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Society news>
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Society of Scotland 2009
Made to the publisher. © The Law Society of Scotland 2009.
Cover to cover
As this edition has to go to press ahead of the Society's 60th anniversary conference but will publish after it, we can't actually bring you anything on the big event of the month. However we hope to carry full coverage in the June issue.

Meantime there is much else happening, as a flick through the features section and the professional news pages will confirm. The features have everything from the change to the Scotland Act to deal with the “slopping out cases”, to how to leave your body to medical science, to the legal aspects of *Slumdog Millionaire*. Don’t say we don’t try and cater for all solicitors’ interests!

The Society pages also have some substantial contributions, beginning with the new Chief Executive’s overview of her first few months. My impression, for what it is worth, is that Lorna Jack’s impact has been very positive for the Society in its dealings with members and with the outside world, which can only be of benefit as the profession seeks to improve its economic position.

On that subject, many writing in the press are anxious to identify whether the wider economy is beginning to turn the corner yet. The temptation sometimes seems to be to claim that this is happening when all that the figures show is that the rate of decline is slowing down. The Council of Mortgage Lenders perhaps hit the right note when it warned against expecting any marked upturn in the housing market even when things do start to improve. The feedback at April’s meeting of our own Society’s Council was certainly that the picture round the country is patchy, with some feeling a little more optimistic while others have yet to see cause for this.

Seeing the whole picture
In the news as I write is the low rate of recovery of fiscal fines under the extended diversion provisions introduced last year. The big change at the time, apart from the greater range of fines and other disposals able to be offered, was the deeming provision by which a fiscal fine is taken to be accepted unless the offender notifies a challenge. This leaves the system vulnerable both to those who deliberately ignore the letters and to those whose chaotic lifestyles make them unlikely to pay the penalty.

In either case, unless the Government quickly gets on top of the issue, there will be a serious undermining of the rule of law – the more widely it is perceived that payment is optional, the more the rate of non-payment will snowball. We should all be concerned at the implications for respect for the law.

In this month’s lead feature the Crown contribution emphasises the successes for the prosecution system resulting from the reforms. We can accept that there have indeed been considerable benefits, even if the picture especially in the larger cities remains mixed, as the defence lawyer comments suggest. However, if the system is being kept under review, that deeming provision should be given some close scrutiny.

AGM call
This magazine should at least reach you ahead of the Society’s Annual General Meeting – 2 pm on Thursday 28 May in Edinburgh’s Sheraton Hotel, Festival Square, Lothian Road. The most lively debate may well centre on the level of subscription to be set for next year. The Society has a tough call in balancing on the one hand the desire to reduce costs for solicitors so far as possible in difficult times, with predicting the effect of those same economic conditions on the membership pool from which subscriptions are levied.

One would hope that the profession can take on trust that all those involved in the budget process will have members’ interests at heart, and not attempt to tie the Society’s hands too closely in advance.

The temptation seems to be to claim that the economy is turning when all that the figures show is that the rate of decline is slowing down
CPD EVENTS

MAY

19 ILG Seminar — Brokers Under Pressure
20 CPD For New Lawyers — Learning to Manage Stress — Aberdeen
20 Risk Management Roadshow — Inverness
21 Financial Development Seminar — Glasgow
21 Managing Your Workforce in a Recession — Edinburgh
26 ILG Seminar — Contract Law
27 Risk Management Roadshow — Glasgow afternoon and Glasgow evening
28 CPD For New Lawyers — Dual Qualification — Glasgow

JUNE

2 Planning for a Successful Retirement — Glasgow
2 Conveyancing Conference — Aberdeen
3 Risk Management Roadshow — Dumfries
3 CPD For New Lawyers — Instructing Advocates — Inverness
4 Financial Development Seminar — Edinburgh
4 Conveyancing Conference — Stirling
10 Risk Management Roadshow — Video Conference
11 Effective Networking Skills — Edinburgh
15 Damages — Edinburgh
17 Effective Networking Skills — Edinburgh
17 CPD For New Lawyers — Dual Qualification — Edinburgh
23 Conveyancing Conference — Glasgow
30 Conveyancing Conference — Inverness

SEPTEMBER

8 Business Development Seminar — Edinburgh
10 Business Development Seminar — Dundee
15 Business Development Seminar — Glasgow
16 Employment Law Conference — Edinburgh
17 Manual Bookkeeping & Accounts Rules for Sole Practitioners — Edinburgh
22 Private Client Conference — Stirling
24 Negotiation Skills — Edinburgh

Details of venues, speakers, programmes and CPD hours are available on our website

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Licensing Conference
Sole Practitioner Conference

FOR FURTHER INFORMATION
Update’s aim is to continue to produce good quality, affordable training for our members, and to help develop a comprehensive portfolio of events to support our members’ needs. If there are any events you would like us to run in 2009, or any comments you have about the Update events programme, please let us know. Also if you are interested in speaking at any of our events we would be more than happy to hear from you.

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Leaving the Presidency after 21 months, Richard Henderson’s message remains one of looking and planning ahead for the opportunities that are bound to arise.

Ever forwards

Driven by confidence
In writing the last in this series of contributions for the Journal I was tempted to look back and review the past 21 months. But looking back is only of value if it helps us better to address the future.

As I write, the Chancellor has just delivered his Budget and, yes, we remain in the grip of recession. In recent months the profession has faced real shocks to the system – redundancies, short time working, pay reductions – harsh realities none of us would have thought possible a couple of years ago. But it is also possible to talk ourselves further into a mire: unnecessarily so. Now is the time to look to the future, plan and ensure we are at the forefront of the recovery.

The Scotland plc Awards 2009 in late April provided ideal examples of Scotland’s success stories, even in the midst of the current troubles. At the ceremony in Glasgow I was struck by the energy of all the nominees and the confidence that exists for the future in Scotland. The awards covered both domestic Scottish activity and entrepreneurial achievement in the global marketplace; there is a lot going on which is positive, much of it driven forward by confidence and resulting in success, and all of it involving solicitors.

Eastern promise
Further afield, there was also a sense of real energy and genuine optimism among lawyers from a variety of jurisdictions at last month’s Commonwealth Law Conference in Hong Kong. As well as that, I found, as I have found everywhere I have represented it, real respect for the Scottish solicitors’ profession, not least among our own members in practice around the world. The message from those in Hong Kong was that they value being part of the global family of excellence in law that is signified by the badge of the Scottish solicitor.

The Society is working hard with government to produce strategies to maximise the Scottish profession’s market share on a worldwide basis

There is considerable potential to develop the Scottish legal services market in the Far East, and the Society’s workplan for the coming year includes support for the profession to look outside the ordinary scope of our activity for business opportunities. To that end, the Society is working hard with government – I met with representatives of both the UK and Scottish Governments while in the Far East – to produce strategies that can maximise the Scottish profession’s market share on a worldwide basis. We are determined to support solicitors as they develop their businesses, and I am confident that the profession will respond to the challenge of the changing marketplace.

The challenge holds the key
The market has thrown down a challenge for our profession at home, just as it has abroad. Law is at the centre of a successful society; we need to be flexible and innovative to ensure that message is understood and that we as a profession live up to it. The key to success, so strongly underlined in the recent High Street conferences for practitioners, will lie in how the profession responds to that challenge. Many features of the market will be different when we emerge from recession, and new ways of working will be necessary. But our skills as a profession can and should be at the forefront of that process, providing clients with professional legal advice and support on a full range of business areas.

Last June I wrote, paraphrasing the words of Baroness Helena Kennedy at the Society’s 2008 conference, that society works because of law, and it is our responsibility and our privilege as lawyers to guarantee that rule of law in order to secure its benefits, economic and otherwise, for society as a whole. That sentiment is as true today as it was then.

It has been an immense honour to have held office as President, especially at a time of such change for us all. Twenty months ago when I was elected, the landscape for the profession was quite different. We faced many challenges then and we confronted them, moving forward on the ABS agenda, on standards, governance, education and training, on the Commission. Would we have started on those had we recognised then the scale of the economic problems we would also face? There were shadows on the horizon as the credit crunch began to show in the US, but I do not think anyone could have fully envisaged the scale of the issue as it has turned out. But I think we did the right thing then and we are doing the right thing now in addressing all those challenges, because they hold the key to future success for the profession. I am confident that the profession is up to all the challenges and will emerge stronger and better able to help develop Scotland to meet its future.

Finally, no one who holds this office does things alone, and I would like to thank the Vice President Ian Smart, Council members and all the staff at the Society for their valuable help, support and advice during my term as President. There is much to do but I am confident that we are heading in the right direction with a Society, Council and staff who are totally committed to a bright future for the profession.
“Scanning and creating” doesn’t work

I wonder how many conveyancers despair at the practices of Registers of Scotland. The new “scan and create” system which is supposed to produce electronic acknowledgments is a disaster. It has had to be withdrawn in relation to first registrations and transfers of part because the correct title number could not be given. Even for dealings, I have had a significant number where no acknowledgment has been received at all – in one recent case, I was told this was because the email address on the Form 2 was “in lower case”, which apparently their system cannot handle!

The electronic acknowledgments (when received) are woefully inadequate – there is no indication of how many or which deeds have been received for the application. If you exhibited it to a lender, they would receive for the application. If you how many or which deeds have been received when received) are woefully lower case”, which apparently their system cannot handle!

I then said that the mismanagement of these institutions had led to what we call a running of aspiring new members currently also leaving very few openings for the redundant or required to work short time, and recession, with many of those employed in these institutions had led to what we call a dangerous job?

I have reached an age where retirement is fast approaching, and rather sadly, I find myself drawn to the Obituary column in each month’s Journal (just in case I feature).

I have noted a trend of “young” deaths recently, but the April edition was a rude awakening. One at 49, three in their 50s and one who reached 73 (hardly old age these days).

First, one feels for their families at such premature loss, but then one must wonder – do we work in a dangerous job? Is this now a factor to consider before graduates join the profession? If so, what a terrible reflection on the profession.

The time may have come for the Society to carry out some statistical analysis of the position, and establish where we sit in the league table. If we are now a high risk occupation, the Society may wish to consider a programme to reverse the trend, including medical advice and support – and, dare I say, less regulation and administration.

Beam me out of here

I thought I would tell you about a conversation I had recently with a visitor from the planet Zog. It asked me about my job. I told it that one thing I did was register title deeds and charge certificates and then send them to the lending institution to keep, but now there was an increasing trend towards them not keeping these documents. I explained that I had recently sent a land and charge certificate to a major lending institution but they had returned them saying they no longer kept these and we should keep them. A few days later this institution sent me a letter saying that their records indicated we had not yet provided evidence of the registration. I phoned them pointing out that we had indeed done this and they had returned the papers. The pleasant lady at the institution then kindly explained that for completions before 1 August 2008 they require the actual title deeds, land and charge certificates etc. For settlements after that date they require certified copies of both certificates where it has been a first registration, and in second registration cases they only require a certified copy of the charge certificate. This meant I had to sign what we call my name about 40 times.

I explained to our visitor that this lending institution had recently encountered financial difficulty to the extent that they had to be bailed out with vast amounts of what we call money. This money came from almost every ordinary citizen of this country, and indeed similar rescues were taking place across our whole planet.

I then said that the mismanagement of these institutions had led to what we call a recession, with many of those employed in my profession and others being made redundant or required to work short time, and also leaving very few openings for the generation of aspiring new members currently wishing to join our profession.

My visitor politely thanked me for this information and, turning away, I distinctly heard him say on his intergalactic mobile phone: “Beam me up Scotty, we’ll not be taking over this planet. The people will not make good slaves because they are too stupid. In fact they are all barking mad.”

Just a thought.

Dying younger?

I have reached an age where retirement is fast approaching, and rather sadly, I find myself drawn to the Obituary column in each month’s Journal (just in case I feature).

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Home reports: advancing the debate

I have no particular view one way or another about home reports, but doubt if the debate is advanced by referring to opposing views as “simply preposterous” (Journal, March, 18).

Surely we can at least be civil to each other and articulate our views while referring to opposing views as “simply stupid. In fact they are all barking mad.” Just a thought.

Surely we can at least be civil to each other and articulate our views while referring to opposing views as “simply preposterous” (Journal, March, 18).

Surely we can at least be civil to each other and articulate our views while referring to opposing views as “simply dumb.”

Just a thought.

Margaret Scanlan, Russell Gibson McCaffrey, Glasgow

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Members of the Society of Solicitor Advocates believe that the recent judicial criticisms of the regulation of solicitor advocates are misplaced.

Shared principles

It has been an interesting few weeks for solicitor advocates since the opinions in Woodside were issued on 18 February 2009. Not since the debates in the House of Lords in 1990, when the law creating solicitor advocates was introduced, has there been such direct criticism of the whole rationale for solicitor advocates.

I believe it is time for us to take stock. The Society of Solicitor Advocates and the Law Society of Scotland have supported the Lord Justice Clerk’s call for a review “of the working of the system overall”. Let us hope that a review takes place and that it examines robustly the professional practices of all those who appear before the higher courts. Our clients deserve nothing less.

The matters of professional practice criticised in Woodside were the instruction of solicitor advocates, seniority, self-certification of competence and mixed representation. In my opinion these criticisms are misplaced.

Instruction

The concerns expressed about instruction centre on rule 3 of the Solicitors (Scotland) (Supreme Courts) Practice Rules 2003, which requires all clients to be given the choice of advocate or solicitor advocate. Clients expect to be advised on appropriate representation. In assisting my client to choose between those two types of representation, it is suggested that I can recommend anyone but myself or one of my firm’s solicitor advocates, as that advice would not be perceived as objective.

My duty is to act only where I am competent to do so. I do not accept that the rules of conduct for solicitor advocates provide no safeguard to protect clients from inexperienced solicitor advocates whose reach exceeds their grasp. The Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 are designed to ensure that an instructing solicitor instructs a solicitor advocate or advocate of appropriate skill, specialisation and experience to the task. The provisions of rule 3 are duplicative and unnecessary. The duty to ensure competent representation provides clients with the same protection.

I also do not accept that if a solicitor advocate is instructed by his own firm, the relationship of instructing solicitor and independent pleader is purely nominal. Junior solicitors instructing senior colleagues have an equal duty to exercise independence and to take appropriate action if concerned about the representation being provided. That is what I would expect of any of my own team instructing me.

Seniority

The rules of seniority in the Faculty of Advocates relate to the time served by its members and are strictly adhered to in their lives and practice. A junior member cannot lead a more senior member. No such rules apply to solicitor advocates. Solicitor advocates may be instructed as senior or junior as the instructing solicitors consider appropriate, provided they ensure that their clients are competently and appropriately represented. Any solicitor advocate acting as senior has to accept that the role carries certain responsibilities.

Self certification

The current system of “self certification” as senior for legal aid remuneration will be brought to an end shortly. In future, the Council of the Law Society of Scotland will recommend certain solicitor advocates for remuneration as seniors for legal aid purposes. A committee chaired by Sheriff Principal Bowen and including a Council member, two members of the Society of Solicitor Advocates’ committee and a lay member will consider applications. A list of accredited senior solicitor advocates for remuneration purposes should be available by 1 September 2009.

Mixed representation

The difference in business structures between the Faculty of Advocates and solicitor advocates who practise in law firms has no bearing on the central question of independence before the court. Woodside perceives dangers where the defence in a serious trial is in the hands of two lawyers who are governed by separate codes of conduct and subject to separate disciplinary jurisdictions. However, the Law Society of Scotland and the Faculty of Advocates subscribe to the same principles of independence, trust, personal integrity and confidentiality. I do not believe that the commitment of solicitor advocates to those fundamental principles is any different to that of members of Faculty.

Choice for the client

Solicitor advocates were created to give clients an alternative: a choice of representation. Members of Faculty (who include the judiciary) cannot force us to fit the Faculty mould. If we did, where would be the choice? Criticisms which point to the differences between us are only constructive if they prompt a raising of standards across both branches of the advocacy profession and ultimately provide benefits to our clients.
In 2004 the Summary Justice Review Committee led by Sheriff Principal McInnes described what many of us knew already: the summary justice system was no longer summary. Repeated adjournments led to lengthy court proceedings with pleas often being adjusted only after such adjournments. The level of churn contributed significantly to the overloading of courts and caused considerable inconvenience to witnesses as well as other court users. The result was that offending behaviour was not tackled promptly and communities affected by crime did not see the summary criminal justice system as contributing effectively to the resolution of their problems.

The summary justice reforms introduced last year had the very clear purpose of putting this right and creating a system which dealt with lower level crime quickly and effectively, with minimum inconvenience to victims and witnesses. The legislative reforms were complemented by changes to working practices and processes by the various criminal justice agencies.

The legislative reform included providing greater scope for the police to issue penalties for antisocial behaviour, and increased powers for procurators fiscal to issue direct measures. Procedural provisions were designed to support better case preparation and measures were introduced to improve the throughput of cases in court. These reforms were subsequently supported by changes to the structure of legal aid payments which ensured that solicitors received appropriate payment for work done in advising a client who accepted guilt at an early stage.

The collective will for change was strong and Parliament unanimously approved the
prosecution in court are “getting away with it.” This is not true. These direct measures are quick, but they are not easy. They will reflect the severity of the crime. In addition, should the offender reoffend within two years, the direct measure can be put before the court in the same way as a previous conviction – and the police and procurators fiscal keep a record to inform future decision making. In this way, those who continue to offend will quickly find themselves in court.

Early disposal
By dealing with such cases by way of direct measures, more resources can be dedicated to those cases involving court proceedings. Where a case requires intervention by the court, we will prosecute – and we will continue to seek to achieve the quickest and most appropriate outcome in every case.

In court, the most significant change has been to the culture of repeated adjournments and delays. Prior to summary justice reform, it was not uncommon for accused persons to plead not guilty and then, after several hearings, including a number of adjourned trials, change their plea to one of guilty. As Sheriff Principal McInnes recognised in his reports, there were a number of reasons for this but the consequences were obvious: witnesses and victims were inconvenienced, often more than once, and the prosecution and courts would find themselves churning large numbers of cases without being able to focus on those likely to go to trial.

Now, we aim to conclude cases which are capable of being resolved without a trial at the earliest opportunity – either the pleading diet or a continued pleading diet. To assist with that, we are providing disclosure of the prosecution case along with the complaint in every case and making ourselves available to discuss cases ahead of the pleading diet.

We are also making evidence available earlier for those cases that do go to trial. In Ayrshire we have worked hard with police colleagues to ensure that productions, particularly CCIV evidence and police interview tapes, are available for solicitors to facilitate constructive discussions and, where possible, to resolve cases quickly. Such evidence is often critical to the issue of guilt. The court can usefully continue cases without plea for evidence to be viewed, or to provide an opportunity to discuss the case so that speculative trial diets are avoided and trials are only fixed in cases which are truly contentious.

Effective discussions
To assist open discussion with solicitors, we are making clear at the outset of every case what plea would be acceptable. We give solicitors an “acceptable plea” letter which sets out the Crown’s position. The acceptable plea is available up to and including the intermediate diet. The intention is to encourage early resolution and to discourage late pleas of guilty on the basis that the Crown’s position was not known. The acceptable plea will not be available at the trial diet other than in exceptional circumstances.

This is a significant change for prosecutors and solicitors alike. It recognises that when a case calls for trial there is an expectation that a trial will proceed, the time for plea negotiation having passed. In Ayrshire we are making progress by providing facilities to ensure that cases can be properly discussed and every opportunity to resolve a case before the trial diet.

Fiscal offices around the country are putting in place practices to ensure effective discussion of cases prior to both the pleading diet and the intermediate diet. This includes holding discussion “surgeries” at specific times or providing a dedicated depute for discussion who can be contacted.

It is recognised that even an improved system is dependent on the commitment of practitioners to make it work.

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More on summary justice reform (also on www.journalonline.co.uk)>
Journal, November 2007, 13; December 2007, 22; January 2008, 20; March 2008, 14: David A Dickson explains the legislation and its aims

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legislation and the broader scope of the reforms. But these reforms are about local justice for local communities, and success depends on how they are implemented at a local level. This means police, prosecutors, solicitors and court staff all working together. It is recognised that even an improved system is dependent on the commitment of practitioners to make it work.

One year on, there is reason for optimism.

Diversion measures
As a prosecution service, we recognised that our policies, practices and procedures needed radical change to support effectively the principles of summary justice reform. Most of all, our staff needed a clear understanding of the content and ethos of the new regime, and clarity as to the changes to our systems and practices. We issued extensive new guidance to all staff as well as detailed and practical training in the application of the reforms. This approach was commended in the Inspectorate of Prosecution’s recent Thematic Report on Fiscal Fines [see following article]. We have continued to monitor and improve our own practices to ensure they fulfil the objectives of a quick and effective summary justice system.

One of the more controversial changes was the extended powers for procurators fiscal to issue direct measures. When making decisions on the most appropriate action to take in any particular case, we now adopt an outcome-focused approach; often issuing a direct measure will result in an equivalent outcome to court proceedings.

In 2005 the average fine in the sheriff court was £310; the average in the district court was £123. We now have powers to issue fines of up to £300. This means that in many cases we can achieve the same result within, on average, six weeks of the offence, providing a swifter response to offending behaviour and prioritising court time for more serious cases.

Compensation offers provide greater scope for dealing with cases quickly and effectively, providing financial compensation to the victim within a few weeks of the offence. Some early local examples demonstrate the benefit. The procurator fiscal in Kilmarnock received a report relating to two vandalised windows in June 2008. The offender was issued with a compensation offer for the value of the damage, £100, and it was paid to the victim by August.

Another Kilmarnock case concerned a report in relation to someone with no previous convictions, who caused £300 damage to a property in Girvan. He was issued with a compensation offer which he paid by instalments within two months. In cases such as these, the use of direct measures has ensured that the victims of crime have been compensated quickly by the offenders. This rapid intervention shows to victims that we are taking action and can encourage offenders to think again about their behaviour.

Work orders, being piloted in Inverness, West Lothian, North Lanarkshire and West Dunbartonshire, provide a much quicker way of tackling offending at an early stage, involving short periods of work in the community. In Inverness, those accepting work offers have cleaned up a local BMX park and a beach. In Dumbarton an offender was offered 30 hours of work in a charity shop. Having completed it successfully, she continued to help as a volunteer with the support and agreement of the shop. In other cases, through carrying out work offers, young offenders have developed practical skills in painting and decorating which will help future employment prospects – and their chances of avoiding a life of crime.

A frequent complaint about prosecution is that even an improved system is dependent on the commitment of practitioners to make it work.
In Ayrshire, as across Scotland, hopeful signs the public in these reforms. Conclusions are very encouraging work in progress, but the early being able to access important plea, not being able to discuss the prosecution case, not knowing the opportunity: not knowing the resolve a case at the earliest intended to support the legislative procedures for discussing cases are in place across the country. All these changes to practice are intended to support the legislative changes and the changes to legal aid. They address the points which frustrated solicitors in trying to resolve a case at the earliest opportunity: not knowing the prosecution case, not knowing the Crown’s approach to an acceptable plea, not being able to discuss the case with a prosecutor, and not being able to access important evidence such as CCTV. It is still work in progress, but the early conclusions are very encouraging and suggest there is real merit for the public in these reforms.

