the changes to HMRC forms last year. Readers are directed to some recent articles covering IHT reporting, and the links from these to HMRC and SCTS pages: "Changes to IHT reporting requirements", Law Society news, 26 January 2022; "Commissary: the top 10 failings", Journal, September 2021, 47.

Agriculture

ADÈLE NICOL, PARTNER, ANDERSON STRATHERN LLP

Agriculture is always a prime concern for the Scottish Government. Proposals for reform are contained in both the consultation *Land Reform in a Net Zero Nation* (covered at Journal, September 2022, 30), which covers a broad range of issues including reform of the agricultural tenanted sector, and *Delivering our vision for Scottish Agriculture. Proposals for a New Agriculture Bill*, covered in my last article (Journal, December 2022, 28). The latter consultation has closed and the bill is expected later this year.

In addition, in March 2022 the Scottish Government published its *Vision for Agriculture*, which outlined its long term vision to transform support for farming and food production in Scotland and create a framework which will deliver high quality food production, climate mitigation and adaptation, and nature restoration. Following from that the Government issued the *Agricultural Reform Route Map* (see ruralpayments.org), announced by Cabinet Secretary Mairi Gougeon on 10 February 2023.

Its objective is to assist rural businesses to plan and prepare for change, and give some clarity on future support mechanisms available.

What will future support look like?

From 2025, at least half of all funding for agriculture will be targeted towards outcomes for biodiversity gain and a drive towards low carbon approaches, to improve the resilience, efficiency and profitability of the sector. Support payments will comprise four tiers:

- **Tier 1 base payment** – to support active farming, conditional on essential standards to ensure climate response, biodiversity and business efficiency outcomes and completion of a whole farm plan.
- **Tier 2 enhanced** – to provide additional support to businesses that are effective in reducing greenhouse gas emissions, restoring and improving nature and adopting regenerative farming practices.
- **Tier 3 elective** – to provide targeted support to facilitate nature restoration, innovation and supply chain improvement.
- **Tier 4 complementary** – to provide complementary funding to undertake continuous professional development to develop skills and provide advice relative to new practices and innovation.

Transition

Introduction of the new support mechanisms will be phased. The existing framework will continue in 2023 and 2024. Conditionality will be introduced to the present Basic Payment Scheme from 2025.

Tier 2 enhanced support will launch in 2026, followed by tier 3 elective and tier 4 complementary support from 2027.

A timetable outlining key dates for provision of further information and guidance between 2023 and 2025 has been created and will be developed as decisions on future policy are reached. Provision of a timeline and an indicative list of activities likely to attract support in the new system is welcome. However, significant detail requires to be added to the available framework and early clarity will assist land-based businesses to plan their futures. For the moment, the *Route Map* provides some assistance on preparing for change and guidance on a list of measures being considered, including information on what support farmers

and crofters will get. While much of this is practical and perhaps more relevant to land agents than law agents, it may be useful to have information on matters which may need to be considered when buying or selling a farm.

Preparing for sustainable farming

This is intended to assist businesses with support for conducting carbon audits and soil sampling, support for animal health and welfare activities, and access to herd data for suckler beef producers through MyHerdStats, an online tool that presents herd management information.

Carbon audits and soil sampling

This is designed to help businesses understand carbon emissions and sequestration; and potentially lower emissions and increase efficiencies. Businesses can claim a standard cost of £500 for an eligible carbon audit that will identify ways to use resources more efficiently and enable a farming business to understand its energy use and costs.

Businesses can claim actual costs of up to £600 per 100ha of region 1 land for soil sampling that will measure the nutrient content of the soil, identify nutrient deficiencies, reduce unnecessary maintenance practices and fertiliser applications, and target application for crop production.

A standard £250 development payment can also be paid with the first soil sampling claim, to allow farmers and crofters to spend time on things that will widen their understanding of nutrient management planning and associated activities such as researching best practice.

Other support

Support is available for farmers to deliver a list of **animal health and welfare measures.** Eligible businesses can claim standard costs up to a maximum £1,250 over two years.

The **Agri-Environment Climate Scheme** promotes land management practices intended to protect and enhance Scotland's natural heritage, improve water quality, manage flood risk and mitigate and adapt to climate change.

The **Forestry Grant Scheme** supports the creation of new woodlands and is intended to contribute towards the Scottish Government target of 18,000ha of new woodlands per year from 2024-25.

Peatland Action supports on-the-ground peatland restoration activities and is open for applications from eligible land managers who have peatlands that would benefit from restoration. There are no geographical restrictions or target areas for funding.

The **Nature Restoration Fund** is a competitive fund launched in July 2021, which specifically encourages applicants with projects that restore wildlife and habitats on land and sea and address the twin crises of biodiversity loss and climate change.

The **Farm Advisory Service** provides practical information and advice to farmers and crofters across Scotland.

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Student financial support

Last year, aspects of the residency rules on eligibility for student financial support were found to be unlawful. The Scottish Government seeks views on remedying this. See consult.gov.scot/higher-education-and-science/changes-to-residency-criteria-for-access/

Respond by 31 March.

Energy and Just Transition

The Scottish Government seeks views on its draft Energy Strategy and Just Transition Plan, underpinning the development of Scotland's energy system to 2045. See consult.gov.scot/energy-and-climate-change-directorate/energy-strategy-and-just-transition-plan/

Respond by 4 April.

Additional dwelling tax

Scottish ministers seek views on a range of changes to the LBTT additional dwelling supplement. See consult.gov.scot/taxation-and-fiscal-sustainability/additional-dwelling-supplement-proposals/

Respond by 5 April.

Cybersecurity

The UK Government is consulting on changes to the Computer Misuse Act 1990 in the face of perceived threats. See www.gov.uk/government/consultations/review-of-the-computer-misuse-act-1990

Respond by 6 April.

Buy now, pay later

UK ministers are consulting on draft legislation to bring buy now, pay later products into Financial Conduct Authority regulation. See www.gov.uk/government/consultations/regulation-of-buy-now-pay-later-consultation-on-draft-legislation

Respond by 11 April.

Military prosecutions

The Armed Forces Act 2006 requires that the Director of Service Prosecutions agree protocols with, *inter alia*, the Lord Advocate regarding whether a case is brought in the service or civilian jurisdiction. There is a public consultation in England & Wales but not in Scotland: a matter for comment in itself? See www.gov.uk/government/consultations/joint-prosecution-protocol-consultation

Respond (England & Wales) by 20 April.

Community wealth building

The Scottish Government seeks views on how its economic development strategy and policies can promote community wealth building. See consult.gov.scot/economic-development/community-wealth-building-consultation/

Respond by 25 April.

Low emissions scheme

The UK Government seeks views on design elements of its planned UK-wide Low Carbon Hydrogen Certification Scheme. See www.gov.uk/government/consultations/uk-low-carbon-hydrogen-certification-scheme

Respond by 28 April.

Cryptoassets

UK ministers seek views on proposals for developing the financial services regime for cryptoassets in light of the opportunities and risks. See www.gov.uk/government/consultations/future-financial-services-regulatory-regime-for-cryptoassets

Respond by 30 April.

About this ticket...

When you're in the back of a taxi (or elsewhere), and you're asked about a private parking ticket, what should you say?

Parking

BARRY BERLOW-JACKSON, ASSOCIATE AND HEAD OF REPARATION, WALKER LAIRD

Every lawyer knows, when you are in the back of a taxi, don't let on what you do for a living. Sometimes, when you are carrying your gown and heading to court, it can be hard to hide, and if you don't look busy enough with papers or on your phone, you'll inevitably be asked legal questions.

"So what do you think of this – I got this parking ticket...". That one is high on my list of frequently asked questions, and not just when in the back of a cab. I now think of it as a fun question, with the inevitable reply: "It depends".

The question is usually about a parking charge in a private car park, not a council issued ticket. It is also usually followed up with: "Should I pay it? My [relative] knows about these things and says they can't do anything in Scotland, and it is just an invoice", or "My mate has had loads of these and he never pays them. He says you can just ignore it." That is usually where I inwardly groan.

Enforceable? Yes

So what is the answer? We know by now that the basis of such a parking charge is in contract. When there are signs setting out the nature of the charges, and you still choose to park, you have accepted the terms of the contract. Is such a contract enforceable? Without needing to go too far back to basics, we have fairly recent (and rather punishing) authority in Scotland that private parking charges in Scotland are clearly enforceable.

In *Vehicle Control Services v Mackie* [2017] SC DUN 24, Ms Mackie regularly parked in a private car park at her parents' flat in Dundee. The property factors entered into a contract with the pursuers to control parking in the car park, as residents could find themselves unable to park due to the public using it. Residents were required to show a permit and any vehicle not showing a permit would receive a penalty charge notice. There were prominent signs of the restrictions within the car park.

Mackie regularly parked in the car park, and refused to obtain a permit, which her father could have arranged for her. In the property factor's evidence, Mackie was aware of what she was doing, but believed the parking regime was illegal. She refused a reduced cost parking permit. Quantum was agreed at £24,500.

