Keeping the faith

Are there times when our courts should recognise Islamic Sharia law?

Stronger or weaker? Should judges be open to complaint?

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Contact

The Law Society of Scotland
26 Drumburn Gardens
Edinburgh EH3 7YJ
Tel: 0131 226 7411
Fax: 0131 225 2934
e: lawscot@lawscot.org.uk
www.lawscot.org.uk

President: Richard Henderson
Vice-President: Ian Smart
Secretary: Douglas Mill

Editorial Office
Connect Communications
Studio 2001, Mile End, Paisley
PA1 1JS
Tel: 0141 560 3018
Fax: 0141 561 0400
e: journal@connectcommunications.co.uk
www.journalonline.co.uk
Editor: Peter Nicholson
e: peter@connectcommunications.co.uk
Review editor: Alistair Bonnington
e: alistair.bonnington@bbc.co.uk
Website news: Emma Braid
e: news@connectcommunications.co.uk
Design & production: Debra Campbell, Alan Morton, Paul McIntyre
Advertising sales: Tel: 0131 561 3021
e: journalsales@connectcommunications.co.uk

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Regular items

5 Editor
Be ready for home reports

7 President
Quality and standards

9 Opinion
Christine Lambie: paralegals

10 Letters
Bleak prediction; lucky bet

32 Professional news: Society
(More in the box below)

37 Current consultations

39 Notifications

40 People
Firms and lawyers on the move

42 Professional practice
42 IT: catching website views
44 IT: creating a winner
46 Retaining staff

50 Professional briefing
50 Civil court
52 Employment
53 Family
54 Executries

56 Discipline Tribunal
58 Websites

59 Book review

60 Property lawyer
Home reports: minister responds

63 In-house
Procurement initiative

64 Sidelines
Abby; Alistair; Hearsay; Six

68 Classified

71 Update

72 Recruitment

60 Looking forward to December

62 Power of persuasion
Marcus Stone concludes his series by discussing advocacy and factfinding

63 Reach of the law
Kavita Chetry on how the UN adds to companies’ human rights duties

65 Out of the spiral
LawCare’s advice on helping people with depression

66 Judging the judges
Peter McNell and Al Gordon debate the proposal for a complaints system

67 Goodwill factor
The Journal and Scott-Moncrieff CA bring you the charities round table

68 Live and kicking
Registers and solicitors celebrate the first full ARTL transfer

69 Lifting the veil
John Fotheringham suggests it’s time to look at the place of Sharia law

70 Judging the judges
Peter McNell and Al Gordon debate the proposal for a complaints system

71 Goodwill factor
The Journal and Scott-Moncrieff CA bring you the charities round table

72 Out of the spiral
LawCare’s advice on helping people with depression

73 Preparing for government
“Why do it? It’s a job”, President Henderson tells the Journal
Whether or not the home report sceptics have a point, clients will still be looking for help and solicitors will have to be ready to win their business.
Quality assurance
The debate and decision on alternative business structures will be a key part of the Annual General Meeting on 22 May. Much has been said on the options for reforming legal services, and many of these views are reflected in the responses to the consultation and in the policy paper which was published at the end of April. Now members of the profession have another opportunity to contribute directly to the discussion, and I would urge all those with an interest to come to the AGM and make their views known. The importance of this debate for legal services, today and in the future, should not be underestimated.

The Society’s focus has been to ensure that the quality of legal services, and the integrity of the solicitors’ profession, are maintained regardless of the course of action taken. The profession has risen to the government’s challenge to determine how legal services should be delivered in Scotland and in so doing determine our future as a profession.

Future present
In considering both ABSs and standards, the Society is keen to scan the legal horizon and develop policy that will meet the needs of solicitors and their clients well into the 21st century. We hope to develop that forward thinking further at the Society’s conference, the day after the AGM. The theme of the event is “The Legal Profession in Five Years’ Time”. With the prominent legal commentator, Richard Susskind, and the Cabinet Secretary for Justice, Kenny MacAskill as speakers, the debate on our future will continue and should be lively.

Paralegals on board
Paralegals already make a vital contribution to the provision of high quality legal services. Recognising their professionalism and creating a formal system of regulation has been under discussion for some time. The agreement to forge ahead with the introduction of a new “Law Society of Scotland Registered Paralegal” status is therefore a welcome step forward.

The principle behind this move was backed unanimously at last month’s Scottish Paralegal Association AGM and subsequently also endorsed by the Society. Work on the detailed arrangements will now begin, but I am sure that the introduction of a badge of quality will benefit paralegals, solicitors and clients. It is also another example of the changing role of the Society.

Beyond our shores
I was reminded that profound change is taking place in many places beyond our borders and shores at the annual conferences of the law societies of Ireland and Northern Ireland, in Budapest and Berlin respectively. Both were important events which gave delegates an opportunity to consider a range of key issues, with the Budapest conference including an interesting contribution from John Bruton, the former Taoiseach and current EU Ambassador to Washington. He spoke of next month’s Irish referendum on the Lisbon Treaty and the important implications of that vote on the rest of the EU. There is a great responsibility on voters because the treaty cannot come into force if it is not ratified by the referendum. But it is a responsibility that must be confronted.

The decision of the Irish electorate on the treaty is of an altogether different magnitude to the issues facing the Society and the profession. However, we share the certainty that our actions will impact on many others beside ourselves. It is one of many reasons why we must consider carefully the choices that we make.

The focus has been on simplifying the existing standards... A reference group of non-lawyers is helping draft standards that are clear for clients as well as solicitors

Standards unveiled
The delivery of clearer standards for the profession is another area where the Society is making progress. The focus has been on simplifying the existing standards rather than setting new ones. A reference group of non-lawyers continues to help the Society draft standards that are clear for clients as well as solicitors. The standards project has now reached the public consultation stage and I hope it will generate substantial feedback.

President Richard Henderson
The changing role of the Society is reflected in the issues that dominate the scene this month, beginning with the imminent AGM.
Opinion

All solicitors have an interest to support the project to regulate the provision of legal services by paralegals, and to take advantage of the scheme finally approved

Paralegal regulation – why?

I have no doubt that as the media pick up on the current proposals to regulate paralegals in Scotland by instituting a registration process, the question “Why” will be frequently asked by members of the legal profession. Is this simply another burden to add to all those they currently labour under (not forgetting cost), and what benefit can be gained by their ensuring that their paralegals are registered?

The Scottish Paralegal Association (the professional body for paralegals in Scotland) has been campaigning for several years for some form of regulation to be put in place for those working as paralegals in Scotland. This campaign received little support until 2006 when the Scottish Government began to take a closer interest in the provision of legal services in Scotland, particularly in relation to ensuring that standards were in place for all those involved in the offering of legal advice by the profession, in addition to practising solicitors who are, of course, governed by the Law Society of Scotland regulations. It is currently estimated that there are some 10,000 people working in Scotland as paralegals, and they are found not only in private practice but also in-house in commercial companies, local authorities, courts, insurance companies, etc.

Our current membership covers paralegals with a very wide variety of qualifications and a wide area of employment, but at this time, unless paralegals are members of the SPA, they do not have to meet any grading criteria or standards and therefore there is no comfort for employers that they are qualified and competent to do the role they are employed for. To quote one of our members, “Everyone and their granny appear to be calling themselves paralegals”, and there was frustration among our members that this required to be rectified.

So what is proposed and what are the benefits to solicitors, paralegals and clients? The Law Society of Scotland and the SPA have been working on a joint venture for the past 18 months to put in place a workable regulatory scheme for paralegals. It is proposed that a Law Society of Scotland register of paralegals be put in place, and that paralegals who wish to become registered will require to hold a formal qualification and also to meet competency levels in specific areas of legal work to do so. Registration will automatically give membership of SPA. A consultation paper will be circulated in May to a wide variety of people throughout Scotland to give their views on the current proposals, and we would encourage everyone who is contacted to respond. Requests for the consultation paper, and comment on it, can be sent to registeredparalegal@lawsoc.org.uk.

It is the joint view of SPA and the Society that the following are the main benefits to all concerned:

- Reassurance that paralegals have the level of skill required by professional bodies;
- Clear outcomes for those wishing to train paralegals in-house and for education providers;
- Reassurance that the Society and the SPA are taking responsibility for this field – being best placed to define the market through qualifications and standards;
- Competitive advantage: firms with “registered paralegals” working within them will achieve a competitive advantage by employing and offering a highly qualified and skilled workforce to their clients – something which can be used as a very valuable marketing tool in the present competitive climate, particularly for high street firms.

I am also delighted to say that we have the support of the new Scottish Legal Complaints Commission which, although confirming that responsibility for the actions of paralegals lies with the supervising solicitor, is keen to see standards for paralegals put in place. I have heard it suggested that should there be a complaint made by a client regarding work done by a paralegal, if the solicitor can provide evidence that the paralegal has been registered as a Law Society of Scotland registered paralegal, this could provide a defence for the solicitor that he/she has taken all reasonable steps to ensure that the paralegal was competent to do the work, at least in relation to any question of misconduct. Should the paralegal not be registered, then it will no doubt prove a more difficult task to provide this evidence of competency and the solicitor, at the end of the day, may suffer accordingly.

I hope this gives some indication of what is proposed, and both the Law Society of Scotland and the SPA welcome feedback. Please contact us through the email address above.

Christine Lambie is President of the Scottish Paralegal Association

Christine Lambie
Diversion and SLAB proposals may see our courts become ghost towns

A rogues’ charter

Tumbleweed blows through empty bar common rooms throughout the country. WRVS canteens are closed and notices for coffee have yellowed. Abandoned gowns have become mildewed and disintegrate in the corridors.

Empty courtrooms echo after 10.30am. The sheriff has gone fishing. Outside the court, the former lawyer is playing a 12 bar blues on his guitar, obtaining the odd 50p from an exiting fine payer. The other legal dinosaurs would all be on the golf course, but their subscriptions have lapsed.

This fantasy is not so ridiculous. You have all seen the demise in civil legal aid. In Edinburgh there are realistically only four firms who now regularly take on civil legal aid work, and they are jumping through administrative hoops and working 24/7 to stay on the treadmill.

Criminal practitioners are facing a familiar scenario with the latest double whammy:

First, there is diversion. A recent Scottish Government poster showed a procurator fiscal at his desk before and after “diversion”. Before, he is grumpy and has lots of files. Afterwards, he has hardly any files and is smiling. Is this what the public want?

The Edinburgh Criminal Justice Project, which has been operating a “fast track” procedure for about a year, showed a “non-prosecution” rate of 39%. Alternative measures – warning letter, fixed penalty, social work counselling and even community service – are being employed by the court instead of taking people to court. Well, the theory does make sense for appropriate cases, but will the practice bear this out?

Whilst it is unfair to criticise a procedure which is in its embryonic stages, the guidelines appear to be indistinct and in many instances inappropriate.

The Sunday Times of 13 April pointed out to some effect the guidelines relative to the “three stitches” theory. In an assault case. If an injury requires less than three stitches, the case should not be prosecuted as it is to be regarded as a “minor injury”. A quite ludicrous proposition.

We see examples of recidivists on bail either not being prosecuted or being prosecuted in the district or JP court. Despite the upgrading of sentencing for offensive weapons, a man with an analogous previous conviction was last week (as I write) prosecuted for an offensive weapon in the JP court. We had understood from government pressure that such cases were to be tried on indictment and bail was to be opposed!

This week again in the JP court, pleas of not guilty were simply accepted by the Crown to a number of complaints alleging assault, shoplifting and breach of the peace.

Apart from the obvious loss of business to the court as a whole, will the public continue to support a justice system which accepts breach of the peace for less than three stitches, the case should not be prosecuted as it is to be regarded as a “minor injury”. A quite ludicrous proportion.

Whilst it is unfair to criticise a procedure which is in its embryonic stages, the guidelines appear to be indistinct and in many instances inappropriate.

Secondly, we see that after a long consultation period where lawyers carefully argued detailed attacks on SLAB proposals for summary justice, SLAB just changed the goalposts completely on a “take it or leave it” basis.

What was the fixed fee for a case going to trial is now being virtually offered for a plea of guilty (a resolution fee). This cannot be right. The work involved in a case going to trial is considerably greater and more onerous. What is wrong with payment on a time and line basis at commercial rates? We also all know from experience that when SLAB say “swings and roundabouts”, you know they are at some time going to reduce whichever one proves beneficial to the practitioner – and this will doubtless occur to the present resolution fee.

SLAB are also insisting on what they call “solemn block fees”, and this to an already uneconomic fee system following the advent of disclosure. Du Plooy (early plea discount), and the absence of the allowance for precognition. Some cases simply cannot be properly prepared within this structure.

Defence lawyers are unsurprisingly obtaining the impression that when there is a (rare) prosecution, the state wants people to plead guilty with the least possible fuss and everything is being geared up to sweep all these cases under the carpet.

The police can hardly be impressed with the new regime; but if cases are not tested and challenged, we move further towards a police state. In China, if as a lawyer you win a trial, you are an instant celebrity, it’s so rare! Enough said.
Those criminal practitioners who manage to survive this pestilential drought will doubtless be impressing upon the Justice Secretary that for those few cases that are going to be left in the system, there will have to be a substantial increase in legal aid if the same budget as from last year is to be employed (as he apparently promised). Such is the level of ill feeling, defence agents are making an approach to the Law Society of Scotland to lobby for the removal of any restrictions on their right to strike.

Defence lawyers are not just bleating for more money. This is now a stark question of survival – and their survival is necessary to enable access to justice for those prosecuted.

In the meantime the prisons are bursting at the seams. If diversion is supposed to alleviate that overcrowding, it will not be long countenanced – specifically by victims of crime and generally by the public at large.

I think I'm gonna dust my blues…

Roy M Harley, Solicitor, Edinburgh

Comply and be thankful

As I approach retirement I am at long, long last grateful to the Law Society of Scotland for their regular audit.

I have always had a flutter on the Grand National even though my knowledge of the horseracing world could be written on the back of a very small postage stamp. I read through a list of the runners and choose a horse whose name jumps out at me.

This year, having just experienced the Society’s audit, I spotted a horse called “Comply or Die”, and had a bet put on before it became a favourite.

Many, many thanks to the Law Society of Scotland.

Morven Cumming, McLennan Adam Davis, Ayr

Above: Comply or Die: advice for the audit … and the Grand National

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Although the Archbishop of Canterbury caused controversy when he raised the possibility of parts of the Islamic Sharia law being assumed into UK law, John Fotheringham believes that in the context of family law it is time for a serious look at the subject.

Faith in the law

D

dr Rowan Williams, the Archbishop of Canterbury, caused a storm, intentionally or unintentionally, by saying that the incorporation of some aspects of Sharia law into the law of the United Kingdom is “inevitable”. Even assuming that he was referring to English law rather than the law of the UK as a whole, his comments were remarkable enough. But what is Sharia family law?

If Muslims living in Scotland wish to regard the Sharia as their personal law in preference to the general law of Scotland, to what extent should the Scottish courts acknowledge this and give it weight? Is it actually ever proper to take note of the Sharia and its policy in a Scottish family court? Is it proper for Muslims to seek remedies through the Sharia courts within the UK, on analogy with the principles of international private law?

The debate is picking up speed in England. The issues will have to be addressed in Scotland sooner or later. Scotland does not have the huge and coherent Muslim populations found in the large English provincial cities and in specific areas of London. Nevertheless it may be useful to have a look at what some of the Sharia principles actually are.

Differing traditions

Within Sharia law there are different schools of thought. There is one main school for Shi’ite Muslims and four main schools for Sunni Muslims. Because of this there is no universally accepted version of Sharia law, and the following should be taken as a general guide only. The great majority of Muslims within the UK are Sunnis, but it is important to ask which community your client belongs to before seeking expert advice.

I will look first at Muslim divorce, since that is probably the area which is most misunderstood in the west. The allied question of recovery of matrimonial property, including dower, is one which can arise in the context of a Scottish court interpreting the intention of a donor or applying the terms of a pre-nuptial contract. This is an area in which Scots law can be more useful and flexible than the law of England for Muslims intending to divorce.

Divorce: myth and reality

The first myth about Islamic divorce is that it is open only to men. This is not correct at all – it is just that the rules for divorce actions can differ depending on the gender of the applicant. Scotland does not have the huge and coherent Muslim populations found in the large English provincial cities and in specific areas of London. Nevertheless it may be useful to have a look at what some of the Sharia principles actually are.

Talaq rules: first seek reconciliation

“If you fear a break between the two, appoint two arbiters, one from his family and one other from hers; if they wish for peace, Allah will cause them reconciliation: for Allah has full knowledge and is acquainted with all things”: Qur’an (Koran), chapter 4:35

pronounces talaq when his wife is in a state of purity, i.e. not menstruating. If she is not in that state of purity, the talaq is not allowed. As soon as the talaq is pronounced (i.e. the words “I divorce you”), the wife immediately enters the period of iddat, which lasts for three menstrual cycles. During this period there is to be no sexual contact between the parties. If there is any such contact the talaq is revoked.

The pronouncement of the talaq may be orally or in writing, but must in any event be done before two adult male witnesses. There is no particular form of words, but they must be clear in intention.

The husband has the option of several other kinds of divorce; some of which are regarded by Islamic jurists as being un-Islamic. The various Islamic schools of legal thought disagree about some aspects of the validity of the different kinds of divorce.

The myth in the west is that the husband can divorce his wife by
pronouncing talaq three times in one go. Some parties from the subcontinent sometimes regard this form of divorce as valid, but almost all schools regard this talaq al bidah as unlawful. There is no doubt that the first option – the talaq under the preferred procedure – is by far the commonest in modern Islam.

Divorce by the wife
The wife may divorce her husband on any one of a number of grounds, such as physical harm, apostasy, and separation without agreement for a period of four months during which no sexual relations have taken place. There is a radical shadow here of s 1(2)(e) of the Divorce (Scotland) Act 1976, as amended by the 2006 Act. Actually, the Qadi can grant divorce on any cause which he considers justifies it. As with the approved talaq form of divorce, the wife’s khulah also involves an iddat period of waiting. Once again this lasts for three menstrual cycles or, where appropriate, three lunar months. If the wife is pregnant at a time when she seeks her khulah, the waiting period is until the birth of the child.

The mahr (dower)
One area of Islamic family law which has no echo in Scots law is the mahr (pronounced “mahoor”). It is very common in Islam – some jurists say compulsory – that when a couple marry, the groom should give to the bride the mahr – that is, a gift of some value. (The translation as dower or dowry perhaps ignores that “dowry” implies a sum of money settled on the bride by her father to improve her chances of a good match, and given to the husband.) The value should depend on the economic circumstances of the groom and has absolutely nothing to do with those of the bride. Even if the bride is very much wealthier than the groom there is no reciprocal gift. The mahr can be a sum of money, a house, a car, a prayer mat, or even an incorporeal gift such as a promise on the part of the groom that he will learn Arabic. Usually however it involves a gift of intrinsic value, and it should be agreed and witnessed. There are two forms of mahr – an immediate payment at the point of marriage, or one deferred to a later

The myth is that the husband can divorce his wife by pronouncing talaq three times in one go

Continued overleaf >
agreed date or event – and any given marriage may have either or both. The deferred mahr is particularly significant in divorce, because if the husband divorces the wife he must pay her the deferred mahr on divorce no matter the ground of divorce he has selected. If the wife divorces the husband, she must usually waive the deferred mahr and may also be required to repay any mahr she has received. Clearly some wives will be subject to a degree of pressure from their husbands or their husbands’ families to divorce the husband in order that they can save money.

Treatment in the courts
The mahr was considered by the English courts in Shahnaz v Rizwan [1964] 3 WLR 1506. The parties had married in India in 1955 and had agreed a deferred mahr in a written marriage contract. The husband divorced the wife in 1959 and the wife raised an action in England, where both parties then lived, for recovery of £1,400 as the sterling equivalent of the deferred mahr. Shahnaz v Rizwan was considered by the English courts in 1986, s 54 and Chaudhury v Chaudhury [1984] 3 All ER 1017; El Fadr v El Fadr [2001] 1 FLR 175; Ahmed v Ahmed 2004 Fam LB 68-7. Various Sharia councils have been set up in England to resolve civil disputes in Muslim communities. They have no recognised judicial role, of course, but their decisions are regarded as binding by those communities in which they are set up. They can only ever be courts of voluntary jurisdiction, but they are rather more deeply rooted than ordinary arbitration because of the divine nature of the law in the eyes of those who use this jurisdiction.

Valuing the mahr
The Qur’an does not give any precise formula for the amount of the mahr, so early commentators had to decide on at least a minimum sum. In Medina, for example, the mahr was fixed at a minimum of three dirhams, which was the minimum value of the goods in respect of which a thief had to be convicted before he was subjected to the penalty of amputation.

Some more radical Islamic thinkers would prefer to see the UK courts treating the mahr as an essential part of any Islamic marriage, and accordingly treated as an implied contract even where it is not reduced to writing. This is surely a step too far for the Scottish courts.

Financial support
Under Islamic law the payment of any financial provision is from the husband to the wife, irrespective of their relative wealth. Claims are for income – the only capital claim the wife can make is for payment of her mahr, which may have to be interpreted according to s 16 of the 1985 Act. Income claims are payable only for the period of ʿiddat, or to the end of the time when any child of the marriage is still being suckled.

Assets in the name of either party acquired before or during the marriage remain in the name of that party. Joint assets are to be divided in an equitable manner, failing which the Qadi will decide the matter. In respect of children the father has a continuing duty to maintain the children throughout their childhood at a level which is reasonable in the circumstances.

Questions of recognition
The Scots courts will be concerned with Sharia divorce chiefly in the context of the recognition of foreign decrees – see Family Law Act 1986, s 54 and Chaudhury v Chaudhury [1984] 3 All ER 1017; El Fadr v El Fadr [2001] 1 FLR 175; Ahmed v Ahmed 2004 Fam LB 68-7. Various Sharia councils have been set up in England to resolve civil disputes in Muslim communities. They have no recognised judicial role, of course, but their decisions are regarded as binding by those communities in which they are set up. They can only ever be courts of voluntary jurisdiction, but they are rather more deeply rooted than ordinary arbitration because of the divine nature of the law in the eyes of those who use this jurisdiction.

Feature Sharia law

There is a large Muslim population in the United Kingdom, and a growing population in Scotland. There has not been the degree of general integration which most commentators anticipated a couple of generations ago. Communities practise their religion with great seriousness, though unfortunately the media tend to view that with ever lessening objectivity and sympathy. Nevertheless, although one Muslim regarding the Sharia as his personal law may not be very important to public policy, thousands of Muslims regarding the Sharia law in the same way cannot be ignored.

If law is an art it is a practical art, and if law is a science it is an applied science. If members of these large Muslim communities actually seek the jurisdiction of the Sharia councils and are willing to accept their judgments, it is at least arguable that what the councils dispense is properly described as law, even if they have none of the enforcement powers of the ordinary civil courts.

The debate about recognition of the importance of the Sharia law is overdue. We should not allow that debate to be derailed by those who confuse it with the shrill demands of some extremists who seek effectively an independent Muslim state within the UK or even within Scotland.

One can at least recommend a greater understanding amongst Scots family lawyers of what the Sharia says – the better informed a debate is, the more likely it is to produce a useful answer.

John Fotheringham is a consultant to Fyfe Ireland LLP, Edinburgh and Glasgow, and an accredited family law specialist.
ARTL: The Full Monty

ARTL first full transfer
On Thursday 17 April 2008, the first full property transfer, including the processing of stamp duty land tax (SDLT), successfully took place through the Automated Registration of Title to Land (ARTL) system, marking a key milestone for the Registers of Scotland (RoS) ARTL project.

The transaction involved PSM Direct (buying agent) and Somerville & Russell (selling agent).

Representatives from the Law Society of Scotland, HM Revenue & Customs (HMRC), BT and RoS attended the PSM Direct office in Dunfermline to observe the first transaction (pictured).

Commenting on this significant development...
Andy Smith, Director of Registration, RoS: “This is a major step forward in the development of ARTL and a milestone in our eRegistration programme. ARTL will improve the way in which Registers of Scotland delivers services to solicitors, the financial community and ultimately the Scottish public. It has enabled us to reduce registration fees for ARTL transactions.”

Kyle Peddie, chief executive, PSM Direct: “We have been involved in the live remortgage pilot since August 2007 and have experienced the benefits that using ARTL brings to us and to our clients. Today marks an important step in the rollout of ARTL to the legal profession and a significant milestone in the history of conveyancing in Scotland.”

Pamela Duncan, Somerville & Russell: “We are extremely pleased to be involved in the first full transfer of a property title using the ARTL system. This is an exciting time and a huge leap forward for Scottish conveyancing.”

Professor Stewart Brymer, Law Society of Scotland: “This is a major milestone in the development of ARTL. It represents a significant step towards full e-conveyancing. I am confident that, in ARTL, Scotland has world-leading technology in eRegistration of which we should be proud.”

Tom Kelly, director, BT Devolved Government: “The use of digital signatures in a system of this kind is a first in Europe and has allowed a traditional, paper-based process to be transformed into a highly sophisticated, online system.”

To find out more about ARTL, visit: www.ros.gov.uk/artl.

Changes to bankruptcy legislation
Part 1 of the Bankruptcy and Diligence etc (Scotland) Act 2007 came into effect on 1 April 2008. Part 1 of the Act introduces a number of significant changes in the bankruptcy regime. For instance, debtors will be discharged from bankruptcy after one year; and debtors will now apply to the Accountant in Bankruptcy instead of the sheriff court for their own sequestration.

The new legislation has an impact on transactions with heritable property which are entered into by debtors or their trustees in sequestration. There are also new provisions for the reversion of property from the trustee to the debtor.