**Pass marks; could do better**

The Journal asked the Society’s review group, and some individual defence lawyers, for their own views on the success of the reforms to date

Some progress, but the system is not yet running smoothly, appears to be the overall verdict on the operation of the summary justice reforms so far. "Statistics suggest the system is delivering on targets", Oliver Adair, convener of the Society’s summary justice reform review group agrees. Adair, whose own practice is in Larriall, has seen figures showing that in Hamilton, cases dealt with at first calling or on first continuation have almost doubled.

He adds: “There is still room for improvement, though we recognise that financial targets will have had to be modified in light of the financial situation and the recent budget.”

Kenneth Coggie, President of the Edinburgh Bar Association, reports that in the capital, diversion from prosecution was “eagerly embraced” by the procurator fiscal’s office. A number of cases were inappropriately diverted, including when the offender was on bail, or subject to other court order or the unexpected portion of a sentence. An attempt by the EBA to obtain a copy of the diversion guidelines was rejected by Crown Office and also on appeal to the Information Commissioner. “The EBA was disappointed that the guidelines have not been disclosed, leading to a lack of openness and perhaps fairness”, Coggie says, while recognising that there is ongoing monitoring of diversion in assault cases.

The EBA, which takes part in standing advisory committee meetings at the court, understands that there has been a reduction of about two weeks in bringing cases to trial. “Most trials however do not commence before midday, and many trials are still adjourned due to pressure of business”, Coggie comments.

He adds: “When the reforms were first introduced there was a marked decrease of business in Edinburgh Sheriff Court. That remains the case. The intermediate diet courts would have fallen from over 90 cases per day to approximately 30 cases, yet with no marked improvement in the number of cases proceeding at the first calling.”

Discussions continue on improvements in disclosure, which should benefit both the accused and the Crown.

In Glasgow, Stuart Munro of Livingston Brown is concerned at an incident where a colleague needed stitches near the eye following an unprovoked assault, for which the two assailants received diversion letters—a decision which elicited an apology from the fiscal following press publicity. Presumably such an outcome would not be repeated. Munro suspects however that repeat offenders are receiving letters for offences such as shoplifting, “that would ordinarily put them at risk of remand or imprisonment.”

And Grazia Robertson of Liam Robertson & Co states bluntly of fiscal fines: “My clients would not pay them or even consult me about them anyway. They would be binned immediately”. While accepting that Crown statistics tend to indicate no overuse of fiscal diversion, she suggests however that “something disturbing has occurred regarding the issuing of police fixed penalties, which have risen quite dramatically. The policy for issuing these is not made public as far as I know, and I don’t know what, if any, independent scrutiny is given to police actions in this regard.”

Regarding disposal of business generally, both agree that the sheer volume of business in Glasgow brings its own problems. “Fewer summary trial courts are running, but those that do are beset by the same problems as before”, says Munro, while Robertson comments: “If it were not for the professionalism and goodwill of the Glasgow practitioners, it could have ground to a halt years ago.”

Both mention disclosure as a problem. "The providing of disclosure evidence timeously does remain a problem in Glasgow, although the Crown tell me that’s because of delays in getting stuff from the police. We defence agents are not in a position to assess where the fault lies", says Robertson, while conceding that defence agents are not infallible either when it comes to picking up statements waiting at the fiscal’s office. And the justice of the peace court doesn’t make them available as does its counterparts elsewhere. “Earlier disclosure and better communications with the Crown would improve the situation considerably”, Munro agrees, while adding: “Often video evidence is not available until the trial, for example. The Crown are making efforts to tackle this through the piloting of

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**A case made out**

Joe O’Donnell tells how the Inspectorate of Prosecution found the new diversion provisions to be working well once the system had settled down

Inspection and regulation have found themselves in the spotlight following the banking crisis and other high level cases of concern. The Inspectorate of Prosecution came into existence after just such a high profile case – the murder trials following the death of Surjit Singh Chhokar. The Jandoor Report which followed recommended the creation of an independent inspectorate, and this was accepted by the then Lord Advocate. Independence is crucial to any inspectorate and can be achieved in a number of ways, including inspectors reporting

Grazia Robertson suggests that “something disturbing has occurred regarding the issuing of police fixed penalties, which have risen quite dramatically”
Many of the fiscal fines were not, of course, new and the report traces their history but, given public concerns, particular attention was paid to assault cases, the focus of much media coverage. Fiscal fines concerning 142 assaults were examined and 25 were queried with the issuing office.

In five of these we concluded that the issue of a fiscal fine had not been appropriate given the nature of the assault. A policy amendment was introduced by the Crown Office in October 2008 and these cases would now be excluded from the issue of a fiscal fine. Overall, looking at the range of offences covered and the different levels offered, the overarching conclusion was that the use of fiscal fines was proportionate and in line with the philosophy on their use. Most of the queries related to the inevitable bedding-in of a new system, and the revised guidelines issued in October 2008 went a long way to addressing issues identified in the early operation of the new system.

We did, however, make three recommendations, all of which were accepted. These concerned the “hierarchy” of the guidance issued by Crown Office, as we felt that on occasions it was not clear which aspect of policy should take precedence. We recommended also that greater use could be made of fiscal fines where an accused was subject to certain court orders, provided the court was informed of the issue. Finally, given the level of concern in assault cases, we recommended continued in-house monitoring of fiscal fines issued for assault.

Further work on the implementation of summary justice reform is also in the programme for the Inspectorate, together with joint inspection with other agencies.

We can be contacted at IPS@scotland.gsi.gov.uk.

Joe O’Donnell, HM Chief Inspector of Prosecutions
Ask the audience

W

hile watching Slumdog Millionaire the intellectual property lawyer is struck by several typically pedantic thoughts. Isn’t this blatant product placement of the game show Who Wants To Be A Millionaire? (hereafter referred to as “Millionaire”)? Are the film makers allowed to do this? Did the film makers have to pay the company which makes Millionaire? Did the company which makes Millionaire pay the film makers? And if this is all it takes to win some Oscars, then what’s to stop me making a film based around The Weakest Link? These questions may seem flippan, but they raise serious legal issues.

Slumdog Millionaire can be interpreted as a glorified game show advert, but this sort of “embedded marketing” or “product placement” is not unusual and has existed for almost as long as moving pictures themselves. “Product placement” (see panel) in the context of films and television can be loosely defined as the intentional placement by the film maker of brand name products and services within scenes for clear on-screen visibility, in return for payment or other reward. A celebrated early example arose in 1949 in the Marx Brothers’ Love Happy. Struggling to finance the picture, the producers concocted a Times Square chase sequence which involved Harpo Marx clambering over various sponsored billboards.

Adverts have been packed into films ever since, and companies with products or services to advertise are now taking the next logical step – commissioning films themselves. Slumdog Millionaire was actually part-funded by Celador Films, an arm of Celador Productions Ltd (“Celador”), the company which owns the film rights for the Millionaire game show format. A further example of this increasingly sophisticated type of product placement is Shane Meadows’ 2008 film Somers Town, funded by Eurostar to promote the UK’s first high speed rail service operating from the new St Pancras station. Somers Town has no overt Eurostar branding, but both the station and the train form an integral part of the story.

Going for gold!

Returning to Slumdog Millionaire, if Celador Films has made a profit from contributing funding to the film it could be seen as reward for Celador’s financial investment in establishing and protecting their legal rights in the Millionaire game show format. TV formats can be broadly defined as “a style or manner of arrangement or procedure” of a television programme. In the specific case of game, chat or quiz shows, the format might be defined as the fixed and repeated elements of the show, including the production rules, the programme rules, the script, the sequence of events, catchphrases, set, lighting, music and so on. Millionaire was sold to foreign broadcasters around the world as a package of these elements.

However, commercially successful ideas in the creative world are often imitated or adapted, and establishing legal rights in game show formats is notoriously difficult. This means that the sale or licence of TV format rights is relatively rare. After all, why should anyone pay to acquire rights in a format if it can be copied without repercussions? What legal protection might game show producers fall back on if there is a rush of films based around game shows seeking to emulate the success of Slumdog Millionaire?

Starting from basic principles, it is important to realise that legally there is no definition of TV formats and they fail to fall neatly within the definitions of protected material under international copyright and trade mark regimes, making them difficult to protect from copying or plagiarism. A fundamental tenet of
copyright law is that ideas themselves cannot be protected – only the expression of them. Distinguishing between the idea of a TV format and the expression of that format is problematic. It can be argued that most of the various format components of TV formats are in themselves potentially protectable, be it the scripts, set designs, stage designs and lighting plots (as literary and/or artistic copyright – subject to the complex rules of substantial similarity), the design elements (as registered designs), or the logos and programme titles (as trade marks – provided they are original, distinctive and capable of graphic representation). Protection can also be sought in the common law on the narrow grounds of breach of confidence (where there has been a relationship of confidence between the parties), or the more broadly applicable action of passing off (where a format is copied to the extent that the viewer believes the programme is being produced by the originator of the format). Nevertheless case law indicates that protecting TV formats is rarely straightforward.

Whose format is it anyway?
This was established in the leading case of Green v Broadcasting Corp of New Zealand [1989] 2 All ER 1065. Hughie Green was the compère of a long running entertainment programme of the 1960s-70s, Opportunity Knocks, whose format he sought to protect against broadcasters in New Zealand who had introduced a very similar local version. Green argued that the studio design, the use of distinctive catchphrases ("It’s make your mind up time") and the clapometer system of measuring audience appreciation of participants all amounted to a literary work protectable by copyright. His claim failed on appeal to the Privy Council because, according to Lord Bridge, there was an absence of "sufficient unity to be capable of performance" – indicating that the door was still open for a comprehensive and detailed record of a format to attract copyright protection.

In Celador Productions Ltd v Melville [2004] EWHC 2362 (Ch), Alan Melville, John Baccini and Timothy Boone sued Celador, claiming that the creation and showing of the Millionaire format infringed copyright in works created by them and amounted to a misuse of confidential information in those works. The claims were factually different, but Celador applied for summary dismissal of all three simultaneously under Civil Procedure Rule 24.2, which allows for dismissal where the claimant or defendant has "no real prospect of succeeding" in its claim or defence and "there is no other compelling reason why the case or issue should be disposed of at a trial". For present purposes the discussions of the merits of the claims of Mr Boone and Mr Baccini are the most enlightening. Mr Boone’s arguments related to a 11 page document setting out the format for a TV game called HELP!, which Mr Boone alleged had been passed to Celador (via ITV) during the development of Millionaire. The Vice Chancellor acknowledged there were similarities in the dark clothing of the presenters, the sets, use of spotlights, the use of a glass-sided box of money, the giving and later destruction of cheques etc, but concluded that "few if any of [these] amount to more than the application of well known presentational techniques".

In contrast the Vice Chancellor was satisfied that the extent of the similarities between Mr Baccini’s proposed game show and Millionaire was sufficient to give rise to an inference of copying a substantial part. Similarities listed included the fact that both had a real maximum prize of £1m, an initial pool of 10 contestants, the concept of the fastest contestant in the first stage progressing to the next, a quiz with multiple choice questions, the concept of correct answers leading to a doubling of prizes, and the concept of "safe havens" for certain levels of prizes.

The Vice Chancellor decided that only Celador’s application against Mr Boone should be upheld, because Mr Melville and Mr Baccini had real prospects of success against Celador, and were entitled to establish the facts upon which they relied at trial. These trials never occurred because, following the judgment, Celador reached an out-of-court settlement with both claimants – on the condition of confidentiality.

Another challenge to Celador’s rights in the Millionaire format arose around the same time in Denmark. On this occasion Celador sought to rely on copyright when Danmarks Radio launched a similar programme called Kvit eller Dobbelt ("Double or Quits") in 2004. The bailiffs court rejected the application for an injunction restraining Danmarks Radio on the basis of infringement of Celador’s copyright in the format. However it did grant the injunction on the basis of violation of s 1 of the Marketing Practices Act by "fraudulently copying Celador’s

Legally there is no definition of TV formats and they fail to fall neatly within the definitions of protected material under international copyright and trade mark regimes

In the UK, product placement – of any type, sophisticated or otherwise – with respect to films made for cinema is not prohibited by law and in fact remains entirely unregulated. In regard to product placement, film makers are answerable to neither Ofcom nor the British Board of Film Classification, and this is true of feature films acquired and broadcasted by UK broadcasters. In contrast product placement in television programmes is prohibited. The prohibition stems from the Television Without Frontiers Directive of 1989 (revised in 1997) that had to be incorporated into UK law. Whilst not being expressly prohibited by the directive, product placement on television has long been considered to be contrary to EU law, which requires clear separation of advertising from programmes and prohibits any kind of advertising or sponsorship which affects the editorial independence of the broadcaster in relation to programme content or scheduling. This blanket prohibition is expressed in rule 10.5 of Ofcom’s Broadcasting Code, which defines product placement as: "the inclusion of, or reference to, a product or service within a programme in return for payment or other valuable consideration to the programme maker or broadcaster".

This prohibition can appear increasingly anachronistic in the face of foreign (primarily American) films and programmes full of product placement which are broadcast on UK television every day. To an extent the new Audiovisual Media Services Directive, adopted by the EU in December 2007, acknowledges this. The directive amends the Television Without Frontiers Directive and, amongst other innovations, permits product placement in certain types of television programmes subject to certain controls and safeguards.

The directive must be implemented by individual member states before the end of 2009, and in the autumn of 2008 the Department for Culture, Media and Sport consulted on its implementation. The result of the consultation was announced by Department minister Andy Burnham on 11 March of this year. Mr Burnham acknowledged that product placement would give commercial broadcasters a new source of revenue, but concluded that "no conclusive evidence has been put forward that the economic benefit of introducing product placement is sufficient to outweigh the detrimental impact it would have on the quality and standards of British television and viewers’ trust in it". This position is to be reviewed in 2011-12.

Product placement: films good, TV bad

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concept and taking unfair advantage of Celador’s efforts and market position”. This breach of marketing law represents a wider version of the common law delict of passing off.

Win, lose or draw?
In Castaway Television Productions Ltd and Planet 24 Productions Ltd v Endemol (unreported, 2004, Dutch Supreme Court), Castaway Television claimed that the format of the TV programme Survivor was entitled to copyright protection from Endemol’s television programme, Big Brother, by virtue of its unique combination of 12 elements. The Dutch Supreme Court agreed with the earlier Dutch Court of Appeal decision in deciding that the Survivor format was a copyright work and should therefore attract copyright protection (on account that the format had been systematically documented), but in this case decided that Big Brother was not an infringing copy.

Endemol then enjoyed further success in Brazil in the case of Endemol v TV SBT (unreported, 2004, Brazil), making a successful claim for copyright infringement based on the Big Brother format. Endemol had entered into negotiations with a production company and provided extensive information on the Big Brother format. The production company chose not to acquire a licence for the format and instead produced Casa Dos Artistas, which was similar to Big Brother. Noting that Brazil was a signatory to the Berne Convention (which provides for copyright works from other signatory states to enjoy certain basic protections), the court found that the Big Brother format attracted copyright protection under Brazilian law, and that the format of Casa Dos Artistas infringed that copyright.

They think it’s all over
Returning to UK disputes, in 2005 the company which created the talent shows Pop Idol and American Idol, 19TV, commenced copyright infringement proceedings against the producers of the talent show The X Factor. It had claimed that the defendants had copied the Pop Idol format in The X Factor, and 30 similarities between the two shows were highlighted to demonstrate substantial similarity, including the logo, music, camera angles and direction (for example cuts to shots of contestants running out of audition room doors, either elated or in tears, and being hugged by presenters). The claim was settled prior to trial and no disputes of this nature have arisen since, meaning that protection of programme formats by copyright remains relatively unexamined in UK courts.

Following the success of Shandog Millionaire that position may change soon.

Given the uncertain nature of legal rights in TV formats, it may be that purely legal methods of protection are not the most pragmatic

Given the uncertain nature of legal rights in TV formats, it may be that purely legal methods of protection are not the most pragmatic. Indeed it can be argued that agreements for the purchase of TV format rights franchise the existing elements of IP whilst also allowing for the provision of knowhow and expertise. There are concerns that an explicit statutory embrace of format rights by copyright would undermine the traditional distinction drawn between copyright’s protection of the expression of an idea rather than the idea itself. The Format Recognition and Protection Association was established in 2001 and acts as a lobby group for legal recognition of format rights, aiming “to ensure that television formats are respected by the industry and protected by law as intellectual property”. At present it seems there is more chance of a Mumbai orphan becoming a millionaire.

John D McGonagle is a solicitor with Brodies LLP Technology Team
Latest statistics from Registers of Scotland show property sales down by more than half compared with last year, but average prices by less than 10%
Since the coming into force of the Family Law (Scotland) Act 2006, Scots law has allowed ex-cohabitants to make financial claims against each other when they split up (2006 Act, s 28). Before being able to do so, however, the pursuer has to establish that he or she was indeed a “cohabitant” as defined in s 25. Early indications suggest that this will be a matter that is strenuously disputed in many cases. Other countries have been facing the same problem for rather longer than Scotland, and foreign jurisprudence can be of some assistance.

Having recently spent the (northern) winter months in the balmy, if windy, environs of Wellington, New Zealand, I was interested to discover how the issue is approached by the New Zealand courts. Few countries in the world have gone quite so far as New Zealand in equating the position of cohabitants with those of married/civilly empartnered couples, for the view is taken there that the needs of the parties, and the justice of claims, do not depend on the legal form the relationship takes. In relation to financial provision on separation (and in most other areas), the claims arising from what are called in New Zealand “de facto relationships” are identical to the claims arising from marriage/civil partnership. This of course is not so in Scotland, but the preliminary question in both jurisdictions is the same: does the relationship satisfy the relevant definition?

**“De facto relationships” defined**

Since amendments in 2001, New Zealand’s Property (Relationships) Act 1976 has allowed a party to any of three types of relationship – marriage, civil union, or de facto relationship – to seek financial readjustment when the relationship breaks down. This basically takes the form of an equal division (subject to certain qualifications) of “relationship property”, which is defined rather more broadly than “matrimonial/partnership property” in Scotland.

The definition of “de facto relationship” for the purposes of this Act is found in s 2D: it is a relationship between two persons, both of whom are over 18 and who are not married/civilly empartnered to each other, but who “live together as a couple.” (Whenever a party is under 18 it would seem that the couple are only de facto a de facto couple but not de iure a de facto couple.)

Section 2D(2) provides that in determining whether two persons live together as a couple, the court must take into account all the circumstances of the relationship, including various specified factors, such as:

- the duration of the relationship;
- the nature and extent of the common residence;
- whether or not the relationship was sexual;
- the degree of financial dependence or interdependence;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life;
- the care and support of children;
- the performance of household duties;
- and the reputation and public aspects of the relationship.

This list is not exhaustive. It serves a similar function to the far shorter list of factors in s 25(2) of our own 2006 Act. The length of the relationship and the financial arrangements between the parties appear in both lists (though worded differently), and the other element mentioned in s 25(2), “the nature of the relationship”, must (if it is not to be tautologous of the very question at issue) allow the Scottish court to take account of any other
She saved her money; he did not. The man she lived with. She earned her a woman had three children by the man who had bought a house for her. The High Court refused to hold the parties to be in a de facto relationship, but rather that they were in a parasitic business relationship (even although a de facto relationship was established at a later period, in respect of which the man could claim little).

Sexual activity between the parties is relevant, but not crucial, and it is clear that in New Zealand the complete absence of any sexual element to the relationship would not preclude the finding that the couple were in a de facto relationship. This is unlikely to be so in Scotland, where "living together as if they were husband and wife" may well imply a sexual element at least at the start of the relationship. (Civil partners are – legally speaking – entirely non-sexual and so it might well be argued that "living together as if they were civil partners" does not require any sexual element.) Conversely, in neither Scotland nor New Zealand will the fact that the couple have sexual partners outwith the relationship negate a de facto relationship that otherwise exists: Scragg v Scott [2006] NZFLR 1076.

Property and perception
The use and ownership of property was also discussed in Scragg. The couple had a sexual and social relationship but they lived apart – indeed for the most part they lived in different countries. However, they visited each other, often for periods of many months, and when they did so they always lived in the other’s house. Also, the man had purchased the woman’s house for her. The High Court held that the parties had "lived together as a couple" and therefore were in a de facto relationship for the purposes of the 1976 Act.

On the other hand, in RPD v FNM [2006] NZFLR 573, a woman had three children by the man she lived with. She earned her living through prostitution, and the man “earned” his by pimping for her. She saved her money; he did not. The judge found that their financial interdependence fell within the context of a business relationship, that their personal relationship was characterised by the man taking a great deal and contributing little in return, that there was a lack of commitment on both sides, and that their relationship was not public but on the contrary was “obscured from public view”. When the man claimed a share of the woman’s savings, the court refused to hold the parties to be in a de facto relationship, but rather that they were in a parasitic business relationship (even although a de facto relationship was established at a later period, in respect of which the man could claim little).

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Subjective perception by the parties plays an important role in New Zealand, for there is a mental element

factor relevant to determining the issue, such as any of the factors listed in the New Zealand legislation.

Colouring in
The New Zealand courts frequently emphasise that none of the listed factors is on its own determinative one way or the other, and all the factors are taken into account to provide an overall “colour”. This allows a certain flexibility, which is sometimes used to ensure that justice is done.

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Subjective perception by the parties plays an important role in New Zealand, for there is a mental element

and other personal possessions at his parents’ house – and slept there, with a hotly disputed level of frequency. The court held that while the woman’s house was used for various “joint activities”, it was never a common residence because the man never saw it as his home, and so the couple were not a de facto couple.

Subjective perception by the parties plays an important role in New Zealand, for there is a mental element to the existence or otherwise of de facto relationships. This is seen most clearly with another factor specified in the s 2D(2) list: the degree of mutual commitment to a shared life.

In PZ v JC [2006] NZFLR 97 a student aged 41 started out as the lodger of a 78-year-old, but the relationship developed into “an affectionate, mutually supportive and close relationship in certain domestic areas of their life, including, it seems, sexual contact”. However, there was no clear indication that the 78-year-old was committing himself to a “couple-relationship” instead of a landlord-lodger relationship, and the claimant failed in her attempt to persuade the court that a de facto relationship existed. It will be interesting to see whether a subjective mental element is considered necessary in Scotland.

Conclusions on the facts
In Scragg the High Court warned that the variety of forms that personal relationships can take is so great that each case must be dealt with on its own facts and none may be regarded as setting a precedent. It also emphasised that the concept of “living together as a couple in a de facto relationship” was chosen by the New Zealand Parliament explicitly to bring in more relationships than would be caught in a formulation such as “living together in a relationship in the nature of marriage”, the formula used in Scotland. This suggests that de facto relationships might be found to exist in New Zealand when, on identical facts, a cohabiting relationship would not be found in Scotland. For this reason the cases discussed above need to be read with care before attempting to apply analogous reasoning in claims before the Scottish courts. I hope that they are, nevertheless, of some interest to family practitioners here. In any case, everyone should visit New Zealand.