"Sadly for Mackie, she was incorrect in her belief that the parking regime was illegal, and Sheriff Way held there was a valid contract"

Sadly for Mackie, she was incorrect in her belief that the parking regime was illegal, and Sheriff Way held there was a valid contract. After being found liable to pay the agreed sum, Mackie was sequestrated some months later.

A path to this decision was led by the pursuers' reference to *Thornton v Shoe Lane Parking* [1971] QB 163, and Lord Macphail's decision in *University of Edinburgh v Onifade* 2005 SLT 63, which set up the framework for the defender's acceptance of the pursuers' conditions of parking. The reasonableness of the size of the charge was tested in the "*Parking Eye* case" (*Parking Eye Ltd v Beavis* [2015] UKSC 67), which held charges of £85 to be reasonable.

Some answers

So when I am asked "Should I pay it?", there are a few useful pieces of advice that can be given. At the top of the list is, was there clear signage? By now, most parking enforcement companies are well aware of their responsibilities to provide clear notices setting out parking terms and charges, but this is always worth checking. There are many reported cases of camera controlled systems making errors, for example where a driver has parked on two occasions in the same car park on the same day – this will come down to what can be proved.

A final important point is to check that the person the ticket was sent to was the driver, and not just the registered keeper if they were not present – they are not likely to have been able to accept the terms of parking. At present the parties will require to prove that a contract was entered into with the driver (or not). However when part 8 of the Transport (Scotland) Act 2019 comes into force, liability will shift from the driver to the registered keeper in certain circumstances.

We all know the stories of people who have received private parking charges and nothing has come of it, but at the end of the day, if the parking enforcement companies wish to pursue an action, the real answer is that if you were the driver, and parked in a private car park with terms shown on clear signage, then yes, the parking charge is an invoice, and it is one you are liable to pay.

As a final addendum, while you could try to contest the charge, parking enforcement companies are notorious for failing to acknowledge correspondence, or simply responding with a further demand for payment (along with increased charges). My advice to clients in all correspondence is to resist the temptation to send screeds of angry invective and remain brief, direct and reasonable.

The only strategy that is guaranteed to fail is not taking risks.

Mark Zuckerberg, Facebook

Graeme McKinstry

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Caring for the carers....

This month's interviewee looks back over her decades in the legal team supporting the NHS in Scotland, from which she retired as head last year

In-house

NORMA SHIPPIN, FORMER DIRECTOR, NHS CENTRAL LEGAL OFFICE IN SCOTLAND

This month we speak with Norma Shippin, former member of the In-house Lawyers' Committee for six years, who worked for 38 years in the NHS Central Legal Office in Scotland, the last 10 of these as director and legal adviser to the NHS in Scotland, culminating in a well deserved retirement last year. She was and is well known in the legal community in Scotland, and reflects here on her experiences.

Tell us about your career path?

My career path ended with my retirement on 4 July 2022 – my own Independence Day! It started, following my LLB and Diploma in Legal Practice at Edinburgh University, with a traineeship at W & J Burness, then on to a job at the NHS Central Legal Office where I remained for the rest of my time as a lawyer.

What was your main driver for working in the public sector/the NHS? Would you encourage new lawyers to consider a career in public service, and why?

My mother was a midwife and while at university I worked during my summers as a nursing auxiliary at Raigmore Hospital Maternity Unit in Inverness. I studied medical jurisprudence under Sandy McCall Smith and Professor J K Mason as one of my honours subjects. This sparked my interest in that field of practice. I applied for a job in CLO when it was advertised, though I have to confess that I had never actually heard of its existence prior to that. It was a much smaller organisation in those days. When I started there were six other lawyers. When I retired I recall there were about 70!

I would really encourage new lawyers to consider a career in public service. I found the clients I worked with to be dedicated and caring – and that sense of being able to provide support and strength at times of trial for them was extremely rewarding.

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

My understanding is that in-house lawyers now make up a considerable proportion of those practising in Scotland, and that this is a much more respected career path than it might have been when I first started. It seems to me that the future is a bright one. The key challenge at the moment in the public sector relates to finance – there is a need to be cost effective and efficient without sacrificing quality.

In terms of challenges and opportunities, the possibilities to be part of a bigger picture and part of the team supporting a crucial service, and to get a real sense of that from your work, were endless. For me that was a great attraction – I loved being part of the NHS, not just part of the organisation that employed us but appreciating that CLO's role was so much bigger than that.

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

I think lawyers can be highly innovative! In the time I was in CLO we transformed our service into one which was client focused and team based. We developed a fee-charging system where the NHS clients would pay for what services they used, and we made sure that we regularly asked them what they thought of the service! We brought in peer review and performance appraisal at an early stage and started business and strategic planning before it was widespread in the profession.

The best ideas often come from unexpected places in organisations, and so we created a team from all parts of CLO to suggest improvements and innovations. Anyone could put forward an idea and it would be considered by the group, and often that was the way change took place. During Covid we adapted – like many others – to wholesale digital practice and communication to enable our service to continue virtually undiminished. I am so proud of the teamwork which prevailed at that time.

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

Very much! The legal profession has become a much more equality conscious one and more sympathetic to work-life balance. I remember as a trainee that working extremely long hours was totally expected – you would never go home before the last person had exited the department. Working part time or job sharing was very rare. Family friendly policies are now part of the culture. This is a good thing.

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

I would say go for it! Make sure you understand the culture and requirements of the organisation you are going into. A good in-house lawyer

Raigmore Hospital, Inverness

is one who is part of the team but who is also able to speak truth to power. A good in-house lawyer is one who understands the detailed rules and regulations which apply to that area of work but who can explain things in ways that the client can understand. A good in-house lawyer is an expert in the relevant area of law but understands their limitations and never advises beyond their competence – however much pressed to do so.

What did you love about your role, and what do you love doing now?

I loved the people I worked with in CLO. That will always be my highlight. They were a wonderful team – highly expert solicitors and support staff but also great fun and extremely committed to the NHS.

My working days are now done, but preparing for the day of retirement is really important for everyone and ensuring work is not all consuming is crucial. I play the cello, guitar and piano – not all at the same time. I lead our church music group and love that. I also have revived my interest in Gaelic and have joined a choir, which is excellent fun! There is definitely life after the law – but I still love catching up with former colleagues for lunch and coffee.

Finally, some quickfire fun if we may!

Rise and shine, or lie-in person?
Used to be lie-in, but now I like to get up and at it reasonably early so as not to waste the days.

Dinner party: host or attend?
Obviously both, but I find great joy in gathering friends round a table. Providing food is one of my currencies of love – a feature I inherited from my mother.

What is your most unusual/amusing work experience?
Turning up to give a lecture on informed consent with my son's English homework on the floppy disk instead of my PowerPoint presentation. *Death of a Salesman* is an excellent play but not really relevant to the audience I had! Also turning up to give a lecture in my white cowboy boots having left my shoes on the train. Walking across the carpet to the podium seemed like an endless journey!

Best advice you've ever been given?
Apart from "Always check in a mirror that you don't have lipstick on your teeth", or Don't take yourself too seriously"? I would say that the best advice is never lose your integrity. Sometimes it can be tempting to go for the jugular or for a quick win at someone else's expense, but a lifetime of practice is a long time. Once you have lost your reputation it is very hard to recover. Be known as a person of your word! Oh, and last of all, be kind!

Questions put by Catherine Corr, In-house Lawyers' Committee

What is the CLO?

CLO is part of NHS National Services Scotland, which provides a number of services to the NHS in Scotland. CLO is comprised of around 130 solicitors and support staff, and provides a comprehensive legal service to the NHS boards and some other public sector bodies. There are four departments – Litigation, Commercial Property, Commercial Contracts, and Employment. CLO solicitors regularly advise on mental health, practitioner services, ethical issues relating to patients, data protection, FOI and many other specialist areas.

SLCC calls for cut in time on conduct cases

Action to reduce the time taken by the Law Society of Scotland to investigate conduct complaints has been recommended by the Scottish Legal Complaints Commission, in a report produced under its oversight function.

The report follows an investigation in which data analysis showed that the majority of complaints investigations take longer than the Society's published average timescale of "about 12 months" to complete.

SLCC analysis showed that of the 295 investigations open as at 31 March 2022, 40% had been open for more than 12 months, and 25% for more than 21 months. Of 497 closed complaints since 2017, the average time taken was 15.9 months and the median 14.4 months.

Although progress had been impacted by Covid restrictions, the Society accepted that further steps were needed to reduce the timescales, focusing on improvements at the recommendation stage where most delay occurs, including through increased resourcing for the Professional Conduct team.

Recognising the Society's "positive engagement on this issue", the SLCC has made three statutory recommendations for improvement:

- set a realistic and achievable target timescale for the completion of conduct investigations as a key performance indicator;
- improve the transparency of communications with both complainers and solicitors on the timescales for the completion of investigations and on the progress of investigations; and
- create a plan of action to achieve the new key performance indicator, detailing how and when the improvements outlined in the Society's response to the SLCC's reports will be achieved.