As a result of these changes, solicitors may see a number of new types of deed being disclosed in searches of the Register of Inhibitions. Practitioners should also be aware that there are a number of changes in the Keeper’s requirements regarding the documents to be produced with an application for registration in the Land Register, where either the trustee or the debtor is a party to a transaction.

These changes are summarised in a news brief at www.ros.gov.uk/registration/bankruptcyupdate.html.

Enquiries on the requirements for applications for recording in the Register of Inhibitions should be made to CAJR on tel: 0131 479 3629 or fax 0131 200 3917.

Enquiries on the requirements for registration in the Land Register should be made to Pre-Registration Enquiries on tel: 0845 607 0163 or fax 0131 479 3675.

2008 Budget: stamp duty land tax
The 2008 Budget has removed the need for an SDLT60 (self-certificate) to accompany an application for registration in the Land Register or an application to record a deed in the General Register of Sasines or Books of the Lords of Council and Session where the application/deed relates to a non-notifiable land transaction.

HMRC has also extended the category of “non-notifiable transactions” to include all transfers of title where the consideration is less than £40,000. This £40,000 threshold applies to both commercial and residential property. This change applies to non-notifiable transactions with an effective date on or after 12 March 2008.

The Keeper continues to have a duty under s 79 of the Finance Act 2003 to ensure that any land transaction which is notifiable is not accepted for registration or recording without an SDLT5.

Further information can be found at www.ros.gov.uk.
Experts involved in the charity sector from various perspectives met at the invitation of the Journal and auditors Scott-Moncrieff for a round table discussion on the health of the sector. As Peter Nicholson reports, the diversity in size and activity of charitable bodies ensured a lively discussion.

Two into one
The Scottish charity sector is incredibly diverse, in reasonable health, and learning to live with the regime policed by its new master, OSCR.

A somewhat oversimplified summary, perhaps, but the Journal’s first sponsored round table discussion – hosted by Scott-Moncrieff, leading auditors to the charity sector – covered a huge range of topics, presenting quite a challenge to compress into a single report.

“Am I the only one who wonders if the average Scot would be puzzled that we are having this conversation in the context of charities?”, Bill Pagan of Pagan Osborne wondered at one point, as the panel considered the growing local authority practice of contracting services to the sector, with the attendant issues of competition from private sector business, whether it helps or hinders the charity achieve its objects, and more.

But given that the 24,000 or so charities in Scotland cover everything from the Church of Scotland, generating over £100,000,000 income each year, through grant-giving endowments, not-for-profit service providers, community bodies and others, as well as the traditional fundraising “good cause”, and it can readily be seen that there is plenty of scope for debate over issues concerning the sector.

One topic that caused relatively little comment was the well-aired question of the divergent Scottish and English definitions of charitable purposes, with HMRC insisting on compliance with their rules for tax relief purposes. While there was broad agreement with Pagan’s comment that “It seems to defeat the object of having devolved legislation”, it also emerged that the Revenue authority, at least, doubts that in practice any body will be found to be charitable by either itself or OSCR but not by the other. Our panel were not so convinced, as the English Act doesn’t mirror the Scottish requirement to be independent of ministerial control, an important principle in the eyes of the Macfadyen Commission which preceded the Act.

As Scott-Moncrieff’s Gillian Donald, herself a member of the Commission, pointed out, the Charities and Trustee Investment (Scotland) Act 2005 debars a body subject to ministerial appointment from being a charity, which put at risk the charitable status of all of Scotland’s further education colleges. Rather than addressing this by making them independent, the Scottish Government has simply exempted these colleges from the relevant part of the Act.

Surely, however, as Anderson Strathern’s Anne Swarbrick noted, this principle also raises the issue whether grant-giving trusts should be able to control what recipients do with the money – and they say, of course they should, because they too have to ensure it is being used for their charitable purposes.

“It’s worth having debates about the boundaries”, commented Duncan Munro, director of the grant-making Robertson Trust, “so that ministers or local government officials don’t just start extending their reach and telling you what you should do. I think these things are absolutely fundamental.”
Both Munro and Richard Hellewell, chief executive of Royal Blind, argued for a distinction between economic control through contractual terms, and management control – and there was wider agreement that local authority representatives who sit on management boards often have difficulty applying the principle of independence required of trustees. “They don’t understand it: you sit in on trustees’ meetings and you hear councillors say ‘Well my council thinks…’”, Bill Pagan observed.

Critical mass
Advice in relation to forming new charities, and merging existing ones, raised interesting observations. First of all, why are there still so many small charities often doing similar things, when it was thought that the Act would encourage mergers?

To Alan Eccles, of Maclay Murray & Spens, whereas larger charities are likely to consider strategic mergers, with smaller ones and their trustees “the idea of ending a charity is quite difficult.”

Dianne Wilde of Barclays Wealth, whose division supports charity investments, agreed. “There is so much emotional energy invested say in a family oriented charitable trust, to look at winding up or merger or whatever, it’s not just about ego.” She knew of an outdoor centre whose trustees wanted to change its operation and hand over after 30 years in office, and liked the idea of selling up and becoming a community fund, but had difficulty in actually letting go.

Duncan Munro thought, to general agreement, that at least with smaller charities, mergers only happened where there was some prior nexus: “The time people give to boundary scanning as you would do in a big company doesn’t really exist… it tends to be ad hoc, such as a particular trustee or circumstances that bring them together.”

Gillian Windever of HBOS had a good example of successful collaboration between charities: two community transport companies successfully joined forces to win the contract to transport people about the London Olympics. Conversely, national charities sometimes set up Scottish offshoots because they find it easier to fundraise in Scotland that way.

Nick Bennett of Scott-Moncrieff predicted a “huge influx” of charities with local authorities as sole trustees, taking advantage of the merger provisions in the Act. “There are literally hundreds if not thousands of charities that are frankly too small, they can’t afford their charitable purposes or these no longer exist or have been superseded. Finally OSCR have got their teeth into it and have begun demanding that they produce accounts – these small single-charity trusts are going to have to reorganise.”

More controversial was whether OSCR could or should play some sort of gatekeeping role when benefactors are proposing to set up a new foundation. “Collectively the adviser sector should be saying hang on a minute, couldn’t you put it into a fund with XYZ, there are many charities out there with the scale”, suggested Giles Ruck, chief executive of the Scottish Community Foundation, which matches donors to community causes. But on OSCR playing that role, “That would be engineering; it’s not part of their remit.”

But is it engineering, Gillian Donald asked, to say there are 15 charities in your sector doing your thing – why don’t you go and talk to them first?

Hellewell, who was with OSCR in its “formative period”, told us that it had been discussed, before the Act was passed, “whether they should create a regulator with that kind of broader power, and it didn’t go the full way”.

Bill Pagan: “I’d be absolutely livid if I were a potential benefactor of a charity in some way and an outside person said, actually what you should do is give it all to the Bill Gates Foundation. It would stifle philanthropy.”

Ruck pointed out that in England the Charity Commission puts charities’ annual reports and accounts on its website, and a
market has grown up providing analyses of the data to potential donors – but there’s no Scottish equivalent because OSCR doesn’t provide that facility.

Dianne Wilde agreed. “If charities want to get serious about their act, they want to get serious about how they report – where’s the transparency; how does anyone find out about what they do?” Although there is a legal right to the information, it can be hard to get hold of “and it really has to be a double click… I do think there is more of a role for OSCR to play in this without them becoming too all-powerful”.

Feeling good factor
Are charities as a sector more upbeat about their prospects in the current economic climate than business generally? If so, why? A survey published in March by the National Council for Voluntary Organisations suggested this was indeed the case, though our panel had various suggestions as to the reasons – and queried whether some downturn might yet take place.

“This whole confidence thing is difficult”, commented Richard Hellewell. “I think it’s true of charities and business that senior management is all about thinking positively. Maybe the balance is different for a charity manager.”

Gillian Windever suggested that being salaried rather than having a personal stake in a business might make a difference to charity managers at present – “there isn’t the same fear factor” – and Dianne Wilde added that the business preoccupation with the bottom line and balance sheet contrasts with the charity sector’s focus which looks more to the social aspect.

Dianne Wilde agreed. “If charities want to get serious about their act, they want to get serious about how they report – where’s the transparency; how does anyone find out about what they do?” Although there is a legal right to the information, it can be hard to get hold of “and it really has to be a double click… I do think there is more of a role for OSCR to play in this without them becoming too all-powerful”.

Innovation and risk
Ruck raised the question of whether trustees are becoming more risk conscious, or risk averse, and the influence if any of local authorities in this area. Although he thought charities were some years behind commercial companies in this respect, others considered the subject less of a novelty.

Donald noted that in devesting themselves of, for example leisure and cultural activities to the charity sector, local councils are trying to divert themselves of certain employment and pension-related risks, whereas the charity sector has welcomed them with open arms”. Ruck thought this illustrated his point – “risk management is front of line but I’m not convinced it’s at the board table of medium sized community charities”.

Munro suggested it wasn’t about devolving risk but devolving financial responsibility, on a parallel with PFI’s. “And it’s not surprising if you’re trying to

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"The big risk area for charities is when a small charity becomes a big charity, and it has to adapt"

devolve financial responsibility that certain chickens come home to roost in the future." As a more general comment he wondered whether the risks to trustees in a more regulated world would "inhibit charities being good at what traditionally they are good at, which is innovating and taking risk, not simply doing the things that are there already, but forging new ground. It would be very sad if there is a sort of 'risk-averse creep' that spreads out from the public sector that inhibits that sort of vitality."

Sloan was more optimistic. "I think there is a greater spirit of innovation and entrepreneurship among charity leaders now than there probably has ever been", he remarked, referring to how they are doing different things to sustain their future and broaden their income streams. He added that this applied to communities as well as individuals, "and that collective community spirit I see burning bright in lots of different places now."

Ruck still wondered whether service provider charities were being led so much by their service level agreements that it was "squashing out the capacity for leadership". He quoted SCVO data suggesting that in the last financial year the third sector subsidised local authorities to the tune of about £180 million. "Clearly that's not sustainable, but it echoes the point that charities have willingly taken on this work."

Nick Bennett thought there was a real financial risk for trustees especially where charities inherit local authority functions. "In effect the authorities are only doing it to cut costs, leaving the difficult decisions to trustees who are going to have to shut pension schemes, make real cuts in services, and I'm not sure that some of the trustees for example on local authority leisure trusts, acknowledge that that's what they're getting themselves into."

It was soon after this that Bill Pagan made the intervention quoted in the introduction – he quoted in the introduction – that this kind of activity was regarded as charitable?

Ruck recalled that "A think tank in London proposed that if your income was 85% or more public sector, you should lose your charitable status." Donald: "That kind of loses the point of beneficiary good."

Sloan suggested that the average member of the public "will have no conception of the organisations that exist like Aberdeen Foyer [which combats youth homelessness and unemployment], or Dundee Cyrenians [resettlement accommodation for homeless adults], or Kibble School in Paisley [education and care for youths with behavioural and other difficulties] who have got so many different dimensions to them that, yes they are a charity, but the range of things they do, in the great majority of cases people will not twig."

Best provider?
Discussion led on to public attitudes to donating towards bodies that are largely council funded, and what they expect local authorities to provide – something Giles Ruck had experienced as affecting support for an innovative adult learning project, one not in fact within the council's legal responsibilities. He suggested that even over the 85% funding level, a charity could still use its other revenues to support something innovative. Hellewell added: "And it's that local authority work that gives that body the critical mass, the size and weight in order to use that money to best advantage."

But as Bennett pointed out, it leaves the charity vulnerable to spending cuts. Dianne Wilde asked if there was an assumption that charities were more efficient than local authorities in providing services. Munro mentioned a study of the care home sector, with its balance of public, private and charity sector providers, which concluded that there were good and bad examples of each type and no general conclusions could be drawn. Others commented on the different accounting practices that made comparisons difficult, the effects of relative size, and the respective decision making processes.

Do charities become more inefficient with size, particularly in terms of decision making?
Hellewell suggested that "a large charity needs large charity type trustees, and a small charity needs small charity type trustees, who are more hands on and at the coalface. The large charity needs people who are used to the idea of what strategic thinking is about, and need to know what reading the danger signals is about and the right kind of alertness to reading the accounts etc… The big risk area for charities is when a small charity becomes a big charity, and it has to adapt, because it needs a different skill set on its board."

The threshold point, he added, couldn't be exactly defined – it depended on its activities and its management challenges. Sloan observed. "It's one of the most difficult things in a whole host of businesses I've been involved with, the management of growth and the ability to understand that you've reached a point where you need to stand back and be a proper managing director, and delegate to others and trust them to do the things that you want to."

Pagan: “It’s not the management of growth, it’s the growth of the management.” Sloan: "Absolutely."
feature LawCare

Spring is not a time that lightens everyone’s mood, and Trish McLellan of LawCare highlights the need for support and understanding for those suffering from depression.

Full of the joys of spring?

With light nights, flowers in bloom and the summer holidays on the horizon, spring is usually a time for optimism. But for some people, the dark chill of winter is not something that lifts with the start of the cricket season.

Indeed for those unfortunate enough to suffer from prolonged stress, or depression, the joys of spring can deepen their sense of isolation, hopelessness and despair. Those little things that lift most hearts can have the opposite effect on those who are struggling with stressful/depressive aspects in their life.

The onset of spring can bring its own strains. The approach of holidays, and the seemingly constant interruption of bank holidays, mean that work can pile up at the same time as pressure increases to comply with deadlines and make suitable arrangements for the break. For conveyancers, the period immediately after the Easter househunting peak can be their busiest time of year.

At home, older children will be facing the trauma of exam time, and for parents who are busy dealing with their own pressures, it can be difficult to find the time to stop and think about what their children are going through.

Younger children may also have their families and colleagues suffering problems which can deepen their sense of isolation, hopelessness and despair. Those little things that lift most hearts can have the opposite effect on those who are struggling with stressful/depressive aspects in their life.

Something deeper

Depression however is not the same thing as feeling down or having that Monday morning feeling. It is an illness, just as heart disease and diabetes are illnesses – and one in five people will suffer it at some time in their life.

Although as many as one in 20 workers suffer from some sort of depressive illness, 75% of them try to hide it from employers, line managers and colleagues, such is the perceived social stigma. Unfortunately, more and more employees are finding that their history of mental illness and/or addiction becomes a barrier to employment. Despite the fact that it is illegal to discriminate on grounds of mental health, 47% of people with past mental health problems report that they have experienced discrimination and difficulty getting a job because of them.

In a recent survey, 200 managers were asked to assess the employment prospects of two (fictional) job applicants. The applications were identical except that one applicant had diabetes, and one had recovered from depression. The applicant who had recovered from depression was seen as “significantly less employable” than the diabetic.

Statistics bear this out: 33% of people with long term health problems such as diabetes and MS are in employment, as against only 13% of those with mental health problems.

Fear of the unknown

Employers are naturally wary of what they do not know or understand. In today’s competitive and strictly regulated profession, they need to be certain that their staff are reliable and competent. A better understanding of certain health issues on their part could benefit hundreds of lawyers who find themselves regarded with suspicion because of past problems. Those suffering from, or recently recovered from, depression or other mental illnesses need to be treated with fairness and understanding, and given every opportunity to rebuild their lives and careers.

What should I look out for?

- Absenteeism;
- Falling productivity;
- Indecision;
- Bad decisions;
- Poor morale and uncharacteristic lack of cooperation;
- Complaints of aches, pains or tiredness on a regular basis;
- Disruptive, interfering or domineering behaviour;
- Alcohol or drug abuse, are just some of the indicators.

Encourage those concerned to seek help initially from their GP. Modern anti-depressant drugs are very effective, especially if used in conjunction with counselling.

Depression can be successfully treated in more than 80% of cases. It has widely been accepted for a number of years that unacknowledged or untreated stress, depression and addictive illnesses are significant factors in disciplinary matters, negligence claims and claims on the compensation fund. Such conditions destroy careers, affect the image of the profession and lead to misery for the affected lawyers and their families, not to mention the problems created for their professional colleagues and clients.

LawCare: free, confidential help

LawCare offers health support and advice to solicitors, their families and colleagues suffering problems which are interfering with or have the potential to interfere with work performance and/or family life.

The freephone helpline is entirely confidential and is available by calling 0800 279 6869, 9am-7.30pm Monday to Friday and 10am-4pm weekends and bank holidays.

Callers to the helpline can be put in touch with professional counsellors or treatment centres and provided with written information about their impairment. There is also a network of lawyer volunteers who have recovered from such problems and are available to befriend and support suffering lawyers.

A secondary purpose is to inform and educate the legal profession generally on the causes and consequences of such problems and how to seek help for themselves and their colleagues. Consequently, free* CPD-accredited seminars are available dealing with stress recognition and management, to help prevent the problems caused by disillusioned staff. For details about these, email: admin@lawcare.org.uk.

* We do ask that our expenses be paid, and some organisations choose to make a donation.
The government believes that alleged misconduct by a judge should be open to investigation as part of its "Strengthening Judicial Independence" measures. Peter McNeill however argues that the proposals are badly thought out and liable to weaken the judiciary.

The government proposals for "Strengthening Judicial Independence in a Modern Scotland" are wide ranging, but I would like in this article to focus on "conduct" of judges (also referred to as "discipline"). "Judge" of course includes "sheriff".

My starting point is the independence of the judiciary, which has been part of the Scottish constitution by statute since 1689, and probably at common law from the foundation of the Court of Session in 1532.

Under the existing arrangements, if a judge goes wrong, the situation is not without remedy. Where the judge makes an apparently wrong decision in a civil or in a criminal case, the decision can be appealed in the appropriate way.

If a judge is thought to have become unfit for office ("by reason of inability, neglect of duty or misbehaviour"), the present system of dealing with that situation has worked well since Acts of 1877 and 1898 in the case of sheriffs. And the application of a similar system to the judges of the Supreme Court came about just recently: Scotland Act 1998, s 95(6) to (11).

This means that judges cannot be removed without good cause, and they should not be penalised for their decisions. These, like the freedom of the press, should not be interfered with without good reasons.

If a judge is not unfit for office, he must be fit for office. The present proposals envisage the creation of an
unwieldy apparatus to deal with some amorphous thing – called indiscipline or misconduct – something in between fitness and unfitness.

A serious problem?
Each year, judges make hundreds of thousands of unremarkable decisions at all stages of criminal and civil cases. The present proposals do not give any figure for the occurrence in the course of these decisions of unacceptable behaviour; and surely the incidence of cases where a judge’s conduct falls short of conduct which would raise a question of fitness for office, must be minute. And indeed on the showing of both consultative documents themselves, that incidence would be small. Yet, what is proposed is an elaborate structure for dealing with a problem of unproven gravity and unproven frequency.

Any attempt to define true misconduct immediately raises a host of difficulties. These difficulties would be apparent whether the conduct touches on the judicial function, such as delay in issuing judgments (which was canvassed in the earlier government document), or relates to the judge’s personal conduct in court, such as rudeness.

Since the evil is not widespread, there is a danger that the very existence of such a procedure would encourage a barrage of allegations of inappropriate behaviour from any source, and would create a perception of widespread failings within the judiciary.

Loss of judicial time
What if the judge disputes the allegation, say of delay in issuing judgment? It may be that the complaint is erroneous, and that the judge had already issued the judgment. Or it may be that the judgment has been delayed because it is necessarily long and complex, because it followed a long and complex proof, or because the judge has been assigned to other more urgent business (such as an adoption proof), or because the judge was ill.

Also, during the currency of the inquiry, the courts would be deprived of the services of both the judge and the judges.

Let us further assume that the judge has been found to have been guilty of some misconduct. Then, the judge may appeal against that decision, thus causing further significant delay.

Such delay is not fanciful: it has happened in a case involving the fitness of a judge. In 1992 the judge took a judicial review against the decision which found that he was unfit. The case was finally heard by five judges in the House of Lords in 1998: see 1995 SLT 895, 1996 SC 271, 1998 SC(HL) 81, and the case was heard over six years by a total of nine judges (or 11, if one includes the two judges who held that the judge was unfit).

Now it is suggested that there will be the involvement of the Lord President who may appoint other members of the judiciary to investigate any complaint, with a possible review by two other judges.

Clearly, on the other hand, in an extreme case, if a judge does persistently fail to issue judgments without cause, that may indicate that the judge is unfit, by reason of “neglect of duty”, or “incapacity”. Then, that unfitness can be established by using the statutory procedure which presently exists.

Thus, if the “inappropriate behaviour” is trivial, it is not worthy of an inquiry; if the conduct is indicative of unfitness, the existing procedure would meet the situation.

Transparent system
The present system for removing an unfit judge provides for the involvement of all three branches of government, but in a system of checks and balances. The judiciary (the Lord President and Lord Justice Clerk) may make an inquiry into the fitness of the judge. The executive (the First Minister or Scottish Ministers) may make the order removing the judge. And the legislature (the Scottish Parliament) may annul the order.

Over the last 40 years (and presumably before then) this simple and elegant system has met all problems that have emerged, apparently without criticism. The result has been, in the cases that have arisen (and there have been very few), that the unfit judges have been removed (two, by my recollection); the fit judges have remained in office (probably not more than 10 examples); and in one or two cases, judges have resigned before any inquiry.

As for openness and transparency, nothing could be more open and more transparent than to have the proceedings available for all to see as a public record, such as Hansard, which has the report of the Lord President and the Lord Justice Clerk finding that the judge was fit or unfit; in the case of an unfit judge, the order of the executive removing the judge; and the debate (if any) in the Parliament on the motion to annul the order.

On the other hand, the proceedings which are now proposed are to be confidential, “except where the Lord President considered that it would be in the interests of the administration of justice for the outcome to be given some publicity”.

But what is misconduct?
The government came to the view, after the original consultation, that there was “general agreement that no attempt should be made to define what might constitute inappropriate conduct”: now they anticipate “that the required standards would be determined by the judiciary and set down in a code of conduct or judicial ethics under the authority of the Lord President or, perhaps, the Judicial Council”.

It is difficult to imagine how anyone, even a future Lord President or a judicial council, would go about the mammoth task of setting down such a “code of conduct or judicial ethics”, especially deciding what the code would include or, more

Continued overleaf >
The disposals which are proposed have an almost arbitrary ring to them.

Who might complain?
A fundamental decision will be whether the scheme envisages that anyone off the street could complain about real or imaginary breaches of the code (as with complaints about advertising standards), or that the class of complainers should be limited to those involved in the litigation, or those present in court, or the press or the local faculty.

Whatever the classes of complainers, the Lord President would have to sift the mass of complaints, whether or not they are to be struck out because they are directed at the merits of a judicial decision, or are vexatious, trivial or lacking any supporting evidence. It is not clear whether the offending judge would be heard in this sift ing process.

Penalties and purpose
The penalties which are envisaged for misconduct do not extend to dock ing the judge's salary. But the disposals which are proposed have an almost arbitrary ring to them, leaving the judge in limbo.

The Lord President would have "a general power to suspend from office any judicial office holder in circumstances where the Lord President was satisfied that such suspension was necessary to maintain public confidence in the judiciary".

Now, one can understand the Lord President and the Lord Justice Clerk recommending that a judge be suspended pending their investigation into the fitness of the judge (as is competent under the existing procedure), but not (as is suggested here) an actual suspension with nothing pending. It is difficult to imagine what kind of misconduct would justify suspension, and what amount of reformation would warrant lifting the suspension.

Similarly, uncertainty appears in another of the disposals for misconduct: for example, the Lord President would be given power to give the defaultor "a formal warning". A formal warning of what? Proceedings for removal? Or something else?

Uncertain course
All in all, what are we to make of these proposals? Some phrases spring to mind: do not legislate for admittedly rare birds, and do not mend something that is not broken.

My submission is that the proposals do nothing towards "Strengthening Judicial Independence in a Modern Scotland", but rather the reverse. The minister says: "Until we reach decisions on the role of the Lord President in the governance of the Court Service, we cannot take a firm view on the subsequent legislation", including arrangements for conduct of the judiciary.

Surely, the best course would be not to proceed with subsequent legislation dealing with the conduct of the judiciary.

Peter G B McNeill was a sheriff for 30 years in Glasgow and Edinburgh and is a former President of the Sheriffs Association.

Sheriffs behaving badly
Sheriffs are just like everybody else. We all make mistakes; we all have bad days. This article is about what happens when the mistakes are repeated, or the bad days become weeks, months or years. And what we should be doing about it.

We all make mistakes…
Several years ago, for reasons I can't remember, I wrote to the Scottish Office (as it then was) asking if anybody there kept statistics on judicial performance. I was particularly interested to see whether they kept tabs on sheriffs' appeal records. I was pretty surprised when they replied that they didn't keep any such statistics at all. It seemed to me that there was at that time no monitoring of sheriffs' performance on the bench. A case could therefore be made that in no other area of public service are so many people with so much power exposed to so little effective public scrutiny.

While researching this topic, I came across a reference to concerns expressed in the House of Commons by an English MP, following newspaper reports claiming that there were certain English judges who were four or five times as likely to be appealed as their colleagues and who were frequently criticised by the Court of Appeal. From the answers given on behalf of the Department for Constitutional Affairs, it would appear that no statistics were kept in England either, as it was thought that to do so might be perceived to amount to political interference.

Anyway, even if appeal statistics were kept, where would that take us? If, for example, we knew that Sheriff X's charges to the jury kept resulting in convictions being overturned, or if we knew that Sheriff Y was repeatedly criticised for the ineptness of her civil judgments, what exactly would be the consequences for those sheriffs? Should it not be possible for sheriffs to be ordered to undergo, for example, retraining? What level of judicial error should we be prepared to tolerate? Who else in public life would get away with such a lack of consequences?

Now, I have no idea whether any sheriff actually fits the above bill(s). I think I'm correct that, in the relatively recent past, only one sheriff has been compulsorily removed from office. In that case, however, I remember hearing about his antics long before his removal. The stories were the stuff of common room gossip.