Kenneth McK Norrie is a Professor of Law in the University of Strathclyde
Solicitors may be familiar with clients, at the time of making wills, enquiring about the possibility of leaving their body to medical science. However, such a direction in a will – unless other steps are taken – often results in no action being taken at the time of death.

When the only instruction is in a will, the family have no documentary link with or contact information from an anatomy department and, in the trauma and turmoil of bereavement, contact is not made in time or often at all. For bodies to be suitable for anatomy or surgical training purposes it is essential that they be received for preservation within two days of death. So what steps do solicitors need to take, how can they guide and advise their clients, and what do solicitors need to know since the amendments to the Anatomy Act came into force?

Simplest solution

The preferred arrangement is when intending donors directly contact the most local anatomy department to complete bequeathal documents; this will often be some years before death. Each anatomy department (for which the contact details are supplied below) will provide full information and offer an opportunity to meet the bequeathal secretary so that they can be talked through and questions answered. Once bequeathal has been signed and witnessed, the anatomy department will supply those bequeathing with two copies of the documentation, one to keep at home, and the other to be supplied to the solicitor to keep with their will. Such witnessed instructions allow the receipt, preservation, and use of the body when death does take place.

Simply put, when bequeathal documents are in place, it is possible when death occurs for the body to go to the anatomy department without there being any instructions in the will. If there is mention in a will, it is also essential that the client be advised by the solicitor to contact the anatomy department to complete bequeathal documents. The written information supplied to those considering bequeathal provides clear and concise guidance on what is involved, and solicitors may find it useful to seek copies so that they too can have a fuller understanding of both the process and the information.

When death does take place, the next of kin will need to access this documentation, and one phone call by next of kin (or a doctor on behalf of the family) will set the intended arrangements in motion. The anatomy department, already holding a copy of the bequeathal documents, will immediately seek information from a doctor who has been involved during the final illness to ascertain the cause of death and to ensure that the body will be suitable.

It is important to note that on rare occasions a body will not be accepted – bequeathal does not guarantee acceptance. Any instruction to allow organ donation takes precedence, and priority is also given when the procurator fiscal wishes to enquire into a death.

The undertaking to the anatomy department can usually transfer the body within a day, and the acceptance documentation, usually completed by next of kin, records the wish for eventual cremation or burial, and return or disposal of ashes. There is a legal requirement that bodies must be sent for cremation or burial within three years of death, and the code of practice requires any separated parts to be returned to the coffin. The anatomy department is responsible for cremation or burial. The acceptance documentation also records whether the next of kin and the family would wish to receive an invitation to the next annual memorial service in the university.

Surgical skills

The 2006 legislation removes the possibility for relatives to donate the body of a family member at the time of their death: it is now a legal requirement that the person themselves must have made formal bequeathal either directly to an anatomy department or in a will.

Until 2006, bodies received by anatomy departments could only be used for traditional anatomy teaching. The most significant innovation when the Anatomy Act 1984 was amended by the Human Tissue (Scotland) Act in 2006 allowed surgical training, including techniques involving implantation of materials. It is already clear that many types of

GIVING UP THE BODY

University medical schools have an increasing demand for bodies left to medical science, but clients wishing to offer this need to do more than simply add a sentence to their will, as Professor Robert Wood explains
surgical training, both for young surgeons and also to allow fully fledged consultants to extend their operative repertoire, are feasible. It is in all interests that skills be developed and shaped before they are provided to living patients.

Solicitors can be reassured that the legislation imposes the very highest standards of practice in anatomy departments, and rigorous supervision by me as HM Inspector on behalf of the Scottish Government Health Directors. Unauthorised access to licensed anatomy departments and surgical skills centres is impossible, and every use of bodies must comply with the legislation. There is great privacy, anonymity, and respect.

Medical and dental students continue to need comprehensive knowledge of anatomy and their education absolutely depends upon there being enough donated bodies. They recognise the debt they owe to those whose bodies have been bequeathed, and this is impressively reflected by substantial student attendance at the annual memorial services held by the universities.

The number of bodies being received has been increasing in recent years and has been enough to allow some surgical training developments in addition to traditional anatomy teaching. These developments are increasing and extending very rapidly and will depend upon further increases in bequeathal. It is believed that solicitors, by acting as suggested in this article, may assist in numbers rising in years to come. I hope that this article assists solicitors to inform and guide clients who are considering bequeathal. We are also intending to convey similar information to general medical practitioners, some of whom are unfamiliar with the bequeathal process and the impact of the 2006 legislation. Later this year we hope to provide a website on body donation in Scotland which we hope will be helpful to members of the public and those assisting them in seeking information.

Professor R A Wood is HM Inspector of Anatomy for Scotland. Professor Wood is a retired consultant physician who was from 1992-1999 Postgraduate Medical Dean for North and North-East Scotland, and a Professor of Clinical Medicine at Aberdeen University.

Addresses and contacts

<table>
<thead>
<tr>
<th>University</th>
<th>Bequeathal secretary</th>
<th>Telephone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aberdeen</td>
<td>Mrs M Moir, Anatomy Dept, Marischal College, Aberdeen AB10 1YS (from August 2009: Matthew Hay Building, Medical School, Foresterhill, Aberdeen AB25 2ZQ)</td>
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<tr>
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<td>Mrs A Mellish, University of Glasgow Anatomy Dept, University Avenue, Glasgow G12 8QQ</td>
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<td><a href="mailto:a.mellish@bio.gla.ac.uk">a.mellish@bio.gla.ac.uk</a></td>
</tr>
<tr>
<td>St Andrews</td>
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</tr>
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The University of Strathclyde, in association with CLT Scotland Ltd, extend their warmest congratulations to the following newly-qualified Specialist Paralegal Practitioners:

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- Tracy Lowther
- Lisa Macarees
- Gail MacKenzie
- Lynne Madden
- James-Jane Findlay McCracken
- Michelle Milne
- Tracey O’Brien
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- Christine Scott
The Scottish Government has succeeded in persuading UK ministers to promote a change to the Scotland Act to put a time limit on Convention rights actions such as “slopping out” claims. Aidan O’Neill QC argues that the measure is unnecessarily wide and that reform could have been achieved at Holyrood after proper public consultation.
Time bars and devolved competence

Section 7(5)(a) of the Human Rights Act imposes a long-stop one-year time limit from the date of the act or omission complained of, within which court proceedings must be brought under s 7(1)(a) in respect of an alleged breach of Convention rights. This is, however, subject to any rule imposing a stricter time in relation to the procedure in question.

No time limit in relation to a Convention rights challenge as a devolution issue is specified in the Scotland Act. As Lord Rodger of Earlsferry noted in Robertson v Higson 2006 SC (PC) 22, 28: “A time-limit for taking proceedings is not incompatible with the Convention…. Since the Scotland Act does not specify any time within which proceedings are to be taken, the ordinary rules relating to the procedure adopted to vindicate the right in question must apply.”

But there are no time limits applicable to judicial review petitions brought in Scotland, which is the procedure which has usually been adopted in seeking the vindication of Convention rights claims. The matter of undue delay in bringing a matter before the court is left to the discretion of the court under the common law principles of mora, taciturnity and acquiescence. There is no Scottish authority in which this plea has been upheld, in the absence of evidence of acquiescence by the pursuer and prejudicial reliance on the part of the defender, on the ground of delay alone. This therefore leaves the acts of the Scottish administration and legislature under the present law potentially open to challenge by way of judicial review for an indefinite period, regardless of whether the case is brought on Convention rights grounds and whether or not seeking just satisfaction damages.

On the other hand it is clearly within devolved competence for the Scottish administration to introduce time limits within which all judicial review claims have to be brought.

provided always that such time limits do not contravene the Strasbourg-derived principle that individuals should have access to an “effective remedy” in respect of any Convention rights breaches.

The Scottish Government, which has long made plain its unhappiness with the decision in Somerville, has not been unaware of this. In his statement to the Scottish Parliament on 11 March 2009 the Cabinet Secretary for Justice said: “The UK Government had suggested that we might address the Somerville issue by changing the law on time bar in Scotland more generally. However, that would reduce the rights of many deserving claimants, such as those who suffer from pleural plaques or been injured through the negligence of an employer.”

Three points can be made in relation to the second sentence quoted. First, the application to Convention rights damages claims of the three year period which currently applies to private law claims for personal injuries would not result in reduction of the rights of any existing private law claimants, since this would simply establish parity of treatment between these two categories of case. Secondly, an unworthy insinuation is being made to the effect that all and any who seek damages in respect of the violation of their Convention rights are ipso facto less deserving than those seeking damages for personal injuries. Finally, and in any event, quite different rules, principles and procedures already apply in relation to public law damages claims, since these are usually brought in the context of judicial review petitions. The introduction of changes in relation to the time limits applicable to such damages claims need not have any impact on private law delictual damages brought by ordinary action.

The draft Modification Order

Be that as it may, the Scottish Ministers appear to have won the day and exerted sufficient political pressure on the Westminster Government to push through a quite unnecessary amendment to the Scotland Act.

The solution unveiled is for a draft order under s 30(2) of the Act to be laid before both the Scottish and Westminster Parliaments for their approval, prior to its being made by the Privy Council. The draft Scotland Act 1998(Modification of Schedule 4) Order 2009would empower the Scottish Parliament to introduce a time bar of one year or less in relation “to any proceedings against the Scottish Ministers or a member of the Scottish Executive that may, by virtue of the Scotland Act, be brought in any court or tribunal by any person” (other than the Law Officers) “on the ground that an act of the Scottish Ministers or of a member of the Scottish Executive is incompatible with the Convention rights”.

“Act” of the Scottish Ministers is said not to include the making of any legislation, but it does include “any other act or failure to act (including a failure to make legislation)”. When the new time limit might begin to run in relation to “failure to act” is left unclear. The new time bar would apply to both civil and criminal proceedings. And yet it will apply only where Convention rights are used as a “sword”, that is to say in cases taken against the Executive by victims of Convention rights breaches, and not as a “shield”, that is to say as a defence in the course of a civil or criminal action brought against an individual defender, respondent or accused by the state.

It is clear, however, that this draft order allows for far more than setting a cap on the bringing of aged claims by prisoners for just satisfaction damages in respect of their slogging out, as was its avowed rationale. Instead it provides for the imposition of a time bar of at most one year in relation to all and any Convention rights claims against the administrative action or inaction of the Scottish Ministers, regardless of whether just satisfaction damages were sought in these actions, and regardless of whether these actions are brought by or on behalf of the apparently deserving (for example the pensioners whose situation was repeatedly mentioned in the Scottish Parliament), as contrasted with the allegedly undeserving (i.e. convicted prisoners).

This change in the law involves, under the guise of limiting prisoners’ rights, a significant reduction in the level of judicial protection afforded to the (Convention) rights of each and every private individual in Scotland vis-à-vis the Scottish Government. And all this is being done without any public consultation, in what looks like a helter-skelter rush to change the constitution to the Scottish Government’s advantage before anyone apparently notices the implications of what is being done. It is playing politics with the constitution and we are all the worse off for it.

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More on the Somerville case (also on www.journalonline.co.uk)>


It is clearly within devolved competence for the Scottish administration to introduce time limits within which all judicial review claims have to be brought

A fuller version of this article can be read on www.journalonline.co.uk/ extras
In the film trilogy of the same name, The Matrix is an artificial world where nothing is as it seems. The Keanu Reeves character, Neo, rails against this parallel universe in order to live a natural life. Lawyers may empathise with Neo’s plight when they are asked to advise on the interpretation of a contractual provision, because the courts have been rewriting the rules over the past few years to make some or all of the background facts surrounding the contract available to assist them in discovering the intention of the parties. The so-called “factual matrix” has opened up a whole parallel universe for lawyers.

Bonfire of the baggage
There was a time when lawyers understood traditional canons of contractual interpretation to include that contractual provisions should be strictly construed and that the contract should, where possible, be interpreted from within the four corners of the document. That is not to say that contracts were always considered in a vacuum. Often extrinsic evidence would be required to ascertain what the parties meant their words to say. For example, in Houldsworth v Gordon Cumming 1910 SC (HL) 49 a plan used by the parties during negotiations was admitted by the House of Lords to define “the estate of Dallas”, when this description did not feature in the title deeds.

The House of Lords has in fact been quietly dropping the traditional rules for at least half a century. But the volume was turned up considerably by Lord Hoffmann’s declaration in his landmark speech in Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896, to the effect that the judicial dismantling of the old rules was nearing completion, when he said: “Almost all the old intellectual baggage of ‘legal’ interpretation has been discarded.” In their place, he set out five “common sense” principles. The principles relevant to this article are the first three, namely that (1) the document should be interpreted as to what it would mean to a reasonable person, having access to the knowledge within the “factual matrix”; (2) the “factual matrix” may include absolutely anything which was reasonably available to the parties at the time of the contract and which would have affected the understanding of the language of the document by a reasonable man; and (3) previous negotiations of the parties and their declarations of subjective intent are only admissible in an action for rectification.

The Hoffmann approach has proven to be controversial for the sheer breadth of its scope. Professor McBryde in chapter 8 of the third edition of Contract Law in Scotland (favourably reviewed on this very point by Lord Woolman: Journal, January 2008, 45) gives six good reasons why these principles are bad news for the business community. For contracts under negotiation, the consequential uncertainty for draftsmen would result in increasing wordiness. The case law shows that consideration of pre-contractual discussions is not always helpful. Given the time that may have elapsed since the contract was entered into, the evidence may be incomplete or unreliable. For contracts under review, solicitors would, of necessity, have to trawl through reams of background information pertaining to any contract to try to arrive at its meaning. Litigators may be tempted to produce details of every communication, matter of knowledge and commercial practice in evidence. The cost of commercial litigation would rise exponentially. Even Lord Hoffmann acknowledged the potential impact by retreating from admitting “absolutely anything” and restricting the factual matrix to relevant knowledge, in a subsequent speech in BCCI v Ali [2002] 1 AC 251 at 259.

The position in Scotland
The Court of Session has tended to be more cautious in embracing the full scope of the factual matrix. The Court of Session has tended to be more cautious than the House of Lords in embracing the full scope of the factual matrix. The indications are that the court has developed a set of indigenous principles for interpreting contracts, representing a sensible curtailment of the wide factual matrix of the Hoffmann approach.

A convenient starting point in
establishing the position in Scotland is Lord Drummond Young’s collation of the legal principles from earlier judgments in Emcor Drake and Scull Ltd v Edinburgh Royal Joint Venture 2005 SLT 1233. To the extent that these principles reflected the established law at that time, the finishing point will hopefully be the restatement and expansion of the same principles by Lord Hodge in Forbo-Nairn Ltd v Murrayfield Properties Ltd [2009] CSOH 47. The relevant principle is that the court can have regard to circumstances in which the contract was made to discover the facts to which it refers and its commercial purpose, objectively considered – in particular expert or other technical evidence as to the meaning of the technical provisions in a contract. This extends only to matters that were known, or ought reasonably to have been known, to both parties.

The limitations and qualifications to the final principle are that evidence which the parties as the background circumstances may have considerable bearing in making sense of the contract. McBryde points to case law showing that draftsmen have often regretted the inclusion of “entire contract” clauses for this reason.

Even Lord Hoffmann acknowledged the potential impact by retreating from admitting “absolutely anything” and restricting the factual matrix to relevant knowledge

dangerous because, even if it were possible to alter this rule of law, it might be a mistake because the factual matrix could serve to assist the parties as the background circumstances may have considerable bearing in making sense of the contract. McBryde points to case law showing that draftsmen have often regretted the inclusion of “entire contract” clauses for this reason.

**Hope springs**

On the strength of Lord Clarke’s Commercial Court judgment in City Wall Properties (Scotland) Ltd v Pearl Assurance plc 2004 SC 214, McBryde suggests that the indications are that the Court of Session is accepting a commonsense view that the words of the contract are paramount.

Since the City Walls case was unsuccessfully appealed to the Inner House ([2007] CSIH 79) as an action for rectification, however, the judicial trend seems to be aligning with the Hoffmann approach. The court preferred this approach to that of Lord Hope in Melanesian Mission Trust Board v Australian Mutual Provident Society [1997] 2 EGLR 128 at 129F. The Hope approach is that the court should read the words of the document without reference to background circumstances, and only if the words are unclear and ambiguous should the court have recourse to those circumstances.

**The matrix prevails**

Minoring the dictum of Lord Wilberforce in Reardon Smith Line v Yngvar Hansen-Tangen [1976] 1 WLR 989 at 995, Lord Philip said: “The effect of the Hoffmann approach is, it seems to me, that the court begins its consideration of the construction of a contractual provision already equipped with the information available as to the circumstances surrounding the contract, and that information is brought to bear on the court’s consideration from the beginning. The court does not begin by looking at the words themselves, as it were in a vacuum, without reference to the surrounding circumstances, in order to ascertain whether they have a plain meaning or whether there is an ambiguity. To adopt that approach, it seems to me, is to assimilate so far as possible, the way in which the document is interpreted to the commonsense principles by which any serious utterance would be interpreted in ordinary life, and to discard ‘the old intellectual baggage of “legal” interpretation’.”

The court’s position would seem to depend on the circumstances and it will not approve of a tawdry through background material in an attempt to depart from the conventional usage. In Autolink Concessionaries (IMB) plc v Amey Construction [2009] CSIH 14 Lord Kingarth said: “In construing the language of any contractual provision the search is for the intention of the parties objectively ascertained, and that search requires due consideration of context, not only the whole terms of the contract but also the underlying factual matrix, so far as relevant.... But while all that is true, and important, there can be no doubt that, as has been said, the search begins and often ends with the language of the clause itself. As Lord Hoffmann said in BCCI v Ali at p 269: ‘But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage’.”

Where does all this leave solicitors trying to make sense of the post-Hoffmann landscape? It would seem that, as Neo discovers in the Matrix films, the parallel universe formed by the matrix will not be subdued any time soon. The nature, style and content of contracts and information available will obviously differ in different commercial spheres. Even in the same sphere the circumstances will vary greatly. However, a sensible approach would be to consider that advice to a client on interpretation of a contractual provision may be incomplete without consulting some or all of the relevant background circumstances. This should be made clear to the client if relevant information is not made available to the solicitor. It is probably trite to suggest that at the outset of litigation, or when instructing counsel for an opinion, the solicitor would be prudent to investigate and evaluate the background material carefully. But it is clear that counsel and court will expect, in Lord Philip’s words, to be equipped with the information available from within the factual matrix to interpret the parties’ intention in framing the contract in the way that they did.

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Euan Sinclair, Professional Support Lawyer, Burness LLP

This article reflects the author’s own personal views and not the opinion or advice of the firm. Thanks are due to David Logan, advocate, for the inspiration to write the article.
In terms of when you would want to have become the President of the Law Society of Scotland, probably there’s no point in the last 10 years that would have been more challenging than this moment.” This cheerful admission from the man about to step up to the mark belies a vision of opportunity for the Society and the profession in the changed and changing circumstances in which each finds itself.

He should know. A “coal face” sole principal in Cumbernauld who has also served an extended term as Vice President of the Society following Richard Henderson’s early elevation to the presidency, Ian Smart has seen the impact of the recession at close quarters from both sides of the fence.

“He might be taking over as President at a challenging time, but Ian Smart has some clear ideas of how the Law Society of Scotland can advance its members’ interests, as he tells Peter Nicholson

**Make it happen**

The profession is financially and economically very much under pressure, and that affects people’s mood generally about new initiatives: if you’re introducing any kind of initiative that involves expenditure,
before the recession hit, the Society was rethinking the way it engages with the profession: the faculty visits round the country continue, but in addition there are now direct meetings with the bigger firms who between them employ a large proportion of the country’s solicitors (“More lawyers work for Dundas & Wilson than in the whole of the city of Dundee”), and this increasing sectoral liaison is being extended to others such as the in-house lawyers.

For the medium to large firms, the Society is aiming to raise the profile of the Scottish profession on a broader front than its previous dealings with its counterparts abroad. If foreign corporate counsel, for example, know that they need Scottish lawyers for transactions in this jurisdiction, they would then be less likely to go automatically to a London firm who will take a cut for referring the business on.

The Society, and Smart in particular, also shares the Scottish Government’s ambition of attracting to Scotland some of the vast amount of business now conducted by City firms under English law, but consisting of international transactions with no other connection with the UK. That involves offering the full package of efficient modern court and arbitration systems, and there is close cooperation with Government in working towards these.

A recurring theme as we talk is his recognition of the Society’s role in protecting the “badge” of solicitor, the status and reputation attaching to the term which many members – and their employers – recognise as making a practising certificate worth having even when not strictly necessary to their work. “The badge lets other people know exactly what your role is, and also I think means that even if they’re on the other side, that entitles them to an expectation of certain standards of behaviour and ethics that you would engage in as a member of the solicitors’ profession. And that’s an important prize, the recognition of the Society’s role in working towards these.

Not so scary?

Important as it is to demonstrate that its members are getting value for money from the Society, Smart would like to see a deeper change in the way they view their regulator. Having argued in last month’s Journal that the Society is acting in all members’ interests even when performing intrusive functions such as Guarantee Fund inspections, he maintains: “It’s easy for me to say, but it would be good if we can put the ‘scary regulator’ image behind us.” Pointing to the numbers who make use of the professional practice hotline, and indeed consult the Guarantee Fund Department for money laundering advice, he adds: “A good section of the profession has a very good working relationship with the Society, and I suppose all I want to say is, I would like to expand that section. The Society does a huge amount in members’ services and representation.

“I understand that people get annoyed at times because of the nitpicking type of things, but some of it is imposed on us by other people” – he instances the six-monthly letters required to comply with the Society’s group licence for incidental investment business, a minor inconvenience compared with what would otherwise be required to get, say, a bond of caution for an executry. A strong supporter of the Society’s internal reforms, to improve the balance of representation of the profession on Council and introduce a management board for making executive decisions while Council retains policymaking and oversight functions, Smart is nonetheless aware that most members will judge the Society by different criteria. “Before I was on the Council I had not the remotest idea how the Council was elected and I’m sure today that most of the profession are the same as I was. While the governance changes will make that sort of thing clearer, I think the profession are more concerned about what the Council does, that the Council is sensitive in an intelligent sense to what’s concerning practitioners and that we pick up on what’s concerning practitioners on the ground.”

Manifesto man

If Ian Smart displays a political-type awareness, that may be due to his record as a Labour activist, though he hastens to add that he distanced himself from party politics on
becoming a Society office bearer. However as Vice President to career Government lawyer Richard Henderson, he brought a practitioner’s perspective to current issues, while at the same time admiring Henderson’s thoughtful approach as well as his skill in achieving positive outcomes for the Society and the profession.

