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SEPTMBER
8 Business Development Seminar – Edinburgh
10 Business Development Seminar – Dundee
15 Business Development Seminar – Glasgow
16 Employment Law Conference – Edinburgh
22 Private Client Conference – Stirling
24 Negotiation Skills – Edinburgh

OCTOBER
6 Agricultural & Rural Conference – Edinburgh
8 Conveyancing Conference – Dumfries
9 & 10 Legal Aid Conference – Polmont (near Stirling)
16 Personal Injury Update Conference – Edinburgh
20 Conveyancing Conference – Dundee
22 Conveyancing Conference – Edinburgh
22 Managing Performance – Edinburgh
28 Legal Advice for the Older Client – Stirling
29 Personal Effectiveness – Edinburgh

NOVEMBER
11 Understanding Business Finance – Glasgow
12 Understanding Business Finance – Edinburgh
19 General Practitioner Forum 2009 – Polmont (near Stirling)
19 Coaching Skills – Edinburgh
26 Customer Service

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Update Department, The Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh EH3 7YR. Legal Post, LP1 Edinburgh 1.
Web: www.lawscot.org.uk
Email: update@lawscot.org.uk
Telephone: 0131 226 7411 Fax: 0131 476 8118
Anyone who questions the difference the Scottish Parliament has made, should take a look at the efforts the profession makes to shape the laws it is passing.

Decade of reform

A Parliament for Scots law

A decade after devolution, half the people of Scotland either think it has made no difference to their lives (46%) or have no view on the question (4%). The BBC poll to mark the anniversary did however find that the other 50% comprised 41% who thought it had been a good thing, while only 9% took the opposite view.

Lawyers, you would think, are less likely to be in the “no effect” camp. As the contributions to our lead feature this month make clear, there can be few practices or businesses that have not felt our Parliament’s reforming zeal in one way or another. Those of us who can remember the long running complaints that Scots law suffered from lack of attention at Westminster will be fully aware of the revolution that the Parliament has brought about. Perhaps at times it may have seemed like too much of a good thing, but as new law inevitably brings new business, we shouldn’t complain too loudly.

Has it been good law? By and large the verdict must be yes. There have been complaints at times of poor drafting, of insufficient parliamentary scrutiny, of last minute amendments that would have been better reflected over at length. If such flaws exist, the remedy lies principally in adapting parliamentary procedure to reduce the risk of a repetition. The Calman Commission recognised a number of points on this subject made to it by the Society, and reflected them in its recent recommendations.

Perhaps as good an indicator as any of the impact of the Parliament is the scale of the effort the Society puts into scrutinising and commenting on its proposed legislation. Michael Clancy’s article reveals that no fewer than 70 submissions were put forward in session 2007-08 alone, followed up by eight attendances to give oral evidence. And no, that was not the year the Legal Profession Bill went through!

Carefully considered and presented though they have been, the Society’s submissions have not always been accepted by the Parliament. We should hardly expect otherwise. Were that to become a matter of course, we would be bound to see some sort of media whispering campaign, most likely followed by the Parliament determining to set its own course on some arbitrary issue, perhaps to the detriment of the profession and/or public.

Much better that the Society and Parliament each accept that the other has a legitimate interest and a valid point of view, and that the Society does its best to play an educational role for non-lawyer MSPs while accepting the result of the democratic process.

It’s good to talk

It is not every day that your editor is offered the chance to interview an individual of global influence, but such was the case when Dr William Ury came to town. If your reaction is “Who?”, perhaps it is because outside of his bestselling books, he prefers to play the low key conciliator and mediator. But he has such a belief in the power of patient negotiation that he seeks out the world’s deepest seated trouble spots to see if he can help bring about a peaceful outcome. Often, of course, he fails – but we all know there are places where conflict has ended when it seemed least likely.

A thought, if you are still a sceptic about mediation.

And finally...

Please do take a few minutes to fill in that survey about the Journal that most of you will have had an email from the Society about. (See p30 of this issue for more details if you haven’t, or inadvertently deleted it or whatever.) It’s already three years since our last facelift and we want to make sure the magazine keeps providing what you, the readers, want.

Oh, and if you notice anything different about the look and feel of this edition, it’s because the Journal too is playing its part in the Society’s costcutting drive.
Among the thorny questions affecting our profession, apart from the forthcoming review of the civil courts, is the future of the solicitor advocate branch.

The issue has run since the adverse comments by the judges in the Woodside appeal. Criticisms were also made of solicitor advocates in England by a judge in a criminal trial, which attracted the attention of the Law Society of England & Wales as being unfair.

We now have the promise of a review in Scotland, following calls not only from the bench, but also from the Society of Solicitor Advocates and the Law Society of Scotland itself, of the professional rules of conduct for solicitor advocates and their role in the legal profession.

I myself am a solicitor engaged in civil litigation, most usually with personal injury actions in the Court of Session. I do not wish to qualify as a solicitor advocate.

I do not instruct solicitor advocates because there are none in my firm, but also because I am happy to use the independent expertise of the Scottish bar. I have a lot of confidence in the expertise, independence and service that I will get from advocates.

There are various changes to the legal profession in Scotland that might in future affect the viability of parts of the Scottish bar. Depending on the recommendations for civil justice reform, it is possible that it may no longer be feasible for counsel to continue to specialise in personal injury cases.

I for one would not like to lose the services of counsel and I think that many solicitors throughout Scotland would not wish to be without the opportunity to instruct excellent counsel in personal injury cases.

Some of the criticisms made by the bench in criminal cases have concerned solicitor advocates instructing solicitors within the same firm (a partner instructed by a more junior solicitor may also be the employer of that junior person), and at least on the face of it there is potential for conflict of interest between a solicitor advocate and the instructing solicitor where both come from the same firm. There is no such conflict between a solicitor and counsel.

Many personal injury cases in Scotland are run under union-referred legal assistance schemes. However, in an essay for Scolag published in late 2007, one of the most eminent senior counsel in Scotland for injured pursuers, described the present condition of many such schemes as: “whereas trade unions used to pick up the bill for expenses in the event that a member’s action was lost, most of them now no longer do so, acting merely as ‘referral agencies’ to the small number of firms of solicitors whom they instruct”. In such cases solicitors’ firms are effectively acting speculatively.

At least one advocate of my acquaintance has asked how a solicitor advocate in a personal injury case, who is a partner in the same firm that has instructed him or her, can truly be seen to be independent if the firm has a financial interest in the outcome. No one is suggesting that abuse happens, but the potential conflict exists.

Similar questions arise perhaps in commercial litigation cases.

How would it be if the professional obligation on the solicitor advocate meant that they had to advise the client that the firm of solicitors had been negligent, for example?

Of course, such situations may never or rarely arise, depending on the expertise of the firms and of the solicitor advocates, but justice and the independence of the branches of the legal profession must be maintained and be seen to be maintained. These are some of the issues which the greater use of solicitor advocates is bringing into focus.

There has also been mention of appointing greater numbers of solicitor advocates as senior counsel, and I for one would want to be satisfied in my own mind that the senior solicitor advocates had done the very large number of proofs and trials which somebody acquiring senior counsel status at the Scottish bar has traditionally had to demonstrate.

All in all, we require much greater discussion about solicitor advocates and their role and professional duties. The Scottish and English bench have surely been right to call for a general debate of the future of solicitor advocates.

Angus Logan, Head of Litigation, Ritchie Neill, Edinburgh
And then there was the real job:... the unexpected absence of two of my five own, long suffering, staff... the constant hassles with SLAB incumbent on those of us trying to make a living from legal aid work

President
Ian Smart

Well, that’s a month in.

I thought it might be helpful if I set out what I’ve done in that period. A workload which Richard Henderson assures me is not an untypical agenda for the President of the Society.

• 29 May. Assumed office and delivered the traditional new President’s speech. Spent the afternoon at Drumsheugh Gardens working on the early stages of implementing the Presidential manifesto and related press work.
• 31 May. Wrote my first President’s column.
• 1 June. Various press commitments dealing with the follow-up to the AGM.
• 2 June. At the Society all day in meetings with senior staff. Lunch at Edinburgh Castle as guest of Brigadier Joe D’Inverno of the Territorial Army to celebrate the Queen’s birthday. (Yes, that Joe D’Inverno?)
• 3/4/5 June. Various correspondence, including concluding negotiations to resolve the Society’s successful appeal to the Court of Session against one of the early decisions of the SLCC.
• 6 June. Open forum at New Partners’ Course with fellow board members Jamie Miller, Alison Atack and Christine McLintock.
• 8 June. Dinner with colleagues from the Law Societies of England & Wales, Ireland, and Northern Ireland, in Edinburgh for our twice yearly meeting. Anybody who thinks the recession couldn’t be worse than it is here should try moving to Ireland.
• 9 June. Board Meeting at Drumsheugh, followed by an informal reception for the Fellows of the Smith Trust, visiting the Society from their various countries in the former Soviet Union. [see news pages – Editor]
• 10 June. Informal meeting with the officers of the Glasgow Bar Association.
• 11 June. Final of the Donald Dewar Debating Competition (only I didn’t make this as I couldn’t get out of Glasgow Sheriff Court in time). Jamie deputies.
• 12 June. Edinburgh Bar Association dinner.
• 15 June. Series of discussions to finalise the Society’s response to questions raised by members at the AGM.
• 16 June. Dinner with the editorial staff of the Scotsman.
• 17 June. Speech to the senior school at Hutcheson’s Grammar School on the role of the Society (lucky them).
• 18 June. Reception at the Faculty of Advocates for the Abbotsford Trust.
• 19 June. Admission Ceremony for newly qualified solicitors; Airdrie Faculty Dinner.
• 22 June. Speech to Holyrood Conference on ADR. Interview with The Firm.
• 24 June. Board orientation meeting.
• 26 June. Council meeting.

None of the above includes the numerous emails and other pieces of correspondence requiring my attention, let alone the daily phone calls with Lorna Jack, our CEO, simply to keep on top of the Society’s routine activities.

And then there was the real job: a four day divorce proof at Glasgow Sheriff Court; four ordinary courts at Airdrie; coping with the unexpected absence, through ill health, of two of my five own, long suffering, staff; the day-to-day legitimate demands of clients demanding to know the whereabouts of their lawyer; and the constant hassles with SLAB incumbent on those of us trying to make a living from legal aid work.

Don’t get me wrong, I sought election to this job. If it gets too much, I have the consolation of knowing that I could walk away and return to a reasonable living from the litigation base of my own firm. In that I have the distinct advantage over so many of my colleagues, with businesses based on property work, who I am only too aware, are suffering grievously in the current recession.

Unfortunately among all of the above, there has also been one irritating subtext from those unwilling to move on from the result of the AGM.