Sarah Hamer, oversight and assurance manager at the SLCC, commented: "The Society has already confirmed its commitment to reducing the time taken to investigate complaints. That is very welcome, and we look forward to seeing the Society's response to our recommendations, and to the impact on its complaint timescales in due course."

Responding to the report, David Gordon, convener of the Society's Regulatory Committee, said the Society was committed to reducing the time taken to investigate and process conduct complaints. "We have already introduced changes that have led to improvements and we continue to monitor their impact."

Highlighting the constraints imposed by the current legislation, he added: "Publication of the SLCC report today further underlines how the Scottish Government's upcoming bill must overhaul the complicated and bureaucratic processes so complaints can be dealt with and action taken much more quickly."

Warning over property investment schemes

A warning to solicitors about becoming involved with property investment schemes has been issued by the Scottish Legal Complaints Commission via a blog by Professor Stewart Brymer.

Examples of such schemes are development of a site as a car park with individual spaces being owned by investors then leased back to the developer who then subleases individual spaces to third parties; and the acquisition of a site to be developed as hotel or student accommodation with individual rooms being owned by investors and sublet as above. In each case, a firm of solicitors is retained to act for the developer and purchasers/investors are offered the services of a nominated firm of solicitors to advise them with fees being payable by the developer.

Professor Brymer describes such schemes as "high risk", and says they should ring warning bells in the head of any solicitor who agrees to act for prospective purchasers. The SRA in England has issued guidance in the form of a warning notice; and although he believes solicitors are aware of the issues, "there is an increasing trend for solicitors to be asked to get involved in such schemes".

He concludes: "the best advice if asked to advise anyone in such a scheme may be to say no".

His blog is on the SLCC website and has also been included in the online copy with this issue of the Journal.

Dundee pilots new digital evidence system

An initiative to transform digitally how evidence is managed across the justice system is being piloted in Dundee.

Digital Evidence Sharing Capability ("DESC") provides a secure and robust system that will for the first time allow prosecutors, court staff, police officers and defence lawyers to access a unified system to handle evidence digitally. The Scottish Government has invested £33 million in the scheme.

DESC handles evidence including CCTV footage, photographs, and data and other materials from computers and mobile devices. This will be expanded to include documents and recordings of police interviews. Members of the public and businesses will be able to submit digital evidence – such as material recorded on mobile phones – more easily by email when sent a link by a police officer. Only approved staff from justice organisations will be able to access DESC software. Access is fully audited and monitored.

Claimed benefits of the system include reducing the impact on victims and witnesses by supporting quicker resolution of cases as well as reducing police officer workloads. It will also significantly reduce the need to transport physical evidence, supporting wider carbon reduction efforts. A nationwide rollout is planned for later this year.

While the pilot will deal with summary cases only, it is envisaged that DESC will be expanded to include solemn business at a later stage.

Justice Secretary Keith Brown commented: "Already the pilot – which began in January – is proving extremely successful, with 600 cases handled and a guilty plea in a case involving digital evidence."

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.

Gambling regulation

An inquiry is being undertaken by the UK Parliament's Digital, Culture, Media & Sport Committee in respect of gambling regulation, to examine the Government's approach with a view to increasing protection for those at risk of gambling-related harms.

The Society's Licensing Law Subcommittee considered and responded to the inquiry. In particular, the response stressed that enforcement should be a key priority for reform of the Gambling Act 2005.

It reiterated the position that a significant regulatory gap persists with respect to enforcement activity in Scotland. Many licensing boards (the bodies responsible for regulating licensed gambling premises in Scotland) do not engage in compliance or inspection work as they have no confidence that their licensing standards officers have the required statutory authority to do so, given the wording in ss 303 to 305 of the Act.

The response also advised that there is a pressing need for clarity regarding enforcement and compliance. It is suggested that the large number of licence conditions, codes of practice, guidance and regulations should be consolidated to ensure that the legislation is clear, easy to interpret and fit for purpose.

Charities Bill

The Society's Charity Law Subcommittee submitted written evidence to the Social Justice & Social Security Committee of the Scottish Parliament on the Charities (Regulation and Administration) (Scotland) Bill.

It highlighted a longstanding involvement in the consultation and engagement process leading to the bill, and the committee's view that more comprehensive reform of charity law is needed to place the sector on the strongest possible footing for the future. The response welcomed the Scottish Government's commitment to a wider review of charity law after the passage of the legislation, but called for further clarification on the scope and timescales of the review.

Changes proposed by the bill were welcomed as sensible and proportionate. In particular, the response welcomed the inclusion of proposals for the creation of a record of charity mergers providing for the transfer of legacies, which was identified as an area for reform by the Society in its response to the 2021 *Strengthening Scottish Charity Law* survey.

While noting that the bill would not bring the Scottish regulatory system fully into line with other parts of the UK, the response highlighted that regulation should be appropriate to the sector and that the bill would create alignment in many respects.

Along with specific comments on a number of sections of the bill, the response noted disappointment that the bill as introduced did not contain reforms relating to the treatment of royal charter/warrant and enactment charities.

The committee would be pleased to hear members' views on the bill. Email your comments to policy@lawscot.org.uk

For the Society's work on the bill so far, and more information on its policy work, see www.lawscot.org.uk/research-and-policy

ACCREDITED SPECIALISTS

Arbitration law

Re-accredited: ALAN McMILLAN, Burness Paul LLP (accredited 25 January 2018).

Child law

RUTH CROMAN, Macnabs LLP (accredited 21 February 2023).

Employment law

Re-accredited: KATHRYN WEDDERBURN, Gunnercooke SCO LLP (accredited 6 February 2008).

Family law

NIKKI HUNTER, Morton Fraser LLP (accredited 30 January 2023).

Re-accredited: ALISON McKEE, Lindsays LLP (accredited 28 January 2008); ROBERT GILMOUR, SKO Family Law Specialists (accredited 15 February 2013); FIONA RASMUSEN, Gibson Kerr Ltd (accredited 18 February 2013); LYDIA McLACHLAN, Brodies LLP (accredited 23 January 2018).

Family mediation

Re-accredited: JACQUELINE STROUD, Brodies LLP (accredited 29 November 2013).

Intellectual property law

RICHARD DANKS, National Westminster plc (accredited 20 February 2023).

Personal injury law

AMY GANNON, Digby Brown LLP (accredited 23 February 2023).

Re-accredited: KIRSTY O'DONNELL, Digby Brown LLP (accredited 19 June 2018).

Planning law

Re-accredited: MORAY THOMSON, Shepherd and Wedderburn LLP (accredited 20 December 2017).

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ACCREDITED PARALEGALS

Civil litigation – debt recovery

LOUISE DOUGLAS, JANE LEWIS, both Yuill & Kyle Ltd.

Civil litigation – family law

NADIA INGLIS, Gibson Kerr & Co.

Commercial conveyancing

SARAH JACK, Blackadders; LOUISE JOHNSTONE, Anderson Strathern.

Employment law

NICOLE WARD, Aberdeen City Council.

Residential conveyancing

KIMBERLEY BEATSON, Morgans; LISA FARMERY, Ledingham Chalmers LLP; STACEY GEMMELL, Andersonbain; NICOLA WILSON, Watters, Steven & Co.

OBITUARIES

NIAMH BOYD BUSCHMAN, Bellshill

On 7 January 2023, Niamh Boyd Buschman, employee of the firm Bell Russell & Co Ltd, Airdrie.

AGE: 53

ADMITTED: 2012

JANE ELIZABETH DAVEY, Inverness

On 31 January 2023, Jane Elizabeth Davey, employee of Highland Council, Inverness.

AGE: 59

ADMITTED: 1997

CHARLES BENZIES, Aberdeen

On 1 February 2023, Charles Benzies, sole partner of the firm Northern Law, Aberdeen.