I realise that removing a sheriff...
is an extremely serious business, but space doesn’t allow me to get into just how cumbersome are the relevant procedures. My point, in any event, is this. Yes, the sheriff was ultimately removed, but it took an awfully long time.

It’s also rather odd that when I read appeal judgments, the sheriffs against whose decisions appeals have been taken are almost never named by the appeal judges, whether in the Inner House or the criminal appeal court. Why is that? Counsel and agents are often named and shamed – why not sheriffs? This seems to be a matter of our national judicial culture. While I was writing this article, my attention was drawn to some examples of misbehaviour by judges in England. In one case, the appeal judges did not shy away from severely criticising the judge below, but also repeatedly referred to him by name.

**We all have bad days…**

In any event, and while the appeals process acts at least as a corrective to bad decisions, what about what happens on the way to the decision being made? What about plain old bad behaviour? I remember for instance being appointed curator ad litem in a children’s hearing case to a child with emotional problems. When in court, he remained mute and refused to answer any of the sheriff’s questions. The sheriff then proceeded to yell at him and tell him he was just being rude. It seemed to me he’d clearly not read the papers. If I’m wrong about that, then he’d even less excuse for such poor behaviour. Both I and the children’s reporter in the case were quite appalled. I’m sure we could all add other examples.

Anyway, my point is this: ought there not to be some way of addressing behaviour that most observers would regard as unacceptable? Yes, you can appeal, but very often it’s not the outcome of the case that’s the problem – it’s the process. I’d argue the current situation is clearly unsatisfactory in any sense. For example, assuming you want to make a complaint about a particular sheriff, how do you go about it? To whom do you complain? Most solicitors I’ve spoken to don’t even seem to know. Scottish Courts? The sheriff principal? What will they do? Will you even find out if anything is done to address your complaint? I know one or two solicitors who asked to speak to sheriffs privately to express unhappiness at how they felt they’d been spoken to. Frankly, though, most wouldn’t even think about complaining.

It therefore seems to me not just that judicial appraisal is necessary and desirable in a modern democracy – the surprise is that we’re only talking about it now, and talking about it openly. Isn’t judicial appraisal just quality control? And, in turn, isn’t quality control at least partly about transparency? How can the public have confidence in its judges without it?

**… but we don’t bother to check**

It’s instructive to look at how all of this is done elsewhere. Even a casual trawl of the internet brings up numerous examples of how other countries manage things differently. For example, some American states publish in detail judicial performance on websites, although it has to be acknowledged that this probably arises from the fact that judges are elected officials there. Other states have independent judicial review boards. For example, Colorado in 1988 set up a commission on judicial performance for the purpose of providing voters with responsible and constructive evaluations of judges and justices seeking retention. Judges are also expected to self-assess.

The ideal of self appraisal seems to have been taken up in England, as I understand it, in the case of part time judges. I am not aware of any plans to do the same thing here for part time sheriffs, although I accept that applicants for shrival positions have to engage in self assessment. Why, however, should the process of self assessment stop on appointment? Why in fact should the process of assessment tout court stop on appointment?

Anyone applying to the Judicial Appointments Board for Scotland has to demonstrate that they meet a number of criteria: for example, that they are courteous, possess integrity and sound temperament, can deal with complex issues, and so on. Now, we can all say, of course we have those qualities; and of course references are required when applying. Where exactly is the check, however, that the successful applicants are in fact meeting those criteria on the bench, where it really matters?

I appreciate that part time sheriffs are subject to review every five years, but that’s to do a disservice to the word “review”. I’ve no idea, for example, how their performance is actually reviewed. I do know, though, that the JABS does not carry out the kind of poll of court users referred to earlier. I have no idea what criteria it even applies in deciding whether or not an applicant’s appointment should be renewed. I’ll make a suggestion of my own, though – how about the JABS publishing the names of appointees seeking retention, and inviting informed comment?

**A minority? So what?**

Yes, it would be easy to say that the vast majority of sheriffs probably do their jobs perfectly well, and treat the public, agents and other court users with respect. That’s probably even true. It wouldn’t be the point, however. Going to court is stressful enough for most people, and a bad sheriff can make it so much worse. (Conversely, good sheriffs can really create a feeling that justice has been done, even if the outcome is adverse.) Why should even a minority get away with bad behaviour? It’s precisely the minority that have the potential to undermine public confidence.

I also appreciate that there’ll be entirely legitimate concerns about opening the floodgates to frivolous complaints against our judges, about ending up with a judiciary that feels itself beleaguered and undermined. I don’t want to see sheriffs having to defend themselves in the press either. Nevertheless, it must be possible to strike a balance between the need for scrutiny of the judiciary and the need for judicial independence. We surely can’t say that such a balance can’t be found, and in any event, we’ve hardly even made a start.

It’s therefore very much to be welcomed that the Scottish Government is finally addressing these issues. It’s just a pity we’ve had to wait so long. It’s also a great pity that the momentum here didn’t come from the profession.

**Postscript:** Just so everything’s open and above board, yes I am one of the many unsuccessful applicants for a part time sheriff’s position. But I have no criticism of the interview process, and thought it entirely fair and reasonable. And no, I’m not saying that because I might want to apply again!

(A number of people helped me with this piece, some of whom asked for their contributions to be anonymous. I’d like, though, to thank Sheriff Andrew Cable in particular for his valuable comments on an earlier draft of this article.)

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Al Gordon is principal of Al Gordon, Solicitors, Glasgow
Summary trials: deciding the facts

If witnesses were not questioned and simply volunteered information in the witness box, nothing would come between them and the bench. But in our courts, lawyers, acting as advocates, intervene in this relationship. They select the witnesses and control and edit their testimony.

As partisans in a situation of conflict, the advocates’ presentations of this evidence are guided by persuasive tactics. Undoubtedly all this must influence a court’s decisions about facts in some way. Any study of the decision-making process must take the role of advocacy into account. But this is a large and complex subject. The present discussion only focuses briefly on how several salient features of advocacy play a part in determining the facts.

Examination in chief
In examination in chief, advocates lay the foundations of their cases. Their selections of witnesses completely determine the sources of testimony which a court can hear. Additionally, the advocates largely control the flow of information from these sources. Further, with significant skill, they present this evidence in ways which they expect will persuade the court to convict or acquit the accused.

Selection of witnesses
Prosecutors call at least as many witnesses as they need for corroborative evidence which may lead to convictions. Ethical questions may arise about when they should include witnesses who might support the defence. The defence need not call any witnesses, but usually does. Courts sometimes draw incriminating inferences if the accused does not testify. In deciding the number of witnesses each party may balance the possible gain from increasing the volume of testimony against the added risk of harmful inconsistencies.

Selection of evidence
So far as possible, advocates control what their witnesses say, usually on the basis of their precognitions. Advocates avoid questions to which they cannot foresee the answers. To a great extent, evidence in chief tends to be predetermined and inflexible. But a wise rule prevents advocates from putting words into their witnesses’ mouths by leading questions, except on undisputed matters.

Yet advocates cannot control evidence in chief completely. Witnesses may unexpectedly forget or remember something, develop doubts, change their minds or express something in an unwanted way.

Despite these occasional deviations from an advocate’s control, however, on the whole evidence in chief is usually what parties want and expect – not a spontaneous report, even if it is truthful.

Tactical presentation of testimony
A whole book would be required for a detailed description of the presentational skills of advocacy and their influence on factual judgments. Undeniably, advocacy is not a neutral component of criminal trials. Whatever the standard of skill may be, advocacy can be expected to make a difference to some extent. But it would be unacceptable if advocacy alone determined the outcomes. Fortunately for the administration of justice, that is certainly not the case.

Re-examination
Re-examination is an opportunity to repair damage caused to testimony by cross examination, or to clarify something or fill a gap, but not to examine the witness in detail.
again. Re-examination is optional and is often omitted. It is generally the least persuasive stage of questioning witnesses. Its significance for the court depends on the circumstances.

Cross examination
In cross examination, parties, in effect, confront one another and two contradictory versions of the facts become explicit. Cross examination may be of three types:

- **New facts or perspectives**
  All witnesses are bound by law to testify truthfully and accurately, irrespective of the party who called them and the outcome their evidence may support. So cross examination of opponents’ witnesses is often aimed at eliciting new facts, or modified ways of looking at facts about which the witness has already spoken. This may be effective and helpful to the court with truthful witnesses. Such additional evidence could be very persuasive. It is difficult for advocates who called witnesses to support their cases to challenge their further evidence when re-examining them.

- **Misstaken testimony**
  Cross examiners routinely try to undermine adverse evidence by contending that it is mistaken, uncertain or incomplete. Grounds for this approach were discussed in the second article. Simply suggesting such defects without probing how they arose will just invite denials. Sound cross examination aimed at exposing mistakes, doubts or gaps in evidence can be of real help in the court’s assessment of testimony.

- **Lying testimony**
  It is common for cross examiners to allege that witnesses are lying. This criticism may seem to be unfounded unless it is shown that they have some significant motive for doing so. Lying in court for trivial reasons or for no reason at all would be odd. The credibility of evidence may be challenged effectively on the grounds discussed in the first article. But unsupported suggestions that witnesses are lying may have little or no effect. Good cross examination which challenges testimony effectively may have a substantial impact on factual judgments by highlighting and exposing a lack of credibility or reliability. But even if strong cross examination fails in its aims, it may still serve a useful purpose for the court by testing and reinforcing adverse evidence – although the cross examiner did not intend this.

  Sometimes a cross examiner must challenge the adverse evidence of witnesses who know the facts, by putting his/her own case to them for comment in order to avoid the risk of the court’s inference that the cross examiner has accepted the adverse evidence. Evidence on credibility or reliability without demonstrable grounds may occasionally have a suggestive effect *per se*, namely, as discussed in the second article, the acceptance of an idea simply because it is presented. But it is to be hoped that courts would resist such influences.

Final speeches
Final speeches summarise the evidence and present arguments for conviction or acquittal. Whether or not speeches add greatly to the effect of the evidence varies according to the situations and advocates’ abilities.

**Judgment on the facts**
A court’s decision about the facts in a trial has several aspects.

- **Time for decisions**
  The bench should decide the facts when it is considering the verdict. All the evidence and speeches can then be compared and weighed. Earlier decisions would be based on incomplete information and disregard of much of the trial process, including advocacy. Early views should only be provisional, not final. An open mind throughout the whole of a trial is proper judicial practice.

- **Basing decisions on all the evidence**
  The great virtue of a criminal trial is that it can ascertain the truth by comparing interlocking or conflicting information from multiple sources after it has been thoroughly tested.

  The material considered by the bench includes the witnesses’ personal qualities, particularly their motives. The credibility and reliability of the information which they provide is scrutinised carefully after the advocates have striven to expose internal inconsistencies and improbabilities in their opponent’s testimony.

  The key to reaching correct decisions about facts in a trial is this total approach rather than any single factor in the evidence.

- **Weight of the evidence**
  The weight of evidence is its cumulative persuasive effect and is a matter of personal judgment. This is a different concept from the legal sufficiency of evidence, which refers to corroborative proof of guilt. The weight of evidence also differs from the volume of evidence, which refers mainly to the number of witnesses who support a particular version of the facts. The volume of evidence, like the agreement of a number of witnesses about certain facts, sometimes adds to its weight. But a large number of witnesses could all be lying or mistaken, whereas a solitary dissenter could be truthful and accurate.

  The weight of the evidence about both the commission of the crime and the accused’s responsibility for it, must attain the standard of proof beyond reasonable doubt for conviction. For an acquittal, the weight of the evidence need only fail to reach that standard on either of these two main issues.

- **The nature of judgment**
  This final discussion of judgment has so far focused on its objective and practical aspects. However further exploration of the process of judgment itself is best left to cognitive psychologists and logicians. It is questionable whether anything of practical value for lawyers would be contributed by these sources.

No tribunal of fact is infallible. But given the necessity of the rule of law, and despite human limitations, no better way than a fair criminal trial for ascertaining the truth about unacceptable conduct seems to exist anywhere in the world.

Marcus Stone, a sheriff for 25 years and now a mediator, is the author of several books on deciding facts in courts and advocacy. He is now writing another book entitled *Deciding the Facts in Summary Criminal Trials.*

E: marcusstone@btinternet.com
A new United Nations report is likely to increase the legal pressures on business to conform to – indeed promote – international standards of human rights, particularly when operating in countries with poor human rights records. Kavita Chetty explains

Soft law, hard edge?

Legal, financial, reputational, and operational risks to business are inextricably intertwined. This is particularly true in the field of business and human rights, where commercial lawyers must be coaxed out of their hard-law comfort zone to appreciate the multifaceted nature of the challenges and the response. The stories linking companies with human rights abuses are well documented. The damage to Shell’s reputation when protestor Ken-Saro Wiwa was executed by the Nigerian government is now a classic business school case study. BP in Colombia, Google and Yahoo in China, and Nike and GAP in Asia, have all suffered the consequences of exposed abuses. In recent weeks, sponsors of the Beijing Olympics have been called on to condemn China’s oppression of pro-Tibet demonstrations and failure to pressurise trading partner Sudan to end atrocities in Darfur.

When companies operate in sensitive parts of the world, where human rights violations are systemic and governments unwilling or unable to fulfil their responsibilities, the challenges and risks become acute. A company may confront labour, contractor and health and safety standards, and security and environmental issues, as well as demands to fulfil needs of the local community.

This is more than a call for philanthropy or legal compliance. It is a call for business as an economic and social actor wielding unprecedented power, to step up to the plate of new responsibilities. It also represents a shift from “bottom line” to “triple bottom line” – people, planet and profits.

Over the past decade there has been a momentum towards defining corporate human rights responsibilities. Globalisation, the privatisation of political power and the lack of a coherent legal framework have created a gap permitting corporate-related human rights abuses to occur. Accountability, which has been in the courts of public opinion, aided by active civil society and global communications, rather than in the law courts. What we are now seeing is the coming together of an international response to this governance gap whereby states and companies will be held accountable for violations.

Developing legal enforcement

The point of departure is the international human rights framework. The Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and the International Covenant of Economic Social and Cultural Rights, form the core. These place legally binding obligations on states, but cannot be directly translated for business, which does not carry the same responsibilities.

The reach of the law to protect against corporate-related human rights violations at both international and national level has been piecemeal to say the least, although societal norms and expectations are now propelling innovative developments.

In the US, the Alien Tort Claims Act has been used where multinationals have committed human rights violations abroad (most notoriously the Unocal case for abuses in Burma). In a House of Lords case, Lubbe v Cape plc (No 2) [2000] 4 All ER 268, the Lords permitted a workers’ case against the company for asbestos-related injuries to continue in the English courts, as the South African courts were not found to be a viable alternative due to lack of legal aid and legal representation. There is thought to be scope for jurisdictions to develop the use of extra-territoriality to hold multinationals accountable.

A further pioneering use of the law in the US was seen in Kasky v Nike, where an activist claimed that Nike made false statements over sweatshop labour in supplier factories. Again, there is considered to be scope in other jurisdictions to transform not just CSR reports but voluntary codes of conduct into standards to which companies can be held legally accountable.

In some countries the law seeks to provide incentives for companies through the concept of corporate culture, where policies, rules and practices are taken into account in deciding corporate criminal liability and sentencing.

Meanwhile, businesses anxious to protect their reputation have used contractual terms to ensure human rights compliance by suppliers, thus shifting the issue from voluntarism to legal obligation. Increased privatisation of public services also opens the opportunity for governments to use its purchasing and contractual power to include social considerations in procurement criteria.

In the UK, the Companies Act 2006 requires directors to “have regard” to matters such as “the impact of a company’s operations on the community and the environment.” It also imposes a degree of CSR reporting for UK quoted companies, potentially encouraging closer scrutiny of suppliers and partners.

Internationally, the developing hard-law for business is likely to
include liability under criminal law. The legal concept of complicity, the indirect involvement of companies in human rights violations, may give rise to criminal and non-criminal liability. So may the International Labour Organisation (ILO) Convention on Forced Labour, criminalised in most jurisdictions, but with relatively few prosecutions. This may change however with the ILO undertaking the training of judges.

**Plugging the gap?**

These legal developments are significant but disparate. Various voluntary initiatives have sought to plug the gap by defining the role of business and putting standards in place, as expected by stakeholders. The UN Norms for Business, adopted in 2003, attempted to do this but ultimately failed to get traction with either business or non-governmental organisations.

Some sectors have developed standards on core issues such as the Voluntary Principles for Security and Human Rights, and the OECD Guidelines for Multinational Enterprises. The ILO has developed explicit guidelines for companies, and the IFC and World Bank funding requirements include social risk assessments, but none of these initiatives take on board the full spectrum of rights. The UN Global Compact brings together around 4,000 participant companies to support principles in the areas of human rights, labour, the environment and anti-corruption, but is criticised for lack of enforcement.

Despite the proliferation of such initiatives, until now there has been a lack of focal point and overarching framework signed up to and supported by all.

**Towards a common framework**

A major milestone comes in the form of the recently published report by the UN Secretary General’s Special Representative for business and human rights, Professor John Ruggie, “Protect, Respect and Remedy: A Framework for Business and Human Rights”. This is likely to be adopted in June by the Human Rights Council and is significant in allowing the adoption of a substantive position on the current and potential future responsibilities of both states and companies.

Ruggie recognises that there is a state duty to protect against abuses by non-state actors, including business. The UN treaty-monitoring bodies recommend that states take all necessary steps to protect against abuse, including to prevent, investigate and punish the abuse, and to provide access to redress. The report also highlights the corporate responsibility to respect human rights as a baseline expectation that they do no harm. It cites business organisations such as the International Organisation of Employers, and International Chamber of Commerce, who recognise that companies “are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent”.

**Managing business’s responsibility**

Companies must now rise to the challenge of ensuring they meet this duty to respect not only legally binding standards, but those that have come to be expected by stakeholders, giving them the “social licence” to operate. It is arguable that a “do no harm” line may be insufficient to meet these demands, as business is often called upon to demonstrate how it is a force for good, and may be required to contribute to the promotion and fulfilment of rights.

The experience of many companies is that taking a proactive approach to managing human rights can turn social risk into business opportunity. Cairn Energy did so with the problem of water scarcity in Rajasthan, where water was required for operations but safe drinking water for the community was in short supply. This involved risk assessment analysis of Cairn’s responsibilities within its spheres of influence, and stakeholder engagement to reach an agreed framework of shared responsibilities and roles with the state administration. To ensure respect for human rights is a challenge for any well-intentioned company, and cannot be neatly dealt with by a CSR or sustainability director, human resources, or other manager or legal adviser alone. A coordinated, often top-down, approach is required and the role of lawyers, in a field which is legal at its core and ultimately legal in its reach, should not be underestimated.

The UN report recommends to companies a process of “due diligence” (note the choice of term as explicitly legalistic). This process is identified as requiring a human rights policy, impact assessments, integration and a monitoring and tracking process.

Companies should now consider adopting these practices to avoid allegations of abuse or complicity. Some sectors already conduct environmental or social impact assessments, which may inherently include human rights-related impacts but may not address all projected issues across a company’s sphere of influence. A consensus around human rights impact assessment methodologies is being reached and can be expected to be gradually introduced into management systems around the globe. Ruggie’s last report stated that “No single measure would yield more immediate results in the human rights performance of firms than conducting such assessments where appropriate”.

Much of the debate over the past decade has been around the efficacy of voluntary initiatives and the need for a binding regulatory framework. Ruggie has moved this debate on, defending voluntarism while paving the way for new standards of intervention to emerge, allowing no party off the hook.

So for now, business and human rights may be broadly characterised as soft-law in nature but with a hard edge of reputational and legal risk. The UN report, however, signposts the potential for a future increasingly characterised by hard-law and legal consequence combined with a softer edge of voluntary leadership. The next generation of commercial lawyers and advisers can expect to play a part in this shift, as business enters new markets and is compelled to take a proactive approach to human rights challenges.

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Kavita Chetty is a human rights solicitor with McGrigors LLP

This represents a shift from “bottom line” to “triple bottom line”: people, planet and profits
Hands-on chief

Richard Henderson: factfile

- Born in Glasgow, brought up in Fife, went to school in Perthshire, came to Edinburgh to study and never left the city – “unless you count living outside it”.
- Joined the Government legal service on qualifying in 1972, working his way up to Solicitor to the Scottish Executive and Head of the Government Legal Service for Scotland – “a title I invented” as a consequence of devolution.
- Retired from the civil service in May 2007 having been awarded a CB.
- Co-opted to Council in 2000 with a particular interest in training.
- Interests outside the law: “Golf. And staying alive.”

Interview Richard Henderson

In the month when the President-elect is normally preparing to step up, Richard Henderson has already held office for over half a year. And having the former head of a government department in charge at the present time appears to be a bonus for the Society, as Peter Nicholson reports.

C ometh the hour, cometh the man. Is it just coincidence, or was some guiding hand at work? Whatever the answer, the fact that the former senior government lawyer in Scotland is set to become the longest serving Law Society of Scotland President in modern times, at a pivotal moment in the history of the Society and the profession, is likely to be seen in retrospect as particularly valuable. Not that Richard Henderson had much inkling of such an outcome when he assumed the vice presidency last May, on leaving his government post. His unexpected elevation less than four months later, brought to sudden public prominence someone who jokes that as a civil servant he “much preferred the shadows to the light”. However there can have been few periods in the Society’s history when an ability to get things done behind the scenes was a better qualification for its President that it is now.

It is instructive to hear Henderson describe, for example, the ongoing preparations for the Scottish Legal Complaints Commission. On the face of it, it is the Commission that has the onus of getting budgets, staff, rules and procedures ready for its target start date in October. But for the Society there remain the logistical issues of handing over one whole line of activity to the Commission, not to mention establishing ongoing relationships, and in particular preparing its own membership. “[The transfer] is logistically quite a complicated issue and it’s not been concluded yet, and things like the budget not being settled until the last point at which it could be done, create their own continuing logistical problems when you’re compressing activity into one of the busiest times of the year.”

Discovering policymaking

Coupled with that is the necessary work on defining professional standards. Not only has that required a lot of effort to redraw the previous “slightly opaque statements”; it has made the Society take a fresh look at its perhaps underdeveloped policymaking processes. “Having been on Council I’m not sure that we’ve done a lot of policymaking over the years”, Henderson comments, “and perhaps it hasn’t been necessary, but take ABS [alternative business structures] and take standards and you’re asking a body which sits at the centre of civic Scotland to take on a role that properly it should have anyway, to come up with policy proposals that affect the sector, and this is a pretty major shift for what the Society is doing.”

“So in preparing policy you’re not only looking at what that policy might be, but you’ve also to ask yourself how you prepare policy. Things we’ve done like setting up a reference group including non-lawyers, clients who are affected by the policy, and getting them to do a critique as the policy is developed, those are fairly novel.”

Both the standards issue and ABS illustrate another point the President makes, that by their nature these are not one-off exercises but “iterative processes”. “The document that comes out in the consultation on standards may not meet people’s entire expectations; it may not be sufficiently developed. Equally for some people it may be overdeveloped. This is the first stage where you’re saying to the profession at large, there’s your starter for 10. That doesn’t mean that in 2010 people say we’ve done it, and in 2011 and on there’s no activity. I expect this type of activity to be a dynamic where the Society keeps under constant review what it’s setting out.”

The key to regulation

Similarly when I ask if the Society believes it has cracked the difficult issue of regulation in the ABS proposals coming before this month’s AGM, he responds: “You never come to a stage where you’ve reached a final solution, and ticked the boxes that way. We came up with a discussion document, which highlighted three models… But the particular models can only be examples of the way people might want to operate. None of us can say how exhaustive those models might be.”

“The key is to develop a regulatory regime. Until now the regime for lawyers has generally been in relation to individuals. That doesn’t really relate to the way in which business works.”

The way forward, he continues, is to regulate the entities that deliver a service, whatever form they take. “If you’re talking about beginning to regulate the LDP, MDP and external capital, you have to ask, what regime will apply that can regulate that or any other entity solicitors might adopt?”

What we’ve done is to say we’ll regulate the entity, and provide some clues as to what the issues might be. Assuming
that the profession signs up for this, which is the important stage, the next stage is to go on and say let us now, in the context of MDPs, begin the conversation with other sectors – financial services, accountants, surveyors and others – to broker a solution amongst ourselves in relation to the new possibilities.”

The Scottish Government’s insistence that there is no need for an England & Wales-style Legal Services Board in a jurisdiction the size of Scotland creates further challenging possibilities for the Society. Henderson admits that he doesn’t have a template for what would exist in place of such a Board, but believes in partnership working with other institutions – within the legal community and from the other professions – “to broker solutions that ensure that in terms of admission to legal practice we have flexible and transparent systems”.

Could the Society, if it found an imbalance between its membership and those it regulates, be forced to split in order to carry on its functions, like its counterpart to the south? “I think it would be regrettable if a professional body felt it ought to split its representational side a fall-away of an important part of professionalism, and that is the aspirational. The profession is a profession because it has values, it has aspirations for the future and those aspirations are for the way in which that regulated area of service can best be provided for the public.”

Confidence in the future
Taking up the theme of this year’s conference, “The Legal Profession in Five Years’ Time”, how does Henderson himself see the future for solicitors, and their professional body? He admits to taking some inspiration from keynote speaker Richard Susskind’s articles in the Times last autumn, talking about the end of lawyers (“I thought there’s a lot of stuff in there that I agree with and that lawyers should be thinking about”), but in a positive vein. “Do I think we will have lawyers in five years’ time? Yes. Do I think that there will be a Law Society of Scotland? Yes. Do I think it will have an expanded role? I think it should have an expanded role, but I don’t see it having imperialist ambitions. I see it fulfilling a role which society should want from a law society or bar association anywhere.”