The idea that I, or indeed any of my past or present colleagues, are doing so to line our own pockets or enjoy the high life at your expense, is not simply misconceived; it is offensive. I don’t know, specifically, the business that might have been brought to my office during my regular absence this month. I do know that, during June, I have declined, for want of time, to accept instructions in two matters (a residence dispute in a distant court and a slam-dunk personal injury claim with complex quantum issues), either of which, alone, would have earned a larger fee than the monthly compensation paid to me as President of the Society. You would expect however that for the next 12 months, my priority must be the affairs of the Society and its members. I accept that as well, not to promote myself but because I believe there is a job needing doing here and that, with due modesty, I am up to the task of undertaking it. Time, not bean counting, will be the ultimate judge of that.

Anyway, point made. The more attentive of you will note that, at least, I have had no commitments after 26 June. That is because, the next day, wee Mo and I departed to the Province of Perugia for our summer holiday. For those of you stuck in the office during July that is where, God willing, I will be when you read this. Can I therefore wish you a happy holiday, and can I console those of you reading this on your return from warmer climes that you can’t beat Scotland when the sun shines!

A presto.
Letters

Delays at the OPG

I was disappointed to note (Journal, May, 30) that the Office of the Public Guardian has set a new target time for processing powers of attorney – to “within 30 working days of receipt at the office”.

A solicitor can therefore expect that it will take up to seven weeks from his posting the papers to receiving back the registered document. It is my experience that most powers of attorney are either signed when the granter is in full command of their faculties, or else when their physical or mental health is deteriorating rapidly. In the latter case, delays in registration can cause added distress if bills cannot be paid and, in some cases, loss to the granter where a conveyance to implement the sale contract cannot be signed ahead of the entry date. In the case of a welfare power of attorney, it can mean that the granter’s welfare needs cannot be addressed pending registration.

I had understood that the role of the Public Guardian was to protect the interests of vulnerable people and it is to be regretted that the administrative process of registration takes so long in all cases, and that there is no “fast track route” available on cause shown.

Eilidh M Scobbie, Burnett & Reid, Aberdeen

A matter of principal?

Having read the terms of the first advertisement in the “Public Sector” box on the back page of June’s Journal, seeking applicants for the post of “Principle Solicitor”, me and my colleague’s is shocked at how standards of spelling and grammar has fell lately. Are we shortly to see classified advertisement’s for the appointment of Employment Judge’s? May I abhor you to ask your advertiser’s for to check there copy better?

Douglas Thomson, Solicitor Advocate, McArthur Stanton, Dumbarton

Gambling premises

Following my article, Journal, June, 28, readers may wish to know of an important new decision which looks at the issue of “split premises and primary activity” in relation to gambling premises.

In Leisure World (UK) Ltd v London Borough of Islington, 26 May 2009 (unreported), the local authority successfully defended its decision to refuse premises licence applications which sought to subdivide an existing adult gaming centre to increase the number of machines available. Taking into account the new Gambling Commission guidance, the district judge ruled that in this case the “artificial division” of the premises into three “units” would not create three “premises”. The judge also said that a broad interpretation of “artificial” should be considered in relation to whether premises are genuinely separate and not just physically separate. Although an English decision, this will be persuasive north of the border.

Stephen McGowan, Tods Murray LLP
Children can suffer many disadvantages from the imprisonment of a parent or carer, and have a right that their interests are taken into account by the sentencing court.

Last year, SCCYP published “Not Seen. Not Heard. Not Guilty.” Exploring the rights and status of the children of prisoners in Scotland at all stages from arrest of the parent through to imprisonment and release, it found that, at present, decisions to imprison a parent rarely take account of the potential impact on children.

Many who read the report were shocked to learn that the estimated number of children affected by imprisonment of a parent in Scotland is similar to the number looked after by local authorities. Yet, while looked-after children are rightly the focus of much social and political concern, often the rights and needs of the children of prisoners are not only unmet, but unseen.

SCCYP believes that in this respect the current approach to the sentencing of parents is contrary to the European Convention on Human Rights (ECHR) and the UN Convention on the Rights of the Child (UNCRC). Children have the same rights as adults to respect for their private and family life under article 8 of the ECHR. The imprisonment of a parent is a prima facie interference with that right, but may be justified if it is in accordance with the law, necessary in the pursuit of a legitimate aim and proportionate to the aim sought.

Applying article 8 to sentencing decisions would require courts to assess the impact of sentencing options on the rights of any children affected, to ensure that any interference with their rights is proportionate.

Children’s rights are set out in more detail in the UNCRC. Alongside the child’s right to benefit from the guidance of a parent (articles 5 and 14), to know and be cared for by parents (articles 7 and 8) and to maintain contact during separation from parents (article 9(2)), article 3(1) is perhaps most critical: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

This suggests that when courts are considering sentencing options for parents that will impact on the child, they must take into account the child’s best interests – not as the determinative factor, but the court must, at the very least, have regard to the child’s rights.

We believe that a child impact assessment should be required at the point of sentencing. This could be a separate assessment, or form an explicit part of a social enquiry report, where ordered by the court.

In his landmark judgment in the South African case S v M [2007] ZACC 18, Justice Albie Sachs dealt with these very issues, echoing many of SCCYP’s recommendations and holding that the best interests of the child should be taken into account when sentencing a primary caregiver of young children.

Speaking in Edinburgh last month, Justice Sachs outlined the change of mindset he went through in dealing with the case. Initially convinced that the case was a simple one, involving the sentencing of a repeat offender, he was minded to recommend that it should not be heard by the Constitutional Court. But a colleague pointed out that the sentencing magistrate had overlooked the rights of the three children involved, vulnerable young people with rights independent of their mother.

“I suddenly saw three wondering, precarious, conflicted young boys with a claim on our court as individuals with their own rights, not just as an extension of their mother,” Justice Sachs explained.

This realisation forced him to reconsider his position and take into account the severe negative consequences on the children if their primary carer was imprisoned.

While sentencing courts cannot always protect children from these consequences, he nonetheless believes that courts can and should “pay appropriate attention to them and where imprisonment is being considered, courts must use the paramountcy principle [of the child’s best interests] to guide their decision as to which sentence to impose”.

The principle, he added, is particularly useful in borderline cases, where the offender might be suitable for a community-based alternative to imprisonment. The objective in all cases must be “to ensure that the sentencing court is in a position to balance all the varied interests involved, including those of the children”. This should become a “standard preoccupation of all sentencing courts”.

In S v M, Justice Sachs was able to draw on explicit guarantees for children’s rights in the South African Constitution, as well as international obligations under the UNCRC. Scotland may not have such constitutional provisions, but our courts should likewise have regard to the UNCRC.

By ratifying the UNCRC, the UK has, after all, committed itself to bringing its law, policy and practice into line with the Convention. There is now a strong case to be made for adjusting our criminal justice system to ensure that the rights of children are fully taken into account, and weighed in the balance, when decisions are made about the imprisonment of a primary carer.

Offenders themselves have to take responsibility for the impact of their behaviour on their children, but the state should avoid adding to it insofar as this is possible.
Donald Dewar famously said of s 1 of the Scotland Act 1998: “There shall be a Scottish Parliament – I like the sound of that.”

The work of the Parliament has been prodigious since then. In session 1, 62 Acts of the Scottish Parliament were passed; in session 2, 66 Acts were passed; and so far, during session 3, there are 13 Acts of the Parliament which have received royal assent and six bills are waiting for royal assent at time of writing. In total, therefore, by the end of the summer, 147 Acts will have been passed by the Scottish Parliament since 1999. This represents a significant effort in the reform of Scots law.

Some of the Acts passed are referred to day in, day out by solicitors across Scotland, and the Society has made great effort to have the views of Scottish solicitors put forward to MSPs in the public interest, with a view to improving the law and making sure that bills before the Parliament end up as Acts which are practical, consistent and work for the greater good of the people of Scotland. Some which come immediately to mind are the Adults with Incapacity (Scotland) Act 2000, the Abolition of Feudal Tenure etc (Scotland) Act 2000, the Debt Arrangement and Attachment (Scotland) Act 2002, the Land Reform (Scotland) Act 2003, the Family Law (Scotland) Act 2006 and the Bankruptcy and Diligence etc (Scotland) Act 2007.

Measures such as the Community Care and Health (Scotland) Act 2002, the Smoking, Health and Social Care (Scotland) Act 2005 and the Graduate Endowment Abolition (Scotland) Act 2008, all speak for the Parliament’s desire to make change to the general welfare, living conditions and educational possibilities of people who live here.

Continuing efforts

The Law Society of Scotland has been closely involved with the Scottish Parliament. From the outset, when we commented on the 1997 white paper “Scotland’s Parliament” and contributed by way of briefing and amendments to the Scotland Bill 1998, we have taken the opportunity to participate fully in the reform projects undertaken by the Parliament since it opened in 1999.

Of course, there are some things which the Parliament has done, with which the profession has taken issue. There were significant matters contained within the Legal Profession and Legal Aid (Scotland) Act 2007 which caused a great deal of concern amongst the profession and where...
Brodies LLP

The Society's response to the Calman Commission, which published its final report on 15 June 2009.

**Influence on Calman**
The headlines naturally focused on income tax, the devolution of further areas of the law (as wide ranging as national speed limits and airgun regulation), and the political debate over Scotland's constitutional future. However, the Law Society of Scotland was more concerned with and indeed had most input on other proposals which perhaps did not make the headlines but were nevertheless extremely significant.

The Society's response to the Calman Commission has involved considerable work on behalf of Society staff and committee members alike. The constitutional law subcommittee, convened by Christine O'Neill of Brodies, has led the Society's response to the Society's response to the Calman Commission, which published its final report on 15 June 2009.

**Public law: expanding practice area**

Every Scots lawyer will have a different perspective on how the first decade of devolution has impacted on their own practice. There would certainly be cause to doubt those who believe that the Scottish Parliament and Government have made no difference: the conveyancer cannot ignore land law reforms, the criminal defence agent is now au fait with the concept of "devolved competence", and my pipe-smoking partner faces daily eviction from his office to the firm's car park. From the perspective of a solicitor who claims to practise in the field of public law, though, the significance of devolution is particularly acute.

In the first place there is the very idea of a "public law practice" as no longer just the fantasy of administrative law anoraks. It would be wrong, of course, to say that before 1999 there were not solicitors in Scotland who advised clients on legislative reform, on the powers of the Westminster Parliament and on questions of constitutional importance: there is a long and strong tradition of in-house legal advice to the Scottish public sector and there were always recognised specialists in private practice.