AGE: 68

ADMITTED: 1993

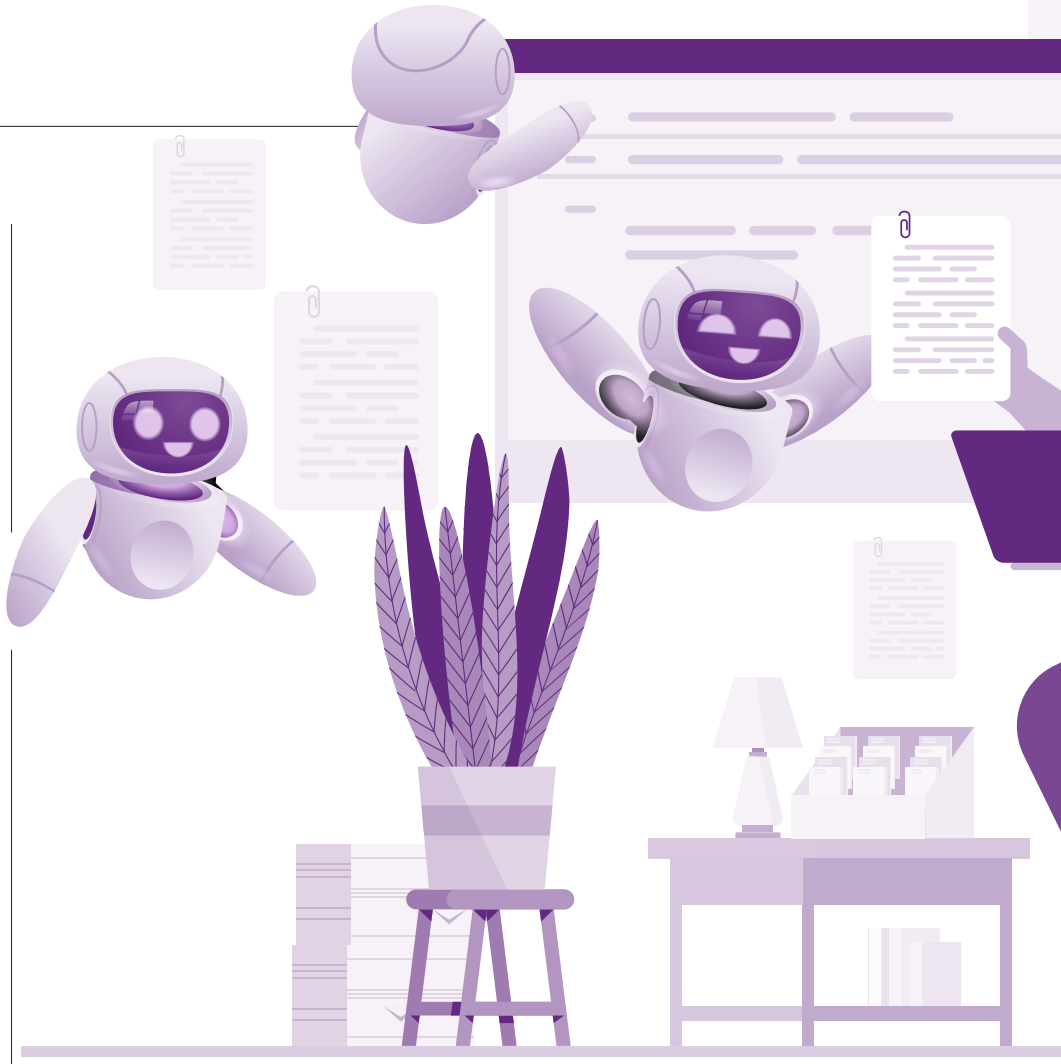
FRANCIS VINCENT NORTON (retired solicitor), Cairnryan

On 16 March 2023, Francis Vincent Norton, formerly partner of and latterly consultant to the firm Gildeas, Glasgow.

AGE: 77

ADMITTED: 1991

THE ETERNAL OPTIMIST



When the chat gets serious

Have you come across ChatGPT yet? If not, you should at least know the potential of this latest variant of AI to raise pretty well anyone's game, Stephen Vallance advises

Apologies if you've heard it all before, the robots are coming blah blah, life as we know it is over blah blah, death of the high street etc etc. I'm old enough to have lived through most industry extinction events (and let's be honest, few were as bad as forecast), but I do believe it is wise to keep an eye on the horizon not just for the threats but also for the opportunities that might be approaching.

Many of you I am sure will already be aware of a piece of software known as ChatGPT (openai.com/blog/chatgpt/); for those of you that aren't I suspect you will be seeing it a lot in the weeks and months ahead. This article though isn't just about this one incredible piece of software – it's also about the importance of being aware of what is happening not just in our own jurisdiction but in the world generally and how at times we can use it to our benefit.

Ask the expert

So what is ChatGPT? In brief, it is what we thought the internet was supposed to be. It's an ability to interact conversationally with a computer, much as you would a human, and to access the answer that you need with incredible accuracy. Unlike Google, for example (who are more than a little concerned by this disrupter of their own long established dominance), it's not a list of pre-ranked websites with potential answers, and it's certainly not a list ranked in accordance with who has paid the most to be there. It is, quite simply, like asking a knowledgeable expert a question and them explaining to you, at a level appropriate to your choice, what the answer is.

Whether you are looking for a highly technical explanation on the chemical properties of lithium, or a short explanation of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 in language suitable for a 10 year old, it will answer you accordingly. If you want to fine tune the response, just ask and it will make it shorter, longer, funnier or more technical. If you'd like the key points summarised, sure, no problem. In essence it's the next level of AI (artificial intelligence), and you will be seeing AI in different contexts a lot in the near future as various companies race to work out how best to deploy this major leap forward.

Knowing (nearly) everything

The extent of ChatGPT's knowledge and abilities in its current version is breathtaking. It should be: its source is pretty much everything accessible on the internet up to 2021 (updates coming will bring it right up to the current moment, more of which shortly). While I'll focus on law and management in this piece, its impact on almost every element of society should not be underestimated. It can write fabulous code for computer programs; it can translate your letters and emails into almost any language; it can answer queries to a website like a receptionist; it can write blogs and articles (no doubt soon "in the style of the Eternal Optimist"); letters and emails and even speeches are all there to be used and adapted as required.

Scarier still, it is getting better at everything all the time. As we feed back to the system our own opinions on the accuracy or appropriateness of an answer, it learns. It's not sentient, but it is able to crunch huge volumes of data (effectively our questions and feedback on the answers) to predict what the best possible answer to any request will be. Currently it is a text driven system, but it can be used in conjunction with speech recognition software to perform much like Alexa or Siri. Likewise, there are other versions of this form of AI that can generate art and music at a level well beyond anything that I would be capable of producing.

Ignore at your peril

"Thank you for the *Tomorrow's World* piece," I hear you say, "but we need to get back to billable work." Understandable, and in the short term perhaps even sensible, but ignoring developments like these won't make them go away, and worse still, opportunities and perhaps potential risks will be missed.

What might these be? On the positive side, it will be easier to prepare everything from blogs and articles to short explanations of long documents, as this software will take the heavy

"The extent of ChatGPT's knowledge and abilities in its current version is breathtaking"

lifting out of these, leaving practitioners to simply check for inaccuracies and perhaps add in a little of their personality where required. Likewise it can assist in drafting some of the simpler correspondence, or particular elements of it (e.g. "explain the issues around planning permission in simple language"). Research will be easier in many areas, and ultimately there are bound to be legal issues arising from the use of this technology (copyright and plagiarism?), with perhaps new areas of law to explore for clients. These are just a few, and there are many, many smart practitioners out there who will see opportunities that I can't imagine yet, never mind what others outwith our own profession might already be looking at.

Similarly, there are risks that we will all need to be aware of. No longer will we be able to identify scam emails by their poor use of language, as everyone can now draft the perfect letter. We will need to remain vigilant with our own staff and systems, as while ChatGPT is good and getting better, it isn't yet perfect, and we still remain the ultimate arbiters of matters of law and best practice no matter how professional a piece might look. Similarly, clients will approach us even more often with flawed understandings of the law as they fail to ask the correct question of the system. Ultimately we ourselves might be the ones who require to develop the skill of framing how to address questions to this AI. There will also be those who will see this as yet another opportunity to try to erode our traditional markets or to take a larger market share within them.

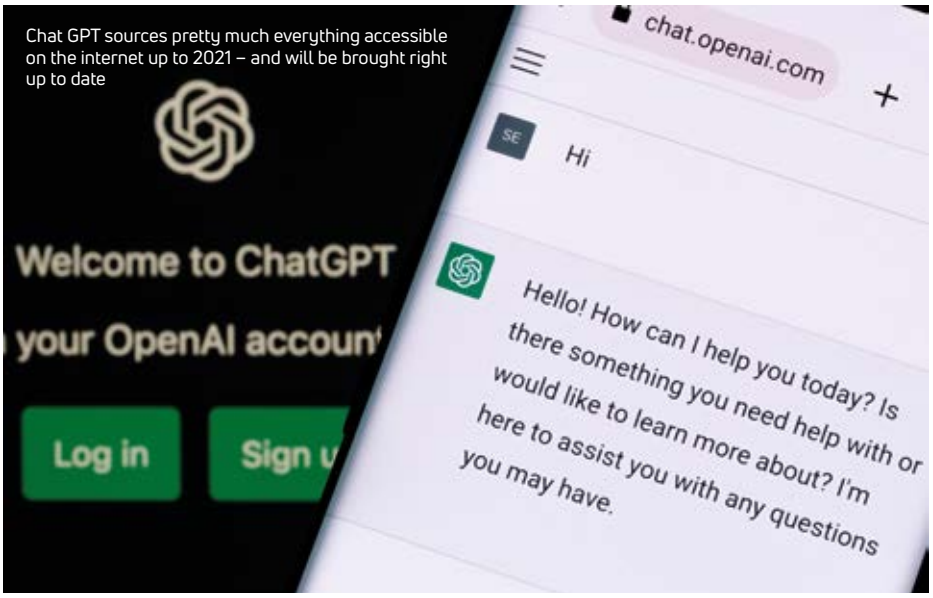
Prize up for grabs

New waves of technology that change everything come along every decade or two, and those that take advantage of them reap the rewards. Web 2.0, for example, allowed firms to create new and better websites to reach out well beyond their normal geographical area and to offer and indeed capture new workflows and clients. The pandemic and our adoption of Zoom and Teams have likewise changed the way that we work forever, as did the wholesale migration onto PC-based systems after the Y2K fears. It's seldom just about those with the deepest pockets, though: more often it's about individuals within a practice unit taking the time to learn and to immerse themselves in what the new technology is all about and what it can do for them and their clients. The technology is there to be used; the question is, who will take up the challenge to use it?