Conceding that the profession may feel itself “slightly undervalued” after recent controversies, Henderson hopes that in five years’ time it will remain "confident of its place in Society, continuing to be able to meet the needs, the demands that are put on it, and fulfilling what I think is its correct role". One thing that should help achieve this is next year’s conference, a special one for the whole legal community in Scotland to mark the Society’s Diamond Jubilee.

Like his predecessors, the President has a firm belief in the value of the “badge” of Scottish solicitor, which is recognised, he says, even beyond our borders. “That’s not simply the training; I think it’s the realisation that we have a professional body which is committed to excellence and providing value; and does not just profess integrity but has real integrity.”

Just a job
With the Society now in the midst of its strategy and governance review, one thing Henderson is anxious to ensure is that his tenure is not regarded as setting a precedent, in terms of the time commitment at any rate. “I think it’s very important for a body like the Society actually to be able to engineer its arrangements in such a way that the example that I have set does not have to be replicated. It would be terrible if anybody thought that they could not take on that kind of role unless they were able to commit full time to it.”

That is about as close as he comes to acknowledging his unique role in pushing the Society forward in this time of change. Asked what he would like to have achieved by the time he leaves office, he declines to offer “pious” statements about making a contribution. “Why am I doing this? It’s a job, it’s there.”

“I think it would be regrettable if a professional body felt it ought to split its representational from its regulatory functions”
Thirteen more solicitor advocates

Thirteen new solicitor advocates were introduced to the supreme courts on 30 April. Granted rights of audience in the Court of Session, House of Lords and Judicial Committee of the Privy Council were John Alexander Gunn Chalmers, Ledingham Chalmers, Edinburgh; Gillian Rushbury and Catherine Luise Bennett, of HBM Sayers, Glasgow; Christine Mary O’Neill, Brodies LLP Edinburgh; Christopher Dickson, Anderson Strathern LLP, Edinburgh; Thomas Lloyd Quail, Anderson Solicitors LLP, Glasgow; Stuart Dale Holmes, Torcan Connell, Edinburgh; Jennifer Alison Grant and Stuart Alexander Clabb, HBI Gateley Wareing LLP, Edinburgh; Joy Agnes Gekkie, Morisons LLP, Edinburgh; Karen McGill, Brown & Co, Glasgow; and Claire Louise Meikle, The Procurator Fiscal Service, Edinburgh.

Michael Scott Jones, QC, Simpson & Marwick, Edinburgh, was granted rights of audience in the Court of Session, House of Lords, Judicial Committee of the Privy Council and the High Court of Justiciary.

TANQ reaches out

TANQ – “Trainees and newly qualified solicitors” – is an expanding group who answered the call to introduce a new level of awareness to the Royal Faculty of Procurators, Glasgow, by forming a group for newly qualified lawyers.

TANQ aims to organise a series of seminars and social events specifically targeted at those embarking on a legal career, or those who are new to a specific area of law. The talks give a practical and informative slant to a given topic, whilst the social events are a great way to forge new contacts.

The seminars are held in the Royal Faculty of Procurators in Glasgow and it is hoped that by attracting novice lawyers to attend, a network of colleagues new to the profession will develop, and more will appreciate the excellent facilities that the Royal Faculty offers.

Our next talk is on 26 June, when Dr John Clarke will speak on forensic evidence. Then after a break for the summer our programme will begin again on 24 September 2008 with a talk by Michael Sheridan.

A social event was held earlier this month and another is scheduled for December.

Pritchard Trust awards open

Grants will be awarded in August. The Pritchard Educational Trust, established to assist those of academic ability who wish to qualify as solicitors in Scotland but who, through financial constraints, are unable to do so, is inviting applications for the academic session 2008-09.

Applications should be made by Friday 27 June 2008 to: The Pritchard Educational Trust, Sisi Chang, Education & Training Department, The Law Society of Scotland, 26 Drumshaghe Gardens, Edinburgh EH3 7YR (e: sisichang@lawscot.org.uk). Grants will be awarded in August.

The grant will be for such period as the trustees determine. Their decision may depend upon academic achievement.

News in brief

ABS policy comes to the vote

The Society’s policy paper on alternative business structures was published on 23 April and comes to the vote at this month’s Annual General Meeting, on 22 May in The Hub, Castlemilk, Edinburgh.

The paper, “The Public Interest: Delivering Scottish Legal Services”, follows the public consultation on options for change, including partnerships with advocates and other legal service providers, joint practices of lawyers and other advisers, and commercial investment in legal firms. The new proposals would essentially permit solicitors to practise in whatever form of business they choose, subject to a proper system of regulation.

President Richard Henderson said the paper reflected the significant recent changes in the profession and the desire to see further change.

He added: “This is only the first step. After the AGM we will take the final proposals to the government. That will start the next stage of looking at just how legal services should be developed and regulated in Scotland and whether it will require any legislative change.”

The paper can be read via the Society’s website www.lawscot.org.uk.

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TANQ contacts are Amanda Benstock, Pauline Greene, Ruth Johnston, Jennifer Barr, Joanne McIvor and Paul Neilly. For further information, and to be added to the mailing list, please email tanq@rfpg.com.
The Scottish Legal Complaints Commission has announced its initial budget.

The Commission’s financial year will run from 1 July to 30 June, and the proposed budget laid before the Scottish Parliament on 3 April covers the nine months from 1 October, when the Commission opens its doors to the public, to June 2009. The budget has been set at £2.6 million.

A flat rate levy per solicitor holding a practising certificate would produce a figure of £248. With discounts for in-house lawyers and those recently qualified, adjusted figures work out at:
- Solicitors with three or more years’ experience – £307
- Solicitors with up to three years’ experience – £153
- Solicitors working in-house – £102.
- Advocates will pay a levy of £248.

Philip Yelland, Director for Regulation at the Law Society of Scotland, said the figures were significantly higher than estimated when the Legal Profession etc Bill was under consideration, when the predicted contribution was about £200 per head, but solicitors would at least now be able to plan their future finances. He warned that the Society faced a tight timescale for collecting the levy from practitioners – as it is required to do. The first invoices will be issued this month.

Case fees where complaints are upheld will be £200 where a mediated settlement is reached, £250 when resolved by an investigator, and £400 if determined by the full Commission. Increases will apply where further complaints are upheld within a certain period; the Commission will have discretion to waive these if the complaints concern different departments within the same firm. Case fees may also be waived where a complainant rejected a solicitor’s offer to settle a case and the Commission’s award is no higher.

**Draft rules now out**
The Complaints Commission is seeking views on the rules under which it will operate from 1 October.

The Commission will accept service complaints against solicitors and advocates where work is instructed on or after 1 October. The rules drafted by the Commission are aimed at allowing it to deal with disputes objectively and quickly.

"They form a framework under which we can develop a process that will allow us to work within our aims of dealing with disputes objectively, facilitating early resolution and acting proportionately, by applying the correct mix of legal and lay skills during our inquisitorial process. "The rules are necessarily formal as they require to be precise. We intend of course to prepare guidance notes and have an active Gateway Team of people in place to guide complainers and practitioners more carefully through our process before we launch the Commission."

A copy of the rules can be found at www.scottishlegalcomplaints.com, the Commission’s recently launched website. Comments can be sent to Ms Irvine through a link on the website or by post to the Ombudsman’s office at 17 Waterloo Place, Edinburgh EH1 3DL. Responses are requested by 31 May 2008.

### The Society faces a tight timescale for collecting the levy – as it is required to. The first invoices will be issued this month

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**Paralegals to come under Society’s wing**

Paralegals are expected to be registered and regulated by the Society for the first time under a new partnership scheme. Innovative plans drawn up by the Society and the Scottish Paralegal Association (SPA) were given the go-ahead by both organisations last month. Paralegals with the required qualifications and work experience will be able to apply for “Law Society of Scotland registered paralegal” status. Work on the detailed arrangements will follow. A discussion document on the proposals will appear on the Society and SPA websites this month, and the scheme could be up and running later this year.

The Society is also working with the Scottish Qualifications Authority to establish new, nationally accredited qualifications for paralegals to complement existing provision.

Neil Stevenson, the Society’s Head of Strategic Change, said the project would bring obvious benefits to paralegals who registered by providing them with a badge of quality, as well as enhanced career opportunities and ongoing training.

"But the scheme also has real advantages for solicitors and their clients, who will be reassured that paralegals have met certain academic and work standards and are bound by a professional code of conduct."

He added: “With the expected reform of the legal services market and the arrival of alternative business structures, the Society may well have an interest in regulating the whole business unit rather than just the solicitors within a practice. Moving forward with plans to regulate paralegals is an example of our forward thinking in this area.”

Up to 10,000 paralegals work in Scotland, though those currently using the title do not need any defined standard of qualifications or experience. For more information visit www.lawscot.org.uk/paralegals or www.scottish-paralegal.org.uk.

See also Opinion, p9.
Pursuers’ Panel solicitors wanted

The Society established a Pursuers’ Panel for professional negligence claims against solicitors in 2002. Panel members assist members of the public with advice about negligence claims against solicitors and, where appropriate, solicitors already advising members of the public in connection with the handling of negligence claims against other solicitors.

Applications are invited for appointment to the panel. Appointments will be for the five year period from 1 November 2008 to 31 October 2013. Applicants should have experience in dealing with professional negligence claims and be solicitors holding an unrestricted practising certificate.

Journal seeks Review Editor

Alistair Bonnington, the Journal’s Book Review Editor, has decided to step down from this role at the end of June 2008. The Society places on record its sincere appreciation to Alistair for all his hard work as Book Review Editor over the last 10 years. The Society wishes Alistair every happiness and good health in his retirement. Peter Nicholson, as Editor of the Journal, will take on the role of Book Review Editor on an interim basis from 1 July 2008 until the end of this year. Anyone interested in applying for the role of Book Review Editor from 1 January 2009, initially for a five-year term, should send a covering letter with CV to David Cullen, Registrar, at the Society by 30 June 2008. The principal task of the Review Editor is to receive books for review in the Journal and then arrange to pass the books for review to the appropriate reviewer.

Legal aid: talks go on

Key concessions over front-loaded payments, levels of bureaucracy and self-certification have improved the Scottish Government’s criminal legal aid and assistance reform plans, according to the Society, though reservations remain.

Oliver Adair, convener of the Society’s Legal Aid (Solicitors) Committee, said that proposals published by ministers last month were more acceptable than those put forward by the previous administration and the Scottish Legal Aid Board (SLAB). However, there would still be an overall cut in the summary legal aid budget and the failure properly to redress underfunding since the last fixed fee increase in 1999 represented a missed opportunity.

The new arrangements follow the summary justice reforms, which are designed to save time and expense by dealing with cases more quickly.

Mr Adair, who negotiated with ministers for the Society, agreed that there were benefits in dealing with cases quickly. He said the Society supported the principle of subsuming several payments under the current system into a single “case disposal fee” for cases disposed of before trial. The Assistance by Way of Representation (ARBWOR) rate has been set at £515 in the sheriff and stipendiary magistrate courts and £150 in district courts.

Crucially, the ARBWO fee will be available even when representing a client in custody, and so allows for the early resolution of such cases.

Under the previous proposals, the case disposal fee would have been at an initial minimum rate with access to enhanced funding only at a lower level following approval from SLAB.

Mr Adair said a number of other concessions had been granted. The government dropped plans to prepare a list of specified sheriff court cases where ARBWO could be self-certified, instead agreeing that all summary cases should be dealt with in this way.

A significant degree of control therefore remains in the hands of solicitors without the need for additional bureaucracy.

Likewise, SLAB is no longer insisting on receiving a copy of the disclosable summary of Crown evidence with any application in sheriff or stipendiary magistrate courts, while reserving the right to see it in specific cases at district court level. Again, this reduces red tape for solicitors.

Other changes include an additional payment of £25 for a deferred hearing where a social enquiry report is required, and a reduction from four to two hours in the length of police custody visits subsumed in the overall case disposal fee.

There is a small rise in the current summary legal aid fixed fee for all courts. Criminal advice and assistance fee rates will rise by 10%.

Mr Adair said: “The Scottish Government listened to our concerns and accepted many of our representations, which was particularly welcome with regard to front-loaded payments.” Recognising that some practitioners continue to have concerns, reflected in motions before the Society’s AGM, he added: “We have sympathy with those concerns but believe the progress made since the publication of the original proposals encourages an inclusive approach and makes it appropriate at this stage to continue our involvement in the ongoing discussions.

“These interim measures will come into force at the beginning of June this year and it is important that they are carefully and rigorously reviewed to ensure that any savings in the overall criminal justice budget are available to reinvest in legal aid. The Cabinet Secretary has assured us that any anomalies identified will be remedied at the earliest opportunity.”

The Society will continue to meet regularly with representatives from the government and SLAB. A major review of the new system is to take place in December.

Obituary

ROBERT GRAHAM WILSON, Glasgow

On 30 March 2008, Robert Graham Wilson, partner to the firm Russells Gibson McAffrey, Glasgow. AGE: 65

ADMITTED: 1982

News in brief

Regulator replaces Communities Scotland

Communities Scotland wishes to advise solicitors that it has been abolished with effect from 1 April 2008. Its regulation and inspection division has been transferred to a new body, the Scottish Housing Regulator, which covers the whole social housing sector.

See the website www.scottishhousingregulator.co.uk for more information about the new regulator.

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The Society will continue to meet regularly with representatives from the government and SLAB. A major review of the new system is to take place in December.

Comments between the Glasgow Bar Association and the Justice Secretary failed to avert a boycott of several sheriff courts, including Glasgow, on Tuesday 6 May. Only duty solicitors were present. The GBA called the action in protest at cuts in levels of payment that have already remained unchanged since 1999. The Society has asked lawyers not to take industrial action while the reforms are being monitored.
I, David Cullen, Registrar of the Law Society of Scotland for the purpose of the election of members of the Council of the Society, hereby give notice that the undernoted persons have been duly elected as members of the Council of the Society for the following constituencies:

- **Sheriff Court District of Aberdeen**
  - Ms Jane MacEachran, Aberdeen City Council, Resources Management, Town House, Broad Street, Aberdeen.
  - Graham G Matthews, Peterkins, 60 Market Place, Inverurie.

- **Sheriff Court District of Airdrie**
  - Ian Smart, Ian S Smart & Co, 3 Annan House, Town Centre, Cumbernauld.

- **Sheriff Court Districts of Dumfries, Kirkcudbright and Stranraer**
  - Ranald B Lindsay, Lindsay, 33 Buccleuch Street, Dumfries.

- **Sheriff Court District of Edinburgh**
  - Robert W Frazer, Drummond Miller, 31/32 Moray Place, Edinburgh.
  - W Ruthven Gemmell, Murray Beith Murray, 39 Castle Street, Edinburgh.
  - Ms Kim L Leslie, Digby Brown, 7 Albyn Place, Edinburgh.
  - Ross A MacKay, HBJ Gateley Wareing (Scotland) LLP, 19 Canning Street, Edinburgh.
  - Scott Miller, Allan McDougall, 3 Coates Crescent, Edinburgh.
  - George Way, Beveridge & Kellas, 52 Leith Walk, Leith.

- **Sheriff Court Districts of Hamilton and Lanark**
  - Oliver Adair, Adair & Bryden, 2 Church Street, Larkhall.

- **Sheriff Court Districts of Stonehaven, Peterhead and Banff**

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**Clancy flies the flag in Illinois**

Michael Clancy, Director of Law Reform at the Law Society of Scotland addressed the Illinois St Andrew Society as part of the United States’ Scotland Week celebrations. His visit aimed to further the relationship between the two societies and create foundations for increased networking and development of business opportunities in the US.

In his speech Mr Clancy said that Scotland could provide American businesses and individuals with a highly skilled workforce, a well established infrastructure, and respected universities and research centres with a world-class reputation for innovation, business sense and financial expertise.

He also explored the historical relationship between Scotland and the US from the documents of its founding fathers and the development of the tobacco and sugar trades in the 18th century to the present day.

He said: “I don’t need to tell you how important the Declaration of Independence included two native born Scots: John Witherspoon, a Paisley minister who left Scotland for the American colonies in 1766, becoming president of the New Jersey College which he reorganised along the lines of his alma mater the University of Glasgow, so that it became ‘a seminary for statesmen’ and eventually Princeton University. The second was James Wilson, who not only signed the Declaration but also the Constitution – a document which he assisted James Madison, fourth president of the US, in writing.”

He went on to describe the separate evolution of Scots law from English law and the legislative activity since the Scottish Parliament was established in 1999, before closing with the comments: “I see my role today, not only as one which cements the relationship between the Law Society of Scotland and the St Andrew’s Society of Illinois, but one which lays the foundation of further dialogue, opening the door to discussions between clients and law firms and enabling Scottish lawyers to come to Chicago and explain why doing business in Scotland is good for you and good for your clients.”

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**Election of members of Council 2008**

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**Above, l-r: Sandy Kerr, partner, Tishler & Wald Ltd; Robb Kuepfer Jr, attorney, Baker & MacKenzie LLC; Judge William Bauer, US Court of Appeal; Michael Clancy, Director of Law Reform, Law Society of Scotland; Gus Noble, President and Chief Executive Officer, Illinois Saint Andrew Society**
A fulsome tribute to the late Lord Macfadyen was paid by the Lord President in the Court of Session, following the judge’s untimely death from cancer at the age of 62.

Lord Hamilton narrated that following a “prize-laden” career at Glasgow University, Donald Macfadyen was admitted to the Faculty of Advocates in 1969 “at what was even then the remarkably early age of 23”. He quickly established a substantial practice, notable as much for its width as for its depth. He served as an advocate depute from 1979 to 1982, took silk in 1983, and in 1994 became one of the first to be appointed a temporary judge of the Court of Session. The following year he was appointed as a Senator of the College of Justice. He was advanced to the Inner House in 2002, frequently presiding over Extra Divisions of the Court of Session and appellate sittings of the High Court – “as well as contributing fully and incisively to discussion and deliberation when another took the chair”.

His interests, the Lord President continued, were wide ranging. He chaired the Judges’ Forum of the International Bar Association. He was General Editor of the looseleaf Court of Session Practice, and a judicial member of the Scottish Council of Law Reporting. He had a particular interest in history, in public affairs, and in the buildings of Edinburgh, serving from 2001 until this year as chairman of the council of the Cockburn Association (The Edinburgh Civic Trust).

“But no mere list of his professional and other achievements can do justice to the Donald Macfadyen whom so many of us knew as a judge and as a man. One can debate at length what are the qualities of a good judge. The Bangalore Principles (formulated under the auspices of the United Nations) identify six characteristics as being of primary importance. They are: independence, impartiality, integrity, propriety, equality (by which is meant equal treatment of all persons and classes), and, lastly, competence and diligence. In all these characteristics Donald Macfadyen excelled. He not only had a sound grasp of legal principles and of decide authority, but also displayed on the bench a patience and a tolerance of manner which made him very special.

“His delivered opinions were both profound in content and elegant in expression. They were also very numerous. A search of the Court of Session and High Court website discloses that, since its inception in early 1998, there are posted sub nomine Lord Macfadyen no less than 401 opinions – either delivered by him personally or to which he was a party. In the earlier years these were principally single judge opinions, many of them in commercial actions where his reputation was of the highest. By way of example, he did much to illuminate in its early life the complex world of adjudication in building contract disputes, his latest judgments in that arcane field always being keenly awaited by practitioners. In the last 12 months of his life he was party to more than 40 appellate opinions; more than half of these were framed and delivered by himself. His enthusiasm, energy and courage, against the background of serious illness, were remarkable. Although cut off with much further promise unfulfilled, he has bequeathed to the law of Scotland a legacy of jurisprudence to which, I am convinced, future generations of lawyers will regularly look for insight and for illumination.”

Lord Hamilton added that Lord Macfadyen, who had an exemplary sense of fairness, freely gave of his time to advise would-be advocates and solicitor advocates in the techniques of court craft; and “To me, as Lord Justice General, his advice was invaluable – not least in sentencing matters where, as the former Chairman of the Sentencing Commission for Scotland, he was uniquely placed to help, as he did, with the identification of cases which would benefit from guideline judgments.”

In private life he was a gentle and essentially private person, devoted to his wife, two children and three granddaughters. The Lord President extended the court’s sincere condolences to them and to all Lord Macfadyen’s family and friends. He concluded:

“His untimely passing deprives the courts of Scotland of a judge of the highest calibre, and his family and friends of one whom they held most dearly. He will indeed be sorely missed.”

“His opinions were both profound in content and elegant in expression”
“Supporting witnesses” conference

“Supporting Witnesses in the Scottish Justice System” is the title of a Scottish Government-sponsored conference, marking the completion of the three year implementation period of the Vulnerable Witnesses (Scotland) Act 2004.

To be held at Tulliallan Police College, Kincardine, Fife on 2 June 2008, the conference will discuss the special measures now in place to protect child and adult vulnerable witnesses, how they are used in practice, why should people have special measures, how giving them special treatment aids the course of justice, and whether these measures can get in the way of a fair trial.

The conference is being put on by the Victims and Witnesses Unit of the Scottish Government Justice Directorate in partnership with other stakeholders. Advocates, defence solicitors, social workers and child protection organisations will all contribute.

- The keynote speech will be delivered by the Cabinet Secretary for Justice. For further details and to register, please visit www.holyrood.com/supportingwitnesses.

FROM THE BRUSSELS OFFICE

Rome I: opting in?
On 2 April the UK Government launched its consultation on the Rome I Regulation on cross-border contracts. “Rome I: Should the UK opt in?” The government chose not to opt in to the original proposals in 2005, but intense negotiation has led to a largely revised version which, the UK argues, should allow cross-border trade to continue with confidence. The paper proposes that the UK should opt in to the revised version of the Regulation and employ the same rules with regard to contractual obligations between England & Wales, Scotland and Northern Ireland.

Antitrust damages claims
On 2 April the European Commission published a white paper on proposals to improve the prospects for victims of breaches of EC antitrust rules (such as price-fixing cartels) recovering damages. A consultation runs until 15 July.

Mediation deal
A deal has finally been brokered on the draft directive on mediation in cross-border legal disputes, as MEPs approved, without amendment, the Council’s position. This instrument is designed to set in place an alternative dispute resolution system for use in cross-border cases.

Brian Dempsey’s monthly survey of consultations that might be of interest to practitioners

...the point is to change it

Alternative business structures
The Council of the Law Society of Scotland has published a policy paper on alternative business structures. The Society says: “in seeking an appropriate way forward, the Council was keen to balance the ability of law firms to compete nationally and internationally with the need to maintain access to justice and uphold the core values of the legal profession”. See “The Public Interest: Delivering Scottish Legal Services; Policy Paper on Alternative Business Structures”, available via www.lawscot.co.uk/Members_information/members_information/.

- The policy is up for discussion at the Society’s AGM on 22 May.

Child trafficking
You have duties to be aware of possible money laundering, but what about child trafficking – would you know it if you saw it and what would you do? The Scottish Government is seeking views on draft guidance for agencies and professionals who may come into contact with vulnerable children. See www.scotland.gov.uk/Resource/Doc/219212/0058832.pdf.

- Respond by 3 July to cprp@scotland.gsi.gov.uk.

Apprenticeship rights
Former electrical fitter at Rosyth Dockyard and now Labour list MSP for Mid Scotland and Fife, John Park, is asking for views on whether young people between 16 and 18 should have a right to an apprenticeship. Can such a thing be effectively subject to “rights”, and what impact will there be on employers and public services who may supply such opportunities? See www.scottish.parliament.uk/s3/bills/MembersBills/pdfs/ApprenticeshipsBillConsultation.pdf.

- Respond by 17 June to john.park.msp@scottish.parliament.uk.

Quick reminders
As noted last month, the Keeper of the Registers of Scotland is seeking views on fees charged for information from the Registers. See www.ros.gov.uk/pdfs/info_fee_consultation08.pdf and respond by 23 June to consultation@ros.gov.uk.

- Should high earners continue to pay a lower proportion of their income in tax than do poorer people? The Scottish Government is consulting on a switch to local income tax which would remove the council tax “subsidy” for high earners: see www.scotland.gov.uk/Resource/Doc/1037/0058031.pdf and respond by 18 July to afairertax@scotland.gsi.gov.uk.
From the beginning of next year the European Union’s legislative and political framework will be governed by the provisions of the new Treaty of Lisbon, the follow-up to the failed Constitutional Treaty of 2004. That is, if all national governments succeed in ratifying the Treaty back at home.

So far so good, as a number of member states have quietly completed their ratification process, including Bulgaria, France, Greece, Hungary, Malta, Poland, Romania, Slovakia and Slovenia. Only Ireland has put the Treaty out to a referendum, as provided for in their constitution, and this is scheduled for 12 June.

Seemingly bruised by the referendum experience in 2005, when the constitution was met with a resounding “No”, both France and the Netherlands shied away from putting the new text to a vote. All eyes are now on Ireland, with political commentators, Euro-sceptics, and the other EU nations waiting with bated breath for the outcome.

Ireland caused upset in the EU the last time round with the Nice Treaty in 2001. It was only during a second referendum on this Treaty that voters answered “yes”. Back in the UK, the European Union Amendment Bill has survived the rigorous debates in the House of Commons and is now making its way through the Lords. The Scottish Parliament has no formal role in the ratification proceedings.

Constitution or not?
When negotiations on the new European Union framework began in earnest last year, the rejection of the Constitutional Treaty loomed large. The political mood was one of pragmatism rather than optimism, and this was clear in the outcome. Rather than unveiling a single constitutional document, national leaders signed up to a “Reform Treaty”, one that presented a series of amendments to the individual European Treaties as they have accumulated over the years.