There has, however, been an enormous growth over the past 10 years in the number of solicitors who spend a very large part of their time advising on such matters as the legislative competence of the Scottish Parliament, parliamentary procedure, statutory interpretation, freedom of information and human rights. Aside from those now employed by the Government Legal Service for Scotland – which has been described as the "third largest law firm in Scotland" – and in local government, NDPBs and elsewhere in public service, most sizeable law firms now provide outsourced legal advice to public bodies as well as to clients who work with or have disputes with public authorities.

These new streams of work are not simply the consequence of UK-wide law reform (of which the Human Rights Act is an obvious example), but of the peculiarities of the Scottish model. So, for example, in the first few years of devolution, advice and representation before parliamentary committees was needed for clients affected by private bills for the construction of railways and trams. That need has now largely dissipated as a result of the Transport and Works (Scotland) Act 2007. In a similar vein, advice is now regularly sought on whether a particular proposal by the Government or Parliament relates to a matter which is reserved to Westminster, or is a breach of EU law, and would therefore be vulnerable to legal challenge if implemented.

Devolution has brought with it a variety of public law work which was, it is fair to say, previously unknown outside of London. In the past week this public law practitioner has participated in the hugely successful conference of the Scottish Public Law Group (www.splg.co.uk); advised on the implications of the proposals to extend the Freedom of Information (Scotland) Act 2002 to private bodies who provide public services; and spent three days in the Court of Session pursuing the judicial review of an Act of the Scottish Parliament on the grounds of breach of Convention rights.

Needless to say the purpose of devolution was not to provide solicitors with a more varied and stimulating professional life, although that has certainly been one consequence of the project. Perhaps more importantly, devolution has brought into being a whole generation of Scots lawyers who have in-depth understanding and appreciation of public law issues and who bring those to bear on behalf of their clients on a daily basis.

Christine O'Neill is a partner in Brodies LLP
to the Commission, but the tax law, pensions law, insolvency law, mental health and disability, rural affairs, and criminal law committees have also been called on for their views on aspects of the Commission’s proposals. The Society attended oral evidence sessions in October 2008 and February 2009 and provided the Commission with written evidence on five separate occasions from July 2008 to May 2009.

Better lawmaking
The Society’s influence can be seen most clearly in the Commission’s recommendations on parliamentary procedure, and the report makes a number of explicit references to evidence given by the Society on this area. Taking a step back from the political debate, the Society’s focus was on how the Scottish Parliament could work better as a body to reform Scots law.

Perhaps most significantly, the Society raised the issue of the lack of scrutiny during stage 3 of the legislative process, especially given the practice that has developed of timetabling all of stage 3 to take place in a single day. If a major amendment has been passed, the situation that therefore arises is one where MSPs have to make a final decision on the merits of the bill only very shortly after a significant change has been made. The Society led the way in recommending that stage 3 should be split into two separate proceedings on different days, to open up the gap between the second main amending stage and the decision on whether to pass the bill – now proposed by recommendation 6.2 of the Commission.

In the course of the consultation, the Society raised its concerns about the loss of control of legislation by Holyrood once a legislative consent motion had been granted. This was particularly the case where amendments to UK Parliament bills were made after a legislative consent motion had been granted. Recommendation 4.3 calls for detailed and ongoing communications between the Parliaments about legislative consent motions, especially if the bill is amended.

The Society also suggested that the Presiding Officer should, when providing the statement that an ASP is within legislative competence, state why it is within competence, i.e. he should issue a “positive statement” as well as the current “negative” one. This was to address the fact that a Scottish lawyer cannot take an Act of the Scottish Parliament at face value but has to ask whether it is within the competence of the Parliament to enact. Although the Commission took the view that this was going too far, the report does recommend that the explanatory notes which accompany bills should give a general account of the main considerations that informed the statement on legislative competence under s 31(1) of the Scotland Act.

The Society’s evidence also focused on more specific details, such as the suggestion that the definition of “social

Private law: boost for the Scottish system
Scots private law has been reinvigorated by the work of the Scottish Parliament

For anyone concerned with the health of Scots law the introduction of the Scottish Parliament has been welcome. Perhaps the Parliament has not lived up to the expectations of the people of Scotland, but arguably such expectations were overoptimistic given the limited remit of the Parliament and the lack of fiscal powers. The most significant changes however have been in relation to the process of enactment itself. Lobbying Westminster or perhaps Brussels is an expensive exercise. The ease with which pressure groups or individuals can access the Parliament, respond to calls for evidence or use the public petition procedure has transformed the lawmaking process and brought the Parliament much closer to the people.

Would the long overdue abolition of the feudal system have passed into statute without the Parliament? The law in relation to adults with incapacity was put onto a firm and modern footing and the Parliament had the capacity to tweak that legislation when parts were found not to be working as intended. Scots family law has received attention and is now modern and forward looking. Had Scotland been forced to rely on Westminster it seems unlikely that such progress would have been made. Some attention to the law of contract is however overdue. The postal rule is long overdue for replacement and more comprehensive statutory treatment of contract law in general would be useful. Calman offers little in relation to Scots law, and seems to further muddle the law in relation to business organisations, particularly as regards corporate insolvency proceedings. Necessarily such proceedings impinge on property rights, which are devolved, and the proposals in this area do not address this. In partnership and unincorporated associations Scots law has some distinctive features. It seems unlikely that time would be found at Westminster to update them. That seems to be a missed opportunity.

Ken Swinton is a solicitor and senior lecturer in law at the University of Abertay, Dundee

The Calman Commission calls for detailed and ongoing communication between the Parliaments about legislative consent motions
In 1998 this Democracy Cairn was built by Democracy in Scotland on Calton Hill to commemorate the ultimate success of the campaign for a Scottish Parliament.

security purposes” in section F1 of sched 4 could be read literally to prevent the Scottish Parliament from legislating in areas like legal aid or prescription charges where reference is made to low income or other social factors. The report recommends that this should be clarified. The Society also gave evidence on the devolution of tax law, taking the view that some taxes, including SDLT, could be relatively easily devolved. However, the Society suggested that the underlying law was sometimes of just as much importance as the right to vary a rate of tax, citing the interaction between charities law and tax relief as an example of this. After others made similar submissions, the report recommends that there should be a single definition of “charity” and “charitable purposes” applicable for all purposes throughout the United Kingdom.

While not all the Society’s suggestions were taken on board, the impact of those that have been adopted will be considerable, and if implemented will have a substantial effect on the Scottish Parliament and on Scots law for the future. I

Michael Clancy is Director of Parliamentary Liaison at the Law Society of Scotland.

The Calman Commission recommendations are not likely to have a significant impact on the bigger picture.

Calman: an anticlimax?

Ten years after the establishment of the Scottish Parliament, it is neither possible to assent to Tam Dalyell’s proposition that Scotland is on “a motorway without an exit” nor to George Robertson’s prediction that the reform “would kill nationalism stone dead”. What may, however, be agreed is that the Parliament is here to stay within some constitutional arrangement or another.

The larger picture will scarcely be affected by the distinctly underwhelming Calman Commission report. Some of its recommendations seem likely to be adopted, given a fair wind from the major parties at Westminster – the same political parties that agreed its remit and conditioned its limited aims. The proposed adjustment to the subject-matters devolved would result in marginal net gains, but do not amount to a hill of beans.

The housing benefits and council tax benefit, where connected to devolved policy changes, finds that the division of legislative responsibilities in the Scotland Act was well thought through, and works well in practice. Wherever the boundary is set, it observes, there will be areas where the responsibilities of the different areas of government interact with one another, hence the need for more effective arrangements for co-operation.

Against that background it confines its attention to those areas where there appear to be problems or pressures for change. Regulation of airguns, drink driving limits and the national speed limit should be added to the devolved powers; regulation of insololvency, the health professions, food content and labelling, and power to define “charity” and “charitable purposes” should return to Westminster. The need for dual registration of charities should end.

The Commission also advocates closer joint working on matters including immigration, to agree sustainable local variations to suit Scottish needs; the wellbeing of children of asylum seekers; and housing benefit and council tax benefit, where connected to devolved policy changes.

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The Parliament: here to stay

Some of the main points from the Calman Commission report.

Devolution has been a real success. The Scottish Parliament works well in practice; it is in general popular with the people, it has embedded itself in the constitution of the UK and the consciousness of the Scottish people. It is here to stay.

The Commission under Professor Sir Kenneth Calman, Chancellor of the University of Glasgow, is unequivocal in reaffirming the settlement established by the Scotland Act; and in truth there is no discernible movement in Scotland seeking to reverse the 1998 arrangements.

However its report caught the headlines for its proposals to improve the financial accountability of the Scottish Government and Parliament.

With independence beyond its remit, the Commission nevertheless highlighted the integrated nature of the UK economy, and produced recommendations explicitly designed not to undermine this. Similarly, concluding that our tax gathering system is relatively efficient, its fiscal proposals are designed to avoid undue compliance costs.

The present funding system, it states, mainly by grant from the UK Parliament, has brought stability but has shortcomings because the Scottish Government and Parliament are not accountable for raising revenue in the same way that they are for spending money.

Taxes that can be devolved without much risk of causing significant economic distortions are stamp duty land tax, the aggregates levy, landfill tax and air passenger duty. Adding to these, to provide a much more substantial measure of financial accountability, it recommends that the Scottish Parliament should be able to determine a Scottish rate of income tax, applying to all rates – but not to change the differential between the tax bands. (This should not apply to tax on income from savings and distributions, due to the administrative burden that would result, but the yield from such tax should be shared on a formula basis between the Parliaments.)

Calman also believes that it would increase accountability if the Scottish Parliament had to take a tax decision when it sets its budget. To achieve that, the UK Government should reduce the income tax rate applying in Scotland, across all bands, by 10p in the pound, and reduce the grant to the Scottish Parliament by an equivalent amount. Thus the Parliament would have to set its own rate to make up the deficit, even if it maintained the status quo.

If the same principle were applied to all four taxes identified for devolution, over one third of Scottish Government spending would be funded by taxes decided and raised in Scotland.

The Parliament should also have the power to borrow in order to fund capital spending; and to legislate, with the agreement of the UK Parliament, to introduce specified new taxes that apply across Scotland.

Turning to lawmaking powers, the report finds that the division of legislative responsibilities in the Scotland Act was well thought through, and works well in practice. Wherever the boundary is set, it observes, there will be areas where the responsibilities of the different areas of government interact with one another, hence the need for more effective arrangements for co-operation.

Against that background it confines its attention to those areas where there appear to be problems or pressures for change. Regulation of airguns, drink driving limits and the national speed limit should be added to the devolved powers; regulation of insololvency, the health professions, food content and labelling, and power to define “charity” and “charitable purposes” should return to Westminster. The need for dual registration of charities should end.