We are already seeing the first tentative steps, as ChatGPT has sat and passed bar exams in the US, and indeed might be going on to assist in the first defence of a court case. Far more importantly, Microsoft has agreed a multi-billion dollar deal for ChatGPT to power its search engine Bing, which will no doubt, for a period at least, create huge waves for anyone using SEO, as Google's dominance might at last be on the wane. This technology is, though, still inexpensive for most of us to use (it ranges from free to $20 per month for individuals), and can be incorporated into our own businesses at minimal cost. Likewise, for those who store enough well organised data (yes, I know that's unlikely to be most legal firms), it will be possible to point the AI at your own system, have it learn your styles and culture, and then interact with your clients and provide responses like we would ourselves, based on our own styles and tone.

In the short term will things change? Yes, the effects are already being felt in teaching, where they are dealing with how to tell whether the student or the AI wrote the essay. For the legal profession I suspect it will be slower, but in the very short term the prize will go to who can best leverage this technology in areas like marketing and simple drafting. In the medium term, however, the genie is out of the bottle and it will grow fast. Billions of dollars are pouring into this technology and we will see improvements occurring even quicker than with any other recent technology. The only question now is, will we use it to our benefit or will we let others use it first to theirs?

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



Chat GPT sources pretty much everything accessible on the internet up to 2021 – and will be brought right up to date

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GUARDIANSHIP

Guardianship applications: optimising the process

The process of obtaining guardianship and intervention orders is vulnerable to delays which can be detrimental to the adult concerned. Here the Society offers advice on steps to help minimise the risk

It's important to minimise delays in the guardianship application process

Anyone practising in the field of adults with incapacity ("AWI") law will be aware of the degree of patience and persistence that is needed to obtain guardianship and intervention orders for vulnerable people and their loved ones. The delays that are commonly experienced pose significant risks for such individuals, particularly where they result in them spending longer than appropriate in an acute hospital bed as their discharge cannot be legally authorised without a court order. Such delays can give rise to further medical complications, the development of comorbidities and even, in some cases, premature death.

Even if there are no direct health consequences, many individuals whose quality of life could be greatly enhanced by being moved into a specialist care facility (e.g. one offering specialist dementia care) are obliged to remain in a hospital setting which is not designed to and cannot offer the level and type of care and support they need. Not only is this detrimental to their wellbeing, it places unnecessary pressure on the NHS.

The root causes of these delays are systemic issues which have been identified and challenged by the Law Society of Scotland over a lengthy period of policy review and law reform, most recently through the consultations in the Scott Review of Mental Health. The review reported at the end of 2022 and recommended urgent legislation to cover deprivation of liberty safeguards rather than, as we are currently doing, using welfare guardianship as an unwieldy and resource-intensive workaround. The Society has pressed for investment in social work services so that more mental health officers ("MHOs") can be deployed by local authorities to provide reports for AWI applications, and thus avoid or at least reduce the widespread breaches of the time limit in the 2000 Act to ensure human rights compliance. It has also called for more support and guidance for medical practitioners to enable them to provide the expert reports necessary in every application, a particularly important point in areas of Scotland where there are fewer psychiatrists available.

Smoothing the path

While these "big picture" issues are the subject of ongoing debate at the policy and resourcing level, and cannot be addressed without systematic and urgent reform to ensure compliance with international human rights obligations, can individual practitioners do anything to speed up AWI applications and get them to the door of the court? The following points, on which the writer has drawn on the experience of expert colleagues, may provide useful guidance for practitioners who perhaps take on this type of work less often. While no article can substitute for the accumulation of practical and technical experience, it is hoped this will assist colleagues open to developing their practice in this area.

- **Optimise information gathering.** It can be time consuming to go back and fill in details that were missed in the original instruction. Consider creating a template which covers the information you need to prepare the application – this may even be sent to the client before the first meeting. If you are offering a private fee for the initial consultation and legal aid application (in the absence of non-means-tested advice and assistance), there may be a tension between covering everything you need to cover and being able to offer an affordable fixed fee. The use of checklists and templates, especially if the applicant can complete most of it themselves, can help resolve that.
- **Minimise funding delays.** Delays in the guardianship application process are often blamed on legal aid. In the writer's experience, however, SLAB will turn around applications for welfare guardianship funding quickly. It can sometimes be quicker to ask the adult's social worker/GP for a supporting statement, rather than a friend/relative of your client. Bear in mind also that while guardianships with a welfare element receive non-means-tested legal aid, the same is *not* the case for advice and assistance, which is means tested on the incapable adult's means. Not only does this create a potential barrier to accessing legal services, your client may not know much about the adult's finances, and older adults may not receive passport benefits.
- **Be alert to conflicts.** From the outset, it's wise to have an eye for potential complexities such as another family member opposing your application. Such situations may require you to address suitability in more detail than for an unopposed application, or to consider other options such as the appointment of a professional guardian. Any reference to conflict around the adult should be addressed from the earliest stage to avoid or mitigate

"The delays that are commonly experienced pose significant risks for such individuals, particularly where they result in them spending longer than appropriate in an acute hospital bed as their discharge cannot be legally authorised without a court order"

delays resulting from opposition and to enable longer-term solutions, such as mediation, to be considered.

- **Manage your experts.** No guardianship or intervention order, even interim, can be obtained without three statutory reports – two medical reports (one from a consultant psychiatrist) and one MHO report. As practitioners know, the latter is what takes the time. The application must be submitted to court within 30 days of the first reporter visiting the adult, so the best plan is usually to line up the doctors but not formally instruct them until it is confirmed that an MHO has been allocated. This also allows time to identify a psychiatrist if the adult does not already have one overseeing their care – this is where having local knowledge and connections can help, enabling agents to build relationships with professionals who can provide good quality and timely reports.
- **Consider further reports.** If your client seeks financial powers, the MHO may not comment on these and the OPG may make observations about this. In such circumstances it can be advisable to obtain other evidence which confirms the applicant's suitability as a financial guardian, to avoid the case being continued to address this. This may include instructing additional expert reports, subject to availability of funding.
- **Time is of the essence.** While the Act allows for submission of an application after 30 days if the medical reports are out of time (provided there has been no significant change in circumstances), note that the same is not true if the MHO report is out of time (something the writer learned the hard way). An application will be returned and the MHO must be asked to re-examine the adult, which has obvious disadvantages.
- **Ensure your application meets requirements.** While the basics are set out in s 57 of the Adults with Incapacity (Scotland) Act 2000 and the Summary Application Rules, most sheriffdoms have practice notes which stipulate additional information which must be enclosed with or included in the application. These can be found on the SCTS website (scotcourts.gov.uk). In Lothian & Borders, for example, your client will need to sign a letter affirming they have no convictions and are not prevented from working with vulnerable adults (although a PVG certificate is not necessary). If your client does have convictions this is not necessarily a barrier, but the issue needs to be addressed, so the earlier it comes to light, the better. Post-Covid and with the advent of WebEx, many of us are raising actions in courts across Scotland, so it is important to check the local requirements. If you do not comply with the practice note, even if the oversight is relatively minor, your application is likely to be returned to you for amendment before warranting, a delay which can be avoided by checking against the note.
- **Attend to the OPG paperwork.** When applying for financial powers, please ensure your client completes the OPG's Guardian Declaration Form. The completed form should be sent to OPG alongside intimation of the application. Further information and a copy of the form can be found at publicguardian-scotland.gov.uk.
- **Be poised for intimation.** There may be limited time to intimate before the first hearing. Many courts will now accept proof of emailed intimation, given the ongoing challenges of using recorded delivery. Depending on your funding you may also wish to proceed directly to instructing sheriff officers. If an interested party is intimated upon late, and they do not oppose the application, you may wish to ask them to confirm in writing they agree to a shortened period of notice, as many sheriffs will accept that and it avoids a continuation to re-intimate. Intimation on the adult is of course crucial, and sometimes staff in hospitals and other care settings do not understand the importance of doing so promptly (or at all!), so you may also consider writing to them separately with specific instructions on how to carry out this process and return the form 22 in time for the hearing.

Working in this area of practice can be challenging, particularly when operating within a legislative and resourcing framework which is overdue for reform and improvement. While AWI can sometimes feel like an undervalued area of legal services, for the individual practitioner it can be extremely rewarding and offers the chance to make a difference to the lives of our most vulnerable citizens. Although many of the factors causing delay are beyond the power of individual practitioners to influence directly, sharing good practice and not being afraid to go back to basics to learn from each other can help us to do all that we can to ensure that applications are dealt with as promptly as possible within the current resourcing arrangements.

Dr Dianne Millen is head of Family Law at Watermans Legal and a member of the Law Society of Scotland's Mental Health & Disability Committee. This article was completed with the assistance of other committee members.