With caution the order of the day, all controversial references to a “constitution” disappeared, along with all references to flags, mottos, anthems etc. For the avoidance of doubt, the message from the June 2007 leaders’ summit was: “the constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called ‘Constitution’, is abandoned”.

Constitution or not, it is however the framework under which the European Union will function for the foreseeable future. It makes extensive changes to the existing Treaty on the European Union (TEU) and the Treaty establishing the European Community (TEC), and in some instances shifts the balance of power between the EU institutions.

What does this mean for you?
The new Treaty matters to the legal profession, as it will bring about changes both in how EU legislation is proposed and adopted, and also with regard to the rights of individuals and organisations in the EU. A number of
specific carve-outs were secured by the UK in relation to criminal justice, police and fundamental rights, which may result in a patchwork of rights and legal obligations around Europe. Practitioners need to be aware that the UK Government can select whether or not to opt in to a specific proposal – for example any future legislative instrument on procedural rights or cross-border recovery of maintenance obligations. Whilst deemed to protect the UK’s national interest, it could result in marginalising the UK and cutting off avenues of legal redress to UK based individuals and businesses.

The role of national parliaments
So far in the life of the EU, there has been no formalised role for national parliaments in the European decision-making process. It has been left to each individual member state to decide how far to involve its national parliament in European lawmaking, and very different practices have arisen. For the first time, the adoption of EU legislation will be subject to prior scrutiny by national parliaments, which will be given the opportunity to challenge proposed legislation if it does not conform to the principle of subsidiarity (i.e. that legislation should be adopted at the appropriate level, which might be national rather than European). If one-third of national parliaments object to a proposal, it is sent back to the Commission for review (a "yellow card"). The Treaty also introduces what has been dubbed an "orange card": if a majority of national parliaments oppose a Commission proposal, and they have the backing of the Parliament or the Council, then the proposal is abandoned.

Whilst Westminster, particularly the House of Lords, is no doubt gearing up to fulfil this function, the debate on the enhanced role of national parliaments in the process is yet to commence in earnest. The role of national parliaments will also assist in clarifying how the Scottish Government might function in negotiations with UK Government departments on important questions such as whether the UK will opt in legislation in the criminal justice area and civil and family law fields, as there may be differences in view on this on either side of the border. This will all have to be worked out.

These are some of the points that the Society made in evidence submitted to the House of Lords in their inquiry on the Treaty of Lisbon. The Society highlighted the importance of ensuring maximum involvement of devolved administrations in relation to the enhanced role of national parliaments and as regards the opt-in arrangements in the area of freedom, security and justice. The Society argued that traditions and norms of national justice systems should be “treated with care”, and that the principle of subsidiarity should be strictly observed. The Lords drew heavily on this argument when formulating their conclusions, as set out in the report from the Select Committee on European Union “The Treaty of Lisbon: an impact assessment”.

EU justice matters
In order to kick-start the debate on these issues, the Society co-hosted a round table on “EU Justice Matters” with the Scottish Parliament Justice Committee last month in the European Parliament. With Director General for Justice, Freedom and Security Jonathan Faull opening the event, a lively discussion was had with high level panellists, including Members of the European Parliament, members of the House of Lords Select Committee and representatives of the Scottish Government.

For more information on the Treaty of Lisbon, please contact Julia Bateman, Head of the Joint Law Societies Brussels Office. e: Brussels@law society.org.uk

Entrance certificates
issued during March/April 2008

Applications for admission
March/April 2008

ASH, Emma Louise, BA(HONS), LLB, DipLP
BOYD, Gregor John, LLB(HONS), DipLP
CHALMERS, Jeanette Ann, LLB(HONS)
COMBE, Malcolm MacDonald, LLB(HONS), DipLP
CONNAL, Lindsay Chalmers, BA(HONS)
COWAN, Andrew Neil, LLB(HONS), DipLP
COWPERTWAITE, Alison Jane, BA, LLB, DipLP
ECKERLEY, Victoria Elizabeth, LLB(HONS), DipLP
GRANIER, Jean-Christophe Roy, LLB(HONS), DipLP
GREEN, William John, LLB(HONS), DipLP
GRIFFIN, Clare Marie, LLB(HONS), DipLP
HARDIE, Sarah Elaine, BA(HONS), LLB, DipLP
KILLIARD, Shelley Leeann, LLB(HONS), DipLP
MCBRIDE, Pamela Susanne, LLB(HONS), DipLP
McNAUGHT, Claire-Frances, LLB, DipLP
MAXWELL, William Allister Scott, BSc, Msc, LLB, DipLP
RUSSELL, Clare, LLB(HONS), DipLP
SCHIAVONE, Paul Rossi, LLB, DipLP

McMULLEN, Anji Frances, LLB(HONS), DipLP
McNIVEN, Moira, LLB(HONS), DipLP
McKIRDY, Heather, LLB(HONS), DipLP
McQUEEN, Stuart Alan, LLB(HONS), DipLP
MIDDLETON, Gayle Elizabeth, MA(HONS), LLB, DipLP
MURRAY, Harriet Cecilia, Macleod, MA(HONS), LLB, DipLP
NAIK, Samantha Devini, LLB(HONS), MA, LLM, MA
NESBITT, Fayre Margaret, Manthei, BA, LLB, DipLP
NESBITT, Gerard Noble, LLB, DipLP
NORMAN, Jeremy Nigel, Fortescue, MA
OGILVIE, Natalie Elizabeth, LLB(HONS), DipLP
RYBAROVA, Jana, LLB(HONS), DipLP
SUTHERLAND, Fiona Marie, LLB(HONS), DipLP
VALENTINE, Katherine, LLB(HONS), DipLP
WATT, Angela, LLB, DipLP

Notifications
People

On the move

ANDERSON FYFE LLP, Glasgow and Edinburgh, intimate the retirement with effect from 30 April 2008 of David Henry Chaplin and Christopher George Andrew Wilkin. David has taken up a position as a Legal Complaints Commissioner. The firm is also delighted to announce the assumption of Christine Macleod and Anthony Vincent Reynolds, as new partners with effect from 1 May 2008.

BRECHIN TINDAL OATTS, 48 St Vincent Street, Glasgow and Hanover House, 45/51 Hanover Street, Edinburgh, intimate that on 1 April 2008 Wendy Jane Thomson, solicitor advocate, and one of the firm’s associates, was assumed as a partner of the firm, and senior solicitor MarieClaire Reid became an associate in the firm. On the same date, current managing partner Willie Young became chairman of the firm.

BROWN & McRAE, Fraserburgh, intimate that with effect from 31 March 2008, John A MacKinnon retired as a partner of the firm. He remains associated with the firm as a consultant. They are also pleased to intimate that with effect from 1 April 2008, their assistant Barry Smith has been appointed as an associate.

CCW LLP, Edinburgh and Dunfermline, is pleased to announce that their assistant Paula Phillips, has been promoted to associate with effect from 1 April 2008.

The partners of HAMILTON BURNS & COMPANY, Glasgow are delighted to announce that Mhari S Mactaggart, family law specialist, has joined the firm as a consultant in the private client department with effect from 1 March 2008.

HILL & ROBB, Stirling, intimate that with effect from 1 April 2008 Michael G Kay has retired as senior partner in the firm but continues with the firm as a consultant. It is hereby announced that Catherine E Chalmers has resigned from the firm of INNES JOHNSTON, Kirkcaldy, Glenrothes and Leven, with effect from 31 March 2008. The remaining partners in the firm shall continue the business in the name of INNES JOHNSTON from the existing offices. The telephone and fax numbers remain unchanged. Ms Chalmers is to commence business as a partner of BLACK & GILILD, Kirkcaldy.

INNES & MACKAY, Inverness, are delighted to announce the appointment of Lisa Law as an associate of the firm with effect from 17 March 2008.

LAMONT & COMPANY, Lothian House, 31 South Tay Street, Dundee are pleased to intimate that their associate Donna Hampton has been appointed as an associate of the firm with effect from 14 May 2008. The partners of LAMONT, Ayr, are pleased to announce the promotion of Susan Elizabeth Forbes to the position of associate with the firm. Susan’s areas of practice are property, wills and estates with responsibility for the operation of the firm’s Executry Department.

THE LEGAL SECRETARIAT TO THE LORD ADVOCATE is pleased to announce that Paul Cackette, formerly on secondment to the JUSTICE DEPARTMENT OF THE SCOTTISH GOVERNMENT, has taken up the post of Legal Secretary to the Lord Advocate with effect from 28 April 2008.

LINDSAYS, WS, Edinburgh and Glasgow, is pleased to announce the acquisition of KIDSTONS, Glasgow. As from Monday 28 April 2008, the partners of KIDSTONS have joined LINDSAYS, with the exception of Caroline Hanlon who joins as a director. LINDSAYS existing Glasgow team have moved into KIDSTONS’ central Glasgow office, 1 Royal Bank Place, Buchanan Street, Glasgow G1 3AA. There will be no staff changes at 43 Milngavie Road, Bearsden, Glasgow G61 2DW.

ALLAN McDougall, 3 Coates Crescent, Edinburgh and at Dalkeith, Penicuik, Liberton and Glasgow, are pleased to announce that their associates, Clare Margaret McCarroll, Johnson MacIntyre and Isobel Sheila Joiner have been assumed as partners in the firm with effect from 1 April 2008. They also intimate that Scott Hall Miller retired as a partner on 31 March 2008 and are pleased to advise that he continues with the firm as a consultant, along with William Francis Brown who retired on 31 March 2007.

James Anderson & Ian Fraser, Millar & Bryce

Millar & Bryce, Scotland’s largest private search firm, are delighted to announce the appointment of James Anderson and Ian Fraser as Joint General Managers based at its Edinburgh headquarters. Both James and Ian have a wealth of experience in the Scottish search market and have been key players in growing and developing the Millar & Bryce business to its current position as market leader.

Focusing on their developed areas of expertise, Ian will take the lead on sales and customer issues, while James will have overall control of operational elements. Both will be equally involved in business planning and strategic development and leadership issues. Also joining the new senior management group will be Gary Donaldson, Kenneth Petrie and Barbara Clark.

www.millar-bryce.com
McINTYRE & COMPANY, Fort William, announce the retirement of Gerald J McIntyre as a partner in the firm with effect from 31 March 2008. Gerald will continue to be associated with the firm as a consultant. The remaining partners are Stephen Kennedy and Nigel Bailey.

MORGANS, Dunfermline, announce the retirement of their senior partner W Blair F Morgan with effect from 31 March 2008 but are delighted to confirm that he will continue to be associated with the firm as a consultant. The firm will continue with the existing partners, Craig Bennet, Claire L Morgan, Graham J Basten, Russel McPhate, John M Morris and Donna M Whyte, and wish Mr Morgan a long and well deserved retirement.

MUNRO & NOBLE, Inverness, are pleased to intimate that with effect from 1 April 2008 Irene Walker and Duncan J Swarbrick, associates with the firm, have been assumed as partners, and that Mary Nimmo (née Cowie) has been appointed as an associate of the firm.

THE OFFICE OF THE SOLICITOR TO THE ADVOCATE GENERAL FOR SCOTLAND is pleased to announce that Jim Logie, formerly of the SCOTTISH GOVERNMENT LEGAL DIRECTORATE, is Head of Division B with effect from 14 April 2008.

PAILL & WILLIAMSONS, Aberdeen and Edinburgh, wish to announce that George Bruce Pirie Smith and Douglas Grieve Abernethy resigned from the partnership with effect from 5 April 2008 but continue to be associated with the firm as consultants, and one of their senior associates, Alasdair Angus Smith, was assumed as a partner with effect from 6 April 2008. They further intimate that two of their assistants, Theresa G G Hunt and Kim L Johnston, were appointed associates with effect from 6 April 2008.

The partners of both firms are delighted to announce the merger of PETERKINS, Aberdeen and Inverurie; and STUART, WILSON, DICKSON & CO, Hundy, Keith and Alford, effective 1 May 2008. The combined firm now operates as PETERKINS. With effect from 30 April 2008, David M Lawtie retired as a partner of PETERKINS and David Black retired as a partner of STUART, WILSON, DICKSON & CO. Both have assumed roles as consultants.

SEMPLE FRASER, LLP, MNP, Glasgow and Edinburgh, wish to announce the appointments of partner, Gordon Hollerin and solicitor, Fiona Carlin as of 1 April 2008. Gordon, previously a partner at DLA PIPER, will be heading up SEMPLE FRASER’s specialist Insolvency and Corporate Recovery team.

THE SCOTTISH GOVERNMENT LEGAL DIRECTORATE is pleased to announce that Alan Williams, formerly of THE OFFICE OF THE SOLICITOR TO THE ADVOCATE GENERAL FOR SCOTLAND, is the Divisional Solicitor of the Rural Affairs Division with effect from 14 April; Colin Troup, formerly the Legal Secretary to the Lord Advocate, is the Divisional Solicitor of the Transport, Culture and Procurement Division with effect from 28 April 2008.

THE SCOTTISH LAW COMMISSION is pleased to announce that Malcolm McMillan, formerly of THE SCOTTISH GOVERNMENT LEGAL DIRECTORATE, has taken up the post as Chief Executive of THE SCOTTISH LAW COMMISSION with effect from 14 April 2008, following the retirement of Michael Lugton.

SIMPSON & MARWICK, Edinburgh, Dundee, Glasgow and Aberdeen, are delighted to announce the assumption to partner of their associates Richard Smith, Brian Smith, Graeme Watson and Gavin Henderson, with effect from 1 May 2008. John Miller, David Burnside and Michael Wood retire as partners but remain with the firm as consultants.

Squadron Leader Allan Richard Morison Steele, WS, RAF (Directorate of Legal Services (RAF)) assumes the position of Chief, Coalition Section, UNITED STATES AIR FORCE (USAF) Operational and International Law Division, the Pentagon, Washington DC, having graduated from both the USAF and the US Army Judge Advocate Generals’ Schools.

Squadron Leader Steele is the sole permanent representative of the RAF in the Pentagon.

J PARIS STEELE & CO, WS, North Berwick, intimate that with effect from 31 March 2008 Shona Margaret Brown has resigned as a partner of the firm. Gordon David Symon and Edward Andrew Danks continue to be partners in the firm.

TODS MURRAY LLP, Edinburgh and Glasgow, are pleased to announce the appointment of Ellis Simpson as a consultant to the firm with effect from 1 April 2008.

WILSON TERRIS & CO, SSC, Edinburgh, intimate that Grace McGill resigned as a partner with effect from 31 March to commence practice on her own account. Ms McGill has also acquired the firm’s former Human Rights and Immigration Team and the firm’s former Glasgow offices at 116 Elderslie Street, Glasgow.

WRIGHT JOHNSTON & MACKENZIE LLP, Glasgow and Edinburgh are delighted to announce that three of their assistants, Laura Boswell, Catriona Neilly and Joanne Reilly have been appointed as associates of the firm with effect from 1 April 2008, and that Shona Brown, previously a partner in J PARIS STEELE & CO, joined the firm as an associate with effect from 7 April 2008.

UPGRADE YOUR ENTRY TO A BOXED ADVERT. Contact Clare Stebbing on 0131 561 0024 or email clare@connectcommunications.co.uk.
How do you optimise the chances of attracting business through your website? Sharon D Nelson and John W Simek offer their guide to the basics of search engine optimisation – what works and what doesn’t

The ABCs of SEO

Articles sometimes come to us in mysterious ways. Recently, we taught a seminar on legal websites. A part of the seminar, of course, was about search engine optimisation (SEO): essentially, the art of getting the highest possible rankings from the search engines by properly constructing your site. At the end, we were struck by how often we saw some variation on the evaluation forms of the comment: “Great seminar – especially enjoyed the SEO portion – I’d like to see a whole seminar on SEO.” Rather to our surprise, it seems that many lawyers now understand how important SEO is, even if they are clueless about how to achieve it.

So let’s start with a…

Bedrock Principle, Never To Be Forgotten: Money invested (sensibly) in websites always return the investment, usually many times over. The average rate of return, according to legal marketing guru Larry Bodine, is 8 to 1. On the other side of the fence, another expert, Dale Tincher, says that the rate of return on yellow page ads has now dropped to less than 2 to 1. We believe both of these stats are very close to accurate.

We sense that those two factoids may have your attention!

Followed up with…

Bedrock Statistics, To Be Taken to Heart:

Studies vary, but all agree that more than 60% of those who are looking for professional services begin their search online. And that number has gone up, significantly, every year since the internet became a part of our lives. The printed Yellow Pages is dying a slow but steady death.

According to a survey conducted by RMP Directional Media (an online marketing research company) in 2007, 82% of those who search for a local business end up contacting local businesses to further their inquiries, and 61% of them become customers.

And when seeking out a lawyer’s website, 66% of internet users are looking for information on a particular legal issue. They are not looking for advice, just practical legal information. The right content coupled with the proper presentation will help potential clients want to hire the firm.

And finally move to the heart of the matter…

The ABCs of SEO

One of the curious things about search engine optimisation (SEO) is how little understood it is. So please bear with us – if you can absorb the material that
follows, you will be well on your way to developing a firm website that really helps your bottom line. Here are some of the most frequently asked questions:

1) When do we do SEO, which search engine do we optimise for?
Easy answer – optimise for Google and no one else. Let other chips fall where they may. For the moment, and the foreseeable future, Google is God. The numbers speak loud and clear. For purposes of analysing trends, Yahoo! has been in a declining mode, and MSN and Ask have seen slight gains. But in the end, the 200 pound gorilla is Google and that isn’t likely to change anytime in the future, notwithstanding a possible (now apparently aborted) acquisition of Yahoo by Microsoft.

2) Do we lose anything by optimising specifically for Google?
Doubtful. There really doesn’t seem to be a great deal of difference between how the various search engines rank websites. Sites that are Google-optimised seem to show up just fine in other search engines. So the best advice is to go with the behemoth.

3) How does Google rank websites?
Stellar question. Tough answer. Lots of people pretend to know, but the truth is, Google uses a complicated algorithm made up of many components – and this algorithm is changing constantly. Those who make their living at SEO often bemoan the rapidity of the change, and allege that it occurs on a daily basis. Moreover, the algorithm is protected as fiercely as the formula for Coke.

Nonetheless, those who study rankings have a reasonably good idea of what works – and what does not. As our Sensei site comes up very well on Google, we have some credibility that we know what we’re talking about, but we want to reiterate that no one really knows how Google ranks websites. Remembering that what follows is a best guess, and nothing more, here are the elements we think are most important, pretty much in order of priority:

- **Page title** – make sure this includes your name and likely keywords that users will employ when searching for you.
- **Content on your site** – the deeper and broader, the better – and yes, keywords count, but never “stuff” them – use as many as permissible within the bounds of graceful writing and the delivery of useful information to a site visitor. Content is assuredly not dead – in our view, it remains “king.”

Content on the home page is the most important to Google, and many theorise that hyperlinked content and page subtitles are given additional weight.

- **Inbound links** – how many quality sites link to you? And how do they link? By firm name only? By keyword text? This is also one of the hardest things to achieve – you have to give someone a reason to link to you, and the majority of law firm sites, especially websites for solo practitioners and small firms, are primarily promotional with little valuable information. In most cases, the inbound links are paid links from directories – which count, but are given far less weight because they are paid (yes, the Google gurus can discern the difference).

- **Your domain name** – If someone is searching for baby gifts and you are babysgifts.com, you have a definite edge, but it is only one factor, and certainly not the major one.

- **Your site’s currency** – those sites that are not updated vanish quickly from the top rankings. Herein lies the problem for most law firms, which scurry about faster than mice in a cheese factory getting a new website done and then, almost invariably, let the site wither on the vine, untended except for minor alterations.

- **The age of your site** – this is a rather new factor, probably introduced by Google as a way of letting brand new sites “stew” for a bit to sift out the scammers who put up new sites with high energy SEO initiatives, but who fold their tents and disappear when the law comes after them.

4) What about all those companies on the net that promise they can get you (quickly) to the top of the search results?
In general, these are snake oil salesmen. Search engine optimisation is a long, hard process – it takes time and effort to cultivate a site that will get to the top of the rankings. Frequently, some of these folks who promise the moon try to cheat the system: for instance, they may have the site listed in link farms (essentially, phoney sites that simply act as a bank of links to sites in a bogus attempt to boost the apparent popularity of a website, which is one factor search engines use to rank websites).

Another trick is to use (for instance) white on white text on the home page to list keywords over and over, invisible to the human eye but picked up by the spider bots that search engines use to “craw” websites. Alas, Google and the other search engines cottoned on to these tricks long ago and penalise (or even ban!) websites that use them.

Of course, the seamy side of the SEO is constantly trying new gambits – and they may succeed, but only briefly, as the search engines have proven that they are adept at sniffing out deceit and ruthless in penalising it.

5) What is the significance of the kind of site – does the amount of competition hurt the chances of a high ranking?
Absolutely. Let us take, for example, a small divorce law firm in Fairfax, Virginia. Such a firm is unlikely to have a site that is both broad and deep – the website is likely to be fairly modest in size and scope. Given the fact that most users will likely use geography and area of law to search

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**Those sites that are not updated vanish quickly from the top rankings. Herein lies the problem for most law firms, whose sites wither on the vine**

May 08 theJournal / 43
(e.g. “divorce lawyer” and “Fairfax Virginia”), and also given the fact that there are a lot of divorce lawyers in Fairfax, Virginia, the competition for rankings is going to be severe.

This is precisely where SEO can really help. But it would be a mistake to expect overnight success – this is definitely a case where “slow and steady wins the race.” But if you practice, say, aviation law in Fairfax, Virginia, you may vault to the top quickly!

6) So… what’s next?
Not an easy quest, no question. First, determine who your prospective clients might be. What age? What gender? What income level? What are their “pain points” that you can touch? Are you in search of clients from the public, or are you looking for referrals from colleagues? There’s a huge difference in approach between the two. Once you have that in mind, you can work on figuring out graphics that will hook a site visitor and text that will keep their attention, and ultimately (we hope) convert them to clients (or to lawyers that want to refer clients).

Creativity is key. No stock graphics please – no courthouses, no gavels, no lawbooks. Nothing that smacks of being a cookie cutter site. If you practise criminal law, you might want to show a really good photo of someone being arrested, handcuffed, etc – now that’s a photo that your potential clients can identify with!

7) How does one figure out which keywords are most valuable?
You have unerringly hit upon the $60,000 question. We are happy to say that there is a most excellent tool to assist you. The tool is called Wordtracker and is available at www.wordtracker.com. It is subscription based: one year costs $329, one month $59 and one week $30. You may be just fine with using it for a week if you are diligent in devising keywords (don’t forget to look at your competitors’ sites for ideas for keywords) and then studying the results and perhaps revising the keywords (which usually are phrases, not just single words) to see what that does to the Wordtracker results.

8) How do you broaden and deepen your site for better SEO?
Without question, this takes time and dogged work. You also need to decide what kind of content will appeal to site visitors. They will certainly appreciate information on your area

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Webltalk

Iain Nisbet and Harry Glen give an inside view of the site that won this year’s Legal Website of the Year award at the Scottish Legal Awards 2008

Creating an award winning legal website

Govan Law Centre’s bank charges website (www.bankcharges.info) recently won the Lightershade Legal Website of the Year award at the Cuthbert Scottish Legal Awards 2008. Many law firms now have a website (or more than one), but what makes the difference between an ordinary legal website and a great one?

Why have a bank charges website?
Govan Law Centre is a small practice and, acting for individuals, could only hope to assist a handful of people with this issue. Therefore, we decided to set up a self-help website that explained the legal issues in an understandable way – and, crucially, offered free downloadable letters to be sent to the banks and advice and downloadable styles on how to raise small claims against the banks in Scotland and in England & Wales.

The website has been a runaway success, allowing us to assist many more individuals than we would have been able to do by conventional means. For example, over 1,000,000 style letters have been downloaded, and hundreds of people have emailed the website to thank us for the help in reclaiming charges. Those people have reclaimed over £500,000 in total, to say nothing of the amounts which others have claimed and not told us about. It is conservatively estimated that the total amounts reclaimed by bank customers across the UK is in excess of £5,000,000.

Website design
The website was designed and created by Govan-based web design company Kuka Studios. The Scottish Legal Awards judge the best legal website using a variety of criteria, which can be summed up in three points: design, usability and content.
An algoholic is always searching, usually daily, on keywords to check his/her site’s Google ranking. You’ll make yourself crazy – resist

The possibilities are endless, so choose carefully, picking that which has the most allure for site visitors and which you know you can maintain. Nothing is worse than stale content. Visitors will disappear quickly and search engine rankings will drop like a rock! And this, lamentably, is the fate of most law firm websites. After producing a diamond of a website, it becomes an orphaned child, and is soon reduced to charcoal through benign neglect.

9) How do law firms stay on top of SEO?
If you’re big enough to have in-house marketing and website design/SEO, you are blessed. Some smaller firms do manage to have marketing committees, which track SEO on a regular basis. But if you’re smaller than that, you probably want to outsource this. Because the Google algorithm changes so much, it is probably a good idea to have your site reviewed for optimisation at least annually. Once it’s been done right to begin with, and you have suffered the “big bang” to the budget, the updates should be considerably more modest in cost.

10) What’s an algoholic?
Don’t laugh – it’s a real word. An algoholic is always searching, usually daily, on keywords to check his/her site’s Google ranking. You’ll make yourself crazy – resist the temptation. Do it no more than quarterly and you won’t need a 12 step program for your addiction.

You may, just may, be able to be a DIY (do it yourself) in this area. We learned it ourselves, became proficient at it, and now receive about 20% of our business from the website – and the collateral impact it has as users “check us out” is phenomenal. But if you don’t have the time (and how many busy lawyers do?), get a professional to assist. Lawyers ask constantly what single investment they can make to help grow their practice and our answer is always the same: Invest in a first class creative website and pay attention to – you guessed it – the ABCs of SEO!