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Peter Nicholson

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He trained as a social anthropologist, is a bestselling American author, and has no obvious connection with the Scottish legal profession. Yet it was a rare privilege for the Journal to be offered the opportunity of interviewing Dr William Ury. The international mediator, whose books include *Getting to Yes*, *Getting Past No: Negotiating with Difficult People*, and *The Power of a Positive No: How to Say No and Still Get to Yes*, was the special guest of Core Solutions at events in Scotland last month, and star attraction at their Edinburgh seminar on key negotiating strategies. (He is, after all, co-founder of Harvard Law School’s Program on Negotiation, where he currently directs the Global Negotiation Initiative: www.pon.harvard.edu/) Even as I caught up with him at his hotel, the *Economist* and *Times* were angling for slots in his packed schedule.

Dr Ury takes it all in his stride, as you would expect from someone who seems equally at home attempting to...
resolve a family conflict, an industrial dispute, or a civil war in one of the world’s flashpoints. What then is his philosophy? “I would say it’s the search for the answer to the question, how we human beings can deal with our most deep-seated differences. Speaking as an anthropologist now, we’re at a juncture where for the first time in the history of humanity, the whole human family, all 15,000 tribes on earth, are coming together in a kind of family reunion. Like most family reunions it’s not all peaceful, and the question is how do we deal with our differences in a co-operative, collaborative way. The animating value is peace, is satisfactory dispute resolution.”

This means revolution
A potent force for change that he identifies is the flattening of the social hierarchy, the pyramids of power (“Scotland back to the time of the Scottish Enlightenment, and even before that, was a bastion of liberal, democratic ideas which have contributed greatly to this”), into organisational forms that are “networks of negotiation, where essentially the primary way in which we can make decisions is actually together in trying to find ways to reach agreements”.

The result is what he terms the “negotiation revolution”. Whether we are talking about the exercise of executive or legislative power, or resolving litigious disputes, Ury maintains that over 90% of decisions are reached by negotiation – otherwise “nothing would get done in a democracy”. He also believes that clients demand this approach. “People nowadays want to affect and to participate in the decisions that affect them. So you find that our clients, our parties, are no longer willing to say OK, let a judge decide… What negotiation and mediation offer is a way for the parties themselves to really have power, it empowers them to craft solutions that satisfy their deep interests.”

A distinctive feature of litigious disputes, he observes, is the existence of a clearly defined alternative if the case does not settle. But “while the court system is extremely important and negotiations have to take place within its shadow… oftentimes, I’ve found, the real interests of the parties don’t get engaged or addressed by the legal system because that’s entirely in terms of the law. Negotiation and mediation offer a way to really address what people honestly care about.”

Home-grown solutions
Yet while advocating that we learn what we can from others (“Goethe, I think it was, who said fools learn from their own experience; wise people learn from the experience of others”), he is careful not to be prescriptive. “The thing with the negotiation revolution is that it’s happening in different cultures in different societies at a slightly different pace, but it’s happening in all of them just like the internet is.”

For lawyers, who may have what he accepts are legitimate concerns about whether it will work, whether they have been trained for it, whether we will still have a system of precedent, “I think the best model here is, if you want to go fast, you have to go slow… At the same time I’ve watched the [US] legal profession go through a sea change around this issue as people become accustomed to it… People are starting to use mediation and similar methods as a tool in everything, commercial disputes, family disputes, even some criminal disputes. There’s a wave of innovation taking place. This is the first generation of lawyers who are reinventing the lawyering profession, and what it means to be a lawyer, and a lot of lawyers are actually deriving much greater satisfaction from these new forms because it’s what they went into law for in the first place, which was to really serve the cause of justice.”

“When I started I must say too, just 30 years ago, it was exceedingly rare to find a course on negotiation given in law schools, and now I would be very surprised if there’s a single law school in the world that doesn’t offer courses on negotiation, because of the recognition that negotiation is a good part of what any lawyer does.”

So would Ury draw any lines as to what types of dispute might or might not be suitable for mediation? “Let the change take place. Try it out. You’re still in an experimental phase, a lot of people are still concerned about it, so try it out on those disputes where parties are most interested in using it. Like for example in commercial situations. For business people time is money, they want to move on, lawsuits are often with people with whom they could have commercial relations. Or families where there’s an ongoing relationship. And then explore and see, innovate and see.

“Mediation is not a cure-all, it’s an alternative, it’s an option, it’s a choice that empowers people. Give it a chance, see what works, and see what works here in Scotland… You can learn from the experience of others in other countries where mediation has been more widely used, but ultimately you’re going to have to tailor it to what works here in the Scottish experience.”

And he observes: “I also see that it’s actually in the smaller countries of the world that you have the potential for the most interesting experiments.”

Positive choice
He has a straight answer to those who maintain that offering mediation is a sign of weakness. “I think it’s a natural concern, but in fact negotiation, mediation is a sign of courage because you have the courage to be able to carry your convictions into speaking with the other side, hearing them out, listening to them, trying to persuade them, and that’s what takes genuine courage: it’s to engage your differences, freely, with other human beings.”

Relevant to Lord Gill’s forthcoming review, Ury is not someone who believes there should be any compulsion to try mediation before going to court. “I’m not a big fan of compelling people. Mediation is consensual, the whole idea is consensual decision making, and to compel a consensual decision to me is a little bit of a paradox.” He returns to the view of mediation as an extra choice, beyond the cost, delay and uncertainty of going to court. “I can still have

“Mediation is not a cure-all, it’s an alternative, it’s an option, it’s a choice that empowers people”

www.lawscotjobs.co.uk July 09 theJournal / 15
There are not just two sides, which is to realise that in any dispute heritage for dealing with conflict, would say our most ancient human negotiating maybe 50% of their time, they realise that in fact they’re whom I work with, they uniformly that any of us can take any time as we

Ancient heritage

Ury’s anthropologist training has led him to develop what he terms the Third Side (www.thirdside.org) – the role of the community in reducing violence and promoting dialogue. “Among some of the more simple societies they use that all the time, and whenever there is a dispute the entire group gets together and they talk it out, they try and reach a collective consensus, and it’s not enough just to reach a transactional agreement, what’s important is to restore the relationship.”

As the website affirms, this is a role that any of us can take any time as we go about our lives. “The lawyers whom I work with, they uniformly realise that they’re negotiating all the time with their family, their children, their colleagues, their employees, and they realise that in fact they’re negotiating maybe 50% of their time, not even thinking of it as negotiation. And yes, the Third Side is basically I would say our most ancient human heritage for dealing with conflict, which is to realise that in any dispute there are not just two sides, two parties, there is always a third party which is the surrounding community, and engaging that surrounding community can be critical to resolving that dispute.”

He instances as learning from those traditions the restorative justice movement, where you do not simply have a judge handing down a decision, but “a negotiated process where there’s an apology, there’s compensation, which are some of the most ancient mechanisms for actually restoring relationships, not just arriving at a particular just outcome”.

The world stage

But fittingly for someone whose interest in mediation developed at the height of the Cold War, as he wondered why we were putting the whole human race at risk through conflict, it is at international level that Ury’s approach is now being particularly applied, and where, when asked, he offers the most remarkable outcomes that show what mediation can achieve. One was in Venezuela, where he helped defuse a confrontation between President Chavez and opposition leaders that many observers believed was headed for civil war. (“Just removing the name calling reduced the amount of emotional intensity… it just struck me again, as a principle, that the cheapest concession you can make in negotiation is to show a little respect to the adversary.”) Another was the resolution of the bloody 25-year independence struggle in Aceh, Indonesia, through a devolution settlement which saw the former rebel leaders become elected provincial governors. Would he negotiate with terrorists, that taboo of governments the world over? “It’s a loaded term, would you negotiate with terrorists, because what it implies is, would you make concessions to terrorists... So I would reframe it and say, would you talk with people who have used terrorism, and I mean would you give yourself a chance to influence those people to change their behaviour? Why deprive yourself of that chance to learn more about them so you can influence them, even if it’s influence with armed force? To me it’s important to talk and listen to everyone, but it’s important not to make concessions of course that can reward the phenomenon.”

He admits to many failures, but Dr Ury’s mission is simply to try: “My life is, I get attracted to trying to apply these techniques which people say will only work in certain situations; I like to try them out in the hardest situations on the planet. I did some work in the Balkans and right now I’m working in the Middle East... Thirty years ago when I entered this field, people were telling me the Cold War will go on for ever, the Berlin Wall will be there for ever, the conflict in Northern Ireland will go on for ever, it’s gone on for hundreds of years and will go on for hundreds of years, the conflict in South Africa will do the same... I visited these places and participated in some of these negotiations and I watched as, I mean who would have imagined that Ian Paisley and Martin McGuinness would be working together in the same government? I do actually believe that it is possible and they used the very same principles of sitting down, engaging in collaborative problem solving.

“I had the occasion to meet Martin McGuinness a few years ago at a conference, and I was amazed – he had just come back from Africa where he was giving talks about how to settle their conflicts using the lessons of Northern Ireland, and he had a copy of Getting to Yes with him! So I would say that it’s difficult, never underestimate the difficulties, but also never underestimate the possibilities. Even the most difficult conflicts can yield through patient, persistent negotiation to outcomes that benefit both sides.”

Global democracy: the e-Parliament

William Ury’s initiatives extend beyond dispute resolution as such, to collaborative measures designed to facilitate application of the principles of democracy at a global level. The “e-Parliament” (www.e-parl.net/parliament/welcome.do) uses the internet to link together all 25,000 democratically elected parliamentarians around the world in fora where they can exchange ideas.

“Right now”, he explains, “you have essentially 150 or more laboratories of legislation that are each isolated from each other like silos, and there’s no easy way for a legislator say in Scotland to communicate with a legislator in the United States or a legislator in India on the same issue and say, how are you dealing with that issue, what’s the legislation, how has it worked, has it been good or not? “There’s that level, and eventually there’s the level of non-binding voting. Let’s take the issue of climate change. There is a UN process for trying to deal with this; there’s a meeting in Copenhagen in a few months, but scientists and the experts would all say the processes that are being used are going so glacially slow that there’s no way they can adapt in time before the phenomenon gets out of control. And so one of the questions is whether we can kind of reinvent global decision-making a little bit and take advantage of existing parliaments which have much faster ways of dealing with decision-making than UN conferences because they can vote, and actually linking them together and having a global conversation in which they would through mediation and facilitation reach consensus on certain legislative initiatives in a non-binding way globally. “Then you can come back and introduce them in your own national parliament so you can have simultaneous co-ordinated legislation to deal with the issue of climate change which would be faster, more connected to the people, because parliamentarians are much more accessible to citizens in a way that could complement what goes on say through a UN system.”
MD becomes new Keeper

Sheenagh Adams

MD becomes new Keeper

New Keeper of the Registers of Scotland
The First Minister Alex Salmond, with the consent of the Lord President of the Court of Session, has announced the appointment of Sheenagh Adams as the new Keeper of the Registers of Scotland.