Beware the weapons link

New amendments to the UK Money Laundering Regulations mean that law firms must assess their exposure to "proliferation financing". Fraser Sinclair explains

In September 2022, new regulations brought in the legal requirement to identify and mitigate your firm's risk of "proliferation financing" ("PF").

PF means the act of providing funds or financial services for use, in whole or part, in the manufacture, acquisition, development, export, trans-shipment, brokering, transport, transfer, stockpiling, or otherwise in connection with the possession or use of, chemical, biological, radiological or nuclear ("CBRN") weapons. It covers provision in connection with the means of delivery of such weapons and other CBRN-related goods and technology, in contravention of a relevant financial sanctions obligation.

Law firms will have vastly different levels of exposure here, but it is important to understand the subject to the extent that you can record a reasonable judgment on your own firm's risk.

Two documents will help steer your course: first, the Financial Action Task Force ("FATF") guidance, and secondly the UK's own National Risk Assessment ("NRA").

FATF guidance

The FATF guidance on PF risk assessment and mitigation (2021) tells us that your assessment may consider the vulnerabilities associated with your products, services, clients and transactions, including whether products or services are complex in nature, or have a cross-border reach. Also, the nature, scale, diversity, and geographical footprint of the firm's business should be considered.

Of most sectoral interest to law firms will be the risks of trust and company service provision ("TCSP"), particularly in facilitating company formation and the use of shell or front companies, or perhaps nominee ownership arrangements. The guidance notes that "designated persons and entities, and those persons and entities acting on their behalf have quickly adapted to sanctions and developed complex schemes to make it difficult to detect their illicit activities; both Iran and [North Korea] frequently use front companies, shell companies, joint ventures and complex, opaque ownership structures for the purpose of violating sanctions measures".

The UK National Risk Assessment

The domicile here of many global financial institutions perhaps represents the most obvious meta risk to the UK. Some niche risks facing the insurance and maritime industry are detailed in the NRA, but it is perhaps the point around use of UK companies which will again be most pertinent to law firms.

The NRA gives a particular case study where an East European business operator used a professional gatekeeper in a Baltic state to set up a Scottish limited partnership ("SLP") to conduct defence contract business activity. A representative resident in Scotland was paid per item to sign all SLP filings and returns, but was completely unconnected with the SLP or the business operator; their payment came from the gatekeeper's business account in the Baltics. At no point was there any link back to the physical person behind the SLP.

Generally, firms involved in transactions and arrangements on behalf of defence or dual-use goods contractors will wish to think seriously about their direct and indirect exposure here, though I suspect such firms might ordinarily be larger firms who are already well aware of the risks and requirements. (Exposure through dual-use goods is an interesting and complex area of its own; to learn more see UK Government guidance.)

Your practice-wide risk assessment ("PWRA")

TCSP work, layering and obfuscation, and geography are clearly key considerations. Fundamentally, these represent general AML risk factors we should all be familiar with by now, but the new requirements demand extra thinking.

As a starting point, you may wish to review the number of customers already identified as high risk, especially those often carrying out cross border transactions involving legal persons and arrangements, or multiple shell or front companies. Information on the type and identity of the customer, as well as the nature, origin and purpose of the customer relationship is also relevant.

Do you act for clients with structures reaching higher risk or so-called "secrecy" jurisdictions? You should be comfortable that you understand the true beneficial ownership, and the rationale for inclusion of such jurisdictions.

Do you provide company formation or other corporate services which might raise exposure to PF arrangements? Be clear about your risk appetite and policy, and ensure you understand the client, their operations, and their ownership on an ongoing basis. Similarly, be vigilant about the use of an intermediary or other contact where the rationale for their use or interest isn't clear.

Finally, where you decide that you have lower exposure due to, for example, not undertaking TCSP work or clients in international matters and transactions, it is just as important to note this clearly in your PWRA. The absence of inherent risk is a legitimate and required part of your assessment of exposure to risk.

Like other areas of AML, the truth is that people who want to abuse your services are forever adapting and enhancing their methods, and your firm is not a special branch of the National Crime Agency. You are not being tasked with catching bad guys, but with taking reasonable measures commensurate to the size and nature of your business. Considering what we know about some of these sanctioned regimes, I'm sure you'll agree this assessment is worthwhile.

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

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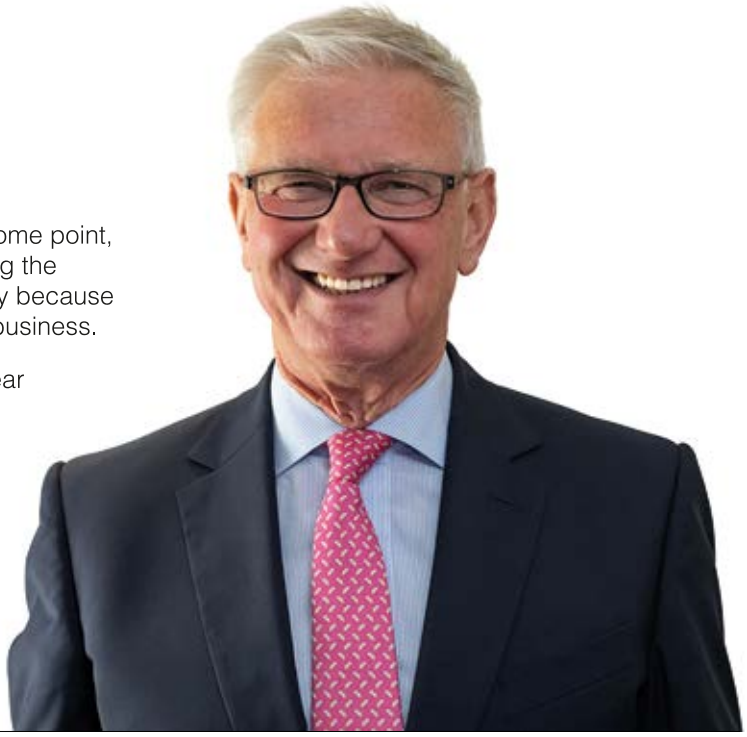

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Cyber policies: what do insurers require?

Cyber risk poses a complicated and growing challenge for law firms. This article explores some of the common coverage restrictions imposed by many insurers, which can make it challenging for law firms to qualify for cyber insurance

In recent years, cyberattacks have become increasingly sophisticated, with threat actors constantly finding new ways to exploit vulnerabilities and avoid detection.

Cyber insurance is a relatively recent form of insurance that, in general terms, covers losses relating to damage to computer systems and networks. Cover extends in some policies to incidents involving media as well as data breaches.

As cyberattacks continue to increase in complexity, professional service firms are now required to have specific controls in place in order to qualify for cyber insurance cover. Such controls are deemed to be the mandatory minimum standards by many cyber insurers. This means that law firms can find themselves struggling to obtain cyber insurance unless (and until) they've adopted these minimum standards.

From a risk management perspective, these minimum standards should be reviewed and considered by all law firms, regardless of whether they intend to apply for a cyber insurance policy or not. The requirements are typically based on the current threat environment, meaning that they might be regarded as some of the most effective controls to mitigate many of the known and commonly exploited weaknesses.

We have outlined a list of the common risk controls below. These are either the minimum standards for the cyber insurance market or highly recommended. The list is not exhaustive and specific minimum standards will obviously vary from insurer to insurer. Also, the list is likely to change as cyber risks develop over time and the nature of cyber claims changes.

While a lot of the terms discussed are technical in nature, this article is intended as a guide to current industry standards and firms should take advice from IT or cybersecurity specialists if they wish to implement anything recommended here.

1. Multi-factor authentication ("MFA") and access management

This means that the law firm must ensure that both employee and all other third party access to the network is secured using push-based multi-factor authentication (usually a code generated on a separate device or a facial recognition app).

Further, access by any third party ought to be closely monitored, also ensuring the ability to record and close the connection at any time. If Remote Desktop Protocol (a protocol developed by Microsoft which provides a user with a graphical interface to connect to another computer over a network connection) is used, connections should be via a virtual private network only, in addition to the MFA requirements. The Remote Desktop Protocol should not be externally facing.

Push-based MFA should also be in place for all administrator accounts, with access to any critical information and remote access to emails.

2. Privilege access management

A dedicated privilege access management ("PAM") tool should be in place to manage all usage of administrator and privilege accounts. Access to PAM should use MFA and ideally be linked to a change control system. Local administrative accounts should be disabled, and domain administrator accounts should not have access to the internet or any email. All administrator users' activity should be monitored and logged. Service accounts should be reduced to a minimum and ideally managed by the PAM tool. In the absence of a dedicated PAM tool, permanent administrator accounts should be kept to a minimum, utilising complex and separate (and frequently rotated) login credentials.

3. Network segregation

Network segregation between critical and non-critical information should be in place, with further segregation between business units or geographical locations to prevent any lateral network movement. Any operational technology should be kept entirely separate from the IT network, with internet and external access blocked. Any legacy or end-of-life software and hardware should be kept segregated from the wider network with no internet or external access, with a plan in place to decommission any end-of-life assets.