And yes, he is writing his “manifesto” for his term of office – with the interests of good government and accountability at heart. As the President has some freedom to set their own priorities, it makes it difficult to evaluate their success in the job, he says. “So I’m in the process of putting together two or three sides of A4, just saying, in the different areas of the Society’s activity these are my priorities for the year” – though he recognises that with many issues requiring external consultation, and perhaps even legislation, to implement change, he won’t be able to see them to a conclusion.

However his agenda is by no means a purely personal one. Smart describes the Society in his time as Vice President as having had “a kind of collective leadership”, comprising in addition to himself and the President, Past President Ruthven Gemmell, treasurer Jamie Millar, and Alistair Morris, the elected Council member on the former President’s Committee. “We’re all from very different backgrounds professionally, but in an odd sort of way I think we’re pretty much of the same idea of the way the Society should be going. That’s one of the things I say in the preamble to the manifesto: we have disagreed about the details from time to time, but about the general direction of travel there’s not been any disagreement about ABS [alternative business structures], the most important issue… And again on standards.” This way of working is set to continue.

Building bridges
An active supporter of the ABS reforms, Smart does not see them as opening up huge opportunities for smaller firms, despite the Government mantra about the solicitor, the accountant and the surveyor operating under the one roof: “In reality there’s nothing at the moment that stops you doing that, if what you want to do is share office costs.” But neither does he see them as a threat to the high street. “I think there are potential legal difficulties making sure that legal professional privilege is protected and we are considering that at a microscopic level, but I’ve said over and over again that subject to the protection of legal professional privilege, I’m in favour of the maximum liberalisation of the market. Which is just as well because that’s what the profession voted for anyway.”

With the resulting bill due in the Parliament shortly, Smart emphasises the improvement in working relations between the Society and Government compared with the more adversarial position that existed over the last Legal Profession Bill – despite the Society, reflecting members’ wishes, having by then accepted the principle of a complaints commission. “This bill is being handled very differently by the Society and the Government. We are working closely with Government on this and have regular and useful discussions about the detail. The Government have a number of interests to balance in deciding on the issues involved, but they will always give us a proper hearing.”

In his time he has also seen a dramatic improvement in relations with the Scottish Legal Aid Board. Having led the Society line for five years in dealing with the Board, he can say with feeling: “If you look at the dialogue there has been, whatever you think of the summary criminal justice reform, if you look at the amount of joint work between the Board and the Society on that, it would have been inconceivable 10 years ago.” And he stands squarely with Government: “Nobody knows the criminal side of it better than Ollie. He has criminal practitioners’ best interests at heart and he promotes those interests effectively.”

Turn around…
Two other topics come to mind from his draft manifesto, as major issues over the next 12 months. One is education and training, on which the reform paper on paths to qualification is almost finalised but ongoing work with the universities will be required; and where discussions are also taking place with various interests on post-qualification accreditation, where Smart sees scope for considerable expansion over the next few years.

The other is more flexible disciplinary procedures. The Discipline Tribunal has a steadily increasing caseload, but often these resolve into matters less serious than the solicitor concerned feared might be the case – but at the same time they have landed in further trouble by failing to reply to Society correspondence. So Smart’s idea, currently being considered within the Society, is for a sort of fiscal fine system, which would involve an acceptance of misconduct (or else proceedings before the Tribunal as at present), with a penalty such as a fine or practising certificate restriction, but a quicker and more certain outcome, and one avoiding the heavy costs of defending Tribunal proceedings – “easily running to five figures” in many cases.

So stand by for a man of ideas, and an energetic presidency – even if one that nearly never happened. Having stood unsuccessfully a couple of times for Vice President and decided after 10 years to come off Council, Ian Smart’s Dick Whittington moment came with the sudden resignation of his good friend John MacKinnon as President, leaving a vacancy for a Vice President able to step immediately into the post. Perhaps, though, he would have found it hard to quit. “Max Hendry, my predecessor on Council, came off halfway through his term, and sold it to me on the basis that I only had 18 months to do it if I didn’t like it – and it would look good on my CV. But I love it, I love all the Law Society stuff.”

“I’m in favour of the maximum liberalisation of the market. Which is just as well because that’s what the profession voted for”
View from the top

Chief Executive
Lorna Jack’s impressions of her first few months

Four months after taking up the position of Society chief executive, Lorna Jack is still settling into her office at Drumsheugh Gardens – such has been her hectic schedule of visits to firms and faculties around the country. But despite meeting several hundred solicitors and trainees at the 100 or so meetings she has attended, her main focus is on engaging even more closely with the profession.

“It’s been fast and furious, no doubt about that,” she says. “But absolutely fantastic too. In one way, it feels like I’ve hardly been here five minutes, yet the whole four months has also been hugely fulfilling. The feedback from the solicitors I’ve met has been really useful and I want to get out even more to meet members and listen to their views and suggestions. I am scheduling in as many meetings with the profession as I can, so I am keen for firms, local faculties and groups to get in touch to arrange visits if I haven’t managed to reach them yet.”

In addition to formal occasions, Jack has met solicitors informally at a variety of events up and down the country, and in other jurisdictions where members practise. Others she has spoken to by phone or email. Always, she says, the contact with the profession has been a very rewarding part of her work to date. “No one at the Society underestimates the current economic difficulties facing Scottish solicitors”, she says. “With that in mind, we applied a bit of imagination and thought it would be helpful to offer free access to the Law in Scotland conference to unemployed solicitors, so that they could keep up their CPD hours and also network with colleagues, which might open up job opportunities. “In response, one of the members who took up the offer sent his unsolicited feedback thanking the Society for what he called ‘an enlightened and valued initiative for solicitors facing unemployment for the first time’. For me, this shows the Society connecting with our membership and responding to their needs. I hope that solicitor goes forward thinking he has a professional body that cared about him when the chips were down. The same goes for others too.”

Jack stresses that much work remains to be done. “When I was recruited last September, I talked about the challenges facing the legal profession, including, at that time, the looming recession. Looking back, the issues for the Society are much the same now as they were then – we need to be more dynamic, efficient and customer-focused so that the membership and the outside world value us more, but the good news is that we are already making progress towards those goals.

“That view has become stronger and stronger as I’ve gone out and met members of the profession and other businesses and organisations. My drive is to follow the path of modernisation by listening, responding and tailoring our services to meet the needs of all members. “Some of the structural and cultural change within the Society has started. But we have to deliver more value for money to our members, whatever size of firm or sector they are in. We need to be more visible, getting out there and meeting our members. After all, we are a service organisation and therefore a people-to-people business. This is about the whole of the Society, not just me, and I am looking forward to working hard with the team to continue the journey we have begun.”

Retiring thoughts

Jamie Millar retires as treasurer of the Law Society of Scotland on 31 May 2009, having been in post since 1 June 2006. Here are some of his thoughts on a turbulent three years for the Law Society of Scotland, the profession and the economy.

● July 2006 – baptism of fire. Newly in post as treasurer and the Chief Accountant has retired; the Society posted a loss in 2005; it is on course for an even bigger loss in 2006; it has a cash flow crisis as its cash reserves have been extinguished. The solution – to propose a budget which increases subscriptions by a massive 18%.

● September 2006 – the budget presented to the SGM proposes the biggest increase in subscriptions ever. A campaign of engagement with the profession and a policy of openness and transparency emphasising the value of the Society to its members results in the approval of the increase. The membership makes clear that it considers that the Society should not spend money on Drumsheugh Gardens but should relocate to more suitable premises.

● September 2007 – with continuing emphasis within the organisation on economies and cost-cutting, a budget is presented which limits the subscription increase to an inflation increase as undertaken at the 2006 SGM.

● Late 2007-spring 2008 – A suitable location is identified for the relocation of the Society to modern, fit-for-purpose premises, location is identified for the relocation of the Society to modern, fit-for-purpose premises, undertaken at the 2006 SGM.

● October 2008 – The Scottish Legal Complaints Commission (SLCC) opens for business and the first levy notices are issued – a major challenge as the SLCC will not handle complaints for service delivered prior to its starting, so the Society has no reduction in its complaints handling obligation and cost overhead.

● Spring 2009 – budgeting for 2009-10 begins. The financial challenges of the last three years see the Society better prepared to weather the financial downturn, with strict budgeting regimes in place, cash reserves restored to an adequate level and cash flow very well managed. The desire is to deliver a practising certificate fee which brings a material reduction on 2008-09 level, although this is dependent on the number of PC holders. The SLCC levy notices issued in May will give us a meaningful pointer on this. Within the Society, Council and the Executive have continued to seek economies and to cut costs. The need for a strong business case for all expenditure is part of the management mantra within the organisation. The Society’s staff, recognising the hardships being faced by the profession, have agreed a freeze on salaries.

I wish my successor as treasurer every success, and the support which I have enjoyed from the profession for the practising certificate fee proposals which I have submitted during my time in post. I look forward to continuing my involvement as I take up my new position as Vice President of the Society.

● AGM date – 28 May 2009, 2pm at the Sheraton Hotel, Festival Square, Lothian Road, Edinburgh
**Commission pronounces on succession**

The Scottish Law Commission published its Report on the Law of Succession on 15 April. It recommends that on intestacy, a surviving spouse or civil partner should inherit the whole estate up to the value of a threshold sum (suggested at £300,000), after which the remainder will be shared equally with the deceased’s issue. Where there is no surviving spouse or civil partner, the deceased’s issue will inherit the whole estate.

Notwithstanding the terms of any will, a surviving spouse or civil partner should be entitled to a legal share amounting to 25% of what they would have inherited if the deceased had died intestate. For children, two possibilities are presented: a similar 25% entitlement, or, for dependent children only, a right to a capital sum calculated by reference to their maintenance needs.

The report recommends that cohabitants should be entitled to a percentage of what they would have received if they had been the deceased’s spouse or civil partner, determined by considering only the length and quality of the cohabitant’s relationship with the deceased.

The report is available on the Commission’s website www.scotlawcom.gov.uk. The preceding discussion paper was outlined in Journal, September 2007, 14.

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**“Pleural plaques” Act comes in**

The Damages (Asbestos-related Conditions) (Scotland) Act 2009 will come into force on Wednesday 17 June. The commencement order was made in the wake of Lord Glennie’s decision (www.scotcourts.gov.uk/opinions/2009csoh57.html) to refuse an application on behalf of five leading insurance companies for interim interdict against the Scottish companies for interim interdict against the Scottish society. The Society is of the view that the bill has been presented as a miscellaneous provisions type bill with a number of wide ranging proposals.

Both the Criminal Law Committee and the Licensing Law Subcommittee have been involved. Their submission can be accessed in full via the Society’s website. It includes substantial comment on a number of areas of the bill, including the proposed Sentencing Council, community payback orders, Crown appeals and a new statutory basis for disclosure of evidence. The Mental Health and Disability Law Subcommittee has also raised a point in relation to how the defence of mental disorder is framed in the bill.

The Criminal Law Committee has also submitted a response to the Scottish Law Commission’s Discussion Paper on Double Jeopardy. The committee agreed that the rule should be retained. It recognised, however, that the principle had evolved in a number of other English speaking jurisdictions such as England & Wales, Australia and New Zealand. It suggested that the principle of the rule is evolving and that in certain limited circumstances there should be an exception to the rule.

The “Better Laws Bill”

The Society set up a small working party to consider the Scottish Government’s proposal for an Interpretation and Legislative Reform (Scotland) Bill. The working party thought the bill, while very technical in nature, represented a worthwhile analysis of the current arrangement.

The response focused on the interpretation provisions, and on the working party’s view that the inclusion of a provision for the serving of documents by electronic means would create difficulties. The response also suggested that while general principles of interpretation might be a useful addition to the bill, further work would need to be done on this area.

**Hybrid bills**

The Law Reform Committee has responded to a call for evidence issued by the Standards, Procedures and Public Appointments Committee of the Scottish Parliament. This asked whether changes should be made to standing order rules to provide for scrutiny of hybrid bills: public bills which affect private interests.

In its response, the committee suggested a number of rule changes that would be necessary to introduce a private bill style consideration stage into the career of a Government bill. It also considered what rules would be necessary for determining whether a bill should fall into the hybrid scheme, and what further procedural rules should be put in place to deal with, for example, the introduction, publication and amendment of hybrid bills.

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**Law reform update**

**Criminal law**

The Society has responded to the Justice Committee’s call for written evidence on the Criminal Justice and Licensing (Scotland) Bill. The Society is of the view that the bill has been presented as a miscellaneous provisions type bill with a number of wide ranging proposals.

Both the Criminal Law Committee and the Licensing Law Subcommittee have been involved. Their submission can be accessed in full via the Society’s website. It includes substantial comment on a number of areas of the bill, including the proposed Sentencing Council, community payback orders, Crown appeals and a new statutory basis for disclosure of evidence. The Mental Health and Disability Law Subcommittee has also raised a point in relation to how the defence of mental disorder is framed in the bill.

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**Court fees up**

The rates in the judicial tables of fees have increased by 5% for 2009-10.

The rise, which was approved by the Lord President following submissions from the Society, came into force on 27 April. As a result, the hourly rate for those recovering expenses in the Court of Session and sheriff court will increase from £136 to £142.80.

**Public Guardian increases target time**

The Office of the Public Guardian has reviewed the target time for processing powers of attorney. As from May 2009 powers of attorney will be processed within 30 working days of receipt at the office. The OPG says the new target time is realistic and in keeping with the level of service it is able to offer customers.

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**SSDT member**

The Lord President has reappointed Malcolm McPherson, HBJ Gateley Wareing (Scotland) LLP, Edinburgh, as a member of the Scottish Solicitors’ Discipline Tribunal for the period of three years from 2 April 2009.

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**Solicitor advocate accreditation**

The Solicitor Advocate Accreditation Committee of the Law Society of Scotland will shortly be inviting applications from solicitor advocates who wish to be recommended as suitable for remuneration as “senior” in criminal legal aid cases. Each solicitor advocate will be contacted individually and, in addition, application forms will be available to download from the Law Society of Scotland’s website.
Election of Members of Council 2009

I, David Cullen, Registrar of the Law Society of Scotland, Returning Officer for the purpose of the election of members of the Council of the Society, hereby give notice that the undemoted persons have been duly elected as members of the Council of the Society for the following constituencies:

- **Sheriff Court District of Inverness**
  Robert McDonald, Stronachs, 46 Church Street, Inverness.

- **Sheriff Court Districts of Kirkwall, Lerwick, Portree, Lochmaddy & Stornoway**
  Shreekha Saha, Council Offices, Sandwick Road, Stornoway, Isle of Lewis.

- **Sheriff Court District of Kilmarnock**
  Andrew Glencross, Ruth Anderson & Co, PO Box 3, 180A Main Street, Kilmwinning.

- **Sheriff Court District of Linlithgow**
  Ian Bryce, Central Criminal Lawyers, 15 Grampian Court, Beveridge Square, Livingston.

- **Sheriff Court Districts of Stirling, Falkirk & Alloa**
  Ian Angus, Virgil M Crawford, 20 Viewfield Street, Stirling; David McClements, Russel & Aitken, 22 & 24 Stirling Street, Denny.

There is a vacancy for a Council member in the Sheriff Court Districts of Haddington, Peebles, Jedburgh, Duns & Selkirk. Any solicitor interested in standing for this constituency should contact me (davidcullen@lawscot.org.uk).

- **Sheriff Court Districts of Haddington, Peebles, Jedburgh, Duns & Selkirk**
  Morris Anderson, Blackwood & Smith, 39 High Street, Peebles.

Three leave Council

The April meeting of the Society’s Council was the last for two longserving members. George Way (Edinburgh) resigned after nine years on being appointed a sheriff. Council and in particular the Society’s Civil Justice Committee, which he convened for several years, will be a less colourful place for his absence. Alan Matthews brought his own touch of colour to the meeting. Bowing out after 12 years in which he has served on financial services, practice management, client relations, Guarantee Fund, insurance, and latterly as convenor of the Professional Practice Committee, he replied in verse to the President’s tribute, beginning with a suitably Dundonian “Jings, crivvens”, before graduating to “pandemonium” as a rhyme for “encomium”, and concluding with the line: “Life at Drumshugh Gardens has helped to keep me sane.” Follow that.

Also leaving Council is Andrew Mellor (Haddington and points south and east), whose three years have seen him contribute particularly on the legal aid front.

Bonnie banks for golf outing

Ross Ireland, organiser of the Scottish Solicitors’ Benevolent Fund Golf Outing, writes: I am delighted to announce that this year’s event will be held at a rather special new venue, The Carrick, Cameron House, Loch Lomond on Tuesday 11 August. This is a rare treat to play an exclusive championship golf course designed by the acclaimed golf course architect Doug Carrick, in a fabulous setting with facilities to match.

Thanks to the continued sponsorship of Legal Post (Scotland) Ltd we have negotiated an excellent package for a magnificent “must play” golf course. Be warned, however, that the “over the hill” amongst us might require a snorkel or bucket and spade to negotiate some of the hazards!

Last year’s outing at The Roxburgh was won comfortably by the Legal Post team, captained by Samantha Burton and ably assisted by Marjorie Townsend, whose magnificent performance ensured a comfortable first win of the individual title by a lady golfer. She eclipsed an eclectic gathering of “has beens”, including Alistair Bonnington, who should surely have completed his world retirement tour by August and at least impress us with his suntan if not his golfing prowess!

Entry forms for teams of four and further information are available from Ross D Ireland, Williamson & Henry, 13 St Mary Street, Kirkcudbright (LP 1, Kirkcudbright; t: 01557 330692; e: rireland@williamsonandhenry.co.uk). (Numbers are restricted to 18 teams for a shotgun start, so book early to avoid disappointment. Last date for entries is 3 July.)

OU appeals for tutors

The Open University is looking for new associate lecturers to tutor students on its course “An introduction to law in contemporary Scotland”. The course looks at lawmakers today and introduces students to some specific areas of Scots law, including the law relating to employment and to children.

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Also leaving Council is Andrew Mellor (Haddington and points south and east), whose three years have seen him contribute particularly on the legal aid front.
The Society’s Regulation Liaison Team has a support programme for all sections of the profession in adapting client care policies for the new complaints regime, as Craig Watson reports

Phone a friend

Firms on the receiving end of complaints face being squeezed between a drop in income brought on by the economic downturn and the rising costs of a new complaints regime, according to the head of the Society’s Regulation Liaison Team.

Complaints dealt with through the new Scottish Legal Complaints Commission (SLCC) carry case fees of between £500 and £2,000 even if settled, and potentially compensation of up to £20,000, explains Mary McGowan. So the time has never been better to review client care policies and standards of service.

“And we’ll be there to help solicitors in any way we can,” McGowan adds. “We are really keen to hear from anyone who wants to take advantage of our services, or even just use us as a sounding board. Our experience tells us that dealing with complaints is an unpleasant and sometimes isolating experience – it’s good to have someone at the end of a phone who will try to help.”

The benefits of picking up the phone and asking for advice are obvious. “Once a firm is in the SLCC process, even one complaint carries a high risk because of the work and costs involved, which is why it is much better to avoid complaints in the first place.

“We appreciate the impact the economic downturn is having on many solicitors, but this is the very time to review client care policies and service standards,” McGowan explains.

Action plan

The Regulation Liaison Team has actively been seeking to support different sections of the profession, writing to all client relations partners as well as in-house lawyers and groups such as the Family Law Association. The team also plans to run a number of workshops and develop a designated section of the Society’s website.

Team head Mary McGowan comments: “We want to support those on the front line and so have visited many faculties and spoken to firms of all sizes. Our messages about recent changes have been well received and we have been very pleasantly surprised by the level of interest shown by firms in making sure they are conducting proper risk management and showing a willingness to evolve.

“We are now looking to expand the focus of our work and so will be contacting different groups to ask how we can meet their needs. While we can’t give advice on what to do with an individual complaint, we can offer guidance and information on processes and procedures. We are more than happy to help if any other groups or individuals want information or support.”

Although no final figures were officially published, the Society has been told that it received its highest ever satisfaction rating in the last six months of the operation of the Scottish Legal Services Ombudsman. In figures, 83% of those complaints passed to the Ombudsman for review between April and September 2008 were handled satisfactorily or generally satisfactorily by the Society.

Top ratings

However, McGowan states that the Society is committed to further improvement. “Most of the cases seen by the Ombudsman involve difficult, challenging issues so the figure of 83% is incredibly high. It can be put down to the fact that everyone has worked very hard to deliver a top quality complaints handling service.

Previously, the average satisfaction rating was 70%.

“It is sometimes overlooked that the Society is still handling a large number of complaints because the SLCC only investigates service complaints for business instructed after 1 October 2008. However, we are confident of achieving the same high standards when the SLCC is the body reviewing the Society’s handling of individual complaints. We will be re-examining our internal complaints handling procedures to ensure that they evolve satisfactorily.”

The Regulation Liaison Team will also continue to meet with the SLCC to discuss matters of mutual interest, such as individual cases as well as policies and procedures. For instance, they are currently looking at the way the Commission handles premature complaints, the process for judging whether complaints are frivolous, vexatious or without merit, and how the Commission intends to deal with third party service complaints.

Mary McGowan adds: “Overall, the transition to the new system of complaints has been very smooth and that’s largely due to dedication and goodwill on both sides. I have regular meetings with Rosemary Agnew, the SLCC’s head of investigations, which has proved to be a constructive way to ensure we all meet the interests of those we serve. If anyone has any concerns, they should get in touch – I’m happy to take up relevant issues on behalf of members.”

www.journalonline.co.uk
### Join the TANQ network

TANQ is an expanding group of trainees and newly qualified solicitors set up by the Royal Faculty of Procurators in Glasgow ("RFPG") three years ago, with the aim of providing training and networking opportunities for trainees and newly qualified solicitors whilst raising awareness about the RFPG.

TANQ hosts seminars every six to eight weeks (with a break in the summer) on a variety of topics and by a wide range of speakers. These are specifically targeted at those who are either embarking on a legal career or are new to a specific area of law, but they have also proved popular amongst more qualified solicitors who wish a refresher on certain topics.

There are also two social events per year that provide a forum for meeting people and finding out what is happening in other law firms. This kind of support network can be invaluable for trainees and NQs in smaller firms, especially in a time of economic uncertainty.

TANQ seminars are free, and aim to give a practical and informative slant to the chosen topics (not to mention CPD points!), whilst the social events are a great way to forge new contacts and catch up with friends.

Forthcoming events, held at the RFPG, Nelson Mandela Place, include:

- 17 June 2009: Summer social – panel consisting of Paul Maharg (Co-Director of Legal Practice Courses), David Semple (Director, Catalyst Mediation) and Cameron Munro (Senior Solicitor, Glasgow City Council).
- 9 September 2009: Seminar by Iain Mitchell QC: “Video Killed the Radio Star – Did the Buggles Get It Right?” (New economic models in a world of technological change)

TANQ committee members are: Jennifer Barr, Paul Neilly, Mhairi Maguire, Katie Roberts, Susan Gibson and Sofia Crolla.

For further information and to be added to the mailing list, please visit www.rfpg.org/tanq.html or contact us at tanq@rfpg.org.