The post of Keeper has existed in various forms since 1617 when it was created during the reign of James VI. Sheenagh is the first woman to hold the post and started in her new role on 1 July 2009. She replaces James Meldrum, who retired from the post after a long career in the civil service, the last six years as Keeper.

Sheenagh was previously the Managing Director at Registers of Scotland and joined the organisation in April 2006. She started her civil service career in 1990 after 11 years in local government and the voluntary sector working in housing and welfare rights. Her civil service career has included posts in the voluntary sector.

Deputy Keeper is moving on
After a little over five years as Deputy Keeper at RoS, Bruce Beveridge will soon be moving to take up new responsibilities. He has been invited to become Head of Rural Communities division in the Scottish Government and will be taking up this post on 27 July. He will continue to retain some contact with RoS as he will be responsible for the policy on the Register of Community Interests in Land and the policy on crofting reform – which it is anticipated might include a new Register of Crofts.

Conveyancing conferences
Registers of Scotland are running half day morning seminars in conjunction with the Law Society of Scotland. We recently held one event in Aberdeen and another in Stirling, with several more set to take place in October.

08 October 2009, Dumfries, Easterbrook Conference Centre
20 October 2009, Dundee, Apex City Quay
22 October 2009, Edinburgh, Signet Library

Seminar topics include: property marketplace in the current climate, changes in procedures for land registration applications, impact of home reports, and the Keeper’s response to PMP Plus and other Lands Tribunal decisions.

You can book online at lawscot.org.uk

The changes to RD have been made at the functional, design and infrastructure levels with a view to building even more services in the future. One of the primary objectives of the redesign has been to improve the user interface to make it more intuitive, but also to maintain continuity with the existing design to ensure a smooth transition for our existing customers. RD has been integrated into the suite of external services provided by RoS.

The suite includes access to Automated Registration of Title to Land (ARTL), eForms and Scotland’s house price service.

PMP Plus and other external services provided by RoS. The changes to RD have been made at the functional, design and infrastructure levels with a view to building even more services in the future. One of the primary objectives of the redesign has been to improve the user interface to make it more intuitive, but also to maintain continuity with the existing design to ensure a smooth transition for our existing customers. RD has been integrated into the suite of external services provided by RoS.

The suite includes access to Automated Registration of Title to Land (ARTL), eForms and Scotland’s house price service.

For more information, please visit our website ros.gov.uk/registersdirect, or contact eServices by telephone: 0845 607 0160 or email: eservices@ros.gov.uk.

Update on enquiries
Since April this year, the Keeper’s Pre-Registration Enquiries section has been working to a reduced turnaround target of five working days from receipt of an enquiry. To date this has been achieved in all cases, and we are committed to maintaining this improved response time. Notably the trend for recourse by solicitors to pre-registration enquiries does not mirror the downturn in the property market. The volume of enquiries received has remained buoyant.

We will deal with your enquiry as quickly as possible, but please contact us in good time, before settlement is imminent. Contacting the Keeper prior to submitting an application helps ensure there are no undue delays in registration. If you are uncertain what the Keeper’s approach may be to your particular circumstances, please contact us by email (pre-reg@ros.gov.uk), fax (0131 479 3675), post (DX: 550907, Edinburgh 9 or LP: 55, Edinburgh S), or phone (0845 607 0163)

Any enquiry submitted by email, fax or post will receive a written response that you can enclose with your application for registration.

For further information on the remit of Pre-Registration Enquiries or to provide feedback please contact Kathryn Ferguson on 0131 528 3786 or kathryn.fergusson@ros.gov.uk.

ARTL UPDATE – as at 22 June 2009

16,971 ARTL transactions have taken place.

Live on ARTL
208 solicitors’ firms.
16 lenders.
10 local authorities.
11 full sign-up meetings scheduled over the next four weeks.

For up-to-date information and a full list of participating practices and companies go to: ros.gov.uk/artl
Enforcing contact orders

One of the most intractable problems in modern family law is the practical enforceability of child contact orders. The letter of the law itself is perfectly clear: a contact order under s 11(2)(d) of the Children (Scotland) Act 1995 will be made by a court only after it has concluded that it is in the welfare of the child to make the order. Any person who deliberately seeks to frustrate that order is acting against the court's assessment of welfare and is in contempt of the court that granted the order. In theory, the law's response to such contempt is no different in this context from any other. In practice, however, there is a serious reluctance ever to imprison or fine a parent acting in this way.

The typical example concerns the mother with residence not allowing contact between the child and the father holding a contact order under s 11. Even when the father goes back to court and the mother is threatened with contempt proceedings, she might still resist. In the literature such a mother is usually referred to as the "implacably hostile" parent. Sometimes she does genuinely believe that the court's assessment of the child's welfare is wrong.

There is a perception that the courts, unwilling to impose the sanction of imprisonment, feel themselves effectively powerless in the face of such a parent. A recent case shows, however, that sometimes the court's patience snaps. In TAM v MJS [2009] CSIH 44 (Second Division, 15 May 2009) the mother had strenuously resisted for almost two years, in the face of numerous court hearings, the implementation of a contact order made by the sheriff. She failed to attend court hearings, made (false) allegations of sexual abuse of the child against the father, feigned illness when warrants for her arrest were issued, and made (spurious) complaints of professional misconduct against the curator who failed to agree with her that contact with the father should be terminated, and against a clerk of court who did not call an ambulance quickly enough in response to one of her episodes of apparent illness. Numerous solicitors whom she had employed had quickly sought leave to withdraw. The sheriff took the view that this pattern of behaviour amounted to a serious contempt of court and he jailed her for four months. The case went to the Inner House of the Court of Session, on a petition to the nobile officium, which is the only method of appealing against imprisonment for contempt of a civil court.

Clearly sympathising with the sheriff's immense frustration, the Lord Justice Clerk concluded that he could see no reason whatsoever to recall the sentence. “If we did, we...
would encourage the petitioner in the view that it is for her to decide which orders of the court she will obey. We would also undermine the authority of the sheriff and deprive the respondent of his rights. In effect, therefore, we would perpetrate an injustice at our own hand” (para 46).

He also concluded that the mother had been in contempt of the Court of Session itself, for she had been released pending the hearing of the petition to the nobile officium on giving a written undertaking to that court that she would in the meantime allow contact, and once liberated had declared that she had no intention of doing so. But in order to give the mother time to reflect on the gravity of her offence, sentence for that contempt was deferred for six months, with a warning that any penalty might be severe.

So, sometimes, the court will impose the penalty of imprisonment for contempt, even when this means depriving the child of the primary carer. In extreme cases – and this was probably one – the residence parent’s behaviour is so perverse as to raise concerns about whether the child should remain in that person’s primary care. This happened in an English case, Re M (Intractable Contact Dispute: Interim Care Order) [2003] EWHC 1024 where the mother had lied to the children, telling them that they had been abused by their father and his parents, and the court responded by transferring residence from the mother to the father, with supervision by the local authority.

Both these cases are extreme. There is no doubt that the mothers in both the cases were acting neither reasonably nor rationally: rather their own interests and feelings were clearly dominating their minds, to the exclusion of their children’s welfare. But in less extreme cases, the problem is that the mother may well be acting rationally in response to a genuine belief that her assessment of the child’s welfare is more accurate than the court’s.

All good parents will doubtless do what they believe is best for their children, some even if the state (through the court) believes otherwise. But one can be rational, even reasonable, and yet wrong. If a court has made a decision as to welfare, then any contrary view is, legally speaking, wrong. Once a contact dispute gets to court, the parent’s assessment of the child’s welfare is never decisive. The real test of the court’s willingness to enforce its own contact orders will come in a far less extreme case than TAM v MIS, where the mother is genuine, rational and even reasonable in her belief that contact would harm the child, but the court simply disagrees.

Sexual offences
On 10 June 2009, the Scottish Parliament passed the long-awaited Sexual Offences (Scotland) Act 2009. One of the primary aims of this legislation is to clarify what the law understands by consent within the context of rape and other sexual offences. It also amends the law of sexual offences involving children. At long last the law is made both gender-neutral and sexuality-neutral, and so all the bizarre distinctions currently drawn by the Criminal Law (Consolidation) (Scotland) Act 1995 will simply disappear.

The Parliament rejected the suggestion of the Scottish Law Commission that sexual activity involving parties both of whom are under 16 should be decriminalised. Both will now be guilty (as opposed to only the boy, as at present). Offences will remain scheduled to the Criminal Procedure (Scotland) Act 1995, with the result that whenever a person under 16 is involved in sexual activity, a ground for referral to the children’s hearing will exist. But reporters will have the choice of whether to refer the child on the basis of being guilty of, or of being a victim of, a scheduled offence.

The long-term consequences to the child of being found guilty of a sexual offence are severe, and it is to be hoped that in the generality of cases reporters will choose to refer children on the basis of being victims. They will of course be able to prove such a case on the balance of probabilities rather than beyond reasonable doubt. A difficulty with that hope might be the case of Constanda v M 1997 SLT 1396, where the Court of Session held that the reporter ought not to avoid referring on the basis of a criminal offence, and thereby avoid the higher standard of proof, by using the same facts to found a different ground if the real essence of the case is the child’s criminal behaviour. Reporters are likely therefore to be faced with the unenviable task of examining the nature of the sexual activity the child has been involved with and making a decision of whether the child was in essence a criminal or a victim. This is unfortunate since it is unlikely that many cases will fall neatly on one side or the other of this false dichotomy.

Same-sex marriages
Just as 1999 was a year of profound change in the legal recognition of same-sex relationships across the western world, so too is 2009 shaping up to be another bumper year for reform. Same-sex marriage (as opposed to civil partnership) has been introduced this year in Norway, Sweden, Vermont, Maine, New Hampshire and Iowa, doubling the number of jurisdictions in which same-sex couples can marry. In addition, civil partnership has been introduced in Hungary and is likely to be introduced in Ireland also.

One departure from the trend was in California, where the Supreme Court, only a year after it opened marriage to same-sex couples, accepted the constitutionality of a ballot initiative (a referendum) to remove that right. It did hold that all the marriages that had been created between its original decision and the passing of the ballot initiative would remain valid.

Two public petitions have this year been presented to the Scottish Parliament for the opening of both marriage and civil partnership to couples of any gender mix, and while some MSPs have expressed support, legislation is, I suspect, unlikely to follow soon. Though it does not generate in this country the political vitriol seen in the USA, the issue remains live and will, sooner or later, have to be addressed by our parliamentarians.