4. EDR and network monitoring

Insurers will often require that firms use endpoint detection and response or managed detection and response across 100% of endpoints, including laptops, desktops and servers, with an endpoint protection platform highly recommended. Any information from these services should be fed into a security information and event management system which is monitored 24/7 by a security operations centre either internally or externally. Regular network penetration testing and vulnerability scanning is also required, with any issues remediated in a timely fashion.

5. Data backups

Regular backups should be immutable, encrypted and subject to vulnerability scanning, and should be tested regularly for their integrity. Backups should also be physically and logically separated from the network and, if using a cloud or online service, subject to MFA with access limited only to specific administrator accounts.

6. Planned responses

Incident response, business continuity and disaster recovery plans for recovery from cyber events with specific responses to ransomware attacks and data breaches should be in place, updated, and rehearsed regularly.

7. Employee awareness and education

Firms are often required to ensure employee security awareness training plans (including regular phishing simulations) are in place and deployed regularly. Protocols should be in place regarding the safe use of portable devices, limited use of public Wi-Fi, and security controls around videoconferencing.

8. Patching

Finally, firms are often expected to ensure all patches are implemented in a timely manner. Critical patches as defined by the Common Vulnerability Scoring System, or CVSS scoring, should be implemented as soon as possible, ideally within 72 hours of the patch release, highs within seven days and mediums/lows as business permits.

Support from the Society

We live in an increasingly interconnected world where reliance on technology has become routine. The digitisation of business has created huge opportunities for law firms but has

also brought the need for a diligent focus on cybersecurity.

The Law Society of Scotland has provided resources to help firms, such as the "Guide to Cybersecurity" which outlines some of the key threats and provides basic tips for best practice. The Society has also partnered with Mitigo, a cybersecurity specialist that provides resources and guidance. Any law firm wanting to enhance their security controls should reach out to IT and cybersecurity specialists such as Mitigo.

Insurance

Subject to its terms and conditions, the Master Policy itself will typically respond to any situation involving loss of client account funds that were in the control of the law firm, regardless of whether that loss has been caused by a cyberattack or fraud.

However, there are situations where a cyber incident will lead to first party costs and, generally, these will not be covered under the Master Policy. Examples include where there is a data breach event or a ransomware attack. In these circumstances, a well-written cyber policy can help to protect a firm when an incident occurs. As highlighted above, however, insurers have been raising the bar for minimum controls for all professional service firms and this can make it difficult to obtain cyber insurance cover.

The benefits of cyber hygiene protocols

While additional underwriter scrutiny might add further complexity and necessitate greater internal resources to provide the requisite degree of comfort to insurers, this scrutiny also offers opportunities for law firms to strengthen their defences through implementing these controls.

In other words, as the frequency and severity of attacks continue and as professional service firms continue to expand their digital footprints, the greater focus by insurers on cyber hygiene protocols could be viewed as a welcome opportunity to increase cyber resilience.

The list of minimum standards is not comprehensive and there might be different and additional requirements in the years ahead as the threat landscape evolves. That said, the current list is certainly worthy of analysis now. Like all businesses, law firms will want to ensure that they have the necessary safeguards in place, as the dangers of cyberattacks increase.

Matthew Thomson is a client executive in the Master Policy team at Lockton. He worked as a solicitor in private practice before joining the Law Society of Scotland in 2011, and then Lockton in September 2018 dealing with all aspects of client service and risk management.
t: 0131 345 5573;
e: matthew.thomson@lockton.com

Notifications

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BLUETT, Jillian Astrid
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CHEAPE, Sarah Gillian
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CRAWFORD, Rory Thomas Andrew
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COX, Nicole
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DOW, Megan Kara
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Neutral evaluation: another resolution tool?

Why this concept should be considered as an option for your client's dispute

The cost and time in resolving a civil dispute can be prohibitive, especially where a court or tribunal decision is required, and can be difficult or impossible to predict for a client – as can the outcome.

There are so many variables: what witnesses actually say in evidence; unexpected objections, or rulings on objections; what the decision maker thinks of your case. The winner-takes-all approach to expenses makes running a case to full hearing a high-risk strategy. Even where it settles, uncertainty over outcome will make negotiations on expenses more complex.

Mediation is one option. But there is another way, which is growing in popularity: neutral evaluation ("NE"). This is sometimes known as early neutral evaluation ("ENE"), but this is a misnomer. While the earlier NE is used, the better, it can happen at any stage in the life of a claim.

How does it work?

Many of you will, from time to time, seek the help of a colleague when faced with a case that is proving hard to resolve, whether because of a headstrong client or simply because a fresh mind is needed.

Instead of seeking an informal opinion, NE allows you to obtain a formal assessment (evaluation) of your client's case. The evaluator (legally qualified and trusted to be reasonable) has no connection with either party and provides an assessment of the merits, usually on paper, from essential documents (including any pleadings) and a briefing note.

Their report can assess the merits of legal arguments, based on evidence available, and note likely pitfalls should the case be adjudicated. If desired, they can make settlement suggestions.

A NE report carries several positives:

- a fresh mind is applied to the merits;
- your client has a safe "dry run" of the case, demonstrating how it might be resolved on adjudication;
- it can give you protection in the event of a negative outcome;
- it offers your client a reality check on prospects;
- it is not expensive or time-consuming;
- additional legal arguments could emerge; and
- it could break a negotiation logjam.

A further benefit is that it is confidential: the other party need not know that you ever received it. On the other hand, if the report is favourable, you could disclose it in seeking to apply pressure: "Here is what a respected neutral thinks of the case."

A joint NE report is an option, but an obvious risk arises: if flaws in your client's case are identified, the other party also receives the report.

ENE in England & Wales

The concept is not new in England & Wales, having been introduced into the Civil Procedure Rules in 2015 (rule 3.1(2)(m)) as a case management power for judges as evaluators. The mechanism has been discussed in case law (for example *Telecom Centre (UK) v Thomas Sanderson* [2020] EWHC 368 (QB); *Seals v Williams* [2015] EWHC 1829 (Ch); *Lomax v Lomax* [2019] EWCA Civ 1467). It is clear that the practice is gathering momentum in their courts.

Who to choose as evaluator?

In England & Wales, a judge is normally appointed. They will not, as a rule, be involved should the case be litigated further. One issue is that the judge can only produce a joint evaluation. As indicated above, that may not be ideal. The only way to obtain one for your own client is to commission it privately.

In the absence of a judicial scheme, ideally someone experienced as a resolver should be appointed. NE is not about getting a second opinion – it is about helping parties understand how a case might be resolved by someone performing a judicial role.

The evaluator's remit

This must be framed carefully, and there are options.

If resolution of a particular contentious issue(s) would end the dispute, you could ask the evaluator to assess that issue(s) alone.

You could present a set of facts for the purposes of the report, even though certain facts are not agreed. Or, the evaluator's views

could be sought on the basis of more than one set of facts. Or you could refer the whole case, including disputed facts.

A further option is to ask the evaluator for any new arguments that the instructing party could advance. Strictly speaking, this is beyond a judicial assessment role, but in a privately instructed report there is no bar to this.

Finally, you could task the evaluator simply to consider the strengths and weaknesses of a party's position. They could then be asked to comment also on possible settlement terms, framed in recognition of their assessment. Again, a judge-made NE would not do this.

Conclusion

Master McCloud in *Telecom Centre* explained that the NE function means that "positive or negative views as to merits are expressed, perhaps robustly". That kind of analysis can be very valuable in cases where, if not settled, much time and money will be consumed, and you then face an unhappy client.

NE will not suit every dispute, but it is a tool available to you. Given its increase in popularity in England & Wales, it is fast becoming mainstream. It therefore ought to be considered when advising your client as required by Law Society of Scotland Guidance (B1.9, Dispute Resolution).

Professor Derek P Auchie, Chair in Dispute Process Law, University of Aberdeen; tribunal legal member; arbitrator mediator Auchie Dispute Resolution: www.resolve-dispute.co.uk

Clio

A free guide to starting your own law firm

The freedom to choose your own clients, decide your own hours and working location, and grow a legacy you can be proud of: those are just a few of the benefits starting your own law firm can bring.

The question is: how do you go about achieving that goal? While many solicitors are well versed in the law, owning and managing a firm can present new challenges and require completely different skillsets than those you've learned in your career and education so far.

If you're considering starting your own law firm, it can be hard to know where to start. A free, in-depth guide from legal software provider Clio can help.

In Clio's *How to Start a Law Firm*, you'll discover what's needed to set a brand new law firm up for success. From creating a business plan to acquiring insurance, as well as networking, marketing, and hiring, this guide will help you to determine your goals and design a roadmap to see them through.

It provides practical information on the basics you need to know – right down to the essential equipment you need and even how to set up your office – as well as information on the approach needed to register and name a firm.

The guide also includes some essential tips when it comes to starting off on the right foot financially, including:

- How to create a law firm budget
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- What you can do to make revenue as predictable as possible.

Whether you're already in the process of setting up your own firm, or are simply starting to consider taking the plunge, this guide will provide you with the resources you need to take the next steps of your journey.