The authors are the President and Vice President of Sensei Enterprises, Inc, a legal technology and computer forensics firm based in Fairfax, Virginia, USA. www.senseient.com

Design
What makes a good design is subject to opinion, and what works for one law firm may not work for another. However, a good design has some key elements: clarity of text, appropriate use of colour, and a good balance between menus, text and images. Be creative. If your website looks the same as all of your competitors, then your designer hasn’t done their job. You should stand out, but try to avoid using heavy images and flash introductions to do so. Company fireworks can block flash- and frame-based websites, and these techniques hinder the ability of search engines to find your company – so it won’t matter how amazing your site looks if no one can find it! These websites will also take longer to download, meaning that your customers could get bored of waiting before they even see your key message.

Content
No matter how much experience you have in writing legal documents, this will not prepare you for marketing your business, so hire a copywriter. They will turn your legal blurb into legible, sales material for your customer. An experienced web copywriter will also make the content rich with the right keywords; to aid search engine optimisation work.

Another important rule is to make your content worth reading. Don’t make your site an elaborate business card, telling everyone how great you are – give people a reason to stay on your site. The www.bankcharges.info site is purely informational, designed to give free help to those in need. If possible, offer downloadable documents and brochures, allowing clients to read about your company without having to stay online, but make sure to keep it relevant. If you have a news/events page, update it once a week. Nothing will put a customer off faster than thinking the last time you were in the news was 1993!

Prompt visitors to act, have a call to action on every page: whether it’s a simple “call us for more information” or “click here to find out more”, you need to get people to interact with your website to make it successful.

When you have the basics down, you can add all the extra functions you want like a blog, or a log-in function for customers. However, these are extras. If the rest of your website is poor, no one will get as far as trying these out.

Usability
A website’s usability is judged on ease of use, ability to find relevant information, accessibility for those with limited internet experience or disabilities, and efficiency of the navigation system. A good website should download quickly, allow users to find what they are looking for in two or three clicks, and have a comprehensive site map.

The easiest way to aid usability is to make sure pages are direct and to the point. Try to make your pages “printer friendly”, to allow your customers to print out information to read later. Another easy change is having clear navigation to allow customers to find and access whatever part of the site is relevant to them.

If you can, offer your website content in several languages. If you show that you are willing to talk to clients in their own tongue, you will win them over much faster.

May 08 theJournal / 45
Before long, there will simply not be enough quality people in the workforce to satisfy business demand. "Retaining Talent", a current Society-hosted seminar series, advises employers how to improve their prospects of securing the loyalty of valued staff against this scenario. Peter Nicholson reports

This means war

The "second war for talent" has arrived, and the losers may be unable to find the people they need to stay in business. That is the stark message to emerge from a sponsored CPD seminar now doing the rounds.

The first war for talent, in case you missed it, was the rush in the 1990s to hire IT-literate people as the digital revolution moved into top gear. There is little debate today that the most profitable legal practices are generally those with the most efficient transaction management and document recording systems. But a wider front has opened, based on the fact that in Europe at least, to put it crudely, there are simply not enough people being born.

By 2020, 47% of the European working population will be 55 or older, and the overall number in the labour force is set to go into decline. UK surveys disclose that for 75% of managers, talent is the top priority; and 62% worry about talent shortages. At the same time the multi-faceted expectations of the "Generation Y" pool of labour entering the market (see opposite) present greater challenges to those seeking to hire and keep them.

These profound changes in the labour market form the backdrop to a series of lunchtime seminars, run by the Society in conjunction with Hudson Talent Management (details below).

"It really is a huge issue", says Neil Stevenson, the Society's Head of Strategy. "Some of the issues are so structural that it’s not just a current fad – it’s an inevitable challenge we will all face."

Hidden costs

Given that picture, the figures presented by Hudson director Victoria Speers show a serious leakage from the average workforce which points to obvious room for improvement in businesses' efforts to encourage essential staff to stay. Across the UK private sector, 22.6% of employees leave their companies each year; in professional services, the figure is almost as high, 20%. That’s one in five of your people.

What is more, two thirds of companies surveyed admit they don’t work out the true cost of employee turnover. When you add up recruitment and training costs, lost productivity and knowhow, rebuilding client relations, managerial and facilities time, and various other consequences, you could easily arrive at the equivalent of an annual salary or more.

Of course it is positively desirable to bring in new blood from time to time, and there are even those who advocate an annual "cull" of employees who score lowest in performance reviews. But there is no advantage in creating a climate of fear, and the balance of opinion is that a good turnover rate should be no more than 10%.

When push comes to pull

There will always be a proportion of employees who leave for domestic or other reasons outwith the control of any employer. In many cases, however, a significant motive will be not just the "pull factor" of a new job, but some element of dissatisfaction with their present position – the "push factor", which, as Speers maintains, "a great deal more significant in most resignations than most managers appreciate".

And it isn’t just a question of money or benefits, which form only one of six main categories of "drivers of turnover" that Speers identifies. Also potentially significant are issues relating to leadership and communication; personal career development; employee support; work environment; and employer resources and brand value. In fact if some surveys are to be believed, salary considerations are less important than a number of others, including career and company culture issues.

The main drivers, however, will vary from one organisation to another, and remedial action needs to be grounded in fact. You also need to prioritise issues according to their cost to your business and their importance to your employees. Understanding why your own people are leaving is therefore your first step to tackling the problem. Interviews with managers, focus groups, online surveys and feedback from leavers can all be deployed – preferably in combination as none of these on its own is a wholly reliable source of information.

On board and buying in

Armed with that knowledge, you can begin to devise solutions. To make them work, you have to be prepared to commit sufficient time and resources. Equally important is ensuring the buy-in of those you are aiming to keep onside. And finally, you have to monitor what happens once you have put your ideas into effect, and be ready to change course where necessary.

It helps, as Speers pointed out, to hire the right people in the first place. Ensuring you have correctly identified the competencies and behaviours required for each role, understanding what your target audience wants from your business, tailored candidate sourcing, and effective screening and selection methods all play a part. And don’t neglect a proper on-boarding process (the phrase covers more than just induction): 19% of leavers have been in post...
for less than six months.

Increased staff engagement in, and commitment to, your action plan also has a direct correlation with improved retention rates. Clear and consistent communication, sharing information with staff to build their trust, linking initiatives to your findings to make it clear you are listening, and a collaborative approach will all pay dividends. The desire for good leadership and management was a recurring theme in Speers’ presentation – see the “success factors” panel.

There is, inevitably, no magic wand or guaranteed formula for success, and typically a range of measures is required. But aim for the best mix of “quick wins” needing relatively little investment, and bigger gains, shorter and longer term, which may require more resources.

The home front

Following up, Neil Stevenson set the retention issue more closely in the context of Scottish solicitors and their businesses. The new status of registered paralegal (see p33), for example, could present a key opportunity for many practices. And with the competition that alternative business structures and outside investment will bring, he posed the question, is your talent for this market, or the next? Do you have a five year, or 10 year, strategy for expanding your turnover or redesigning your business?

The gaps in legal advice provision in some areas of the law and some parts of Scotland, have led to the project between the Society, the Scottish Government and the Scottish Legal Aid Board to monitor current and future trends in recruitment and retention of solicitors – but the issues raised in this seminar are relevant to the whole workforce. Whatever the answers, Stevenson passionately believes that solicitors need to be aware of the national trends and the issues thrown up by the research.

“Whether you are succession planning in a small firm or competing for global talent in the City, these social, economic, and population trends will be affecting you today, tomorrow, and for the foreseeable future. There is no doubt that failing to engage with these issues now will see businesses placed at a competitive disadvantage.”

Two events in the series remain – Wednesday 4 June in the Hilton Hotel, Dundee, and Monday 23 June in the Copthorne Hotel, Aberdeen. Each runs from 12 noon to 2pm, with lunch provided. Details of how to register for the free events, which count for one hour’s CPD, are at www.lawscot.org.uk/diversity/news.aspx.

Victoria Speers can be contacted on 020 7187 6268 or at Victoria.Speers@hudson.com.

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“Generation Y” and expectations from work

- High value on self fulfilment – look for fulfilling jobs
- Have a sense of purpose and look for meaning in work
- Work-life balance isn’t just a buzzword – they expect great flexibility
- Financially savvy, they care about benefits, pensions, savings
- Multi-taskers, they don’t like to stay too long on one job or assignment
- CSR conscious, they care about ethical management and tend to promote a corporate agenda that looks beyond value creation for shareholders

They are also:
- Used to “self serve”, highly personalised and immediate services (think of the latest TV services where you can fast forward, and download films) and expect that in their work environment
- Interested in gap years/career breaks
- More comfortable working with background noise than their predecessors, and not with “sitting in rows, in silence”, as commented on some trainee blogs from big firms
- Aware of the affordability of working – in relation to levels of debt, property and commuting costs etc – and that their seniors voted away their free education!

Have you heard of reverse mentoring? It applies when a senior person takes time to listen to a junior about such things.

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Feeling the draft?

Drafting documents is, of course, a key skill that lawyers use every day in every area of legal practice. It is no surprise therefore that claims against solicitors arising from drafting errors, omissions and ambiguities feature in the current Master Policy claims experience in every area of client work.

**Failure to implement instructions**

However, in many cases where it is alleged that there has been an error or omission in a document, it transpires on analysis that the underlying cause is not poor draftsmanship at all but a failure to implement the client’s instructions. Consider this case study:

A firm had acted for the seller of a small country estate. One of the partners had taken instructions from the client, who had clearly specified that he wished to retain a two acre paddock for future development. The partner passed the file to an assistant who dealt with the missives and conveyancing. The assistant omitted to provide in the missives that ownership of the paddock would be retained by the client. The client subsequently made a claim against the firm.

In this case, the underlying cause of the claim was not that there was an error or omission in the drafting of the missives or that the assistant had simply forgotten the client’s instructions: it was a failure to give effect to the client’s express instructions. Somehow the partner had failed to pass on those instructions to the assistant. There are practical risk controls that can prevent communication failures of this kind. A detailed note for the file by the partner recording the client’s instructions, and/or a detailed handover note to the assistant or, wherever possible, arranging that the colleague who will be carrying out the work attends the meeting with the client, will minimise the risk of any aspect of the client’s instructions being overlooked.

Claims have also arisen where the responsible fee earner is fully aware of the client’s instructions but nonetheless the document drafted by the fee earner does not reflect those instructions.

A client instructed his solicitors to draft a will leaving a liferent in his house to his disabled son and the residue of his estate to his daughters. Owing to an error in the will drafted by the solicitors, the son received a quarter of the residue on the client’s death.

A clearly enumerated note of the points to be included in the draft will and a comparison of the draft against that note, or the written record of the client’s instructions, would have helped prevent the error in the will.

There are instances of claims arising out of conveyancing transactions, where the missives correctly reflected the client’s instructions but the instructions were not carried through to the subsequent conveyance.

In terms of the missives the seller of property retained a right of access to his adjoining land, but this right was omitted from the disposition. The problem only emerged after the missives had expired. The seller intimated a claim against his solicitors for the reduction in value of his property, the right of access having been lost.

A methodical approach of highlighting provisions in the missives to be incorporated into the conveyance and then checking those provisions off systematically would minimise the risk of omissions.

**Failure to appreciate a risk**

Another type of claim, often ascribed to defective drafting (but where the true underlying cause is not a defective drafting issue at all), is illustrated by the following scenario:

It was provided in a separation agreement that an insurance policy was to be transferred to Mrs D. The policy could not be transferred because it had lapsed when Mr D ceased payment of the premium. Mrs D intimated a claim against her solicitors alleging defective drafting of the agreement in respect that it omitted to bind Mr D to continue paying the premium.

In this particular case the problem was not so much a drafting omission, but rather a failure by the solicitors to appreciate a risk (that the ex-spouse would stop paying the premiums) and then provide the appropriate contractual protection for the client.

A useful risk management control to address this is a checklist of issues for each of typical transactions or cases handled by the firm, amended, as appropriate, for the particular transaction or case, including a risk assessment focusing on potential risks and worst case scenarios.

**Complexity**

Missives for the purchase of a housing development were subject to a suspensive condition relating to planning. In order to keep the missives alive, the developers instructed their solicitors to waive the condition. The responsible partner had been about to depart for a fortnight’s holiday at the point when the developers were making up their minds about the planning condition and the file was left with an assistant who had recently joined the firm. The missives were extremely complex, running to six or seven formal letters and the complex price-setting arrangements were dealt with in the same set of provisions as the planning condition.

Waiving the planning condition had the unintended effect of crystallising the price payable by the developers at the fixed price.

Russell Lang of Marsh considers by reference to case studies how the risk of claims arising from drafting errors, omissions and ambiguities can be minimised...
deleted from the final draft.

- Owing to a typing error, missives were concluded for a price that was £500,000 less than the intended price. Enough said!

**Ambiguity**

Typographical/word processing errors aside, perhaps the main type of claim which truly results from poor drafting is ambiguity in the document. Sometimes claims arising from drafting ambiguities can arise because words or phrases are used in the document are not defined in the document itself and have no standard, well understood meaning.

A firm acted for tenants in taking a lease over commercial premises. The rent review clause provided that the rent would be reviewed (upwards only) every five years with the rent being reviewed by the greater of 2.5% or the “average prime office rental in the centre of Glendale”. Five years later the landlords sought a 50% increase in rent. They argued that the “prime office rental” in question should be determined by the three plush government quango offices recently erected as a result of devolution from Edinburgh. The landlords argued that all other office space (at much cheaper rentals) was no longer in the category of “prime” and should be disregarded. The dispute was referred to arbitration under the lease and the arbiter awarded a 45% increase in the rent. The tenants sued the firm, alleging that they were unaware that such a large increase could have been awarded and that they would have agreed to the terms of the lease if this had been explained to them.

In this case, the phrase “prime office rental” was not defined in the lease itself, and that often sows the seeds of a later dispute. Clarifying both the client’s understanding of the landlords’ intentions and his instructions with input from a surveyor might have made it possible to use more precise language. A full written record of the advice given and the risk being assumed by the client would have provided the firm with a defence to the allegation that the terms of the lease had not been explained to them.

In a recent communication, Master Policy lead insurers stated: “Master Policy Insurers have seen a number of cases where rent review clauses are variously void for uncertainty, ambiguous, or clearly very much in favour of landlord or tenant, and the client (whether landlord or tenant) later complains they did not understand this. The claims can be expensive and time-consuming for all parties.”

It is not only unusual clauses that can cause problems of interpretation.

A firm acted for the sellers in the sale of their shares in A Ltd. Much of the value of A Ltd comprised debts owed to it by customers. In the share sale agreement, the sellers gave the purchasers a warranty that the book debts “either have been realised in full or will be realised in full in the normal course of collection not later than 120 days from Completion”. The sellers brought a claim against the firm when the purchasers retained the second instalment of the price on the basis of a claim for breach of the warranty, arguing that the words “in the normal course of collection” did not require them to take court action against customers for recovery of unpaid debts.

Consider avoiding the use of words such as “normal” which, as in the case study, can lead to arguments about what is “normal” in any given situation. More precise wording outlining what actions required to be taken, or not taken, could have minimised the risk of a claim, particularly since the recoverability and value of the book debts was a critical feature of the transaction. 

**Typographical/word processing errors**

It may be thought that, with the almost universal use of word processing software, comparison of documents is a thing of the past. Not so – as the following recent examples from the claims experience illustrate:

- In a separation agreement the number of a life policy to be assigned was mistyped.
- A typing error in a will caused part of an estate to fall into intestacy.
- A clause specifying the length of a consultancy agreement was accidentally specified as the default position in the missives. The developers made a claim for the difference between the fixed price they ended up being committed to and the lower price they would have been bound to pay in accordance with the price-setting formula.

While issues such as lack of supervision of a junior solicitor may have been a contributing factor, there can be little doubt that the complexity of the missives, leading to a failure to appreciate the consequences of the waiver, was the main underlying cause of this claim. Consider, where possible, structuring missives in a way that keeps issues distinct. Many firms adopt the approach of adjusting a draft offer so that there is a single contract document. Having a colleague test the effect of the proposed waiver before it was sent to the seller’s solicitors might have brought the unintended consequence to light.

**Russell Lang and Marsh**

Russell Lang is a former solicitor in private practice who works in the FinPro (Financial and Professional Risks) National Practice at Marsh, the world’s leading risk and insurance services firm. To contact Russell, email: russell.x.lang@marsh.com.

The information contained in this article provides only a general overview of subjects covered, is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Insureds should consult their insurance and legal advisers regarding specific coverage issues.

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Two cases raising rights of audience questions are among those discussed by Sheriff Lindsay Foulis in his latest survey, along with evidence issues and summary cause and small claim procedure.

Rights of audience
In Anderson, Petr [2007] CSOH 110; 2008 SCLR 59 the petitioner was represented by her son, who was a member of Faculty. He, however, represented his mother in a personal as opposed to a professional capacity. The petitioner’s son argued that in circumstances in which a party litigant was unable to appear and the court was so satisfied, there was an inherent right to allow another person, who did not have rights of audience, to represent that party’s interests. A power of attorney had been granted by the petitioner in favour of her son entitling the latter to represent her and appear as a party to that action.

Lord Mackay of Drumadoon refused the application. It was incompetent for an unqualified person to appear on behalf of another. It was not possible to allow a person assisting a party litigant to address the court on behalf of the party litigant. The power of attorney was of no relevance.

A related question arose in Cultural and Educational Development Association of Scotland v Glasgow City Council [2008] CSIH 23; 2008 GWD 10-174. One of the issues was whether a member of a voluntary association could competently sign an initial writ. The other was whether that member could represent the association in court. In deciding the appeal the Inner House determined that such an association, although it might be a grouping of natural persons, was not itself a natural person. Whilst it could sue or be sued in its own name in the sheriff court, it did not follow that it should be treated as a natural person. Accordingly, an association could not initiate proceedings by an initial writ signed by one of its members. The writ was a nullity and the dispensing power had no locus to operate. The initial writ should never have been accepted by the sheriff clerk.

Professional conduct
Still on the issue of conduct of proceedings, in Henry v Rentobil Initial plc [2008] CSIH 24 the Inner House again made comments about the professional obligations incumbent on agents in the conduct of litigation. In this instance an appeal hearing, estimated to last four days, ended midway through the second day. The court observed that the overestimate had resulted in judicial time being wasted and prevented another matter being heard. Agents had duties to the court as well as the litigants. Proper and timeous discharge of such duties was not conditional on instructions from clients.

Evidential matters
In two recently reported decisions, issues relating to civil evidence have arisen. In the first, Advocate General for Scotland v Montgomery [2006] CSOH 123; 2008 SCLR 1, Lady Paton considered that a certificate issued in terms of s 70 of the Taxes Management Act 1970 of the tax charged, due but unpaid, is sufficient evidence on the issue. These certificates were, however, not conclusive. Accordingly the defender was entitled to a proof into the issue of tax liabilities. It
was not necessary to reduce such certificates to dispute their accuracy.

In Riddell v Leisure Link Electronic Entertainment Ltd [2008] CSIH 16; 2008 GWD 8-154, evidence had been led at the proof in the form of video evidence purporting to show the pursuer walking relatively normally. The pursuer’s general practitioner had also treated her for a number of years for back pain. The sheriff had awarded damages for back injury sustained in the course of her employment in May 2000. The First Division upheld the sheriff’s assessment of the evidence. He had rationally justified his conclusion as to the credibility and reliability of the pursuer. She had been in the witness box for five days and thus observed for that period. Her general practitioner spoke of her desire to return to work. This was detailed in the medical records. Her husband and son supported the pursuer’s evidence of her disability. Some of the video footage had not been lodged in court, and important aspects of the investigator’s evidence, which related to video footage not lodged, were not put to the pursuer or medical experts who were questioned in cross about some footage actually lodged in court. The sheriff had a proper basis for rejecting the defenders’ challenge to the pursuer’s credibility and reliability. Further, he had rationally explained why he had concluded that the accident had caused the pursuer’s injury in light of the evidence of the medical experts, notwithstanding the prior treatment for back pain. The lessons to be learned by practitioners are self evident.

Summary cause and small claim

In Penman v The Auction Rooms 2008 GWD 10-178 (named in error as the pursuer traded as The Auction Rooms), the dismissal of a summary cause at a continued preliminary diet was appealed. The pursuer sought delivery of an item. The sheriff considered that for the pursuer to succeed he had to prove the defender had been given the item in error. The sheriff did not have the documentation produced made it clear that this could not be established. The statement of claim and defences, however, seemed to indicate that there was a factual dispute. Sheriff Principal Bowen considered that at the continued preliminary hearing, once the sheriff determined that a negotiated resolution was not possible, he could either assign a proof, or if satisfied that the facts were sufficiently agreed, determine the matter then and there. As the documents undermined the pursuer’s whole case and no explanation could be given for this, the facts were readily ascertainable and thus it was entirely appropriate for the sheriff to determine the issue.

It seems to me that this decision is a practical demonstration of the terms of summary cause rule 8.3(3)(d) working in practice. I suspect that this may not often happen, in part due to the programming of a court being such that the time available to deal with a summary cause at a preliminary hearing in most instances is limited.

It is also worth contrasting the above with the circumstances in Niven v Ryanair Ltd, Aberdeen Sheriff Court, 15 April 2008. In that case, after a minute for recall had been granted and the initial defence was withdrawn, a further defence based on jurisdiction was presented. An appeal against a refusal at first instance to allow the second line of defence to be stated was successful, and the action was dismissed on the basis of no jurisdiction. The fundamental nature of jurisdiction was clearly the basis of the successful appeal.

An interesting aside comes from this decision. Whilst the application for the stated case was lodged timeously, through an oversight it was not accompanied by the appropriate fee. The sheriff clerk did not advise of this omission promptly, which resulted in the fee being paid after the time for lodging the application had expired. The issue was whether the application had been lodged timeously. Did a document have to be accompanied by the fee to be accepted by the sheriff clerk and thus lodged? Sheriff Principal Young did not need to consider the issue as he was not addressed in full and it was a clear case for the exercise of his dispensing power.

The usual caveat applies.
Professional briefing  
Employment

Two employment tribunal cases highlight the importance of proper proof in defending age discrimination claims

The reason of age?

In two recent cases under the Employment Equality (Age) Regulations 2006, the tribunal had to answer the question: was the claimant’s dismissal for a potentially fair reason, or was it in fact discriminatory on the grounds of age?

Youth in issue

In Wilkinson v Springwell Engineering ET/2507420/07 the employer argued that 18-year-old Ms Wilkinson had been dismissed from her office administrator job not because of her youth but on the grounds of capability.

Ms Wilkinson had taken over the role from her aunt, who gave her some basic instruction. A few weeks into employment, concerns were raised about her workrate and an administrator from another office was brought in to help out. She was older and perceived to have more experience by the respondents. A further month on, Ms Wilkinson’s employment was terminated. She claimed she was told she was too young, an accusation denied by the respondents.

The tribunal found that the respondents did indeed equate experience and age, and conversely linked a lack of experience with incapability – stereotypical assumptions to Ms Wilkinson’s prejudice.

The respondents’ case was further hampered by Ms Wilkinson’s consistent evidence throughout, while their witnesses achieved “nowhere near the same degree of consistency”. On the crucial question of what was said on termination, the tribunal preferred the claimant’s evidence.

The tribunal readily found a prima facie case of discrimination. This shifted the burden of proof to the respondents, whose argument that capability was the real reason for dismissal was rejected as no concrete evidence of poor performance had been submitted.

Ms Wilkinson was awarded more than a year’s loss of earnings, plus £5,000 injury to feelings, an additional two weeks’ salary for not being given a full statement of employment particulars – and a 50% uplift for failure to follow the statutory dismissal procedures. Finally, the tribunal made a recommendation – an under-utilised provision – that the respondents provide a “truthful and not misleading” reference whenever requested to do so by a prospective employer, to state expressly that she was dismissed in breach of the Age Regulations.

Managers liable

While Wilkinson considered capability as the potentially fair reason, Hussain v Live Nation (Venues) UK ET/1401186/2007 considered conduct. The claimant, aged 51, had been front-of-house manager at the Hippodrome Theatre for 22 years. After a new general manager (GM) and assistant were appointed, various instances of work conflict ensued. Among other things, Mr Hussain alleged he was marked down in appraisals, and undermined when a front-of-house reorganisation was implemented in his absence on holiday.

In March 2007 Mr Hussain was summoned to a disciplinary hearing for an incident in autumn 2006. In his words, he made his way to GM’s office and expressed his “dismay and displeasure” at his treatment. She claimed he stood above her at the edge of her desk, waving his finger at her and waving his arms around. Mr Hussain was suspended and subsequently dismissed for bullying and harassment.

When considering whether a prima facie case of age discrimination was made out, the tribunal were swayed by a file note by the divisional manager which said: “it became increasingly obvious to me that his main issue was being managed by two younger members of management”. At tribunal both the divisional manager and the HR manager emphasised the age difference between Mr Hussain and the GM.

The tribunal held there was enough to shift the burden of proof to the respondents, then rejected out of hand the suggestion that conduct was the reason for dismissal and held that the approach taken would not have been applied to a younger man. The age discrimination claim was upheld not only against the employer but also the divisional and HR managers, with £7,000 of the total £42,000-plus award being made jointly and severally against those three respondents.

Some useful points

If acting for a claimant:

● Consider the merits of naming individuals as respondents where it is alleged they are responsible for the discrimination in question;

● Explore the full range of claims available to your client: e.g. often forgotten are those re failure to give a written statement of employment particulars, or to comply with the right to be accompanied;

● As part of the remedy sought, consider seeking a recommendation where this will obviate or reduce the adverse effect of the discrimination to your client.