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### Glasgow “Best Practice” conference

The University of Glasgow School of Law is running a conference on “Best Practice in Teaching and Learning Methods” on Wednesday 10 June.

With the Society’s AGM this month due to consider proposals for education and training including a revised framework for the Diploma, the conference will provide a forum in which issues such as the balance of core and elective subjects, choice of elective subjects, and teaching and assessment methods can be discussed.

A number of experts in legal education from Scotland and elsewhere in the UK, and representatives of professional bodies, have been invited to participate.

The conference is free but numbers are strictly limited to 80. Please email Kirsty Davidson (K.Davidson@law.gla.ac.uk) to reserve a place.

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### Introductory course runs in June

The Society of Solicitor Advocates is running its annual introductory course for prospective solicitor advocates on Friday 12 June at the Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh.

The half-day event (10 am-1 pm) is intended for all solicitors (civil or criminal) considering applying for extended rights of audience but unsure of what is involved.

The course deals with the practical and administrative steps involved in applying for extended rights of audience, covering application criteria, referees, examinations (Supreme Courts procedure and codes of conduct), and the subsequent written pleading/oral advocacy assessment courses, as well as costs. Speakers include Bruce Ritchie, Director of Professional Practice at the Law Society of Scotland, and Lord McGhie who acts as one of the advocacy assessors. Contributions will be made by senior office bearers of the Society of Solicitor Advocates, and there will also be a panel session dealing with practical and topical matters relative to practising as a solicitor advocate.

The course is £100. To reserve a place contact Paul Motion, secretary of the Society of Solicitor Advocates, on 0131 240 1114 or email prm@bto.co.uk.

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### Obituary

**JOHN MACDONALD ROBERTSON**  
(retired solicitor), Stromness  
AGE: 94  
ADMITTED: 1945

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### Scotland Act modification: July claims deadline

The Scotland Act 1998 (Modification of Schedule 4) Order 2009 was laid on 1 April before the Scottish Parliament and both Houses of the UK Parliament. Its purpose is to amend Schedule 4 to the Scotland Act 1998 to enable the Scottish Parliament to create a time limit for certain proceedings brought under that Act alleging that the Scottish Ministers or a member of the Scottish Executive have or has acted in breach of Convention Rights. Subject to parliamentary approval of the draft order and the subsequent Act of the Scottish Parliament, it is anticipated that a one year time limit will apply to ECHR based claims raised against the Scottish Ministers or any member of the Scottish Executive on or after 31 July 2009. The time limit will not apply to ECHR based challenges to legislative acts of the Scottish Ministers.

The courts will have the power to allow proceedings to be brought despite the time bar where it is considered equitable in all the circumstances. All cases raised before 31 July 2009 will continue to be dealt with in accordance with the existing law. Copies of the draft order and a more detailed explanatory note are available from the Scottish Government’s website at www.scotland.gov.uk/News/Releases/2009/04/01140512.

For comment see O’Neill, “Playing politics with the constitution”, p 22 above.
Ranks swelling for extended rights

Two recent admission ceremonies have brought the number of current solicitor advocates to 264.

On 29 April seven solicitors were granted extended rights of audience in the civil courts: Margaret Smillie of Bannatyne Kirkwood France, Glasgow; Fiona K Muirs and Robert Holland of Balfour & Manson, Edinburgh, and Malcolm McKay of the firm’s Aberdeen office; Carly L Forrest and Vikki Watt, of Brechin Tindal Oatts, Glasgow; and Iain K Clark of Ross Harper Solicitors, Glasgow.

They were joined by former advocate John Carruthers, who was awarded extended rights in both the criminal and civil courts. Carruthers remains in Oracle Chambers, which he founded along with John Campbell QC to provide support for their respective practices outwith Faculty Services Ltd, and will continue to take instructions from solicitors to appear in the higher courts.

For long critical of the Faculty of Advocates’ resistance to changing its practice rules, Carruthers told the Journal that he would have more flexibility and lower costs operating as a solicitor. He praised the Law Society of Scotland for making it possible for him to be admitted without a break in practice, and hoped it would serve as a model for the ease of transfer between the branches of the profession that the Scottish Government sought in its consultation paper, *Wider choice and better protection*.

A further five solicitors were granted extended rights in the civil courts on 6 May: David McLean of Tods Murray LLP, Edinburgh; Fergus Thomson of Harper Macleod, Glasgow; Mary Maitland of McGrigors LLP, Edinburgh; Catriona McLean of MBM Commercial, Edinburgh; and Linda Pyle of Thursons, Dundee.

Richard Henderson, President of the Law Society of Scotland, said: “There has been much discussion recently over the role of solicitor advocates and the Society is currently pressing for a review to ensure that the system is working for all those who need it. What will be key to any review process of rights of audience is an assurance of continued high standards and client choice.”

An extraordinary general meeting of the Society of Solicitor Advocates on 22 April, called to debate the judges’ criticisms in the *Woodside* case, passed a resolution stressing the existing duties of solicitors and solicitor advocates and the right of solicitor advocates to accept instructions from solicitors with whom they are in a business relationship. This resolution will also be put to the Law Society of Scotland’s AGM on 28 May.

See this month’s Opinion column, p 9, accreditation, p 30 and June course, p 33

Notifications

Entrance certificates

issued during March/April 2009

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<thead>
<tr>
<th>Name</th>
<th>Degree</th>
<th>Accreditation</th>
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<tr>
<td>BREEN, Paul Douglas</td>
<td>LLB(HONS), DipLP</td>
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<tr>
<td>KIDD, Jenna Maureen</td>
<td>LLB(HONS), DipLP</td>
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<tr>
<td>WHILLANS, Matthew</td>
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Applications for admission

March/April 2009

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<tr>
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<tr>
<td>CAMPBELL, Liam</td>
<td>LLB(HONS), DipLP</td>
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<td>CONNACHAN, Claire</td>
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<td>CRUCKSHANK, Adel</td>
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<td>DOULL, Kirsty McDonald</td>
<td>LLB(HONS), DipLP</td>
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<td>FRIEND, Clemency Alice</td>
<td>MA</td>
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<td>GEDDES, Raymond Wayne</td>
<td>BA(HONS), DipLP</td>
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<td>GOODALL, Gemma</td>
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<td>HUNTER, Rachel Louise</td>
<td>MA, LLB, DipLP</td>
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<td>MAXWELL, William Allister</td>
<td>LLB(HONS), DipLP</td>
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<tr>
<td>Scott, BSc, MSc, LLB, DipLP</td>
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<td>MONTGOMERY, Joanne</td>
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<td>SHAND, Nicola Anne</td>
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<td>TANCREDI, Chiara</td>
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<td>THAPA-MAGAR, Gunga</td>
<td>LLB(HONS), DipLP</td>
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<td>WHYTE, Scott Donald David</td>
<td>LLB(HONS), DipLP</td>
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See this month’s Opinion column, p 9, accreditation, p 30 and June course, p 33
Lighting the way

A charity which brings experienced professionals together to form teams to help other charities develop, is looking for volunteers to help expand its operations in Scotland.

The current economic climate is making life difficult for many small local charities and social enterprises in Scotland. Before this recession, research indicated that of the 45,000 charities in Scotland, only 20 organisations shared 38% of the total income in the sector.

Pilotlight Scotland (PLS) is a registered charity which brings together senior business people with directors of small local charities and social enterprises in order to help them grow and develop as an organisation. By bringing together people with excellent business skills and charities who are poised for growth, Pilotlight makes a difference to many different lives in many different communities.

Crucially, the Pilotlight process is overseen by project managers who ensure the smooth running of the scheme, so that the business people – known as Pilotlighters – only have to donate their skills for three hours per month. The ultimate aim is the production of a strategic business plan which will ensure that the charity becomes sustainable and reaches more local people in need.

Isobel d’Inverno, a Director of Corporate Tax at Brodies, got involved as an individual member because she wanted to use the skills she’d built up over several years to help a local charity she felt passionate about.

“I have been a Pilotlighter for a year now, working with an Edinburgh based charity which provides day, accommodation and support services for adults with disabilities. Running a charity like this on a day-to-day basis is hugely demanding, and the Pilotlight process lets the charity take time out to look to the future. Working with the charity director and three other business people, and helping the charity to develop, has been a fantastic experience.”

The results are impressive, with Pilotlight charities reporting that they have increased the number of people they help by nearly 60% in the two years following Pilotlight’s work with them.

In Scotland, Pilotlight is currently working with 15 charities and social enterprises and is looking to expand. With over 40 senior business members it has access to a wealth of talent which can be matched to the needs of the organisation.

If you would like to know more about Pilotlight Scotland and how you could become a Pilotlighter and make a sustainable impact on the lives of local disadvantaged people, please call Pilotlight Scotland on 0131 243 2769 or visit www.pilotlight.org.uk.

Graeme Powie is membership manager of Pilotlight Scotland.

Public contracts portal

Solicitors interested in tendering for work from public bodies – central or local government, NHS Scotland, agencies and NDPBs, higher and further education, housing associations, emergency services and others – should register at www.publiccontracts.scotland.gov.uk, which is to become the central clearing house for public contracts awarded in Scotland.

The legal services section is already live: www.publiccontracts.scotland.gov.uk/search/search_category.aspx?CatID=280000. You can browse the available contracts on the site and also register to receive free email alerts.

Plaudits for High Street re-run

A second Society conference for small and medium sized firms facing the challenges of the credit crunch and economic downturn has been hailed a success. Around 50 delegates attended the High Street Conference 2 at Stirling Management Centre on 4 April.

Presentations included updates on the economic situation and banks’ requirements. Other sessions looked at managing redundancy, business planning and using the Mortgage Rights Act.

The President Elect, Ian Smart, said: “Once again the event went really well, offering insight and assistance to those facing the challenges of today’s difficult trading environment.”

The conference was organised following an overwhelmingly positive response to a similar event last year. A third high street conference is expected to run in November.

Smart leads at ADR event

Ian Smart, President Elect of the Law Society of Scotland, will speak at a major conference on alternative dispute resolution in Edinburgh on Monday 22 June, along with many of the big names in arbitration and mediation in Scotland and overseas.

The Scottish Government has a broad commitment to making Scotland a world leader in this area, believing that Scotland has some very distinct advantages including its perceived political neutrality, respected and developed legal system and top tourist destination status.

The event has been designed with solicitors and solicitor advocates in mind, exploring how ADR affects the daily work of legal practitioners, how they can take full advantage of radical government arbitration reforms and the development of mediation, while at the same time debating the importance of the formal courts system.

For more information see www.holyrood.com/adr.
People

On the move

ARThUR & CARmichael, Dornoch and macdonald & SANDISON, Tain, intimate that on 31 March 2009 Gordon K Lawson retired as a partner of the associated firms. ARThUR & CARmichael, Dornoch will continue to be run by the remaining partners Norman J D Wright and John B Gunn. MACdonald & SANDISON, Tain has closed with effect from 31 March 2009. Any enquiries regarding the ongoing business of MACdonald & SANDISON or wills, title deeds or funds previously held by that firm on behalf of clients should be addressed to MACKenZe & Cormack, 20 Tower Street, Tain IV19 1DZ (LP1, Tain; tel 01862 892046), which is run by the existing partners T Lawson Keir and Nigel D Jones and who have taken over safe custody of those items and have undertaken to complete all unfinished business of MACdonald & SANDISON.

BEVeridge & kellas SSC, Edinburgh are pleased to announce that their former senior partner George Alexander Way, solicitor advocate, immediate Past President of the Society of Solicitors in the Supreme Courts, has retired as consultant, with effect from 15 May 2009, following his elevation to the shrieval bench. Sheriff Way also intimates his resignation as HM Procurator Fiscal to the Court of the Lord Lyon, member of the Council and convener of the Civil Justice Committee of the Law Society of Scotland and from the Sheriff Court Rules Council. The firm will continue to offer a full legal service through its remaining partners, Graeme Duncan WS, Lynn Harrison SSC, John Campbell WS and Gillian Conlon SSC from Hope Chambers, 52 Leith Walk, Edinburgh with all contact details remaining unchanged. The partners and staff wish Sheriff Way every success in his new career.

BreChin tindal Oatts, 48 St Vincent Street, Glasgow and Hanover House, 45/51 Hanover Street, Edinburgh, intimate that on 2 March 2009 Laura Jane Donald, solicitor advocate, was assumed as a partner of the firm. They further intimate that on 1 April 2009 Mark Alistair Craig Morton, solicitor advocate and one of the firm’s associates, and Jill Setterington, another of the firm’s associates, were assumed as partners of the firm, and senior solicitors, Carly Louise Forrest, Fiona Dorothy Mckeracher, Lesley Helen Waddell and Vikki Watt became associates in the firm.

Burn & McGREGor, Aberdeen are pleased to announce that their associate Tony Burgess has been assumed as a partner of the firm, effective from 1 April 2009.

Crawford Mason & Company, Blantyre, are delighted to announce that Anne Brophy (formerly of Hay CasSels) has joined the practice as a Director with effect from 1 April 2009.

DICKson minto WS, Edinburgh and London, intimate that with effect from 27 April 2009, Keith T Anderson has retired as a partner of the firm.

GARDen Stirling burnet, Haddington, Dunbar and Tranent are delighted to announce the assumption of Ian philip as a partner of the firm with effect from 1 May 2009. lan will continue to be responsible for all commercial work and remains in charge of the Leasing department.

Gillian Ralston Jordan announces her appointment as Director, IFG International Limited, Douglas, Isle of Man; Gillian.jordan@ifgint.com.

HER majesty’s revenue & customs solicitor’s office is pleased to announce that Michael Chalmers, formerly of the Scottish Government Legal Directorate, has taken up promotion to the post of Head of the Scotland Team from 21 April 2009.

Kerr Stirling LLP, Stirling intimate that with effect from 31 March 2009 Andrew Thomson has resigned as a member and designated member of the firm.
The partners are delighted that Andrew will continue to be associated with the firm as a consultant whilst also developing his own licensed trade business interests.

KIPPEN CAMPBELL, WS, 48 Tay Street, Perth, intimate that the practice converts to LLP as from 1 May 2009. On the same date associate, Sally Ann McCartney became a partner. All contact and other details for KIPPEN CAMPBELL LLP remain the same.

THE LEGAL SECRETARIAT TO THE LORD ADVOCATE is pleased to announce that Colin Troup, formerly Divisional Solicitor in the Scottish Government Legal Directorate, has taken up on promotion the post of Legal Secretary to the Lord Advocate from 11 March 2009.

LEFEVRE LITIGATION, Aberdeen and Edinburgh, intimate that Martin T Sinclair resigned as a partner with effect from 27 March 2009 to take up a position with MACKINNONS. The firm wish him every success.

LINDSAYS WS, Edinburgh and Glasgow, intimate that Marjorie Townsend ceased to be a partner with the firm on 31 March 2009. The firm also announces that Gary Chapman and Colin N McKenzie were promoted to senior associates and Jennifer G Hunter were appointed associates.

MURRAY DONALD DRUMMOND COOK LLP of St Andrews, Anstruther, Cupar and Leuchars announces that senior partner James C Murray retired on 31 March 2009. The remaining partners wish him well in his retirement. As of 1 April 2009 John Angus WS becomes senior partner.

J MYLES & CO, Dundee intimate they have assumed John Hall and Ian Myles as partners in the firm with effect from 1 April 2009. They also wish to announce the opening of a second office at 63 High Street, Carnoustie DD7 6AD (LP 2 Carnoustie; tel 01241 855769; fax 01241 859775).

PAGAN OSBORNE, Cupar, Anstruther, St Andrews and Edinburgh, intimate that following the recent acquisition of ROBSON McLEAN, PAGAN OSBORNE is pleased to confirm that Neil Paterson, Ronnie Sembay and Kenneth Haughney will join the firm as partners. Nicole Noble and Elaine Del Valle join as solicitors with Walter Thomson acting as a consultant following his retiral.

PAULL & WILLIAMSONS LLP, Aberdeen and Edinburgh are pleased to announce that with effect from 6 April 2009 two of their associates, Gary G Chapman and Colin N McKenzie were promoted to senior associates and Jennifer A Gardner and Jennifer G Hunter were appointed associates.

THE SCOTTISH GOVERNMENT LEGAL DIRECTORATE is pleased to announce the following promotions in the Directorate: Paul Cackette, formerly Legal Secretary to the Lord Advocate, to Deputy Solicitor to the Scottish Government from 11 March 2009; Caroline Lyon to Divisional Solicitor in Transport, Culture, and Procurement Division from 11 March 2009; John Paterson to Divisional Solicitor in Children, Education, Enterprise and Pensions Division from 14 April 2009; and the appointment of Lindsey Nicoll, Secretary to the Civils Courts Review, as Chief Inquiry Reporter and Director for Planning and Environmental Appeals, at the completion of the review.

STEWART & WATSON, Turriff and elsewhere, announce the retiral of Thomas Nicol as senior partner of the firm with effect from 31 March 2009. Tom will continue to be associated with the firm as a consultant at their Turriff office. As of the same date, Euan C Martin resigned as a partner in the firm to pursue other business interests outwith the legal profession. The partners of the firm wish him well in his new ventures.

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

Scottish Court Service membership
The Scottish Government is seeking views on draft provisions which specify the means by which members may be nominated or otherwise selected for appointment to the governing body of the new statutory Scottish Court Service. The SCS is established by the Judiciary and Courts (Scotland) Act 2008 under the chairmanship of the Lord President and is responsible for providing the property, services, officers and other staff for the courts and the judiciary. See www.scotland.gov.uk/Resource/Doc/270312/0080518.pdf.

Respond by 19 June along with a respondent information form to delina.cowell@scotland.gsi.gov.uk.

Victim Commissioner
It had to happen! Scottish Labour member for the Highlands and Islands, David Stewart MSP, is promoting a member’s bill with the aim of establishing a commissioner for people who are victims of crime. Apparently there already exists a Commissioner for Victims and Survivors in Northern Ireland. England & Wales is soon to get a Commissioner for Victims and Witnesses. Mr Stewart sees the proposed commissioner being in addition to all those currently working in the field. See the consultation document at www.scottish.parliament.uk/s3/bills/MembersBills/documents/ConsultationLeafletFinal.pdf.

Respond by 1 July to david.stewart.msp@scottish.parliament.uk.

Teachers’ self-regulation
Is the First Minister correct in his desire that the General Teaching Council for Scotland, the regulatory body for the teaching profession in Scotland, be turned into a “self-regulating, profession-led body, along the lines of the General Medical Council”? Will this help the Council regulate the profession at the same time as being “an advocate for the teaching profession”? See the document at http://www.scotland.gov.uk/Resource/Doc/266699/0079774.pdf.

Respond by 26 June by completed response form to David.Roy@scotland.gsi.gov.uk.

Planning policy
Following on from the reform in the Planning etc (Scotland) Act 2006, the Government proposes to merge the current Scottish Planning Policies (SPPs) and National Planning Policy Guidelines (NPPGs) into a single Scottish Planning Policy (SPP). Will this “result in a planning system where policies are proportionate, practical and informed by early and wide engagement, advice is clear and consistent, processes are effective and efficient, and skills are developed and performance improved”, as intended? See www.scotland.gov.uk/Resource/Doc/266838/0079875.pdf.

Respond by 24 June to sppconsultation@scotland.gsi.gov.uk.
The fight against crime and terrorism has led to newly expanded monitoring requirements on communications companies, with cost implications and an impact on privacy rights, as Loretta Maxfield explains.

The importance of data held by communications companies cannot be underestimated. It is thought that data of this nature forms an integral piece of prosecution evidence in 95% of serious crime cases in the UK. For example, communications data placed Ian Huntley at the scene of the crime in the Soham murders.

It is therefore of little surprise that following the Madrid bombings in 2004, EU member states sought to widen the monitoring powers of communications companies with a view to retaining valuable data which could be used to prevent criminal acts or catch those carrying out these acts.

Accordingly, the EU Data Retention Directive 2006/24/EC was brought into force requiring member states to adopt laws requiring telecom service providers and internet service providers (“ISPs”) to retain certain data.

Like many other member states, the UK decided to implement the directive in two parts. The Data Retention (EC Directive) Regulations 2007 dealt with data in respect of fixed and mobile telephony. The Data Retention (EC Directive) Regulations 2009 (SI 2009/859), which came into force on 6 April 2009, replace and expand the 2007 Regulations, dealing with fixed and mobile telephony and also data retained by ISPs in respect of internet use.

While a degree of monitoring is understandable in the aftermath of terrorist attacks such as those in Madrid, London and Glasgow, is the extent of monitoring pushing the UK into the realms of becoming a surveillance state? Also, what are the implications for those undertaking this level of monitoring?

**Extent of monitoring**

Under the 2009 Regulations, if requested by the Secretary of State, telecom service providers and ISPs (referred to in the 2009 Regulations as “public communications providers”) must retain certain data for 12 months from the date the data is created.

The specific data to be retained is stated in the schedule to the 2009 Regulations and includes: calling telephone number and dialled telephone number (including the telephone number to which the call is forwarded or transferred); name and address of the subscriber or registered user of such telephone numbers; date and time of the start and end of the call; and the telephone service used. It also includes data to indentify a user’s mobile communication equipment and the location of that equipment.

In respect of data arising from use of the internet, the information to be retained includes data that traces and identifies the source of a communication; destination of a communication; date, time and duration of a communication; type of communication; and a user’s communication equipment. Notably, content of the communication should not be retained.

The purpose of retaining this data is so that it can be easily transmitted to the appropriate authorities without undue delay. Such transfers will only take place in limited circumstances and require to be done in accordance with the existing legislative framework in place dealing with such transfers, such as the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000.

**Money, money, money**

Aside from the additional administrative burden the 2009 Regulations place on public communications providers, there is a serious cost implication to consider, which in the current economic climate, is about as welcome as a slap in the face.

Public communications providers must ensure that they put the necessary technological provisions in place to retain this data in such a manner that they can transmit the data as quickly as possible should they be required to do so. This, together with the costs of retaining all the records for 12 months, has been estimated by the Home Office to require in the region of £30 million in capital and £16 million in operating costs over an eight year period. Although these are cumulative figures, the cost for the individual public communications provider is still likely to be significant.

The Secretary of State may decide to reimburse a public communications provider any expenses in complying with the 2009 Regulations, but this is likely to be conditional on such expenses having been notified to and agreed by the Secretary of State in advance. There is no guarantee that public communications providers will be reimbursed for costs.

**And the right to privacy?**

Article 8 in sched 1 to the Human Rights Act 1998 secures to each individual in the UK the right to respect for a private life, which includes correspondence. Many would argue that the level of monitoring noted above infringes this human right. Indeed, the Open Human rights and privacy organisations challenged, unsuccessfully, the implementation of the directive on the basis that it was incompatible with human rights legislation.
Dear Ash,
I have recently been moved to a new department and consequently have to share a room with a new colleague. The person I share a room with is perfectly pleasant and has a good sense of humour but I have some issues with regard to her personal hygiene. I do not want to hurt her feelings, but as our room is relatively small and the windows are locked due to the air conditioning system, I don’t feel that I can just ignore the issue. Please help!