Kenneth McK Norrie is a Professor of Law in the University of Strathclyde.
Pensions play an important role in the overall financial plans of many high earners. Their pension contributions typically benefit from 40% initial tax relief, and while there are restrictions on taking benefits, 25% of the fund can usually be taken as a tax-free lump sum. Depending on the circumstances of the investor, it may also be that the remainder of the pension fund, when taken as income, may be taxed at basic rather than higher rate tax. At least that is how it used to work.

The Budget of 22 April 2009 introduced fundamental changes to pension legislation. Alistair Darling, the Chancellor, announced that from 6 April 2011 income tax relief on pension contributions will be restricted for those with total income (relevant income) of more than £150,000 per annum. For these high earners, pension tax relief will be tapered down until it becomes only 20% when relevant income reaches £180,000 per annum. These changes mean that high earners will need to ask whether it is sensible for them to make additional pension contributions.

Double hit
It is important to recognise that “relevant income” used in these calculations is not just salary, but total income chargeable to income tax. This will include any deductions from employment income for pension contributions made under net pay arrangements. It will also include salary exchange arrangements, where they were not in place prior to 22 April 2009.

While it may seem fair to provide the same level of tax relief for all people, there are significant differences between high earners and basic rate taxpayers that should be taken into account. High earners will be paying 40% tax on their income anyway, soon to be increasing to a top rate of 50%, whereas basic rate taxpayers will be paying only 20%. High earners also face a greater risk of then paying higher rate tax on their pension income when they draw benefits, whereas this is unlikely for a basic rate taxpayer. The prospect for high earners of getting tax relief at 20% and then paying tax on their pension proceeds at 40% or more does not sound too attractive.

Those high earners who accrue benefits in defined benefit (final salary) pension schemes, or where their employers make contributions on their behalf, will not escape the new rules. The Government has announced that equivalent tax charges will be in place and it will consult on how these will be applied.

Immediate effect
A change of rules coming into force in two years’ time would normally spark a flurry of activity as advisers and their clients try to circumvent any future problems. However, to prevent effective tax planning ahead of the 2011 start date, the Government has introduced new rules which may restrict tax relief on some pension contributions made from 22 April 2009.

These preventative measures will be imposed unless any of the following exceptions apply:
- Relevant income is less than £150,000 in the current tax year and each of the previous two tax years.
- Normal ongoing pension saving arrangements (protected pension input) are in place before 22 April 2009 and continue unaltered. If pension savings remain unaltered and involve regular contributions paid quarterly or more frequently then the preventative measures will not apply, even if relevant income is £150,000 or more in any tax year.
Those high earners who accrue benefits in defined benefit (final salary) pension schemes, or where their employers make contributions on their behalf, will not escape the new rules from 2007-08 to 2010-11.

- Overall annual pension savings in 2009-10 and 2010-11 are less than the special annual allowance. The special annual allowance is £20,000 and includes existing normal ongoing pension saving arrangements. Therefore if normal pension savings arrangements are less than £20,000, a client can top up to £20,000 in 2009-10 and 2010-11 and still benefit from higher rate tax relief. However, if normal pension savings are more than £20,000, any additional pension savings by someone with relevant income of £150,000 or more will be restricted to 20% tax relief.

Next steps
It may not be immediately clear whether clients are affected by the changes. This will depend on their relevant income in the current and two preceding tax years and on their existing pension arrangements and previous contributions.

The first step is for clients to establish whether the new rules apply to them and whether existing pension contributions qualify as normal pension savings arrangements. This is likely to dictate the next steps.

Those with relevant income under £150,000 will not be affected by these changes and higher rate taxpayers will continue to benefit from 40% tax relief on their pension contributions. Depending on their tax position, pension income may not be subject to higher rate tax when taking benefits and this increases the potential benefits of making pension contributions.

Tax thresholds in the equation
The Chancellor also announced changes to income tax whereby an individual’s basic personal income tax allowance will be reduced by £1 for every £2 of “adjusted net income” above £100,000 from 6 April 2010.

For those with income above £100,000 they may be able to make a pension contribution to reduce their adjusted net income to below the £100,000 threshold. They may then benefit from both higher rate tax relief on their pension contribution and by preserving their income tax personal allowance. This could provide clients with an effective tax relief rate of up to 60% on their pension contributions.

For those with relevant income above £150,000, it is important to assess the impact of the changes on their eligibility for higher rate tax relief on pension contributions. They will continue to benefit from higher rate relief on normal ongoing pension savings, or up to £20,000 if greater in 2009-10 and 2010-11. Indeed, in 2010-11 the highest rate of income tax will be at 50% and so there will be even more reason to ensure this £20,000 allowance is utilised.

Where high earners currently have no normal ongoing pension savings, they should look to utilise their £20,000 special annual allowance in 2009-10 and 2010-11 as they will still benefit from higher rate tax relief. However, it will no longer be appropriate for them to make additional pension contributions in excess of the £20,000 limit. These high earners will therefore need to carefully investigate their overall financial plan and consider alternative means of long-term retirement planning.

Investment considerations
Clients should look at investment structures that offer both tax advantages and flexibility.

The proposed increased ISA limit to £10,200 per annum is welcomed. However, some clients may also benefit from specialist advice on tax-led investments offering income tax reductions. For example, the Budget announced changes affecting Enterprise Investment Scheme (EIS) investors. The carry-back facility which allows for income tax relief to be claimed has been increased to £500,000. This, together with the standard limit, could potentially allow clients to participate in up to £1 million of EIS qualifying investments in the current year. In addition, Venture Capital Trust (VCT) investments allow for income tax relief to be claimed on up to £200,000 each year. It should be recognised, though, that these investments can carry high degrees of risk and so will not be suitable for all clients.

Treating as individuals
The new pension rules are complex and high earners need to understand how they are affected. You need to ensure that your clients know whether the new rules apply to them, whether existing pension arrangements are protected, and what their next steps should be.

The most appropriate course of action will depend on their individual circumstances, and so it is important that they take the right professional advice to react to these changes in the short term, and if necessary adapt their longer-term financial plans.

Bryan Innes is Senior Client Partner at Towry Law, Aberdeen
In June of this year, as a result of an extensive four month programme of research, the Charity Commission for England & Wales launched an initiative entitled "The Big Board Talk... the conversation all charities need to have", in which they challenged charities to ask themselves a series of difficult questions.

One of those questions, in the section dealing with governance, asks: “Have we considered collaborating with other charities?” and specifically urges trustees to “consider the possibility of a formal merger with another charity or charities in the interests of [their] beneficiaries”.

**Type of merger or collaboration**

Before taking a look at some of the particular legal issues involved, it is worth considering the form any potential merger or collaboration might take. The charities involved may be contemplating a merger in the true sense of the word, where one new charity is to be formed and two or more existing charities are to transfer their assets into the new charity, and thereafter wind up – model A; or the charities may simply be considering the transfer of assets from one “donor charity” to an existing “donee charity” where, once the transfer of assets has taken place, the “donor charity” winds up and the “donee charity” is in the same position as the new charity in the first scenario – model B.

**KYC – “Know your constitution”**

KYC is a well known acronym among those involved in the delivery of professional services as meaning “Know your client”, but it can equally be applied to legal advisers advising charity trustees in connection with their constitution, deed of trust, royal charter and statutes, or memorandum and articles of association. Here, the advice is to “Know your constitution” – or indeed your client’s constitution.

**Power to merge?**

Whether the form of merger which is being proposed is model A or model B, it is important to consider whether the charities have the requisite powers in their constitutions to do so, and whether that is a specific power to merge or to wind up. The terms of the power should also be considered: for example, when contemplating a model B merger, are the terms of the wind-up clause restrictive at all? Do the charitable objects of the donee charity have to be the same as, or similar to, those of the donor charity?

The lack of a specific power to merge or any restriction on the terms of the wind-up clause is not fatal, but rather can be cured by the use of the reorganisation provisions set out in Chapter 5 of the Charities and Trustee Investment (Scotland) Act 2005, whereby either or both merging charities could seek to have the missing power inserted into an existing constitution, or the wind-up power amended. Indeed the merger itself can be effected as part of a reorganisation.

**Suitable objects**

Notwithstanding the terms of any power to merge or wind up, it is necessary to consider the charitable objects of the merging charities. Are they sufficiently similar to allow the...
The merging charities will have to carry out a due diligence exercise, examining the assets and liabilities of the other

wishes of the settlor perhaps not written in the constitution, but informing the way the charity operates, so long as that is consistent with the charitable purposes.

- (b) acting with due care and diligence

This is a higher standard than that expected of an individual looking after his or her own affairs. The merging charities will have to carry out a due diligence exercise, examining the assets and liabilities of the other charity to ensure so far as possible that there are no “hidden surprises”. This can be a lengthy and potentially expensive process and may involve charities disclosing otherwise confidential information. At this stage, the proposed business plan of the new charity will also require to be considered and the charity trustees must be satisfied that they are transferring their charity’s assets to a body that will not, for example, run into financial difficulties in a short time. How to deal with any potential income stream from legacies should also be considered. This is discussed in more detail in the panel.

- (c) conflicts of interest

Finally, the charity trustees will have to consider whether any conflicts of interest exist. Particular difficulties might arise where an individual is a charity trustee perhaps of the prospective board of trustees of the new charity where model A is being used and of one of the merging charities. Any such conflicts should be documented carefully and managed properly to ensure that any trustees’ decision is beyond challenge.

OSCR and timings

It is important not to lose sight of the various timing issues which must be built into any plan to merge, once a prospective date is fixed. An early approach to OSCR might be prudent to ensure that the route to merger is an acceptable one and that any complex issues can be considered and expectations managed from the outset. Time should be allowed for further discussion and amendments after consulting with OSCR.

In short, in terms of s 16 of the Act, OSCR requires not less than 42 days’ notice of a proposal specifying the date a charity intends to merge, wind up or dissolve. If within 28 days of the date on which notice is given, OSCR neither consents nor refuses, OSCR is taken to have consented to the proposal. Alternatively, OSCR might consent actively, refuse its consent or direct the charity not to take action for six months all as specified in the direction.

Other considerations

In addition to the legalities and practicalities mentioned, when considering a merger, we would also recommend that a charity considers the wider issues. Change is always difficult to manage, and where there is a large volunteer group it will be important to engage with them at an early stage to ensure their support.

The views of substantial donors might also be canvassed as there may be those who regard a proposed merger as more of a takeover and could potentially take their much valued support elsewhere.