If acting for a respondent:

● Explain to clients the risks of not following the statutory dispute resolution procedures, regardless of the length of service of the employee in question;

● Plead a reasonable steps defence if one can be made out, then ensure evidence is led and submissions made on the point.

Whichever party you act for:

● Test the evidence of your witnesses thoroughly before going into a hearing, cross-examining them yourself to see how their testimony will stand up under pressure!

Jane Fraser, Head of Employment, Pensions and Benefits, Maclay Murray & Spens LLP
The benefit burden

A dangerous trap exists for separated parents receiving child-related benefits, who agree to share care of their child

Child benefit. Child tax credit. Working tax credit. The current UK benefit system presents a complex array of options providing varying degrees of support for families. But what constitutes a “family” for the purpose of these benefits, and what implications does that have for those in most need of support?

There are now a variety of different domestic arrangements which involve caring for a child. A child may live with both parents, or only one. In particular, a child whose parents are separated may divide his or her time between two households over the course of a week.

This last arrangement can cause unforeseen issues when it comes to receipt of benefits. Ultimately, “shared care” does not translate into shared benefits. Some benefits, child benefit in particular, can only be paid to one individual for one child. Where there are two children, parents can elect that each receives the benefit for one child. However, the benefit for one child cannot be divided between two parents, and must be paid to the parent with “main responsibility” for the child. This can cause real difficulties, particularly where one or both rely on benefits as a principal source of financial support.

Revenue policy: CSA rules
The relevant legislation (the Social Security Contributions and Benefits Act 1992) fails to provide specific guidance as to how child benefit should be dealt with in situations of shared care, stating merely that where parents do not elect who is to receive child benefit in such a situation, the Secretary of State will use his discretion to make a determination. In reality this power is delegated to HM Revenue & Customs.

The policy not to divide payment of child benefit between two individuals was unsuccessfully challenged in R (Barber) v Secretary of State for Work and Pensions [2002] 2 FLR 1181, where the court ruled that the Secretary of State’s refusal to split child benefit payments did not amount to discrimination. This issue is one of which the prudent family law practitioner must be aware in order to ensure a client enters into a shared care arrangement in full knowledge of all potential consequences.

The issue becomes more complex due to the direct correlation between receipt of child benefit and assessments by the Child Support Agency. In short, if the CSA cannot decipher who is the parent with care and who is the non-resident parent, it will look to who receives the child benefit, and that party will become the only “parent with care” for assessment purposes. This provision can be found in the Child Support (Maintenance Calculations and Special Cases) Regulations 2000, reg 8(2)(b).

A cautionary tale
In extreme cases this can produce alarming and inequitable results. This was the position in which a recent client found herself. She had separated from her husband, with whom she had one child. On separation they agreed to share care equally between them. They entered into an agreement whereby the client assigned the child benefit to the father in recognition that he was paying specific childcare costs. The father earned considerably more, and the client eventually submitted an application to the CSA. This was refused because without the child benefit she was the “non-resident parent”. The father then retaliated with his own CSA application and was successful. The client, with an equal share of care and a significantly lower income, had no choice but to make maintenance payments to the father.

She had sought advice from another firm at the point of entering into the original agreement, but had not, evidently, been advised of all the potential pitfalls of relinquishing child benefit. While this example is perhaps an indication of one of the most serious consequences of the prohibition against sharing benefits, other effects are worthy of note. For example, receipt of child benefit brings with it another less known advantage, in the form of the Home Responsibilities Protection Scheme. This applies to individuals who care for a child under 16 and bolsters that person’s entitlement to a state pension where they may otherwise have had insufficient national insurance contributions.

Further, child benefit is not the only benefit which must only go to one person in respect of one child. Child tax credit and the childcare element of working tax credit are subject to the same restriction.

In short, a client entering into a shared care arrangement needs to be aware of the potential impact on receipt of benefits. Although it may be impossible to provide total security for clients who find themselves in this situation, a carefully worded agreement can seek to remedy any inequities privately between parties, provided they are anticipated and dealt with accordingly.

Hard cases: Importance of child benefit
A mother in a shared care arrangement, who had agreed to assign her right to child benefit to her separated husband, then made an application to the CSA as she had the lower income, was refused and even found liable herself in maintenance as the non-resident parent.

One Parent Families Scotland provides helpful information on the benefits system which may be of use to both practitioners and clients.

Anna McGovern, The Morton Fraser Family Law Team
Iain Rutherford and Alan Barr highlight an issue over renunciations of rights in an intestate estate which is causing difficulty in obtaining bonds of caution

Signing away family rights

Our firm acts for Zurich GSG Ltd who issue many types of surety bonds and guarantees. Since 2002, Zurich GSG Ltd have been providing individuals and professional firms with bonds of caution as required by the courts for executors in connection with the administration of intestate estates in Scotland.

Zurich have become aware of certain problems occurring as a result of parties executing renunciations of their succession rights. These problems can lead to a delay in bonds of caution being granted and, in a very few cases, no bond being issued at all. As a result, Zurich considered it would be useful if the profession were made aware of the problems which can occur and how best to resolve and avoid them.

As execrury practitioners will know, in certain circumstances it may be preferable from a family’s point of view for an individual to redirect their succession rights in favour of another individual. It is quite common, for example, to arrange for a surviving spouse to inherit instead of an adult child, so that the surviving spouse is supported during their lifetime.

No significant problems occur when legal rights or prior rights are discharged. However, when a beneficiary renounces a share in the free estate (the “dead’s part”), problems can occur. There is strong authority to support the conclusion that rather than a renouncing beneficiary’s share passing to the free estate, that share would, in fact, transfer to the Crown as ultimus haeres. Zurich have advised us that there may be some confusion amongst the profession about this effect of a renunciation of succession rights.

### Discharge of legal or prior rights

The consequences of a discharge of legal rights by a child or spouse are well established. If the discharge occurs pre-death, the discharging party is treated as having predeceased, with the effect that the shares of the other individuals entitled to legal rights are increased.

If the discharge is made post-death, the share of the discharging party falls into the free estate and is distributed according to the rules of intestate succession.

A spouse is entitled to discharge his or her prior rights. If this occurs, the entire moveable estate becomes available for satisfaction of legal rights. Thereafter, the estate (including any dwellinghouse which may have been subject to prior rights) is distributed in accordance with the rules of intestate succession.

### Renunciation of succession rights

Regardless of the class of beneficiary concerned, where a beneficiary renounces entitlement to the estate under the rules of intestate succession, the share of the estate to which they would be entitled passes to the Crown as ultimus haeres. This is irrespective of whether the renunciation occurs pre- or post-death. The Queen’s & Lord Treasurer’s Remembrancer (QLTR) have confirmed that this is their understanding of the legal position. However, Zurich are concerned that a number of applicant solicitors may not be aware of this.

Where the renunciation occurs pre-death, both the Succession (Scotland) Act 1964 and the common law support the conclusion that the share of the estate renounced passes to the Crown. Under s 2 of the 1964 Act, each successive class of beneficiaries becomes entitled to the estate only if the intestate “is not survived by a prior relative”. By implication, if a prior relative does survive, the next class of beneficiaries is not entitled to the estate. As no class of beneficiary is entitled to the estate where a prior relative survives but renounces, the right to the estate would fall to the Crown.

The common law, in general, supports this view. There is some authority that prior to the assimilation of moveable and heritable succession in 1964, where a right in heritable property was renounced, this right would transfer to the next heir in line, with the Crown being the final heir only where no other heir was available. However, there is no such authority in respect of moveable property, which instead was dealt with more closely in line with what became the assimilated law in the 1964 Act. (For further consideration, see McLaren, Wills and Succession, paras 136-142 and 278; Johnston v Miller (1847) 9D 1389; Erskine, Institute (3rd ed), III.9.23.)

In respect of a post-death renunciation, the interest has, in contrast to a pre-death renunciation, already vested in the beneficiary. In such a circumstance the right of the more remote class of beneficiary to the free estate in fact never came into existence, with the result that there are no rights to revive when the beneficiary with the prior interest renounces the interest. The right to the estate would, in such circumstances, again fall to the Crown.

### How to resolve the problem

Thus, where a party wishes to redirect their succession rights in favour of another individual, the appropriate way to achieve this would be by way of a deed of variation in favour of that other individual. However, where a renunciation has already been executed the situation is more complex, particularly since...
renunciations are generally irrevocable.

A deed which purports to transfer a right under intestate succession to another party may be reduced where the deed is of a gratuitous and unilateral nature and it is granted under essential error as to its effect (see McCaig v University Court of the University of Glasgow (1904) 68 R 918, and Hunter v Bradford Property Trust Ltd 1970 SLT 173 (HL)). The relevant test is whether the error was such that were it not for the error, the party would not have executed the deed. It appears reasonable that where an individual renounces their rights under intestate succession with the intention that their rights transfer to someone other than the Crown, this test is met. An action of reduction of the renunciation would be the appropriate remedy in such circumstances.

The Crown’s position
In these particular circumstances it appears that an action of reduction would not be necessary. The QLTR has confirmed that if there are surviving blood relatives and the intention of the renouncing party is clear, the Crown will not assert its rights under the 1964 Act. In such circumstances the Crown will provide a letter confirming that it does not assert its rights to the estate, with the intention that its interest is subsumed into the free estate for distribution to the remaining claimants. The Crown has confirmed that an entry to this effect will be included in its published policies in due course.

Requirements for a bond
From Zurich’s point of view, if you are dealing with an intestate executry where a renunciation has been executed they will require:

- confirmation from the Crown that it will not assert its rights to the estate;
- indemnification of Zurich GSG Ltd’s liability by the beneficiary to whom the estate is to pass;
- a discharge of Zurich GSG Ltd’s liability by the beneficiary who has executed the renunciation.

In order that delays do not occur with the bond of caution, it would be advisable if the above were obtained prior to the application being made.

In the event that a party does wish to redirect their succession rights, renunciations should, at least for this purpose, be avoided and practitioners should arrange for that party to execute an appropriate deed of variation.

Iain Rutherford and Alan Barr, Brodies LLP
This month’s cases deal with failures to respond, charging unintimated fees, interest in a will, sending false letters, and acting in a conflict of interest situation.

Margaret McAfee
A complaint was made by the Council of the Law Society of Scotland against Margaret McAfee, solicitor, formerly of Margaret Gray & Company, 297 East Muirhall Street, Coatbridge and now at Flat 1, Fountain Court, 72 Deedes Street, Airdrie (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of her failure without explanation to timeously provide her business file to the Society. The Tribunal censured the respondent. The respondent did not lodge answers or appear at the Tribunal. The Tribunal accepted the evidence led on behalf of the Society and considered that the respondent’s delay of approximately four and a half months in producing the file, which resulted in the Society being delayed and impeded in investigating the complaint, did amount to professional misconduct. The Tribunal noted that the respondent did eventually produce the file, but found it unfortunate that the respondent had not lodged answers or seen fit to attend the Tribunal. The Tribunal was aware that the respondent’s conduct was such conduct and found that the respondent’s conduct amounted to professional misconduct. The Tribunal however would not wish to associate itself with such conduct and found that the respondent’s conduct was unprofessional. The case was appealed to the Court of Session by the respondent. The Court of Session upheld the Tribunal’s decision.

Michael Gordon Robson
A complaint was made by the Council of the Law Society of Scotland against Michael Gordon Robson, solicitor, The Old School House, 2 Baird Road, Ratho (“the respondent”). The Tribunal made no finding of professional misconduct against the respondent. The respondent did not appear at the Tribunal hearing and requested an adjournment on medical grounds. The Tribunal was not however satisfied that he was unfit to attend the Tribunal and proceeded in his absence. The fiscal led affidavit evidence before the Tribunal. The Tribunal were not satisfied beyond reasonable doubt on the basis of the affidavit evidence that the respondent’s conduct amounted to professional misconduct. The Tribunal was satisfied beyond reasonable doubt that the respondent had failed to communicate effectively with his client but did not find that this failure was serious and reprehensible enough so as to amount to professional misconduct. The Tribunal however would not wish to associate itself with such conduct and found that the respondent’s conduct was unprofessional. The case was appealed to the Court of Session by the respondent. The Court of Session upheld the Tribunal’s decision.

Michael Gordon Robson
A complaint was made by the Council of the Law Society of Scotland against Michael Gordon Robson, solicitor, The Old School House, 2 Baird Road, Ratho (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of his breach of rule 6(1)(d) of the Solicitors (Scotland) Accounts Rules 1997, his acting dishonestly by charging a fee well in excess of that which he agreed with the co-executor, which fee he took to account from executry funds without intimating a fee note to the executors, and his failure to respond timeously, openly and accurately to the reasonable enquiries made of him by the Society. The Tribunal ordered that the name of the respondent be struck off the Roll of Solicitors in Scotland. The respondent did not appear at the Tribunal and asked for an adjournment on medical grounds. The Tribunal was not satisfied that the respondent was unfit to attend the Tribunal and proceeded in the respondent’s absence. Affidavit evidence was lodged. The Tribunal was satisfied beyond reasonable doubt that the respondent had agreed a fee in respect of the executry, then gone on to charge a fee in excess of the agreed fee, and had taken these fees to account without issuing a fee note to the executors, and that this amounted to professional misconduct. The Tribunal was also satisfied beyond reasonable doubt that the respondent had failed to respond to the Society. The Tribunal considered that the respondent had deliberately acted in breach of an agreement with his client. The Tribunal was particularly concerned to note two previous findings of professional misconduct against the respondent where he had failed to respond to the Society. The Tribunal noted that the failures to respond to the Society in this case arose in December 2002, which was after the Tribunal findings issued on 8 October 2002 when the Tribunal had taken a very serious view of the respondent’s
failure to respond to the Society and failure to comply with previous undertakings given on his behalf to the Tribunal that he would comply in future. Even after the two previous findings against the respondent he still failed to respond to the Society. This taken together with the respondent’s acting in a dishonest fashion and charging fees in excess of that agreed with his client brought the Tribunal to conclude that the respondent was not a fit and proper person to remain on the Roll of Solicitors in Scotland.

The case was appealed to the Court of Session by the respondent. The Court of Session upheld the Tribunal’s decision.

Louise Ranee Koulaouzos

A complaint was made by the Council of the Law Society of Scotland against Louise Ranee Koulaouzos, solicitor, Torridon House, Almondvale Boulevard, Livingston (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of her preparation of a will on behalf of a client which conferred upon her a significant monetary benefit. The Tribunal censured the respondent.

The Tribunal considered whether or not the respondent’s conduct amounted to professional misconduct. The majority view was that it did because the respondent drew up the will in which she was the residuary legatee, which was contrary to the Code of Conduct in place at the time, and the respondent either knew or ought to have known that she should not have prepared the will in these circumstances. The situation did not fall within either of the exceptions which the Tribunal had acknowledged existed in previous cases. It was however clear that at the time the will was made, the respondent was in a long term relationship with the client and they were living together. It was also clear that the will reflected the client’s wishes and the respondent did not exert any undue influence over him. The respondent had made an unfortunate error of judgment in preparing the will. The Tribunal considered that a censure was sufficient penalty.

Mary-Rose McLean

A complaint was made by the Council of the Law Society of Scotland against Mary-Rose McLean, solicitor, Appartement 12, Bloc A2 Le Roqueville, 20 Boulevard de Princesse Charlotte, Monaco (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of her preparing and sending to her employer two letters, purportedly from her doctor, which gave a completely false account of her medical condition as well as a false explanation for a period of sick leave. The Tribunal censured the respondent.

The respondent used fake letters to mislead her employer, which is totally unacceptable conduct for a solicitor. The Tribunal however found that the circumstances of the case were unusual. It was clear from the report from the respondent’s psychiatrist that she did not realise what she was doing at the time that she prepared the letters. The Tribunal considered that the medical evidence lodged in connection with the respondent’s state of mind, both before and at the time of writing the letters, substantially mitigated the misconduct. The Tribunal was also impressed by the fact that once matters came to light the respondent dealt with them, got treatment from her doctor and cooperated with her firm and the Society. In the whole circumstances, the Tribunal considered that a censure would be sufficient penalty.

Iain John Smith Vaughan

A complaint was made by the Council of the Law Society of Scotland against Iain John Smith Vaughan, solicitor, Messrs Caird Vaughan Solicitors, 1 Bank Street, Dundee (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of his acting in a conflict of interest situation by acting for a client when he had previously acted for the co-accused in circumstances where his firm had sought to incriminate the client when acting for the co-accused, the respondent having acted throughout the prosecution of the co-accused, and by accepting instructions to act for a client when he had access to confidential information in respect of the case against the co-accused which could be relevant to the defence of the client. The Tribunal censured the respondent and fined him in the sum of £2,500.

The Tribunal considered that the respondent owed a continuing professional duty to respect the co-accused’s confidence, and was not free to disclose to his client the confidential instructions that he had been given by the co-accused and accordingly could not properly advise his client in connection whether or not the co-accused should be incriminated. The respondent was in breach of the Society’s Code of Conduct for criminal work. The Tribunal took account of the fact that the conflict in this case was complex and successive. The Tribunal considered that the respondent had made an unfortunate error of judgment. The Tribunal was impressed by the fact that the respondent had taken steps as set out in the letter from his firm to put in place measures to ensure that the situation would not arise again. The Tribunal however considered that the respondent, as an experienced solicitor, should have known better. The Tribunal accordingly considered that a censure and fine of £2,500 was the appropriate penalty.
Professional briefing Web review

Posts for the post

The web review explores the sites of the various mail services available to the legal profession

Often disparagingly referred to as “snail mail” by those who prefer its electronic counterpart, sometimes you need to get an original document somewhere and that’s where these three mail delivery services come in.

DX
www.thedx.co.uk
DX (or Document exchange) delivers items of mail between lawyers (and others). Never having used the DX service in my life I am content to assume that it works well and simply tell you about their website.

I tend to visit the DX website in order to use the online directory, so I can get a DX number for filling in legal aid forms. This works well and is easy to use. It offers a “copy to clipboard” function which is a good idea, but works only in Internet Explorer, and not in Firefox or Opera browsers.

A feature called “Webtrack” allows DX users to track their mail as it whistles across the country – receiving online confirmation and even proof of delivery. This service is available for certain specified types of delivery service only.

The website also has a number of useful materials and guides for users, including a DX poster for your mailroom with instructions on how to label a DX envelope and suchlike.

The members directory has a search function like DX’s, but returns more details, including the postal address, fax and telephone numbers, email and website addresses. As well as a search function, the website allows you to download the whole directory as a PDF document or a CSV (comma separated values) database file.

The site has very little else in the way of bells and whistles, and while the news archive did make mention of a tracking service for some items of mail, this did not appear to be an online function (at least not through this website).

Royal Mail
www.royalmail.com
If the DX and Legal Post really are siblings, then the Royal Mail must be their single mother – constantly criticised for being a drain on public funds, but still working hard for a very low fee! Some law firms, like my own, are members of neither DX nor Legal Post and have to rely upon the Royal Mail. I have therefore made use of the Royal Mail many, many times and I am content to tell you that it works well (most of the time). I am also happy to report that it has a pretty terrific website.

The reason I visit the Royal Mail’s website most often is to check a postcode – this is a free service and works well even with only partial address information, delivering not only the postcode but also the full address with post town, a map of the surrounding area and the offer to make up a label for you to print off. A click on the next tab allows a more general address search, working backwards from the postcode or with only some of an address. This service can only be utilised 15 times per day, which should be plenty for anyone – and if you exceed your limit you can always start again on your colleague’s computer.

If the Legal Post site lacked in the way of online toys, this site has gadgets and gizmos galore (to quote the Little Mermaid). Run out of stamps? Franking machine broken? Simply pay for your postage online and print out the postage label or directly to the envelope! Want to know if a recorded delivery item has reached its intended destination? Use the Track and Trace service – which not only confirms the mail’s status but also shows you the scanned signature from the recipient.

Obviously there is also a large volume of information on Royal Mail services – from logistics to junk mail. Obviously there is also a large volume of information on Royal Mail services – from logistics to junk mail. Now, if only there was a spam filter for letterboxes.

Who writes this column?
The website review column is written by Iain A Nisbet of Govan Law Centre
e: iain@absolvitor.com
All of these links and hundreds more can be found at the recently revamped www.absolvitor.com

The Legal Post
www.legalpost.co.uk
The Legal Post is younger sister to the DX and, as if still suffering from sibling rivalry, feels the need to trumpet news of a firm that has not only joined the LP, but has also severed ties with DX. In the interests of neutrality, I can confirm that I have never in my life used the Legal Post either and am just as content to assume that it too works well.
The theme of this book is how the impact of women on the economic market should affect our business operations.

Why women mean business
Understanding the emergence of our next economic revolution

Avivah Wittenberg-Cox and Alison Maitland
PUBLISHER: Jossey-Bass
ISBN: 0 470 72508 5
PRICE: £16.99

Both authors have impressive profiles. Avivah Wittenberg-Cox is a founder and Honorary President of the European Professional Women’s Network, the CEO of a management consultancy specialising in building “gender bilingual” organisations, and an executive coach. Alison Maitland is a journalist, senior visiting fellow in the Faculty of Management at Cass Business School, City University, London, and directs the Work-Life Diversity Council of The Conference Board Europe.

Their style of approach to the topic of the impact of women on the business market is mirrored by their style of writing. The book flows well, is easy to read and provides references for further reading. Its case studies are useful, often based on direct interviews and to the point. I particularly like the illustrative cartoons, which are often harder hitting than the balanced approach taken in the text.

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The theme of the book is that women now have a significant impact on the economic market. As a result, it is important to consider how this affects our business operations. Chapter 1 sets out the economic case resulting from women having more than half of the purchasing power across the globe, a theme developed in more detail in Chapter 3. Whilst women are now active in the labour market, many are stuck at middle management level or lower. Chapter 2 sets out the business case for having more women in top jobs, illustrating that companies who have a higher than average percentage of women in their top management teams significantly outperform those with lower than average representation. With skilled talent in short supply, organisations need to make specific adjustments in how they recruit, retain and promote. They need to become “bilingual”, recognising that people are equal and different. The authors do not recommend positive discrimination or gender-based stereotyping. Instead they argue that there should be commitment from the top to manage the differences proactively and ban bias. Chapters 4 and 5 offer a range of specific actions that organisations can take.

Chapter 6 looks at the differences in culture across a range of countries. Interestingly, France leads the field in enabling women to work and have children. The key to their success appears to lie in significant investment by the state in childcare provision, and a society that accepts the principle of dual full-time careers and parenthood free from guilt.

Chapter 7 is entitled “Figuring out Females”, and analyses the different motivations and career paths of women to work. It sets out the case for a range of behavioural patterns that may puzzle employers, and explains what training may assist women in developing their careers. Chapter 8 considers how employers need to respond to the impact of technology on offering options to current work practices, the value of “grey brainpower”, the demands of the “Me Generation” and the desire of fathers to play an active part in their children’s upbringing.

I would recommend this book to anyone wanting to think strategically about current trends in the economic and employment markets. The Schlumberger case study illustrates succinctly the theme underpinning this book. Their senior director finishes his interview by saying: “When we figure it out for women, we will have created a better workplace for all our employees. It’s not about working less hard. It’s about taking the shackles off and letting smart, ambitious people decide how best to work”. I couldn’t agree more.


Fiona Westwood
Responding to Graeme McCormick’s article in last month’s Journal, Stewart Maxwell, Minister for Communities and Sport, seeks to dispel the misconceptions surrounding the home report and argues that it should be welcomed.

A better buy

In just over six months, on 1 December 2008, the home report will be part of the Scottish housing market, required by law. It is one of a range of Scottish Government policies intended to improve the condition of private sector housing in Scotland.

For most people, buying a house is the biggest financial decision of their lives. I believe it is one that should be based on reliable and detailed information and I am confident that the home report will achieve this.

Under the current housebuying system, around 90% of buyers rely only on a mortgage valuation, the most basic inspection of a property. A few years ago, I was one of the 90% when I purchased a home. Before long I realised that essential repairs were needed, which cost me unplanned time and money – because I bought without enough information about the condition of my property. That experience is one that I do not want other buyers in Scotland to suffer, and it has brought alive the arguments and evidence that I have spent very many hours exploring since taking up my ministerial role.

The object: better information

Under the home report reforms, sellers will commission a single survey, containing detailed information on the property, prior to marketing their house for sale. A chartered surveyor will prepare the single survey, which will include a valuation and an energy report with details of the energy efficiency of the property and how it can be improved. The seller will also complete a property questionnaire about various other aspects of the house that will be of interest to buyers and to conveyancers.

The result will be that both buyers and sellers will have far better information at an early stage in the transaction process to help them to decide how to proceed. In my view it is at this early stage in the process that people are most alert to questions of value and condition. I want any potential owner to be armed with sound, professional information before deciding to submit an offer to buy.

In his article in the April edition of this Journal, “Homing in on Home Reports”, Graeme McCormick deplored the emotionally driven nature of many decisions to purchase. That is precisely the reason why the home report will bring benefits to the system. It provides information as early in the decision making process as possible, while keeping other, sound, parts of the system. I believe that the home report is a pragmatic step that as far as possible goes with the grain of the existing system.

Another example of that is the concept of the property questionnaire, which was suggested initially by a representative of the Law Society of Scotland on the Purchasers’ Information Advisory Group. Building on existing good practice, the property

The Law Society of Scotland has organised a series of introductory home reports seminars in May and June, funded by the Scottish Government. Speakers from both organisations will tour Scotland to inform the profession on the detailed nature and content of home reports and go through the requirements of each component. Further, more comprehensive seminars are also planned for September, nearer the 1 December launch date. The seminars take place in Dundee on 26 May; Dumfries, 30 May; Inverness, 2 June; Edinburgh, 5 June; Aberdeen, 9 June; and Glasgow, 16 June. For further information contact Update at the Society or log on to www.lawscot.org.uk.
The introduction date was chosen on advice from lenders and selling agents, as the market will be relatively quiet

questionnaire will give prospective buyers a useful summary of key information and will assist in the conveyancing process.