Ash replies:
In this era of open plan offices the issue of personal hygiene is something that is difficult to ignore! However, having to deal with this issue in a relatively confined place can understandably prove even more difficult to ignore. Inevitably, personal hygiene is a sensitive subject to approach and especially when the person is pleasant.

Initially, I would avoid any direct approach as you do not want to sour your relationship with your colleague at such an early stage and thus create a difficult environment in which to work. As you rely on the air conditioning system, it may be worth adjusting in your temperature to speak with your colleague whether she finds it too warm. If she agrees that it is too warm, you could volunteer to speak with the maintenance staff in order to have the temperature adjusted in your room. This may help to alleviate any problem with sweating and make the air a bit fresher.

If this still does not help alleviate the offending odour then you may consider bringing a deodorising air freshener to work. You could buy one with an automatic timer switch in order to avoid having to actually spray the deodoriser yourself and cause any alarm or suspicion to your colleague. You could explain that due to the lack of fresh air in the room you prefer to have the air freshener in the room for both of you to enjoy.

These solutions are clearly temporary measures but as you have just recently moved departments and are still in the process of building relations, it is not advisable, in my opinion, to approach such a sensitive issue in a direct manner at this stage. However, if the issue is still bothersome a few months down the line, and you feel that you have quite a good and open relationship with your colleague, then at that point you may feel comfortable enough to address the issue with her in a direct but tactful manner. However, be warned that by taking the direct approach, you potentially risk causing a certain degree of upset and resentment due to the sensitive nature of the problem and you have to weigh up whether you would rather risk offending your colleague than your nostrils!

Loretta Maxfield is a solicitor in the Intellectual Property and Information Technology Team, Thorntons Law LLP. www.thorntons-law.co.uk

Ash is asked for help by someone whose room mate tends to get up their nose

Rights Group, an organisation campaigning to protect civil liberties against digital rights abuse, together with 40 other human rights and privacy organisations, challenged, albeit unsuccessfully, the implementation of the directive on the basis that it was incompatible with human rights legislation.

The question of compatibility is a matter of interpretation of article 8. Article 8(2) provides the UK with a get-out clause: the UK is permitted to interfere with this human right if it is in the interest of national security or public safety or for the prevention of crime and disorder. Given that the content of the communications will not be recorded, and the benefit likely to arise from this monitoring, it is perhaps easier to justify the implementation of the directive.

Future possibilities
Currently, the 2009 Regulations are limited to tracking data (as opposed to content) and do not include recording data regarding the actual websites visited by users, nor do they cover communications via social networking sites such as Facebook. However the Government’s Intercept Modernisation Programme discusses the extension of monitoring powers to others. While the level of monitoring imposed by the 2009 Regulations may be justified, it is likely that individuals within the UK will be under additional scrutiny in the future.

Loretta Maxfield is a solicitor in the Intellectual Property and Information Technology Team, Thorntons Law LLP. www.thorntons-law.co.uk

www.lawscotjobs.co.uk

Don’t miss in this section

Ask Ash: Advice column 38

Recruitment: Supporting diversity 40

Risk management: File management 42
Despite the depressed state of the job market, those employers who are recruiting stand to gain much by adopting best practice especially in relation to diversity. A new report by the research organisation for professional bodies provides guidance and helpful case studies, as Matthew Hall explains.

Selection, the professional way

On 25 February 2009, David Lammy MP launched the “Professional Recruitment Guide”. The launch of the guide coincides with the New Opportunities white paper and the creation of a panel to identify obstacles to accessing the professions, as well as propose actions which will widen participation. The panel is chaired by Alan Milburn and will work closely with representatives of the professions. The aim of the panel is to identify the options that the professions, working with Government, could take to improve access.

The idea for the Professional Recruitment Guide can be found in Sir Alan Langlands’ The Gateway to the Professions report (2005), which considered how opportunities for graduates could sustain and improve access. The report concluded that the introduction of fees should have no effect on university entrance, although it might impact on diversity in recruitment to the professions.

In 2008 the Department for Innovation, Universities & Skills (DIUS) commissioned PARN, the Professional Associations Research Network (see panel) to research and identify interesting and innovative employer recruitment practices that widened access to new graduates entering the professional labour market. The research output was to provide guidance to employers, for implementing recruitment processes that widened access to new graduates entering the professional labour market. The research identified many recruitment practices, which are included in the Professional Recruitment Guide. These are contained as concise information and positive case studies.

Studying good practice

PARN interviewed recruitment staff from nine small, medium and large employers. These were: ACube Architects; Doughty Chambers (barristers); Filton Avenue Junior School; GlaxoSmithKline; an inner-city medical practice; Penna Recruitment Agency; Pinsent Masons LLP; PriceWaterhouseCoopers; and New Siblands Special School. It emerged from these interviews that the recruitment processes extended beyond the traditional notion of vacancy to job offer. People recognised that there is no point in focusing only on the recruitment process, considering this will miss candidates who do not even apply, or employees who vote with their feet because they feel unwelcome or their needs go unmet.

Many of these employers were actively engaging with negative stereotypes of their professions and the employees who work in them. Some of this, they believed, could be addressed through community outreach programmes and initiatives that provided students of all ages with concise information and positive role models. The results have been encouraging, although all agree more work is needed.

With applications and recruitment rates for the six diversity strands – gender, black and multiethnic, religion, sexual orientation, disabilities, and age – apparently on the increase, the case study employers demonstrated a desire to make the workplace more inclusive and welcoming to all. PriceWaterhouseCoopers used bias training as a tool for making employees aware of the effect of their individual practices and actions on others. It was felt that failing to tackle an inharmonious working environment resulted in reduced productivity levels and low retention rates.

Increased re-recruitment costs and reduced productivity levels were a concern for employers, and this transmitted into their specific recruitment activities. Yet these employers also believed they would gain a competitive advantage from the multitude of differing perspectives emanating from a more diverse workforce. Where clients are likely to be diverse, employers thought their organisations should reflect this; and they have profited from such moves.

Practising what they preach

The research identified many other interesting and innovative practices, which are included in the Professional Recruitment Guide. These are contained as case studies.

Doughty Street Chambers, for example, consists of independent barristers who aim to provide outstanding, accessible and sensitive services to a broad range of clients in accordance with their commitment to the promotion of human rights and civil liberties. Their fundamental ethos is reflected in their recruitment process. All applicants, regardless of their background, are considered as long as they meet the core principles: a fundamental...
commitment to human rights; and a demand for excellence in all services to clients.

These two principles inform the business case for diversity. A less diverse workforce, the Chambers argues, would narrow opportunity. High calibre applicants from diverse backgrounds are attracted, which reflects the diverse needs of their clients.

Besides the case studies, the Professional Recruitment Guide also features recruitment tips, hints, signposts and a section on how to get started. The guide is designed to allow employers to dip in and out or to read extensively. It offers employers a variety of tools that they can tailor to their own specific needs.

For more information on the Guide go to: www.dius.gov.uk/higher_education/widening_participation/professional_recruitment_guide.

Matthew Hall, PARN
Every practice wants to minimise as far as it possibly can the risk of claims and complaints, and in the event that a claim or complaint is made, they would like to be in a position to put forward a cast-iron defence. In recent years the Master Policy panel solicitors in presentations at successive series of the Risk Management Roadshows have stressed that, in their experience of handling claims under the Master Policy, very often the defence is hindered by the lack of entries (file notes of telephone conversations and meetings, and correspondence) on the solicitor’s file. In such circumstances, the solicitor may have nothing but his or her memory to rely on to refute the allegations being made by the claimant.

Many claims arise many years after the work was carried out or the alleged error or omission took place – for example, 25% of all property/conveyancing claims are intimated five or more years after the transaction was completed – and the solicitor will sometimes have only an imperfect recollection of the details of the transaction. It is no surprise that Master Policy panel solicitors always emphasise the importance of effective file management.

**Scoping the engagement**

Many claims and complaints can be prevented by issuing the client with terms of engagement in which the scope of work to be carried out (and, equally importantly, not carried out) is properly set out.

**Case study**

A solicitor had just settled three commercial conveyancing transactions on behalf of three different clients. During the following week, each of these clients separately contacted the solicitor complaining that the solicitor had been negligent by not giving the client advice in relation to the VAT implications of the transaction concerned and that as a result the client had sustained loss. The solicitor was able to refer each client to a clear statement in his terms of engagement explaining that he would not be giving tax advice in relation to the relevant transaction. Each complaint was immediately withdrawn.

**Solicitor’s authority**

A feature of the claims experience that has become noticeable to Master Policy lead insurers over the past few months is an increasing number of claims where it is alleged that the solicitor had no authority to act for the client.
increasing number of claims where it is being alleged that the solicitor had no authority to act for the client.

Case study
The firm had previously acted for Mr and Mrs A in the purchase of their family home. In the absence of Mr A, who was abroad for a lengthy period on business, Mrs A consulted the firm about selling the home and purchasing a country house she had found. Missives were quickly concluded for the purchase of the property, but, with the date of entry looming, no offer had been received for the sale of the current family home. The firm was surprised to receive a letter from Mr A enquiring what authority they had to conclude missives on his behalf for the purchase of a house he had never seen and could not afford.

As well as being clear about who is and who is not your client, particularly in situations, as in the case study, where more than one party is involved, there should be terms of engagement on file dealing with the question of who has authority to give you instructions where you are acting for more than one party. Had that been clarified at the outset with both Mr A and Mrs A, the issue which arose in the case study would not have occurred.

Failure to advise
Claims based on allegations of failure to advise/report to the client have been, and continue to be, a common feature of the claims experience across all practice areas. Insurers anticipate that in the current economic downturn they will see an increase in claims based on these allegations, for example from claimants who find that they are unable to withdraw from a contract they have entered into but are now unable for economic reasons to complete, or from clients who under economic pressures want to revisit the settlement of a claim to which they agreed in haste.

Case study
The firm acted for Mr B in pursuing a claim for personal injuries sustained by him in a road traffic accident. Shortly after intimation of the claim, insurers made an offer of £50,000 in settlement of Mr B’s claim. Mr B appeared to be recovering well from his injuries but the prognosis was uncertain. As Mr B had recently been made redundant, he was keen to settle and accept the insurers’ offer. Two years later Mr B alleges that, since he will never fully recover from his injuries, his claim is worth at least £100,000 and that he should not have accepted the offer.

The corollary is the situation where Mr B does not accept the offer and two years later has to settle for, or is awarded by the court, a much smaller sum. If a letter had been sent by the firm clearly outlining the options available to Mr B and the risks involved in accepting/rejecting the offer of settlement, it is likely that the firm could have avoided any subsequent claim by Mr B. Having the client provide written acknowledgment and confirmation of instructions will further assist in the event that such an allegation is made in spite of the information and analysis provided.

Allegations of delay
Insurers are also concerned that in the current economic downturn in a volatile stock market or a falling property market, they may see more claims in private client work based on allegations of delay in selling, realising or transferring property or shares. To minimise the risk of claims based on such allegations in trust and executry work, manage clients’ expectations at the outset by dealing with timescales in terms of engagement. If that is not done, there is a danger that clients, who may have their own perceptions of timescales, may consider there to be a delay if their expectations are not met.

During the course of the executry, the file needs to be kept under regular review (and the client regularly updated), particularly with regard to timescales for obtaining confirmation, ingathering the estate and making distributions to beneficiaries.

File notes
Corporate transactions where instructions may need to be taken on complex documentation or at late-night completions can present particular challenges. In such situations there can be a danger that the file will not reveal (and may never reveal) the up-to-date situation, if contemporaneous, detailed and legible handwritten file notes are not made. The following case study illustrates the dangers.

Case study
The firm was acting for Mr C, in the sale of the whole issued share capital of C Ltd. Many matters still remained to be negotiated at the completion meeting. During the course of that meeting many alterations were made to the draft sale and purchase agreement. Eventually completion was achieved at 3am. Some weeks later the firm received a letter from Mr C stating that he was annoyed to have found out that the provisions in the sale and purchase agreement for payment of part of the deferred consideration had altered from the position as he had understood it, and that he had given no instructions to the firm to agree the change. The firm was adamant that instructions had been given by Mr C at the completion meeting but did not have a file note, and had not written to Mr C after completion, recording the instructions given to them at the meeting.
Professional briefing Civil court

Sheriff Lindsay Foulis discovers a wide range of cases from the civil courts in his latest roundup of decisions on court practice

Bumper crop

Jurisdiction
In Williamson v Williamson, Kirkcaldy Sheriff Court, 6 March 2009, Sheriff McCulloch was moved to determine that there was no jurisdiction for a divorce action. Looking at the authorities, Sheriff McCulloch held that domicile of origin could only be displaced by a domicile of choice if a party decided to make their home in a new country. Habitual residence was the place where the person had established on a fixed basis their permanent or habitual centre of interests. Unlike habitual residence, it was possible to reside in more than one country.

In Oceanfix International Ltd v AGIP Kazakhstan North Caspian Operating Co NV, Aberdeen Sheriff Court, 3 April 2009, Sheriff Tierney was moved to hold that although Aberdeen Sheriff Court had jurisdiction, a court in Kazakhstan was the convenient forum. Sheriff Tierney would have acceded to that motion, but decided that once a court in the UK is properly seized of jurisdiction over a national of a member state in terms of article 5 of Council Regulation (EC) 44/2001, the court could not thereafter decline jurisdiction.

Recovery of documents
In Bridgefoot Building Contracts Ltd v Michie, Dundee Sheriff Court, 9 April 2009 the defenders argued on appeal...
that an application in terms of s 1(1) of the Administration of Justice (Scotland) Act 1972 for the inspection, preservation, etc of documents should not have been granted. One argument presented was that the order was incompetent. In terms of rule 3.1.2 of the Act of Sederunt (Summary Applications and Appeals etc Rules) 1999 an application in terms of s 1(1) was made by summary application and required to aver the facts which gave rise to the belief that the items sought would no longer exist if the order was not granted. Sheriff Principal Dunlop had little difficulty in deciding that that rule was limited to applying to the “dawn raid” type orders sought in terms of that legislation.

**Parties’ representatives**

In the petition by Parties’ representatives in terms of that legislation. The “dawn raid” type orders sought in

**Diligence on the dependence**

In McCormack v Hamilton Academical Football Club Ltd [2009] CSH 16; 2009 GWD 10-158, the pursuer obtained an arrestment on the dependence in respect of his claim for damages following his summary dismissal as the defenders’ manager. The Lord Ordinary recalled the arrestment but the Inner House allowed the pursuer’s appeal against the recall. The defenders were undoubtedly absolutely insolvent and thus there had to be a risk that the satisfaction of any ultimate decree might be prejudiced. In considering whether there was the possibility of prejudice, consideration was not simply limited to the present position but account could be taken of the likely position when decree was obtained. The defenders’ future financial position was dependent on the goodwill of creditors. It was reasonable that an arrestment remain in place.

**Caution for expenses**

In Gaelic Seafoods (Ireland) Ltd v Ewos Ltd [2009] CSOH 29; 26 February 2009, on a motion for caution for expenses at common law, Lord Drummond Young considered it particularly important that the pursuers were a limited company which could technically deal with its affairs in such a way that its creditors were left with little or nothing, where they were admittedly insolvent. The pursuers were in liquidation. Thus unless the liquidator sited himself to the action, in view of the pursuers’ insolvency, caution should be ordered unless there were strong factors pointing to a contrary conclusion. The relevancy of the parties’ respective pleadings could be such a factor, but the fact that the defenders had a substantial business, the closeness in relationship between the parties, and the fact that the defendants had been able to carry out investigations in a claim against them elsewhere, were not such factors. Likewise the fact that a substantial sum was claimed was not relevant.

Lord Drummond Young also rejected the argument that extension of a funding agreement and legal expenses insurance was ground for not ordering caution. On appeal, the agreement, there were doubts as to whether it gave cover. He also rejected an argument for the defendants that as the pursuers were a company incorporated in a country within the EU, the common law test for caution should be the same as the Companies Act, s 726, otherwise there was discrimination against UK corporations. A state could discriminate against its own nationals if it chose to. However, the tests which applied to s 726 applications were very similar to those applied in applications for caution.

**Interim interdict**

In South East Traders Ltd v Robertson, Airdrie Sheriff Court, 4 March 2009, the issue was whether leave to appeal was required. Interim interdict had been granted ex parte and continued to enable the defendant to be represented. At the full hearing the order previously granted was continued. A subsequent motion for appeal on the basis of a change of circumstances was unsuccessful. Sheriff Principal Lockhart held that appeal of this decision without leave was incompetent: while, following the decision of Sheriff Principal Nicholson in ASA International Ltd v Nelson 1999 SLT (Sh Ct) 44, the second hearing constituted a hearing at which full submissions were made in respect of the grant or refusal of the interim order and no leave was required at that stage, the further hearing did not result in a “grant or refusal” of interdict and leave to appeal was required.

**Res judicata**

In Primary Health Care Centres (Braidford) Ltd v Rangavarm [2009] CSOH 46 (26 March 2009), Lord Hodge considered the extent of the plea. It required there to be a prior determination by a court of competent jurisdiction, the decree to be pronounced without fraud or collusion, the subject matter of the actions to be the same, the media conclusendi to be the same, and the parties to be the same or representative of the parties in the earlier action. In relation to the last condition, it was of no consequence that an additional party was a defender in the second action. The media conclusendi directed the later court’s attention to what had been litigated and what was decided in the earlier action. A plea of res judicata was not the mirror image of a pursuer’s plea of competent but omitted. A subsequent action which apparently is res judicata can however be pursued if the pursuer can set out a different factual basis for the same claim and can show that he could not reasonably have been aware of the facts when the first action was conducted.

**Proof or preliminary proof?**

In G v Glasgow City Council [2009] CSOH 34 (5 March 2009), Lord

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**The defenders’ future financial position was dependent on the goodwill of creditors. It was reasonable that an arrestment remain in place**

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Proof or preliminary proof?

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Continued overleaf >
Malcolm allowed an inquiry into the issues regarding time bar. An issue arose as to whether it should be a preliminary proof or a proof before answer. In allowing the latter, the factors taken into account were that the averments relevant to time bar were also relevant to issues of quantum. Further, the defences seemed to suggest that the pursuer was simply being put to the proof by the defenders. There were no apparent benefits in limiting a proof. In addition, the pursuer had already given evidence in a criminal trial. There was no apparent benefit in requiring her to give evidence on a further two occasions on the same matter.

Remit to the ordinary cause
In Hamilton v The Royal Bank of Scotland plc 2009 GWD 9-144 the issue was whether a small claim should be remitted to the ordinary roll. Sheriff Pender was persuaded that a remit was appropriate. In a small claim there was no provision for written pleadings and a debate on legal issues was not envisaged. Any evidence was noted only by the presiding sheriff. The legal difficulties inherent in the present action, the complexity of the facts and the length of proof justified the additional expense. The matter was further of great importance to the defenders and of great public interest. A remit was merited. It was difficult to determine what delay if any would be caused by the subsequent procedure if the remit was granted, in light of the facility to debate issues.

Whilst still on small claims, an interesting observation was made obiter by Sheriff Principal Young in Mono Seal Plus Ltd v Young, Tain Sheriff Court, 23 February 2009. The pursuer sued for a principal sum together with a further sum claimed by the pursuer sued for a principal sum together with a further sum claimed by the pursuer. Sheriff Principal Young in his obiter by Sheriff Principal Young in Mono Seal Plus Ltd v Young, Tain Sheriff Court, 23 February 2009. The pursuer sued for a principal sum together with a further sum claimed by the pursuer.

Such a person was not an expert whose function was to give advice to the court, but rather a consultant for the party instructing.

Awards for children
In S v Argyll & Clyde Acute Hospitals NHS Trust [2009] CSOH 43 (20 March 2009), Lord Brodie considered that an application to the court in terms of s 13 of the Children (Scotland) Act 1995 was likely only to be appropriate before the sums in damages were paid by the defenders and not thereafter.

Expenses
In Emerson v The Edrington Group Ltd [2009] CSOH 40 (19 March 2009), Lord Matthews moved to restrict expenses when the sum awarded was significantly within the summary cause limit. The case had settled without evidence. Lord Matthews had difficulty in assessing the likely value of the claim on full liability but it did seem that it would have exceeded £5,000. A compromise figure was ultimately accepted. The initial report on which the pursuer founded seemed to support the higher valuation. A subsequent report which resulted in this view being modified was only received after the action was raised. Lord Matthews was not persuaded in the circumstances to modify the expenses, although the action could have been raised under post-2002 summary cause rules.

Witnesses
In Ross v PGS Production AS [2009] CSOH 45 (25 March 2009), Lord Malcolm refused to certify two witnesses as skilled witnesses. They appeared to have carried out investigations to ascertain whether the pursuer had a claim. Such a person was not an expert whose function it was to give advice to the court, but rather a consultant for the party instructing. They were further giving opinions on factual matters. The exact function an expert witness is fulfilling, I suspect, is often overlooked.

Sequestration
In the petition of John Ross (2009) CSOH 33 (10 March 2009), the petitioner sought recall of sequestration. It was accepted that a charge had been served and expired without payment. The fact that in terms of the document of debt a certificate was required to confirm the indebtedness did not invalidate the constitution of absolute insolvency. Temporary Judge Morag Wise decided further that the fact that the petition was continued for a number of occasions for settlement, did not preclude the court from awarding sequestration when the petitioner was not present at the relevant calling of the petition. This did not breach his right to a fair hearing. There had never been any suggestion that the petitioner was seeking to lodge a defence to the petition for sequestration.

Adults with incapacity
In the minute for Carol Cooper, Stonehaven Sheriff Court, 23 April 2009, Sheriff Principal Young considered that a solicitor’s Master Policy cover and the existence of the Guarantee Fund did not result necessarily in there being no requirement for caution if a solicitor was appointed guardian to an adult. There might however be circumstances when the cost of providing such caution was excessive when regard was had to the risk and the value of the estate.
A place in the sun?

All family lawyers should now be aware (and wary) of the invasive reach of legislation from Brussels. Most are familiar with the European regulation governing jurisdiction for divorce purposes (known as “Brussels II-bis”). However, there remain important, and unanswered, questions regarding the interpretation of parts of this regulation. One such question concerns “habitual residence”.

Conclusive guidance can of course only be provided by the European Court, but the case of Williamson v Williamson (Kirkcaldy Sheriff Court, 6 March 2009, available on www.scotcourts.gov.uk) may assist Scottish practitioners to a certain extent. It is important to note, however, that it is currently subject to appeal, so this may not be the final word on the matter.

Williamson examined (1) the interpretation to be given to “habitual residence” for the purpose of Brussels II-bis; and (2) the interaction of Brussels II-bis with the old “40 day rule” in the sheriff court.

The case turned on whether the Scottish court had jurisdiction to deal with the divorce, or matters should proceed in Spain. The ground relied on by the pursuer was: “the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and... has his or her domicile there”.