The guide is available to download for free at clio.com/uk/start-scotland

Tradecraft tips

Ashley Swanson's latest practice points drawn from his years of experience

Empathy

A client was buying a house which was a listed building. The seller had carried out unauthorised alterations and the resulting delay was causing no end of anxiety to the client as he had sold his existing house in anticipation of the purchase. A former employer of mine once said that buying a house should be an enjoyable experience, but on this occasion it was little short of a nightmare. When I indicated to the client that the problem was also waking me up at 6am every day he simply did not believe me. No solicitor likes seeing his client struggling in such circumstances. The only saving grace was that the client could see that I was using my imagination in trying to deal with the situation.

In such impasse situations, clients are sometimes tempted to take matters into their own hands. They buttonhole anyone who will listen to them, and if someone comes up with a weird and wonderful solution which is what the client wants to hear, you have a job on your hands to explain to them why their proposal simply will not work. Not every problem in life has a solution, but you have to explain the situation to the client in detail and outline the possible courses of action and the pluses and minuses of each of them. Even if this does not alleviate the client's anxiety, at the least it lays the foundations of your defence if matters reach the stage of a formal complaint. If you have done as much as and possibly more than any other solicitor would have done in a similar situation, surely you cannot be blamed if the problem proves to be incapable of resolution.

Notarising documents

My advice here is simple. Just don't do it. Clients bring us documents from countries all over the world and expect us to know exactly what is required in all cases, when more often than not we have even less idea than they have. I once had to notarise documents for a couple who were intending to get married while they were on holiday in Cyprus. I advised them to fax the documents out to Cyprus right away to make sure that everything was in order. I did not want them coming back weeks later because the notarising was not done correctly, and saying "Not only did you ruin our holiday, you ruined our wedding as well."

If you must notarise documents, ask the clients to scan them to you in advance so that you can try to work out exactly what is required, rather than only seeing them for the first time when the clients are sitting on the other side of your desk. I had a case recently where I spent 90 minutes studying various sources of information, only to come to the conclusion that a notary public simply had no part to play in the process of certification in question. I was quite happy to expend this effort if it avoided a situation where the clients gained the impression that I did not know what I was doing.

Charging fees

The obligation to quote fees or the hourly charging rate in advance has narrowed down the possibility of clients complaining that the fee was much more than they had anticipated, but if you find yourself running into complications you should inform the clients that the fee is going to exceed the estimate and not just assume that the client will anticipate a higher fee.

A number of years ago I changed my car and the insurance premium shot up. When I rang up to query this, the man at the other end looked at my details on his computer screen and said: "You have been with us a long time, Mr Swanson; in fact you have been with us since before I was born." There was a legitimate reason for the increased premium but I was then offered a £60 discount. I switched the cover to another company. Strangely enough, if I had not been offered a discount I would have left the cover with the original insurers but I felt that if there was a discount going I should have received it automatically. If a client complains about a fee, be very cautious about offering a discount in case the client takes this as evidence that they have been overcharged. Try to resolve the matter by other means, possibly by allowing extended credit or even offering to do a free will.

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

ASK ASH

Stay or go?

I enjoy my current work, but doubt I can progress

Dear Ash,

I have been offered a new role at another company, and although the pay offer is great, I have now been advised by some friends that the atmosphere at the new firm can be tense and challenging, with high work expectations. There is also a relatively high staff turnover.

I do enjoy working at my current firm but I don't think I can progress in my career without moving roles. I am therefore caught between career ambition and maintaining a comfortable working environment.

Ash replies:

I can appreciate that before making your final decision you want to ensure that you have all the facts to make an informed decision.

Having feedback from your friends is important, but make sure you can verify the accuracy of the information you have been provided. It may be that there *were* previous challenges in the firm, but due to the high staff turnover this may have prompted an effective review, and the issues being subsequently addressed?

Also at the same time you should sufficiently explore why you feel there is limited career progression at your current firm. Have you looked at addressing this issue with your line manager, and have you explored the possibility of leveraging your new job offer to help expedite and improve your current role and conditions?

As we spend a large part of our lives at work, it is important not to underestimate the value of a good working environment. Therefore if you can improve aspects of your current role to your satisfaction, I would urge you to consider this seriously before jumping to a new role.

Whatever you decide, it is great that you are taking steps to review and improve your career prospects; and I have no doubt that you will make it work no matter what you decide! I've always taken inspiration from a saying by TS Eliot:

"If you do not push the boundaries, you will never know where they are." Good luck!

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).

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FROM THE ARCHIVES

50 years ago

From "*Faculty Services Ltd", March 1973*: "Some measure of august secrecy may sometimes appear to surround the activities of the Faculty of Advocates. This is unfortunate. Perhaps it is inevitable in a body so small as the Faculty, and in one which lacks any kind of written constitution. Justice may be thought to be as long as the Dean's foot. Nevertheless, the Faculty has many of the virtues of a perfect democracy. The Dean is elected annually upon the universal suffrage of all members, and any member may attend any meeting... It is inconceivable that the Faculty would send a circular to its members like that recently sent to English Barristers by the Bar Council which narrated that if no increase in income was forthcoming the Bar Council would cease to operate well before the end of 1974."

25 years ago

From *"Renouncing the Right to Prosecute", March 1998*: "Much more questionable is the effect which appears to be given to policy statements by the Lord Advocate. This whole area has developed in a remarkable way without the full implications being addressed in the courts. It is a massive leap from saying that the Crown can abandon proceedings which they have started in an individual case... to the position where a public statement of policy can bar prosecutions even for offences which have not yet been committed..., yet this leap was made simply on the basis of a concession by the Crown."

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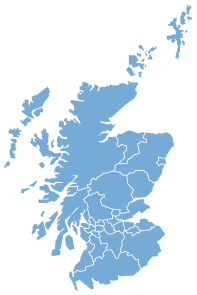

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Iain William Semple – Deceased
Would anyone holding or knowing of a Will for the above, last known address being 7 Clincarthill Road, Rutherglen, Glasgow, G73 2LF, please contact Jade Dupont at Dupont Associates, Gordon Chambers, 90 Mitchell Street, Glasgow, G1 3LY (0141 221 1403 or jade@dupontassociates.co.uk).

WILLS BANK WANTED

If any firm is interested in selling a Wills bank please contact journalenquiries@ connectcommunications. co.uk quoting Box Number J2155.

Campbell Whitehouse Thomson (Deceased)
Would anyone holding or knowing of a Will for the above, latterly of 80 Clarence Gardens, Glasgow G11 7JW, please contact Jennifer Rennie of R & RS Mearns, 2 Carment Drive, Glasgow G41 3PR (Email: jarmearns@gmail.com/ Tel: 0141 632 6162)

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NQ 2023 OPPORTUNITIES

We continue to see a busy market for NQ roles, and firms and organisations are still instructing us on new opportunities for NQ solicitors. We have listed a few of the roles we have been instructed on below; these would be suitable for candidates qualifying or who have qualified this year.

Personal Injury Solicitor (Defender) – Glasgow/Edinburgh
This busy Personal Injury Team is currently recruiting a Solicitor to join the team in either Edinburgh or Glasgow. You will deal with a range of personal injury claims on behalf a number of insurer clients. (Assignment 14747)

Professional Indemnity (Construction) – Glasgow
Exciting opportunity for a Professional Indemnity Solicitor to join this Professional and Commercial Risk team in Glasgow. (Assignment 14656)

Solicitor (Environmental, Waste & Renewables) – Edinburgh
This dynamic firm is currently seeking a newly qualified Solicitor to join its Environmental, Waste and Renewables department, based within its Edinburgh office. (Assignment 14628)

Commercial / Residential Property Solicitor – Ayrshire
An established Ayrshire-based firm is seeking to recruit a full time newly qualified solicitor. This role will cover all aspects of commercial and residential conveyancing with the possibility of leading into rural matters. (Assignment 14700)

Private Client Solicitor – Edinburgh
An exciting opportunity has arisen for a junior private client lawyer within a highly regarded firm. The ideal candidate will be at the NQ – 2 years' PQE level, ideally with previous experience in private client work. (Assignment 14758)

In-House Commercial Litigator – Edinburgh
This organisation is seeking a Commercial Litigation Lawyer to join its busy team who focuses on offshore wind developers. (Assignment 14676)

Property Lawyer (Development & Investment) – Glasgow/Edinburgh
A market leading UK law firm is growing, and it currently has a need for a Property Lawyer to join its busy team based in Edinburgh or Glasgow. (Assignment 14757)

Banking & Finance Solicitor – Edinburgh/Glasgow
A recognised UK commercial firm is seeking a qualified solicitor to join its busy Banking and Finance Team. This team advises clients on a range of transactions across a variety of sectors, including other jurisdictions. (Assignment 14657)

To discuss any of the above roles further or for just a general chat around the market, please do not hesitate to contact either teddie@frasiawright.com or stephanie@frasiawright.com for an initial and confidential discussion.

Frasia Wright Associates, The Barn, Stacklawhill, By Stewarton, Ayrshire KA3 3EJ
T: 01294 850501 www.frasiawright.com

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