Environmental groups have rightly welcomed the introduction of the energy report. It will provide buyers with information on the energy efficiency of any home they may be considering purchasing. It should result in greater demand for energy-efficient homes. And it will help people to plan how to reduce their fuel bills.

The accessibility information included in the single survey will help buyers with mobility problems and encourage buyers to think ahead about their household’s possible future needs – whether for access for prams, for wheelchairs or other reasons.

Misconceptions
I know there is still some confusion about the home report reforms. Let me address some of the most common misconceptions about the changes that will result from the introduction of the home report.

Offers subject to survey
One of the most common suggestions is that the main reason for introducing the single survey aspect of the home report is to remove the occurrence of multiple surveys in the market. On the contrary, the primary objective is to provide better information on the condition and value of houses to sellers and buyers before offers are submitted. It makes perfect sense for buyers to have quality, reliable information about what they are buying before they decide to offer. The offers “subject to survey” approach does not meet that objective.

Confusion with home information packs
There seems to be an assumption by some people that home information packs on the English model are being introduced in Scotland. This could not be further from the truth. The home report and home information packs have been devised for very different reasons.

In Scotland, a home report will comprise a single survey with an energy report and a property questionnaire, but no “legal documents” such as building warrants or property searches. In England & Wales, a home information pack contains such legal documents, but no mandatory survey report. Information on energy efficiency is the only common element of the two systems.

The home report will not be phased in over a period of time as home information packs were in England & Wales. Instead, the new duties will apply to all properties marketed for sale from 1 December. This introduction date was chosen on advice from lenders and selling agents, as a time when the market will be relatively quiet and therefore to minimise any short term disruption during the transfer to the new system.

Lenders and single surveys
Despite repeated assurances by the Council of Mortgage Lenders (CML), some selling agents still assume that lenders will not accept a mortgage valuation derived from a single survey. The CML has worked closely with the Scottish Government and Royal Institution of Chartered Surveyors (RICS) to develop an approach that will provide the necessary information to lenders to assess mortgage applications.

The CML has repeatedly said that it believes that lenders will usually accept a mortgage valuation in the lender’s format provided by a surveyor who has also prepared the single survey.

The Society’s Council has also approved in principle plans to offer a Society-branded home report pack to members.

James Ness, Deputy Director of Professional Practice, said: “It’s important that the profession is fully up to speed on home reports. Their introduction represents a significant change for conveyancers offering estate agency services and how they will do business, and we will be issuing home report guidelines shortly. The provision of a Law Society of Scotland branded home report will also help set a quality benchmark for solicitors and the public using the packs.”

The Society seeks tenders for the provision of home reports, as defined within the Housing (Scotland) Act 2006 (Prescribed Documents) Regulations 2008, to members of the Society. The tender documents can be downloaded from the Society’s homepage. Alternatively contact Charlotta Cederqvist on 0131 476 8166 for further information. Tenders close 28 May 2008.

Continued overleaf >
The RICS has confirmed that the mortgage valuation will be covered by the fee for the single survey. However, the CML has always reserved the option for lenders to instruct an independent valuation, as they do under the current system, for example where there is a high loan to value ratio or the surveyor is not on the lender’s panel.

**Buyer’s trust**

Buyers will have full reliance on the survey and will enjoy all the rights of redress against the surveyor that they do at present. The RICS has confidence in its ability to deliver. The surveying profession in Scotland has high professional standards and strict professional rules of conduct. A working group of RICS is currently developing the terms and conditions on which a chartered surveyor will provide the single survey. These will, among other things, make clear that the surveyor must take an independent view and will set out the rights of redress. These measures will ensure that buyers can trust the single survey.

**Providers of single surveys**

Nearly all surveys and valuations in Scotland are currently carried out by members of RICS, the only group of survey providers we know of that meets our criteria for suitable providers of the single survey. That is why the legislation says that only chartered surveyors registered with or authorised to practise by RICS can prepare single surveys. We are in discussion with organisations representing various other potential providers. If they or others wish their members to become single survey providers and can demonstrate that they meet the criteria, they can be added to the home report regulations in due course. The criteria are on our website at www.homereport.scotland.gov.uk.

**Home report costs**

A market is developing for providers to organise the single survey and other elements of the home report package for the seller or the seller’s agent. This will be an important factor in ensuring competitive costs for sellers. There is scope for the market to deliver a choice of affordable options to suit sellers’ circumstances. The market in England & Wales has done this in relation to home information packs, and some firms are already developing such options in Scotland.

A seller of a good home has nothing to fear and will demonstrate the condition and energy efficiency of the property to would-be buyers through the home report. Remember that nearly all sellers are also buyers – so they will benefit from the home report in the purchase of their next home. As the duty to provide the home report rests with the seller, first-time buyers will be the biggest beneficiaries from the changes to the system.

**An improved system**

The home report has been approved overwhelmingly by the Scottish Parliament, both in principle and in detail and under two different administrations. It is strongly supported by consumer organisations such as Which? and the Scottish Consumer Council. I agree with the SCC’s view that “in a few years’ time, the new system will seem unremarkable, and we will wonder why it took us so long to finally adopt a more commonsense approach”.

I am pleased that preparations by the property industry for the introduction of the home report are already well underway. Some businesses have already begun work to adapt to the changes. The Law Society of Scotland, the National Association of Estate Agents and the RICS will soon be in touch with their members with dates for training and awareness-raising events, which we are supporting. I encourage anyone involved with buying or selling houses in Scotland to ensure that they take advantage of these training opportunities.

I remain convinced that the home report will not only bring better information for individual buyers and sellers, but will deliver benefits which will profoundly improve the way that houses are bought and sold in Scotland.

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**Registers of Scotland**

**Performance against Keeper’s registration performance targets to March 2008**

[The more detailed quarterly performance report on turnaround times]

<table>
<thead>
<tr>
<th>Keeper’s registration performance target</th>
<th>Performance for the period 1 Jan – 31 Mar</th>
<th>Year end 2007-2008</th>
</tr>
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<tbody>
<tr>
<td>Speed of registration</td>
<td></td>
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<tr>
<td>To achieve recording and registration</td>
<td></td>
<td></td>
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<tr>
<td>turnaround times in 2007-2008:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Averaging no more than 20 working days</td>
<td>21.1 working days</td>
<td>15.7 working days</td>
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<tr>
<td>over the year as a whole for saisine</td>
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<td>writs</td>
<td>27.4 working days</td>
<td>22.6 working days</td>
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<td>Averaging no more than 30 working days</td>
<td>110.0 working days</td>
<td>88.5 working days</td>
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<td>over the year as a whole for dealings</td>
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<td>with whole deeds</td>
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</tr>
<tr>
<td>Averaging no more than 100 working days</td>
<td></td>
<td></td>
</tr>
<tr>
<td>for all domestic first registrations</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Stock reduction**

To eliminate all pre-January 2004 casework where it is in Registers of Scotland’s power to do so

All pre-January 2004 casework eliminated where it was in Registers of Scotland’s power to do so

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**Registration accuracy**

To achieve a registration accuracy rate of at least 98% for applications despatched during the previous 12 months

98.6% 98.8%

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**Customer service**

To continue to operate at Charter Mark standards by:

Achieving a 98% rating for overall customer care in the annual customer satisfaction survey of solicitors

n/a 99.0%

Processing 98% of all customer enquiries in compliance with the Agency’s published response standards

98.0% 98.6%

**Year to date**

<table>
<thead>
<tr>
<th>Total volumes</th>
<th>On time</th>
<th>% Achieved</th>
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</thead>
<tbody>
<tr>
<td>Standard letter enquiries</td>
<td>26,750</td>
<td>26,727</td>
</tr>
<tr>
<td>Copy deeds (NAS)</td>
<td>4,350</td>
<td>4,337</td>
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<tr>
<td>Office copies</td>
<td>18,604</td>
<td>18,447</td>
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<tr>
<td>C&amp;S extracts</td>
<td>1,702</td>
<td>1,696</td>
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<tr>
<td>Pre-registration enquiries</td>
<td>87,503</td>
<td>87,503</td>
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<tr>
<td>Land Register reports</td>
<td>5,059</td>
<td>4,280</td>
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<tr>
<td>Correction cases</td>
<td>51,630</td>
<td>51,379</td>
</tr>
<tr>
<td>Copy deeds (LR)</td>
<td>9,048</td>
<td>9,020</td>
</tr>
<tr>
<td>Total</td>
<td>224,815</td>
<td>221,622</td>
</tr>
</tbody>
</table>

A detailed explanation of the registration targets – particularly for domestic first registrations – was given in Keeper’s Corner in the Journal, February 2006, 50
The Procurement Directorate announces a new enquiry and dispute resolution service, aimed at providing better and more consistent tendering practice across the public sector.

Tenders: a better way

The Single Point of Enquiry service has been introduced by the Scottish Government’s Procurement Directorate to provide suppliers to public sector/public funded bodies with an impartial point of contact where they can ask for advice or raise concerns about public procurement practices in Scotland. The SPoE is part of the Public Procurement Reform Programme, initiated in response to a review of public procurement in Scotland by John F McClelland CBE. The programme’s vision is the implementation of structures, capability and processes to provide continuous improvement in procurement across the Scottish public sector, in order to deliver value-for-money improvements and support increased efficiency.

The Single Point of Enquiry

- **Aims** – To provide businesses with advice on procurement legislation and practices, to seek resolution of disputes regarding procurement practice and to help improve the consistency of public procurement processes applied by public and publicly funded bodies in Scotland.

- **Vision** – To encourage and establish best practice in procurement within the Scottish public sector and publicly funded bodies by working with suppliers, the business community and purchasers to address issues of concern.

- **Values** – To operate with impartiality, fairness and objectivity and promote a culture of openness and transparency in relation to procurement practice.

Suppliers’ issues should, in the first instance, be discussed with the contracting authority concerned, or the centre of expertise for the relevant sectors (central government, NHS, universities and colleges, and local authorities) to seek resolution or clarification at that level. If this route fails to produce satisfactory results the supplier can then contact the SPoE. Alternatively, suppliers may approach the SPoE, on a confidential basis, at any stage.

Contact details for the centres of expertise can be found at: [www.scotland.gov.uk/](http://www.scotland.gov.uk/) Publications/2007/10/22132922/1. The SPoE is not a point of appeal on procurement decisions, nor will it seek to influence or change sourcing decisions made by a contracting authority. It complements the existing formal avenues of redress available, such as court proceedings or submitting a complaint to the European Commission. The SPoE will seek to work with the procuring authority and the centre of expertise concerned to bring about a positive outcome to supplier issues.

European Remedies Directive

The Scottish Government will also shortly be consulting on the implementation of a new European Remedies Directive. The new directive (2007/66/EC) makes significant changes to the remedies available to tenderers. It introduces a new remedy of “ineffectiveness” for contracts which, contrary to EU procurement law, have not been advertised in the Official Journal of the European Union (OJEU) but have instead been awarded directly. It also provides for a harmonised standstill period between a contract award decision and the conclusion of the contract, to allow tenderers to challenge the contract award decision.

The consultation paper will be published on the Scottish Government website: [www.scotland.gov.uk/Consultations/Current](http://www.scotland.gov.uk/Consultations/Current).

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**The SPoE is not a point of appeal on procurement decisions, nor will it seek to influence sourcing decisions... It complements the existing formal avenues of redress available**

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**IP lawyers take the cake**

The inaugural World IP Day (WIPD) conference jointly organised by the Law Society’s In-house Lawyers Group and the Faculty of Advocates (see Journal, April, 56), was hosted by the Faculty, in Edinburgh on 25 April. The 47 attendees at the event, chaired by Graeme McWilliams of Standard Life, enjoyed presentations from advocate Roisin Higgins on Scottish innovation and Magnus Cormack of the Scotch Whisky Association on geographical indications, as well as a very good lunch and some WIPD cake.

With five WIPD events organised in the UK in 2008, and three of these being held in Edinburgh, there is also some demand for the Society and Faculty to consider organising an annual event in Scotland. Pictured with the WIPD cakes are the three speakers (l-r), Roisin Higgins, Graeme McWilliams and Magnus Cormack.
Reputation? Abby Solvitor reckons that lawyers often hang on to the most trivial things – but if you really want to go down in legal folklore, plan a dramatic exit.

Shake me up before you go go

Is it just me, or are there lawyers everywhere you go? Often concealed in the nooks and crannies of our beloved nation, they can pop up anywhere, especially when you really have had enough of the lot of them. In Auld Reekie, I grant you, off duty lawyers, especially of a certain ten, are as easy to spot as the German spies in ‘Allo ‘Allo, all chinos and brogues and a distinct look of weathered stress etched on moustachioed coupon. However, even in the bustle of Glasgow, where one might feel able to escape unobtrusively to the west end to get “the banter”, they abound, often in the least likely spots.

This is why one quickly learns to keep one’s petty thoughts about that particularly irksome partner or hopelessly inefficient trainee, quite firmly to one’s own musings. With the certainty of eggs, that idiot you are blithely badmouthing to all and sundry over a bottle of the hard stuff will be perched in a dark corner, taking notes and storing up untold trouble for the future. It was my mentor Wilde who declared, “One can survive everything nowadays, except death, and live down anything, except a bad reputation.” However, even in our Heat magazine culture of vacuous fame, often on a notorious scale, lawyers have not taken this mantra on board. The law is a world where reputation hangs on the tenuous things.

I don’t mean to sound like the preachy matriarch in a Jane Austen novel, clutching her smelling salts on learning that her youngest has eloped with some Regency buck. Of course, when we start off fresh faced and ready to go, we all want to be known one day as “a great lawyer”, to have a “certain presence” “… ‘gravitas” … or at the very least “can string a sentence together and might even possess a law degree”. Sadly, we usually end up with the less distinguished “I ain’t the one who did an impromptu striptease at the office bash”, or “Isn’t that the twerp who cost us thousands when he was two days late with the caveat?” Of course these minor trifles can be lived down. I don’t mean to suggest that lawyers are such a bitter lot as to remember every youthful mishap. However, if you really want to cement a reputation across the board for all eternity, the surefire way is a dramatic exit.

Wondrous stories abound, usually the “fifth hand as epitaph” of Larkin’s “Poetry of Departures”, of fantastic exits accompanied with amateur theatrics. These tales have become integral to the urban mythology of lawyerland, no doubt embellished through the ages in the gossip-oral tradition. A colleague related the adventures of one young upstart who decided to take her leave of a particularly domineering wunderfirm. This star in the making did so with some chutzpah and, like a jilted lover with an axe to grind, emailed the firm en masse with details of just how grim she found them all as individuals. Pressing “send” without even a nanosecond’s pause for thought, our trusty heroine swanned out, leaving only the sharp intaking of breath, and the ominous shredding machine whirr, in her wake. Exit stage left to a new and successful career in marketing and PR.

Then there was a mate who worked with a brazen young man so miserable in his job that he actually had a Robinson Crusoesque roman numeral countdown of “days to go” behind his desk for all the firm to see. When the glorious morning finally arrived, expletives abounded, punches were
though, alcohol consumed: it was unbridled carnage. Elvis had certainly left the building. "You folks are so uptight you should have opium pumped through the pipes", declared another student of the "Don't leave without an implosive email" school of thought, before packing up her calendar and leaving only her Marti Pellow screensaver to face the reaction.

I love these tales of wondrous anarchy with modern day heroes storming out of the straitjacket, leaving us all enthralled in their wake. Now that the sun has finally decided to glimpse through windows blocked by files and post-its, the temptation to just cock a Rhett Butler "don't give a damn" eyebrow and vent one's spleen is strong. The day will arrive when with Pip Latkin, you will wish you had the courage to shout, "You can stuff your pension." Don't we all?

So why don't we? If you have no desire ever to set foot in a law firm again, my friend, and have decided that the law is just really not for you, then please do take the road less favoured – much more exciting than the usual whipround and mundane embarrassed goodbyes. Smash up guitars with The Clash and bound off the law stage waving an angry fist with The Sex Pistols. Creating havoc with Mick and the lads, believe me, will give us all something to talk about and make the daily grind of the office that little bit more aspirational. We need these tales, we really do.

However, if you do favour a career in law and not on the stage, a slightly more sophisticated exit strategy is probably best in the short term. That chap who bossed you until you really had to take the high road, or that nippy sweetie who terrified you so much you cried yourself a river, didn't get to where they are today by ignoring the undercover, underground society of lawyers, who, in their omnipresent way, will relive and retell that dramatic swansong like a TV blooper on repeat. It is sad that you have to mind your ps and goodbyes, but your career in our little legal world might just depend on it. Make sure you jump ship before your sanity has, or failing that, just store it up till the grand retirement party. After 60-odd years you surely deserve to sing with Belle and Sebastian "you can take your carriage clock and shove it", and make some law-legend for the next generation, declare. That will give them something to remember you by.

A class apart

v.s and I had always promised ourselves that we would pay a visit to Philip Myers, our old tutor in the first ever class in Public Law Honours at Glasgow University. Back in 1973-74, v.s and I were in a class of three pioneer students who, within the confines of the traditionally staid Glasgow LLB course, managed to study the Watergate affair in America, the unilateral declaration of independence in Rhodesia, and the civil rights movement in America. Many of our classes on these topics took the form of tutorial discussions in Philip’s room. They regularly became shouting matches between v.s and myself, who held diametrically opposed political viewpoints. The poor third member of the class seldom managed to speak.

Philip, uncharacteristically for a law teacher, had a great sense of fun. He deliberately provoked fights between v.s and myself – something it is easy to do, even to this day! Occasionally, as we hurled insults at each other, we would notice that Philip was sitting back in his chair, smiling that wicked little Myers smile which was very much his trade mark.

So it was a great pleasure to fly down to the historic town of Cambridge to see our old friend. Even more than Oxford, I would say that Cambridge has “class”. The colleges are closer together and there is less in the way of intrusion of normal, commercial, modern life into the city centre. As in Oxford, the college buildings are simply stunning. The bookshops, as you would expect, are superb. One place you should visit is Fitzbillies’ café/restaurant, where they make Chelsea buns of international renown. In fact, they send parcels of buns all over the world.

v.s and I decided to go to evensong at King’s College, from where the BBC’s Christmas carol service is broadcast. We were amazed to find there was a queue to get in – must be the power of television. The college chapel is really extremely large, when you consider its original purpose was to house a small group of scholar priests. Henry VIII endowed the building with an incredible wooden screen containing the organ. Another English king, who presumably had led a life as blameworthy as Henry, left funds for the purpose of services being said for his soul every day at regular times.

During the service, we began to realise why the English are presently feeling a little “taken over” by the Scots. The Church of England priest who led the service was Scottish, and the organist was from Aberdeen! Wandering around Cambridge, as so often in my experience, you begin to realise just how much richer English society has been than Scotland’s. For many hundreds of years, England was a rich nation, one of the leaders of the world. They must have been eating five course dinners off gold plates when we Scots were still living in caves.

I suppose one of the attractions of places like Cambridge is that, to some extent, time has stopped there. They preserve buildings which were created for purposes of English society hundreds of years back. These purposes, with some adaptations, still hold true – you need top-flight education to provide a world-leading nation with the personnel to fill that role. Cambridge, and other universities like it, still fulfil that function. The dumbing down which has taken place generally in UK university education has not come about because the market has ceased to need top-flight graduates. But it is regrettable that the case very much its trade mark.
Advocates? Accountants? Financial advisers? This year, next year, whenever? A small firm in Berwickshire has found a way to jump the MDP gun, as it were, by taking over the village post office. "When the postmistress retired in November 2006 we all complacently assumed that someone would take it on, but no one did", says Doughtys principal Sheila Stoddart. "We have always resisted franking machines and the like, preferring to support the post office, and did we then discover how inconvenient the closing was for us!"

With the mainly elderly people of the village also suffering from the loss, Sheila hit on the idea of Doughtys stepping in. Many hoops had to be jumped through, but with the enthusiastic backing of her staff and the support of the Society's Professional Practice Department, the village post office reopened last July. "The post office is in our cashroom and is manned by our cashier and our property manager", Sheila explains. "We only open in the mornings, and of course one of the benefits is that our office is now fitted with a state of the art alarm system. "Though I am the designated sub-postmistress, I'm not allowed near this or the other sophisticated equipment installed – I can't even sell a stamp!"

Not surprisingly it has generated much goodwill among the locals, even if no great upturn in the number of people wanting to buy a house along with their stamps. "It has however brought people into the office who would not normally come in unless in trouble, but I really know that they come in with pockets of biscuits for the ever present Stoddart dogs, who welcome each and every customer."

Hearsay is well used to hearing of Scottish solicitors climbing highest mountains, or cycling across continents – but thinks a cross-Channel swimmer is a first, or is he wrong? Steve Weatherley, head of internal audit at Scottish & Newcastle plc and head of UK legal for several years before that, plans to make the Dover-Calais trip the hard way in the week of 6 September. Wearing only trunks, cap and goggles in line with English Channel Swimming Association rules (goose-fat is an optional extra), he will tackle the “Everest” of open-water swimming – which in fact, he assures us, fewer people have achieved than have scaled the summit of the mountain itself.

Inspired by David Walliams of Little Britain fame, Steve reckons he would soon have got over the urge, “but I stupidly told too many people that I fancied having a go and ended up hoist by my own speedos!”

His good cause? Appropriately enough, the Whale and Dolphin Conservation Society – see www.justgiving.com/steveweatherleychannelswim. Hearsay reckons that anyone whose training includes swimming up and down Gullane bay right through winter deserves all the support they can get.
There are a whole range of ways to reward your employees with a break from the usual routine. Louise Farquhar highlights some favourites.

**Six of the best... Employee outings**

All work and no play makes Jack a dull boy… and all of his colleagues too. Bosses who want to get the most out of their staff, and keep them, understand that fun is a crucial part of the employee experience. Throwing a bonus at workers once a year or putting on a Christmas party isn’t enough to attract and hold the best professional talent.

Here are my top six ideas:

The Cookery School, Glasgow

For those who prefer two feet on the ground The Cookery School in Glasgow has a wide range of events suitable for staff outings. Standard cookery demonstrations are complemented by other options such as the chocolate heaven tasting session, or the popular “call my bluff” wine competition which guarantees plenty of laughs. As well as being great fun all the classes are rewarding: employees genuinely learn new skills and can be quite amazed when they learn to cook!  
*0141 552 5239 www.thecookeryschool.org*

Highland Adventure Safaris

Need a break from the stuffy office? Highland Adventure Safaris offer an exciting array of itineraries through private Perthshire estates, with the added bonus of five-star hospitality when it comes to refreshments. Their Comico Mountain Safari lets guests take the wheel of a trusty Land Rover, trundling through the dirt tracks and hilltops of this stunning landscape, perhaps with a picnic or bothy lunch on the way. A mock Highland Games can also be included, complete with caber tossing! There is also a deerstalking day, where you use a camera lens rather than a rifle to shoot these magnificent animals.  
*01887 820071 www.highlandsafaris.net*

Go Ape, Aberfoyle

Swap the laptops for the treetops at Go Ape’s high-wire adventure course in the Queen Elizabeth Forest. Bespoke corporate packages offer the chance to foster team spirit amongst your workforce as they swing from one activity zone to another – 40ft from the forest floor. A dedicated host will look after you throughout the day and there’s even a barbeque at the end where the budding Tarzans can swap tall stories.  
*0845 643 9348 www.goape.co.uk*

It’s a Knockout, Edinburgh

For a really hilarious get together you can’t beat “It’s a Knockout”. Specialist company Off Limits can recreate this famous BBC programme at their Edinburgh venue using the original props and games – they can even supply Stuart Hall for a touch of nostalgia. Slippery Summit, Perilous Pendulum and Golden Shot are amongst the legendary inflatables, and competitors can dress in a variety of costumes. Calling all Musical Monks and Damsels in Distress …  
*01773 766053 www.itsaknockout.net*

Xscape, Glasgow

The modern facilities of Xscape at Braehead, Glasgow are perfect for an employee outing. Adrenalin-fuelled activity zones like the aerial adventure course, climbing wall, free-falling fan drop and 200m ski slope with ‘heat’ snow sit alongside more sedate options including minigolf, bowling and a cinema. To round off the day there are a multitude of different bars and restaurants happy to cater for groups.  
*0871 260 3222 www.xscape.co.uk*

Lendrick Lodge, The Trossachs

If your workmates are the antithesis of the “adrenalin junkie” types then Lendrick Lodge, set in the peaceful Trossachs, may be the ideal place for your next staff away day. This holistic retreat offers a medley of yoga, reiki, detoxing and healing courses suitable for everyone and they have a dedicated corporate events programme.  
*0800 052 6190 www.lendricklodge.com*

Blue Sky Experiences

For further ideas see:

**From the Journal archives**

50 years ago  
*From a letter, “Lunch hour thefts“, May 1958: “Recently another legal firm in Glasgow and myself have had the misfortune to have our cash boxes stolen during the lunch hour, when staff are depleted. In my case the evidence points to the box having been stolen from my private room at about 1.30 p.m. during my absence for less than two minutes. I... suggest to other busy and preoccupied solicitors that if it is not convenient for them to keep their cash boxes under lock and key, they keep as little cash therein as possible”.*

25 years ago  
*From “Aspect”, May 1983: “The definition of incompetence is a problem. Attempting to describe incompetence is rather like trying to paint a word picture of an elephant in no more than thirty words. You know it when you see it, but defining it is another matter... Until incompetence... is recognised as professional misconduct it is likely that little will be done to eradicate it.”*