With regard to domicile, the defender, Mrs Williamson, claimed that parties had emigrated permanently to Spain in February 2006, and had remained there since. The pursuer stated that although they had a Spanish property, where they spent considerable time, this was primarily a holiday home. He continued to operate his business in Scotland, he had a place of residence here, and his family were here. He had not obtained the necessary “tarjeta de residencia” (residence permit) in Spain. He could only speak basic Spanish, and his few friends in Spain were British ex-pats. This evidence was preferred, and the issue of domicile determined in his favour.

The more novel question was whether Mr Williamson was “habitually resident” in Scotland for the purpose of Brussels II-bis.

A recent Scottish decision provides guidance on the jurisdiction provisions in the Brussels II-bis regulation governing divorce actions

The sheriff held that the regulation requires an applicant to be habitually resident only at the time of raising the action.

The pursuer relied on the English case of Marinos [2007] EWHC 2047 (Fam), along with the explanatory report to the regulation, and European Court case law regarding the interpretation of “habitual residence” in the context of other EU regulations. In line with these authorities, the sheriff held that there was an autonomous EU definition of “habitual residence”, being: “the place where the person has established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence”.

In addition, the sheriff held that it was not necessary for the pursuer to be habitually resident for the entire period of six months. Instead, the regulation requires an applicant to be habitually resident only at the time of raising the action; only residence (not habitual residence) is required for the preceding six months.

It was agreed that Mr Williamson had spent roughly equal periods in Scotland and Spain during the preceding six months. The defender argued that as the pursuer had not spent that period entirely in Scotland, he could not establish that he was resident here. The sheriff however held that “it is entirely logical that a person can be resident in more than one place at a time” – and in this case, the pursuer was resident in both Scotland and Spain. Accordingly, the habitual residence and six-month residence requirements were both satisfied.

This was not the end of the matter, due to the rule in the 1973 Act requiring residence in the sheriffdom for 40 days prior to the raising of the action. It was accepted that Mr Williamson had spent time in Spain during that period. The defender argued that one had to be physically in the sheriffdom for the whole period. The sheriff, however, held that “resident” must be given its ordinary and natural meaning, and that it would be illogical and unnatural to read this as requiring physical presence over the whole period.

In addition, the sheriff looked at the intent behind the 1973 Act, which he held was presumably to provide sufficient linking factors with the sheriffdom where the action was raised: “All that the 1973 Act does is indicate which sheriffdom is the correct one, after the basic principle of jurisdiction is established. In any conflict between the 1973 Act and Brussels II-bis, the European regulation must take precedence. I have found that jurisdiction in Scotland has been established, and it would be illogical to deprive a litigant of his or her domicile there”.

The pursuer argued that as the pursuer had not established a permanent or habitual centre of interests, it was not possible to determine his habitual residence. The sheriff however held that “it is entirely logical that a person can be resident in more than one place at a time”.

Could this be another victory for Brussels over domestic law?

Lucia Clark, Senior Solicitor, Morton Fraser Family Law Team
The Government’s Equality Bill is a wide-ranging measure to introduce a common code for all forms of discrimination

Press focus on the Equality Bill announcement centred firmly on plans to “force” firms to reveal the gender pay gap. However, amongst the 252 pages, 205 clauses and 28 schedules, there is a great deal more for employment lawyers to digest.

There is new language. The bill talks of “protected characteristics”, of which there are nine: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

The definition of “direct discrimination” is amended to bring age, disability; gender reassignment and sex into line with race, religion or belief and sexual orientation. A person (A) discriminates against another (B) “if, because of a protected characteristic, A treats B less favourably than A treats or would treat others” (emphasis added). So, gone is “on the grounds of B’s age”, “on the grounds of the disabled person’s disability” etc. The new definition is intended to cover less favourable treatment because of the victim’s association with someone who has a protected characteristic, or because the victim is wrongly perceived to have it.

There are no great surprises regarding indirect discrimination. The new definition is simply a streamlined version of the current definitions.

However, the concept of disability-related discrimination isrecast in an effort to re-establish the protection lost following the House of Lords judgment in London Borough of Lewisham v Malcolm [2008] UKHL 43. Clause 14 provides: “A person (A) discriminates against a disabled person (B) if: (a) A treats B in a particular way, (b) because of B’s disability, the treatment amounts to a detriment, and (c) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.” This aims to strike a balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer to defend the treatment.

Three types of harassment are enshrined in the bill, retaining the current distinction in the Sex Discrimination Act 1975, s 4A. The first applies to all the protected characteristics, apart from pregnancy and maternity, and marriage and civil partnership. It is the familiar definition involving unwanted conduct that has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant, or which violates the complainant’s dignity. The second type is sexual harassment in the form of unwanted conduct of a sexual nature, where this has the same purpose or effect as above. The third is treating someone less favourably than another because they have either submitted, or failed to submit, to sexual harassment, or harassment related to sex or gender reassignment. The use of “related to”, however, widens the ability to bring harassment claims to acts founded on association or perception.

At present, liability for third party harassment (i.e. by someone who is not the employer or another employee) is restricted to the grounds of sex (1975 Act, s 6(2B)).

Contrary to many of the media reports, private sector employers are not to be forced to reveal the gender pay gap imminently

This is broadened in the bill to all protected characteristics (clause 37). However, the “three strikes” rule which caused controversy when it was introduced is retained. Multiple discrimination is a concept being considered for introduction into the bill. A short consultation has been launched on the implications of such a move, which would strike at cases where a unique combination of protected characteristics results in discrimination, in such a way that they are completely inseparable. The explanatory notes to the bill describe this as “intersectional multiple discrimination”, noting that the current discrimination law framework does not always provide a remedy for it. The consultation – which closes on 5 June – aims to ascertain how this could work in practice.

What of equal pay? Contrary to many of the media reports, private sector employers are not to be forced to reveal the gender pay gap imminently. The bill does contain a power to require employers with 250-plus employees to report on the gender pay gap, but the Government has committed not to exercise this power until 2013, and then only if insufficient progress has been made on voluntary reporting. The Equality and Human Rights Commission will consult over the summer on a set of metrics for gender pay reports.

There is not enough space to go into the changes being made to positive action provisions, the provision of a single public sector equality duty, the implementation of a socio-economic public sector duty, the banning of pay secrecy clauses, tweaks to other definitions, or the extension of a tribunal’s ability to make recommendations benefiting the workforce as a whole. The target date for key provisions to come into force appears to be late 2010 or early 2011, so there is plenty of time to begin absorbing the bill’s contents. However, my advice – do it in bite-sized chunks. 1

1. Jane Fraser, Head of Employment, Pensions and Benefits, Maclay Murray & Spens LLP; convener, Employment Law Specialisation Panel
A briefing by the Accountant in Bankruptcy on the latest provisions of the Bankruptcy and Diligence etc Act to be brought into force

Changes incorporated in Part 5

Part 5 codifies and, to an extent, alters the common law on inhibition in execution. Changes to inhibition on the dependence were previously introduced when Part 6 of the Act was commenced on 1 April 2008.

- Creditors are no longer required to obtain “letters of inhibition” from the Court of Session in order to inhibit in execution of a sheriff court judgment. Warrant for all lawful execution is automatically contained in a sheriff court extract decree.

- For individual debtors, the schedule of inhibition served in execution of an inhibition must be accompanied by a Debt Advice and Information Package (DAIP). Failure to provide this will render the inhibition incompetent.

- A new s 155 is inserted into the Titles to Land Consolidation (Scotland) Act 1868 to clarify from when the inhibition takes effect, including in those cases when a notice of inhibition has been registered.

- Where an inhibition on the dependence has been limited to specific property at the discretion of the sheriff under s 151(b) of the Debtors (Scotland) Act 1987, any inhibition in execution of a decree is no longer limited to that property. Further clarification is provided by the Bankruptcy and Diligence etc (Scotland) Act 2007 (Inhibition) Order 2009 (SSI 2009/129), which came into force on 22 April 2009. This modifies s 152 of the 2007 Act to require registration of a decree following inhibition on the dependence limited under s 151(b) of the 1987 Act. The order also clarifies when the effect of such a limited inhibition is widened.

- Inhibitions no longer confer any preference in sequestration, insolvency proceedings or other processes with ranking.

- Inhibitions are no longer terminated by payment of the debt alone. They cease to have effect when the debt is paid plus interest, expenses, and expenses of discharging the inhibition.

Changes incorporated in Part 10


- The arrestee has a duty to disclose to the creditor the nature and value of any funds or moveable property arrested within three weeks from the date on which the schedule of arrestment is served. Failure to disclose may result in financial penalty or be treated as contempt of court.

- Arrested funds are subject to automatic release 14 weeks after the arrestment if no objection is raised. Actions of forthcoming for releasing funds will no longer normally be necessary under this procedure, but will still be required for the release of goods.

- Sums that can be attached by arrestment are limited. For ascertainable debts, funds attached by the arrestment will be calculated with reference to the sum due, expenses and interest. The previous “more or less” provision which attached all funds in a bank account without reference to the size of the actual debt no longer applies.

- A protected minimum balance (PMB) of funds within bank and other accounts is introduced. Only funds above the minimum balance can be arrested. The PMB is currently set at £370 but will increase when proposed future changes to Earnings Arrestment Regulations are progressed.

- NB New s 73D, which provides for the provision of a DAIP, is not being commenced at this point in time. Tables for deductions from earnings by arrestment are contained in the Diligence against Earnings (Variation) (Scotland) Regulations 2006 (SSI 2006/116). It was intended to update these tables by the Diligence against Earnings (Variation) (Scotland) Regulations 2009 (SSI 2009/98) on 6 April 2009. The 2009 Regulations have now been revoked (SSI 2009/133). It is anticipated that changes to the existing regulations will now be introduced later in 2009. This will be confirmed in due course.

Further information can be found on the AiB website at www.aib.gov.uk

www.lawscotjobs.co.uk

Taking diligence forward

The Bankruptcy and Diligence etc (Scotland) Act 2007 is the largest Act passed by the Scottish Parliament to date. The Accountant in Bankruptcy (AiB) has policy responsibility for bankruptcy and diligence and for commencement of the Act.

Whilst some provisions have already been commenced, the full Act has not yet been brought into force. On 22 April 2009, Part 5 and Part 10 were commenced, dealing respectively with changes to inhibition, and arrestment in execution and actions of forthcoming. Some aspects of these diligences not changed continue to be provided for in the common law.

Four Scottish Statutory Instruments, which can be found on www.opsi.gov.uk, support the inhibition and arrestment changes, together with Acts of Sederunt.
This month’s cases concern accounts rules breaches, failures in relation to standard securities, and acting improperly in relation to a codicil

Scottish Solicitors
Discipline Tribunal

Duncan Hugh Drummond and David Richard Blair Lyons

A complaint was made by the Council of the Law Society of Scotland against Duncan Hugh Drummond, solicitor, of Messrs Lyons Laing & Co, Solicitors, 25 Newton Place, Glasgow (“the first respondent”) and David Richard Blair Lyons, solicitor of Messrs Lyons Laing & Co, Solicitors, 5 George Square, Greenock (“the second respondent”). The Tribunal found the first and second respondents guilty of professional misconduct in respect of their breach of rules 4, 6, 8, 11, 14 and 24 of the Solicitors (Scotland) Accounts, Accounts Certificate, Professional Practice and Guarantee Fund Rules 2001, their failure to timely stamp and record deeds, their failure to issue conflict of interest letters in the correct form and their persistent failure to respond to correspondence from the Law Society of Scotland.

The Tribunal censured the respondents and fined them in the sum of £10,000 each.

The Accounts Rules are in place in order to protect the public. Solicitors who fail to comply with the provisions of the Accounts Rules undermine public confidence in the profession. In this case the respondents breached a considerable number of the Accounts Rules at a number of different inspections. In addition to this there were delays in recording deeds, failure to issue conflict of interest letters and failure to respond to correspondence from the Society. The Tribunal accordingly considered that the respondents’ acts clearly amounted to professional misconduct and called into question the respondents’ ability to manage a legal firm properly. The Tribunal considered the individual responsibility of each respondent. It was noted that the second respondent was the cashier and money laundering partner. It was also noted that the first respondent was located at the Glasgow office, some geographical distance from the Greenock office. However the first respondent indicated that he accepted joint responsibility and it was also clear from the evidence that the second respondent was off work due to ill health from time to time when the first respondent would have been the only partner in charge. The Tribunal also noted that at the October 2007 inspection a substantial number of the issues identified related to delay in recording deeds in respect of which the first respondent had responsibility. The Tribunal accordingly considered the first and second respondents equally culpable. The Tribunal was concerned that despite a number of inspections and interviews, there were still problems at the October 2007 inspection. The Tribunal was also not provided with any evidence to show that all matters had been sorted out to the Society’s satisfaction. The Tribunal however noted that the respondents had employed a new financial manager and had a new software system in place. The Tribunal also noted the difficulties caused by the indebtedness of a previous partner and the time this took to be resolved, and noted the references lodged. In the circumstances, the Tribunal stopped short of restricting the respondents’ practising certificates but imposed the maximum fine on each respondent to show the Tribunal’s severe disapproval of the repeated breaches of the Accounts Rules and delay in recording deeds.

David Richard Blair Lyons

A complaint was made by the Council of the Law Society of Scotland against David Richard Blair Lyons, solicitor, of Messrs Lyons Laing & Co, Solicitors, 5 George Square, Greenock (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of his failure to respond to correspondence from the Law Society of Scotland, and his failure to obtemper statutory notices issued by the Society. The Tribunal censured the respondent.

The Tribunal has made it clear on numerous occasions that failure to respond to the Society, hampers the Society in performing its statutory duty and can bring the profession into disrepute. The Tribunal noted the unusual circumstances in connection with the failure to respond in respect of one of the clients. The Tribunal noted that the respondent had a previous finding for inter alia failure to respond to the Society. The Tribunal however also took into account the fact that the respondent was being dealt with by the Tribunal in respect of two other complaints where he appeared with another respondent on the same date where he had been fined £10,000. The
Shahid Sattar Pervez

A complaint was made by the Council of the Law Society of Scotland against Shahid Sattar Pervez, solicitor of the former firm of Belton Pervez, 430 Victoria Road, Glasgow. The Tribunal found the respondent guilty of professional misconduct in respect of his failure to comply with instructions in the CML Lenders Handbook for Scotland and in particular his breach of conditions 10.3, 6.3.1 and 5.8 of said Handbook and his unreasonable delay between 18 October 2006 and 16 January 2007 in responding to the reasonable enquiries of the Society.

The Tribunal directed that an order be issued under s 53C of the Solicitors (Scotland) Act 1980, censured the respondent and fined him in the sum of £1,000.

The Tribunal noted that unfortunately the respondent had not seen fit to lodge answers or attend the Tribunal hearing. The Tribunal however did not consider the respondent’s breaches of the CML Lenders Handbook to be particularly serious in this case. This however taken together with the respondent’s unreasonable delay in responding to the Society, which hampers the Society in the performance of their statutory duty and brings the profession into disrepute, resulted in the Tribunal imposing a fine of £1,000 in addition to a censure.

Shahid Sattar Pervez

A complaint was made by the Council of the Law Society of Scotland against Shahid Sattar Pervez of the former firm of Belton Pervez, 430 Victoria Road, Glasgow (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of his unreasonable delay in responding to the reasonable enquiries of the Society in relation to a complaint made against him. The Tribunal censured the respondent.

The Tribunal was satisfied that the respondent was aware of the complaint and the hearing. The respondent had not lodged answers or attended the hearing. However, the Tribunal also noted that the respondent had entered into a joint minute of admissions agreeing the complainer’s productions and a joint minute agreeing the facts, averments of duty and averments of professional misconduct. The Tribunal noted that the respondent was no longer on the Roll of Solicitors, his name having been removed in September 2006 due to a non-payment of his practising certificate fees. The Tribunal’s powers were accordingly restricted. The Tribunal imposed a censure.

Shahid Sattar Pervez

A complaint was made by the Council of the Law Society of Scotland against Shahid Sattar Pervez of the former firm of Belton Pervez, 430 Victoria Road, Glasgow (“the respondent”). The Tribunal found the respondent guilty of professional misconduct singly and in cumulo in respect of his and his firm’s unreasonable delay in or failing to record standard securities in favour of their client, a lender; to provide that client with any or any relevant schedule of particulars; to advise the said client that the standard securities had been registered; to deliver relevant standard securities and/or title deeds to the said client; to provide the relevant company documentation in particular minutes or resolutions to protect their client’s interest; to advise the said client whether a proposed lease was to proceed or not; to communicate effectively with the said client to update the said client on developments and to protect their interests; and in relation to the respondent’s unreasonable delay to respond to the reasonable enquiries of the Society. The Tribunal censured the respondent.

The Tribunal considered it was clear that the respondent’s conduct amounted to professional misconduct. The respondent did not record or register a number of standard securities in favour of the lender as soon as reasonably possible and did not make any attempt to explain the situation to the lender and ignored their correspondence. He also failed to communicate effectively with the bank and update them on developments and to protect their interest. The Tribunal was concerned about his lengthy and repeated sequence of failures. He also failed to respond to correspondence from the Society. The Tribunal took into account the fact that the respondent had recently been found guilty of professional misconduct for a similar failure. The Tribunal noted that the respondent’s name was no longer on the Roll of Solicitors and the Tribunal’s powers were accordingly unfortunately restricted. The Tribunal would have considered striking the respondent’s name from the Roll but in the circumstances, imposed a censure in this case.

David McLean Watt

A complaint was made by the Council of the Law Society of Scotland against David McLean Watt, solicitor, Ardrishaig, Argyll (“the respondent”). Following a decision in a procedural matter, the Tribunal dealt with the complaint on 20 April 2005, when the respondent was found guilty of professional misconduct in respect of his preparation of a codicil for his father in terms of which his father conferred upon him a significant financial benefit to the disadvantage of other members of his family, and his failure to notify his trustee in sequestration of the existence of the codicil and his beneficial entitlement thereunder. At this time the Tribunal censured the respondent, fined him £5,000 and imposed a restriction on his practising certificate for a period of 10 years. This interlocutor was appealed to the Court of Session, which confirmed certain parts of the interlocutor and remitted some matters back to the Tribunal. Before a freshly constituted Tribunal on 3 September 2008, the Society indicated that it did not wish to proceed with the allegation of professional misconduct in respect of the respondent’s failure to notify his trustee in sequestration of the existence of the codicil and his beneficial entitlement thereunder, or his attempts to mislead his trustee as to the full extent of his assets. The Tribunal then considered sentence in respect of the outstanding finding of professional misconduct in relation to the making of the codicil. The Tribunal censured the respondent.

In connection with the making of the codicil, the Tribunal considered that in normal circumstances this would be viewed very seriously. Solicitors have a duty not to take instructions to act in preparation of a codicil to a will if the codicil contains a significant benefit to that solicitor. The Tribunal however noted the very unusual history in this case. The Tribunal took account of the fact that the codicil was made in 1984 and was revoked only a few weeks later. The Tribunal also took account of the fact that since the previous interlocutor the respondent had been working as an assistant and there had been no further issues which had come to the attention of the Society. The other peculiarity in the case was that the fiscal had asked the Tribunal only to censure the respondent. In the whole circumstances the Tribunal considered that a censure was a sufficient penalty.
The Rule of Law
Perspectives from Around the Globe

Francis Neate, a past President of the International Bar Association, and the IBA itself are to be congratulated for this collection of papers and for convening the various symposia on the rule of law which provide much of the content.

This is not a collection of learned essays – although there are valuable examples, notably in Lord Bingham’s Sir David Williams Lecture and the paper on “The Rule of Law in a Globalising World” by Judge Hisashi Owada of the International Court of Justice, as well as the substantive contributions of Francis Neate himself.

One consequence of drawing heavily from presentations to symposia is variability of depth of research and analysis: some contributions perhaps played better to an international convention centre audience. Attendees of conferences will not be surprised by such titles as “The World Rule of Law Movement and the Moscow City Chamber of Advocates”, or “How the Nigerian Bar Association Promotes and Defends the Rule of Law in Nigeria”, but it would be very wrong to assume that these papers are parochial or self-congratulatory.

Indeed, the strength of this collection is in the sharing of experience – often frightening – and the acceptance by almost all contributors of the challenge presented. The Russian papers, in particular that of Valery Zorkin, President of the Constitutional Court of the Russian Federation, give a fascinating, if sometimes chilling, but disarmingly frank insight into what lawyers and judges are doing to promote the rule of law in a country whose soil, as Zorkin puts it, “is barely suitable for the cultivation of a fragile flower’ like the rule of law”.

Equally, the African contributions, including the short Nigerian paper already mentioned, repay study. Indeed, the highlight of the collection is “Tales of Terrorism and Torture” by Justice Albie Sachs of the South African Constitutional Court. His life story will be known to many, but for those to whom it is unfamiliar I will not spoil the opportunity to read his powerfully direct and humbling prose.

Lawyers and judges can sometimes sound a bit smug on their own role in promoting human rights and the rule of law, but while that is not wholly absent from this collection, essays such as those of Sachs and Zorkin have none of that and underline the challenge of nurturing this fragile flower.

Events since the beginning of this year demonstrate the resilience and fragility of that flower: these include President Obama’s determination to close Guantanamo Bay, incoming US Attorney General Eric Holder’s acceptance that waterboarding is

Adults with Incapacity Legislation

Adrian D Ward

As the author says in his preface, “this book sets out, with annotations, the text of the Adults with Incapacity (Scotland) Act 2000 with all amendments up to and including those made by the Adult Support and Protection (Scotland) Act 2007”. The author has also included as an appendix a text of s 13ZA of the Social Work (Scotland) Act 1968, which has been in force since 22 March 2007. He has included with that a very detailed general note.

The blurb on the back cover tells us that this book is principally intended as a stand-alone volume but is also a supplement to the author’s book Adult Incapacity, which was published in 2003 after the 2000 Act came into force, together with the first draft of the regulatory review.

All serious practitioners in the area of adults with incapacity will already have a copy of the earlier volume. This text will be a valuable supplement, including as it does all relevant regulations brought into force up to the end of October 2008. For those only with a need to make casual reference to the 2000 Act, this volume will probably suffice.

As well as detailed annotations for each section, there is an expansive introduction giving the history of the provenance of the legislation, with a comparison between the situation prior to the enactment of the 2000 Act and the principal provisions of that enactment. There is a general overview of each part of the Act, and even a section headed “Matters not covered by this Act”. This is a reference to the Scottish Law Commission report published in September 1995 which generated the legislative process. The annotations to the sections of the Act are particularly
torture, the publication of the legal advice which justified that practice, confirmation by the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case of Karadzic that political negotiation cannot ground immunity for crimes against humanity, and the International Criminal Court’s issue of a warrant for the arrest of the President of Sudan. Yet that ruling has been ignored by Sudan; its President has been able to travel freely to a number of countries and even appear in the same conference room as the Secretary General of the United Nations. It has still to be established whether recent developments in South Africa, including the removal of the National Director of Public Prosecutions and the dropping of criminal proceedings against presidential candidate Jacob Zuma, enhance or weaken the rule of law. And Somalia has slid so far into lawlessness that piracy is able to flourish in and from its ports – giving the international community a whole new set of rule of law challenges.