A merger of two charities can throw up a number of difficulties and unforeseen complexities, so if it is considered the best course of action, then the long-term future of the merged charity should be mapped out clearly in early discussions. It may not be the easiest route for charities to choose, but in the current economic climate, merging may just provide the answer to a difficult question.

Kenneth Pinkerton is a senior associate with Turcan Connell and a member of its Charity Legal Team.
In progressing from stage 1 to stage 3 of its passage through the Scottish Parliament, the Education (Additional Support for Learning) (Scotland) Bill has nearly trebled in size – introducing many new aspects of reform. These amendments have come from the Scottish Government, the Education and Lifelong Learning Committee and from opposition MSPs. The bill has changed from what was a narrow, somewhat technical piece of legislation to one which makes some fundamental changes to education law.

Placing requests
In addition to retaining (in labyrinthine complexity) the proposals for determining jurisdiction for placing request appeals by reference to co-ordinated support plans (CSPs), section 1 of the bill now also provides that any placing request appeal where the specified school is a special school will be heard by the Additional Support Needs Tribunals for Scotland.

Additional support
The decision of the Court of Session in the case of C v City of Edinburgh Council 2008 SLT 522 threw some doubt over the definition of the term “additional support” by suggesting that it would be restricted to support provided in an “educational context”. This seemed to conflict with the code of practice, which gave several examples of additional support being provided by external providers – principally health professionals and social work. Section 5A of the bill as passed amends s 1 of the Education (Additional Support for Learning) (Scotland) Act 2004 and effectively reverses this decision by clarifying that additional support includes “provision (whether or not educational provision)” which is required in order for the child or young person to benefit from school education.

Assessments and examinations
Section 5B of the bill as passed introduces a new s 8A to the 2004 Act, which allows a parent or young person to make an assessment request (i.e. a request that the education authority arrange a specific assessment or examination for a child or young person) for the purpose of considering that child or young person’s additional support needs. Currently, assessment requests can only be made in the context of the authority’s consideration of whether a child or young person has additional support needs or requires a CSP. A request made under s 8A must be complied with, unless it is an unreasonable request. It is understood that the Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005 (SSI 2005/501) will be amended to ensure that the refusal of such a request by an authority is a specified matter which may be referred to dispute resolution.

Looked-after children and young people
Section 5C further amends s 1 and amends s 6 of the 2004 Act, effectively to introduce a statutory presumption Twenty out of ten

The Education (Additional Support for Learning) (Scotland) Bill, now passed by the Scottish Parliament, attracted some important additional provisions during its passage. Iain Nisbet updates his earlier article to highlight the principal changes
that every child or young person who is “looked after” by the local authority in terms of s 17(6) of the Children (Scotland) Act 1995 has additional support needs. This presumption can be rebutted if a full assessment of the child’s or young person’s needs reveals that they do not require additional support to benefit from school education. Where the presumption holds, the authority must formally determine whether or not the child or young person requires a CSP.

Looked-after children and young people were one of the groups identified by HM Inspectorate of Education (HMIE) as missing out on the benefits of the 2004 Act, and it is to the credit of the Scottish Government and the Scottish Parliament alike that such positive action has been taken to address this shortfall.

**Pre-school children**

Section 5D of the bill amends s 5 of the 2004 Act in relation to pre-school children who are not entitled to free nursery education (broadly, those aged 0 to 3). By removing many of the legislative barriers previously included in this section, the bill will make it easier for those disabled children who require additional support in the very early years to receive it. The local authority will be under a duty to assess such disabled children and, where they have additional support needs, to provide appropriate support for them (unless the parents refuse such support).

**Advocacy service**

Section 5DA introduces a new s 14A to the 2004 Act which requires the Scottish Ministers to secure the provision of an advocacy service for parents and young people in relation to proceedings before the additional support needs tribunals. The bill specifies that the service must be “available on request” and “free of charge.” It is not yet clear what form this advocacy service will take.

**Mediation and dispute resolution**

Section 5DB requires that mediation services be independent of the local authority and effectively puts a stop to authorities using “in-house” mediators. This is thought to affect services in Edinburgh and Clackmannanshire only. Section 5DC amends the Scottish Ministers’ regulation-making powers with regard to dispute resolution, such that the initial point of contact for a parent or young person making a reference would be to the Scottish Ministers, rather than directly to the authority.

**Information**

Sections 5E, 5F, 5G, 5GA and 5GB make sundry amendments to the 2004 Act in relation to the authority’s duty to make certain information available to parents, specifying what, when, how and to whom it must be made available.

**References to the tribunal**

Section 6 of the bill has been amended since stage 1 to include a new ground for making a reference to the tribunal. A reference will be possible where an authority has failed to provide additional support (or, crucially, arrange for the provision of additional support) as specified in a CSP. In such cases the tribunal will have wide ranging powers to make orders to the authority (with deadlines) to remedy the failure.

Section 6A also introduces a fresh ground for making a reference to the tribunal. A reference will be possible where an authority has failed to comply with its transition duties in relation to pupils due to leave school. Given that HMIE has identified that “Children’s services [are] not effective in helping children to make the transition from child to adult services”, and that the duties apply to all children and young people with additional support needs (not just those with CSPs), we can predict with some confidence that there will be a large number of such tribunal cases in future years.

In these cases, the tribunal will again have wide ranging powers to make orders to the authority (with deadlines) to remedy the failure. However, some amendment to the tribunal rules may be necessary in order to ensure that such orders retain their efficacy even in cases where the young person has reached (or is about to reach) the age of 18.

Section 7A introduces a para 11A to sched 1 to the 2004 Act, which will give the President of the additional support needs tribunals powers to monitor the implementation of tribunal decisions. Specifically, she is empowered to require the authority in question to provide information on their implementation of the decision and, if not satisfied that an authority is complying with a decision of the tribunal, to refer the matter to the Scottish Ministers. Ministers already have powers in terms of s 27(9) of the 2004 Act to issue directions to an authority.

**Scottish Ministers**

Section 7AA of the bill will require the Scottish Ministers to report annually to the Scottish Parliament for the next five years on the sufficiency of information regarding children and young people with additional support needs for the purposes of monitoring the implementation of the 2004 Act.

Section 7AB requires the ministers to collect from education authorities and subsequently publish the following data:

- (a) the number of children and young persons for whose school education an authority is responsible having additional support needs,
- (b) the principal factors giving rise to the additional support needs of those children and young persons,
- (c) the types of support provided to those children and young persons, and
- (d) the cost of providing that support.

**Commencement**

As can clearly be seen, the bill has changed quite significantly and now imposes some testing new duties on both education authorities and the Scottish Ministers. The Additional Support Needs Tribunals for Scotland had a quiet year last year. However, with an expanded jurisdiction and new powers, next year could be busier than ever before.

At the time of writing, it is understood that a consultation on amendments to the regulations and code of practice will take place in the autumn of this year, with a view to the bill coming into force at the end of 2009 or beginning of 2010.

- Iain Nisbet is a partner at the Govan Law Centre and head of its Education Law Unit
- Govan Law Centre’s dedicated website on the law relating to additional support needs can be found at www.additionalsupportneeds.org.uk

A new s 14A requires ministers to secure the provision of an advocacy service for parents and young people in relation to proceedings before ASNTs
The advent of devolution has opened a “Pandora’s box” of opportunities for Scots lawyers. New jobs have been created in the Scottish Parliament and Government. There has been an increase in purely Scottish legislative drafting, review and reform. Even the judiciary has been involved through use of the review jurisdiction over the competence of the new Parliament. The work of the Parliament itself is clearly at the heart of the devolution experience, and lawyers are at the heart of the Parliament.

However at this junction, 10 years after the opening of the new Scottish Parliament in 1999 it is important to take stock. While devolved power is still relatively new to Scotland, it is certain that Scotland’s legal and political landscape has changed in ways which were not envisaged in the early days of Donald Dewar’s pioneering first parliament. It is important to assess the work of the Parliament, and the lawyers associated with it, and how the Parliament can achieve continued success. Successes to date include far reaching law reform, imaginative responses to constitutional change and a broad range of new legislation. Challenges have arisen in areas such as the role of the Lord Advocate and to increase Parliament’s legislative competence. Additionally legal education, the role of the judiciary and the place of Scotland within the UK are important issues for public law in Scotland, today and in the future.

It has been suggested that lawyers in Scotland have an “increasingly political” role. This may be because lawyers in Scotland are now working on legislative drafting which formerly took place in London. Thus lawyers will have policy and political objectives firmly in mind when working in this area. Conversely, but equally important in terms of the relationship between law and politics in Holyrood, is the fact that many MSPs are, or have been, practising lawyers. While many of Scotland’s politicians will continue to come from...
a legal background, the real area of growth for lawyers in the Scottish Parliament will be the public lawyers working behind the scenes of the Parliament and other institutions. It is in this context, rather than as politicians, that the potential future contribution of lawyers to the Scottish Parliament should be examined.

The actions of the Scottish Parliament since 1999 have been scrutinised by lawyers and laymen alike. The template provided by the Consultative Steering Group has been achieved with varying degrees of consistency. However the Parliament has been applauded for the broad scope and sheer amount of legislation it has produced in its first decade. It was envisaged by the CSG that the Parliament would not pass significant amounts of legislation – estimating “10-12 bills each year”. In fact the Parliament passed 127 bills in its first two sessions to 2007 – an average of 16 per year. Scottish subordinate legislation has also increased – 453 Scottish Statutory Instruments were passed in 2000; this rose to 660 by 2005. Indeed since 1999 there has been an “explosion in purely Scottish law making”, a firm quantitative indication of a successful and functional legislature.

The Parliament has also exceeded expectations about the type of legislation passed. Instead of law made by English lawyers amended for a Scottish context, we now see complex and pioneering legislation made by Scottish lawyers, and designed around Scotland’s legal and social culture. Legislation passed in Scotland such as the Abolition of Feudal Tenure (Scotland) Act 2000 and the Family Law (Scotland) Act 2006 has changed the substance of Scots law. Acts such as the Smoking, Health and Social Care Act 2005 have been introduced with high publicity and a noticeable effect on daily life in Scotland. Finally the Graduate Endowment Abolition (Scotland) Act 2008 has reduced financial pressures on Scotland’s students. This last is just one example of legislation being used to achieve policy aims which differ substantially to policy applied in England. Importantly these reforming Acts have all been passed by different administrations, showing that Scotland’s new found legislative courage is not a political force. Rather it is seen as the effect of devolution on a generation of Scots public lawyers who are now able to work effectively within their own domestic system to develop and improve the law.

Commentators pre-1999 demanded “a parliament within Scotland which is able to meet the demands of its own society and time.” From an assessment of the Acts passed by the Parliament, it seems this has been achieved. Lawyers have played a large part in this by advising and drafting legislation. If this contribution continues in future legislative programmes, the governmental lawyers working in Scotland today will surely expand upon these early successes.