This is a timely and, at times, stimulating collection. [1]

Norman McFadyen

There are some quibbles. The target readership is students, legal practitioners and health professionals. This is as diverse as the subjects covered, and rather difficult to reconcile in terms of what each of these groups will look for. The matters covered include the professional structure and discipline of medical and allied professions, confidentiality, consent, fertility, transplantation, negligence, death, and aspects of criminal law (my summary). While many of these areas are governed by complex statute law and difficult case law, the author makes a pretty good attempt at identifying the issues and making them understandable. I liked the essential facts and case summaries which conclude each chapter.

There are some quibbles. The proofreading has allowed occasional references to the “action injuriam”. The author correctly indicates that there is no statutory definition of death, but that brain stem death is the definitive medical usage (pp 152 and 165). I was surprised not to see reference to the Department of Health Code of Practice for the Diagnosis of Brain Stem Death 1998 (amended 2008, subsequent to date of publication). The author also makes a reference to the crime of “reckless endangerment” in his treatment of active euthanasia (pp 163-164).

There is no such crime known to the law of Scotland. The only reference to the term reckless endangerment I could find was in the index to McCall Smith and Sheldon’s book on criminal law, which leads back to a discussion of culpable and reckless conduct. I also found some of the narrative on e.g. the claim for psychiatric injury under English law (p 144), the tort of breach of confidence (p 114), and other discussions of English law where it proceeds upon its own distinct basis a bit unnecessary. My final quibble is the occasional lack of clarity as to whether Scots or English law was under discussion, which might be a bit confusing to the medical practitioner and some lawyers too!

Having said all that and with the general caveat that the author may be trying to appeal to too wide an audience, I found this book quite valuable. It is well set out and logically divided in terms of topic. It directs one to the appropriate statutory provisions and considerations that a medical practitioner may have to consider especially in relation to incapacity and confidentiality, and gives good guidance. The same applies to the practitioner in what has become something of a maze of legislation. I was similarly pleased to see the clear account of the circumstances under which a post mortem examination can be carried out, and the role of the procurator fiscal is clearly explained.

I certainly learned a lot from reading this book and at the end of the day, for a textbook, that is the point after all. [2]

John Keir. (The reviewer is a senior procurator fiscal depute and would like to stress that the opinions here are his personal views.)

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May 09 theJournal / 53
This month the web review examines two Scottish law firms (one big, one not so big) who are making the most of modern technology online.

**MacRoberts**

www.macroberts.com

Wow! MacRoberts’ website has had a major facelift. The content of the site was always pretty impressive, to be fair – but I was never sold on the white on blue colour scheme they adopted. Corporate colours are all very well, but not at the expense of readability. The front page now boasts a large masthead with a variety of typically Scottish scenes, and the text is generally black on a white background – which is handy.

But there is so much more to this new website than a cosmetic makeover. The eye is almost immediately drawn to the section heading “Interactive Services” – well my eye was anyway.

All the items in that section are both novel and impressive. Let’s start with that little black and orange logo at the top left of every page – a speech bubble with the words “Say it”. Click on this and the site will read the page aloud to you. True, the voice sounds a little like it should be explaining the origins of the universe to you, rather than MacRoberts’ environmental policy, but that’s no bad thing. While read-along functionality is becoming more common in the public sector, it’s still very rare for commercial firms, so kudos to MacRoberts for leading the way here. In fact, on web accessibility generally, this ticks a number of boxes: access keys; scalable text; cascading style sheets – they’re all here, and it’s really good to see a firm taking pride in inclusion.

Finally, it appears that if you are a client or member of staff you can log in to MacRoberts Online Resource (More) or MacRoberts Global, respectively. As I am neither, I couldn’t log in – but they’re probably terrific too.

**Inksters**

www.inksters.com

Inksters market themselves as “Just that little bit different”, and that’s probably fair comment if the website is anything to go by. Inksters TV and Inksters FM are not yet available on Freeview or DAB Radio, but on the website you can get interesting legal insights in video or audio clips. You can pay your legal fees to Inksters online using a credit card – which is very useful, I dare say. But aside from having an excellent website, there is one main reason that the online community is very excited about this firm in particular: Inksters are twittering.

If you are reading the web review then I will assume that you already know what Twitter is. If not, “microblogging” may not mean that much to you either. You can find out more by visiting http://twitter.com or http://en.wikipedia.org/wiki/Twitter. What you may not know is that Inksters is (was?) the first Scottish law firm to get in on the act. And what, exactly, do they tweet? Well, there are three streams – one being a general firm channel, one for Scottish (residential) property and a third for property on Shetland (which is the most popular, with 74 followers at the time of writing). I’m inclined to think that this is more than just a cute piece of marketing – for 74 followers to be instantly updated when new property comes on the market, or goes under offer, or is transferred to a fixed price, has to offer a competitive advantage over other firms. And that information being delivered direct to potential purchasers at home, work or on the move ensures that potential bidders don’t miss out because they didn’t pick up their phone messages on time.

Impressive, most impressive.

Think your firm can do better? Let me know, and you may feature in a future web review.
Societies’ challenge secures Abbey rethink

Joint action by the UK’s law societies has helped secure a retreat by the mortgage lender from its cull of panel solicitors.

Mortgage lender Abbey has agreed to reverse some of the cuts to its panel of approved solicitors following a meeting with representatives of the Law Societies of Scotland, England & Wales, and Northern Ireland on 17 April.

The bank, which took the largest single share (28%) of the lending market in 2008, shocked over 6,000 solicitors’ firms across the UK – half the number on its approved panel – a month earlier with a letter telling them without warning that they had been removed from the panel.

All three UK law societies protested the move. The Law Society of Scotland was concerned that the decision would particularly impact on smaller firms, especially in rural parts of Scotland where many solicitors operate in small partnerships or as sole practitioners, as well as on clients who might have to instruct an additional solicitor.

“Firms removed from the panel could be facing a significant loss of business”, Janette Wilson, convener of the Conveyancing Committee, said. “We also believe that this move reduces consumer choice and may be anti-competitive.”

The Society was further concerned that as Abbey is part of the same group as Alliance & Leicester, the latter might follow suit.

Initially Abbey agreed to contact affected firms to advise them on potential reinstatement to the approved panels, if they could make a case for ongoing business with the bank. This failed to satisfy the Society, which pressed for a meeting to discuss the issue.

John Scott of the Professional Practice Department said following the talks that Abbey had admitted it had been “inundated with requests for reinstatement” from individual firms. “It was a very constructive meeting and Abbey has promised to keep all three law societies informed on how it intends to proceed, which will allow us to keep our own members fully up to date.”

Abbey, he added, “has now agreed to an interim approach of automatically reinstating solicitors if they have ongoing transactions with the bank and will continue to deal with requests for reinstatement. Clients who have an Abbey mortgage product can still engage solicitors who have been removed from the panel, on the basis that their application for reinstatement will be fast-tracked by the bank.”

Abbey has committed to work towards a permanent solution which will not disadvantage solicitors in the UK and their clients.

Registers of Scotland

Turnaround times as at 28 April 2009

The Keeper’s turnaround targets for 2009-2010, endorsed by Scottish Ministers, are set to drive continuous improvement in RoS’s performance. This year the targets again set specific timeframes rather than relying on averaging. The targets and performance are as follows:

**Speed of registration**

**Target:** Where it is in the Keeper’s power and is legally appropriate, to complete the recording and registration of:

- 80% of standard first registration applications within 70 working days.

**Target:** 80% of dealings with whole within 30 working days, with no dealing taking longer than 100 working days.

**Target:** 80% of sasine writs within 20 working days, with no writ taking longer than 40 working days.

**Target:** 80% of sasine writs within 20 working days, with no writ taking longer than 40 working days.

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<th>Timeframe</th>
<th>Targets</th>
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<tr>
<td>1,125 received since 1 April 2009</td>
<td>9,710 received since 1 April 2009</td>
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<tr>
<td>9 despatched of which 100% within 70 working days</td>
<td>1,082 despatched of which 100% within 30 working days</td>
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<td>0 despatched in more than 70 working days</td>
<td>0 despatched within 31 to 100 working days</td>
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<td>1,116 (99.2%) received since 1 April are in process</td>
<td>8,628 (88.9%) are in process</td>
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<td>0 despatched in more than 100 days</td>
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<td>4,106 received since 1 April 2009</td>
<td>4,106 received since 1 April 2009</td>
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<td>245 despatched of which 100% within 20 working days</td>
<td>245 despatched of which 100% within 20 working days</td>
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<td>0 despatched within 21 to 40 working days</td>
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<td>3,861 (94%) are in process</td>
<td>3,861 (94%) are in process</td>
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How I learned to love the law

Manus Straw recalls the diverse and creative forms of electronic communication with his trainee colleagues

A bright spot in the trainee day was a funny email or three from a witty trainee colleague. In a rare example of a trainee perk, the firm’s system permitted emailing the trainees collectively at one address, a facility which encouraged countless flippant missives.

My original preferred contribution was “Searching the Staff Intranet for Really Hilarious Pictures”. This entailed finding a really stupid staff picture, then forwarding the link. Finding a Hilarious Staff Picture carried cachet amongst the trainees and there were some real belters waiting to be discovered. Among my favourites were the receptionist who looked like something was about to burst out of her forehead, and the partner in employment who looked like he was having a stroke.

Searching for Beardies was a splendid variation. There was no glory in finding a picture of someone whom everybody knew had a beard. The Holy Grail was finding somebody who had sported a beard at the time his intranet picture was taken, but was now clean shaven in an attempt to bury his beady past. (A few cruel participants tried to submit pictures of female members of staff, but these entries were rightly banned on grounds of taste and decency.)

Then for the trainee who liked to live on the edge, there was Searching for Staff Lookers. This was a high stakes pastime, as you didn’t want to be gazing too long at a Staff Looker in case she unexpectedly appeared right behind you wanting a serious chat about the law. (Bradley the banking trainee suffered this inglorious fate and his name was mud for months afterwards.) I couldn’t resist the odd foray, and you can imagine my delight when a particular Staff Looker’s intranet picture made her look like a dead ringer for Legolas the elf from Lord of the Rings. In a moment of inspiration I pasted her picture into an email together with a picture of Legolas in similar pose, put the names under the pictures the wrong way round in classic Private Eye style, and gave the email the subject “Afternoon Lookalike”.

Spontaneous laughter greeted the missive, and it didn’t take long for what had started out as a virtual schoolboy tug of a Staff Looker’s pigtails to become a genuine craze. For the next few months “Afternoon Lookalikes” came thick and fast. Trainees got their thinking caps on and started spotting all sorts of hitherto undetected resemblances. One morning I decided that a girl trainee bore an uncanny resemblance to George Best in his youth. An “Afternoon Lookalike” was swiftly dispatched, and the trainee’s disgruntled response earned her the sobriquet “Besty”. The plot thickened when Besty was subsequently off work on the day of George’s funeral, and again on the day of a memorial service in Belfast the month after. (I still wonder if there was something in that.) To her credit, Besty managed to pick up on a derogatory but nonetheless amusing Lookalike for myself which I had personally noted (but hoped nobody else would).

Like every great art form, the Afternoon Lookalikes became increasingly abstract over time as the creative trainees stretched the medium. I felt a male trainee was “cutting my grass” by interrupting whenever I was trying to speak to a particular Staff Looker. So I sent an Afternoon Lookalike of him and a Flymo. A lot of trainee intrigue that would perhaps have remained out of emails was being disclosed in this kind of way, and certain secretaries seemed to be very clued up. We suspected a particular trainee was passing on gossip. So we released an Afternoon Lookalike of her juxtaposed with a mole. (It turned out that the secretaries were getting the information another way, but that’s a whole other story.)

Inevitably not every Lookalike was embraced in the correct spirit. It was highlighted that one young corporate solicitor bore a passing resemblance to the android from a popular sci-fi franchise. Sadly he refused to acknowledge the resemblance, claiming instead that we were trying to compare him to a robot.

The Afternoon Lookalike craze fizzled out soon after, and we turned our talents towards entertaining each other with creative verse, usually mangling the language with scant regard for rhythm or rhyme. Morrissey would have called it “bloody awful poetry”, but I’ll leave you with my favourite verse:

“Partners, went mad when they saw/My occasional, small drafting flaw/But I took it all on the jaw/I learned How to Love the Law”.

Manus Straw is the pen name of a practising solicitor
Sidelines Letter from somewhere else...

Alistair Bonnington finds the era of the Confederacy coming to life in Charleston, South Carolina

My recent reading up on the American Civil War made me want to visit Fort Sumter, which is on a tiny, manmade island in the bay of Charleston, South Carolina. The Confederates’ attack on this Union outpost sparked off the bitter conflict of the early 1860s which so nearly brought the United States to an end. Brother really did fight brother in that war. At the battle of Hilton Head Island (further down the coast and now a golfing resort) the respective commanders of the rebel and Yankee forces were Thomas and Percival Drayton. Charleston, Rhett Butler’s town, you may recall, is quite glorious. The gracious mansions – which just get grander and grander as you approach the seashore – belonged to wealthy plantation owners. During the intolerable midsummer heat and humidity inland, they and their families came into Charleston to enjoy the sea breezes. Many of these homes are now “historic inns”, so you can stay there, if you have a few quid.

Like so many places in America, the inhabitants of the “Holy City” (there are over 70 churches here) are proud of their home town and are anxious to help the visitor appreciate it. The local museum not only has a collection of Charleston artefacts, it owns two of the mansions – certainly worth a visit. A separate museum houses the remains of the Confederate submarine Hunley, which carried out the first successful submarine attack on another vessel – well, not a complete success as the Hunley sank too, drowning all eight crew. The Hunley was only recently raised and the remains of these eight pioneer submariners buried with full military honours, nearly 150 years after they died. The “Old South” still exists in some folks’ emotions here!

The excellent visitor centre on Meeting Street is hugely helpful to the tourist. I had four days of sightseeing under their guidance, and could easily have stayed for much longer as there is so much to see.

Walking around Charleston in the cool of the early morning is a great treat, especially in the pretty French Quarter: the Huguenots came here to escape persecution in Europe. There are plenty of dinky shops for the ladies, not to mention the more mainstream ones along King Street. I got sent by my daughter with a shopping list to Abercrombie & Fitch. When you buy girls’ stuff in A & F, you get a bag with a picture of a semi-naked young man on it! Most embarrassing for a venerable golf club member like me. (I calculate that I have been sent by various women to shops – with lists – for the past 54 years. Will it never end?)

For me the highlight of this trip was a visit to the Magnolia Plantation – in the same Carolinian family for six generations. The dark green Spanish moss droops off the huge old oaks in the driveway up to the plantation house. In March, the azaleas, wisteria and other flowers were in full bloom. A boardwalk took me over the swampland, which is astonishingly beautiful – and the wildlife there is fascinating. I can see just why the planters of the Old South wanted their mediæval style social system to go on forever. Life was good – incredibly good – for the landowning aristocracy of this supposed nation of equal opportunity.

The opening scenes of Gone with the Wind are in Tara (Scarlett O’Hara’s family plantation), just after the first shots have been fired at Fort Sumter. Only Rhett seems to realise that the outcome of the imminent war will depend as much on superior armaments as on gallantry. His pointing out that the South sorely lacks war materiel causes great offence at the Wilkes’ party at their “Twelve Oaks” plantation. Rhett was right. Despite Robert E Lee’s brilliant and courageous generalship, the North wore down the South: after Gettysburg they were in truth finished. So the world of Scarlett, Rhett and Ashley was “gone with the wind”.

The final irony of the Civil War could be said to have occurred at Fort Sumter too. As a symbolic gesture, the victorious North insisted on the day the Confederates fired on the Fort, the general in charge of the Union troops accepted the final surrender on that tiny island. Many dignitaries from all over America were invited to attend. Naturally this included the victorious President Abraham Lincoln. He declined his invitation, saying he was to attend the theatre in Washington with his family on that night. There, as you will know, he was assassinated by an insignificant Southern bigot.

For the States these were the headiest of times since the Revolution of 1776. You can experience a good deal of them in and around Charleston.
Been on one of those courses you occasionally get to go on when all the places aren’t taken up by full-timers. It took place in a splendid old country house hotel set in picturesque grounds. It was held over two days. Met up with some of my old pals and spent the first evening, after dinner, trying out the fine selection of single malts.

Didn’t feel great at the first lecture next morning so I sat at the rear in a table shaded by a large drape. Alas, a little too shaded, as I nodded off during the Lord Somebody or Other’s opening remarks. You know that feeling you get when you wake up suddenly after nodding off and jerk awake with a grunt. (Well I am told that it sounded like a grunt.) The poor fellow was so nonplussed to be heckled, as he thought, believing I was voicing a contrary opinion to whatever he was speaking about, that he indignantly spent the next 20 minutes justifying whatever he had said and directing his remarks at me. Anyway it all made little sense to me, and the other chaps at lunchtime said that my intervention hadn’t made any difference as no one really knew what it was supposed to be about anyway.

I must record that lunch was fantastic! All sorts of dishes with super touches like those little eggs you get on cracker sort of things lying on a bed of haggis or something. Anyway really great food. All this intellectual stuff works up an appetite! Can’t recall much of interest on the first day apart from the usual spiel that prison was awfully expensive so don’t use it unless you really, really, have to. Dinner that night surpassed the previous. We partook of much wine. Felt sorry that while we dined on this gastronomic feast the one vegetarian in our company was provided with a sad looking cheese salad. They can be very brutal, these continental chefs. Once more we counted the “Glens” until early morning. Costly I know, but you do get paid to attend these things so I would still come out ahead.

There is always a reckoning and the next morning it came. First of all I felt terrible. I also discovered that, unknown to or forgotten by me, we had been given homework to prepare for the course. Some new Act or something but I decided to wing it or if seriously caught out to rush out, feigning illness. Actually not too much feigning required. Why do they call these things workshops? I always think of workshops as having machines, tools, craftsmen, the smell of wood and leather or lubricating oil. Kept head down until a hearty lunch revived my spirits, as did the shared bottle of red.

Had to queue up for dessert and I decided to have some of them all. Got cream all over the suit of the chap that spoke to us on the first day. He seemed to take this in good part but was a little irritated, I think, about the fudge sauce landing on his shoes. Back at the table my pals all thought it terrific fun, as did I, until someone thought that the “saucy fellow” might be on the Judicial Appointments Board and that I was going to get my just desserts as well. Offered to pay his dry cleaning but he declined. Must read the course notes some time to see what it was all about.

Scott Rettie is the pen name of a solicitor who sits as a part time sheriff

Hearsay

Why did the chicken…

…run along the road for 13 miles? Probably just trying to put behind him that bet he took on down the pub, especially if it involved running the Edinburgh Half Marathon in one hour 31 minutes dressed like this. Actually it’s HBJ Gateley Wareing’s Colin Turner (spotted that a mile off, didn’t you), who with colleagues Claudia Barron and David Reiss managed to raise over £1,000 for the Scottish Love in Action charity, which supports over 560 destitute and orphan children in India.

So maybe the chicken did come before the (nest) egg.
Louise Farquhar finds some ways of tackling that activity you always wanted to try, while enjoying a Scottish weekend break

Six of the best...
Activity weekends

Getting away for an active weekend can mean many things. Perhaps you crave a physical challenge or maybe some intellectual stimulation? Other people may want to cook fine food or be at peace with nature. Whatever the reason, it’s important to take a break from the routine and stresses of work and domestic life and have some fun.

Here are my top six ideas:

**Scotland for Golf**
This specialist golf vacation company runs the St Andrews Golf Academy, which overlooks the famous Old Course. Head professional George Finlayson is an advanced PGA tutor and can develop programmes to suit all levels and ambitions. Tuition sessions might include play supervised by a professional as well as tee times on some fine local links courses. Hotels and transport can be arranged and there are excellent corporate options offered too.

- [www.scotlandforgolf.co.uk](http://www.scotlandforgolf.co.uk)

**Wild Tiles**
Jan Kilpatrick runs weekend courses through her company Wild Tiles. Opportunities for creative expression are sensitively pitched to appeal to all ranges of experience. Skills include mosaic, textile embroidery, and creative journals, paper and bookmaking, and the courses take place in a relaxed and enjoyable atmosphere. Jan is based in the North West Highlands so many weekends are set in Ullapool. For those nearer the centre of Scotland Jan also has some dates in Edinburgh.

- [www.wildtiles.co.uk](http://www.wildtiles.co.uk)

**Kinloch Cookery Courses**
Claire Macdonald is a bestselling cookery writer who has a genuine enthusiasm for sharing her recipes and technical secrets. Her cookery school is based at Kinloch Lodge – her home and also a luxurious hotel. The teaching sessions maintain an informal and fun mood despite imparting plenty of knowledge and giving participants lots of practical experience. The short breaks include three overnights, all meals and two cookery lessons in Claire’s own kitchen.

- [www.claire-macdonald.com](http://www.claire-macdonald.com)

**Heatherlea Birdwatching**
This company, formed by wildlife and Scottish mountaineering experts organise trips all over Scotland, some of which are enticing weekend outings – they claim you can see over 70 birds and 10 mammal species in one of their three day trips! The Mountview Hotel, in Nethybridge, is their comfortable base for most of the breaks and it has a restaurant with 2 AA rosettes.

- [www.heatherlea.co.uk](http://www.heatherlea.co.uk)

**The Belgrave Arms Hotel**
For the chance to “get rich quick”, why not try a weekend of gold panning in Helmsdale? Prospectors have been coming to this little village for 19 years to pan for gold in the Bal An Or burn, Kildonan; there are also semi-precious stones and fossils to be found. The gold gets an official 18 carat rating and can be made into jewellery or deposited for a rainy day! The Belgrave Arms Hotel is situated in the centre of town and can organise equipment hire and point you in the right direction.

- [www.belgravearmshotel.co.uk](http://www.belgravearmshotel.co.uk)

For further ideas see:
- [Visit Scotland’s gardens](http://www.gardensofscotland.org)
- [Scottish mountaineering](http://www.alpine-guides.com)

**Six of the best**

**Activity weekends**

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From the Journal archives

**50 years ago**

From the minute of the Society’s AGM, May 1959, on proposed changes to the regulations on qualifying by the Society’s examinations: “The apprentice under the present Regulations requires to pass separate examinations in Roman Law, Jurisprudence and Constitutional Law, and it is proposed to dispense with these as separate examinations. This is based on the view that there is a place for two categories of lawyers – the lawyer who can conduct a useful practice on a knowledge of Scots law as well as the lawyer who has a more academic training.”

**25 years ago**

From “Signing schedules”, May 1984: “It has come to the notice of the Professional Practice Committee that some members are still apparently issuing to prospective witnesses of deeds, signing schedules containing such phrases as ‘A female witness should state in the subjoined schedule whether she is married or unmarried or a widow…”’