Another perceived success of the Scottish Parliament has been to take Scottish politics closer to the Scottish people, to allow decisions to be made on Scottish issues in Scotland. This was the main argument for devolution, applying the principle of subsidiarity to UK law making. However it cannot be said that the Scottish electorate has so far embraced this democratic opportunity – turnout is significantly lower for Scottish parliamentary elections than for UK general elections.

For Scotland’s Parliament to truly matter to Scottish people, its work must have a real impact on life in Scotland. A legal response to this would be to say that the Scottish Executive and Scottish Parliament must commit to a programme of law reform and consolidation through statute law. Family law has been significantly modernised and updated, and the Scottish system is now seen as a model for 21st century family law. It is important to note that this reform was based upon Scottish Law Commission proposals from 1989. This shows the importance of the work of lawyers both in the Scottish Parliament and in independent bodies in formulating law reform and legislative proposals.

In the coming years this pattern of reform should continue as far as possible across the spectrum of Scots law. A devolved parliament with competence over the legal system affords opportunities to consider steps such as codification of Scots criminal law, or the formation of a written constitution for Scotland. Lawyers will have input in any reform program, for example via the Scottish Law Commission. It is vital that lawyers and politicians work with the Scottish public, business community and private legal practitioners, prioritising reform of high profile topics. This will improve the public perception of the success of the Scottish Parliament, and raise the profile of the legal professionals in Scotland whose work lies behind such reform.

The law officers of the Scottish Parliament are perhaps the best known lawyers working within the Scottish Parliament. In recent years these positions have become controversial, despite recent attempts by the SNP to depoliticise the roles by removing the custom for law officers to attend meetings of the Scottish Cabinet. The position of the Lord Advocate as head of the prosecution service and Government legal adviser remains especially heavily criticised. Continuing challenges to the role of Lord Advocate made using devolution issues suggest that this issue has caught public imagination, and further

Another perceived success of the Parliament has been to take Scottish politics closer to the Scottish people

1 James G Kellas, “Lawyers in Contemporary Scots law. Acts such as the Smoking, Health and Social Care Act 2005; 51.8% turnout in Scottish Parliament general elections.
2 10 59% turnout in UK general election
3 This shows the importance of the work of lawyers both in the Scottish Parliament and in independent bodies in formulating law reform and legislative proposals.
4 Alan Page, “One Legal System, Two Parliaments?” The Political Quarterly 78 (2).
5 453 Scottish Statutory Instruments were passed in 2000; this rose to 660 by 2005. Indeed since 1999 there has been an “explosion in purely Scottish law making”, a firm quantitative indication of a successful and functional legislature.
6 From an assessment of the Acts passed by the Parliament, it seems this has been achieved. Lawyers have played a large part in this by advising and drafting legislation. If this contribution continues in future legislative programmes, the governmental lawyers working in Scotland today will surely expand upon these early successes.
7 Ibid, p129.
8 Instead of law made by English lawyers amended for a Scottish context, we now see complex and pioneering legislation made by Scottish lawyers, and designed around Scotland’s legal and social culture. Legislation passed in Scotland such as the Abolition of Feudal Tenure (Scotland) Act 2000 and the Family Law (Scotland) Act 2006 has changed the substance of Scots law.
12 See http://business.timesonline.co.uk/tol/businesslaw/article519743.ece, as quoted in Lord Hope of Craighead, “Do we still need a Scottish Law Commission?” Edin LR 2006 10 (1).

www.lawscotjobs.co.uk
alteration to the Lord Advocate’s role and remit seems inevitable. The Commission on Scottish Devolution took evidence from the Scottish judiciary which questioned whether the dual role of the Lord Advocate is appropriate and lawful. The fact that this issue has been raised by senior figures within the Scottish legal community shows that there is concern over the future of this historic legal role in a new devolved Scotland. It seems inevitable that the role of the Law Officers will be subject to further change in the coming years. So, just as the Commission notes that the devolution settlement will not “remain static”, neither will the role of lawyers remain unaltered. The means by which law officers and lawyers in general contribute to the work of the Scottish Parliament seems on the cusp of structural and substantive changes.

Devolution has led to changes in both the position of Scots lawyers and the role of Scotland in the UK’s constitution. It has even been said that devolution has ‘inaugurated a new Scottish legal system’. While Scotland has maintained an independent legal system and judiciary since the Act of Union in 1707, it is true that with devolution and a separate Scottish parliamentary identity, the role of Scotland’s lawyers is even more distinguishable from their English counterparts.

The legal system is protectionist in its outlook, aiming to preserve Scotland’s strong legal heritage and identity for example by requiring specifically Scottish legal training for Scots lawyers. This means that for the continued success of the Parliament, not only must qualified lawyers continue to work to a high standard, but Scotland’s law schools must remain committed to providing a uniquely Scottish legal education. At the same time legal institutions should not be afraid to look beyond Scotland’s borders for ideas and practices which can improve efficiency and effectiveness in all areas of legal practice. In this way even legal academics can contribute to the success of Scottish public law and the Scottish Parliament.

Following devolution, Scotland is governed by a Parliament which has a restricted legislative competence and is subject to a “strong” judicial review. Since the first session of the Scottish Parliament there has been noticeable involvement of the courts in assessing this competence and considering legal challenges from the public and pressure groups. Lawyers and the judiciary are therefore inextricably linked to the exercise of the Parliament’s legislative powers, and Scottish legislation is rigorously scrutinised. Despite the prominence given to judicial review of Acts of the Scottish Parliament in both legal commentary and mainstream media, the fact remains that there have been relatively few challenges to Scottish legislation, and none have been successful.

It was initially feared that subjecting Acts of Parliament to judicial review could lead to a non-democratic concentration of power in the hands of the unelected judiciary. This has not materialised. Concerns are still expressed that Scottish democracy “will be harmed by inappropriate, invasive scrutiny and interference by the unelected judges”. However judicial scrutiny to date has been appropriate: thorough but respectful of the powers of Parliament. It can be argued that the vulnerability of legislation to judicial review has a positive effect on Scottish statute law, as drafters know their work will be scrutinised and challenged if it does not respect the limits on Parliament’s powers.

In the coming years it is likely that more legal challenges will be made to Acts of the Scottish Parliament, particularly in the case of any moves towards independence. Lawyers will have a vital role on both sides of future review petitions. They will act as counsel for the challenging party, as representatives of the ministers defending the legislation, as the drafters and advisers behind the legislation, and also in sitting in judgment as to the nature of the act as intra or ultra vires. Therefore lawyers can expect to have a growing role in ensuring the legality and appropriate scrutiny of Acts of the Scottish Parliament, a function which is vital to the parliament’s future success.

Looking to the future, it is clear that the Scottish Parliament and the lawyers who contribute to its work will be looking to build upon the foundations they have laid over the past decade. Successes such as legal reform and strong legislative programmes should continue, likewise the ongoing reassessment of the proper role of lawyers and the judiciary under devolution. Challenges will arise in the guise of devolution issues, judicial review petitions and calls for a remodelling of the devolution settlement.

However in their work to date, public lawyers and all other individuals who have contributed to the successes of the first decade of a devolved Scotland have much to be proud of. It is vital that momentum is not lost and that the roles of the Scottish Parliament and Scottish lawyers in all sectors are allowed to develop and mature during the next decade, and more, of devolution.

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**Feature Essay winner**

The Law Society of Scotland and the Scottish Parliament joined forces to run the essay competition, which marked the 60th anniversary of the Society and the 10th anniversary of the Parliament. The aim was to encourage law students in the final and penultimate years of the LLB at Scotland’s LLB providing universities to think about the input of Scotland’s 10,000 solicitors in shaping the country’s laws.

In addition to having her essay published in the Journal, the winner receives a cash prize of £500 and a three week summer placement in the Parliament’s legal department.

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18 Ibid, p27.
20 Ibid, p112.
23 Commentary: “Devolution – the next phase”, The Political Quarterly 78 (3).
Glasgow Academy pupils Cosmo Grant (on left) and Allen Farrington triumphed at the final of the Law Society of Scotland’s Donald Dewar Memorial Debating Tournament in the Scottish Parliament on 11 June. In addition to the tournament trophy, the pair won £1,000 for their school debating society, a commemorative quaich and £100 of book tokens each for their arguments proposing the motion “This house believes that the babies of 1999 are reaping the benefits of devolution”.

Runners up Imogen Dewar and Georgina Barker from George Heriot’s School, Edinburgh, received £250 for their school, donated by the Glasgow Bar Association, a commemorative quaich and £75 of book tokens each. The two schools will also share £500 of educational books from Hodder Gibson. The two other teams, Madras College of St Andrews, and Mearns Castle High School, Newton Mearns, were each presented with a quaich and £50 of book tokens.

This year the Society teamed up with the Scottish Youth Parliament, with additional support from Young Scot, as part of its 60th year commemorations and the Scottish Parliament’s 10th anniversary.

Fee-setting SGM will be on 24/9

The Society’s Special General Meeting will be held on Thursday 24 September 2009 at 2.00pm.

The Special General Meeting will be held in Glasgow at the Radisson SAS Hotel, 301 Argyle Street, close to Glasgow Central station. Registration will be from 1.30pm. All members of the Society are eligible to attend the Special General Meeting and contribute to its proceedings.

The principal purpose of the Special General Meeting is to set the practising certificate fee for members for the practising certificate year 2009-10, which runs from 1 November 2009 to 31 October 2010. The initial notice for this meeting will be sent out later this month, with the formal notice and agenda for the meeting being sent out on 3 September 2009.

The deadline for motions from members for the Special General Meeting is 2.00pm on 25 August 2009. A summary of the Society’s corporate plan and budget for 2009-10 is targeted for publication on the Society’s website on 7 August.

A number of changes have been made to the arrangements for the Special General Meeting in light of comments made by members arising from the Annual General Meeting in May 2009. The first change is that each member who submits a motion to the Special General Meeting will be entitled to one double sided A4 document to be sent out to members explaining their motion. Furthermore each member will be sent an individual proxy form in relation to the motions to be considered at the Special General Meeting.

Any member who has any questions on the Special General Meeting should contact David Cullen, Registrar at the Society (direct dial 0131 476 8160 or email davidcullen@lawscot.org.uk).

CBE for Montgomery

Lindsay Montgomery, chief executive of the Scottish Legal Aid Board since 1999, has been awarded a CBE in the Queen’s Birthday Honours List, for services to the administration of justice.

Glasgow court alterations agreed

A number of practitioners have expressed concern about arrangements for access to their clients in the cell area at Glasgow Sheriff Court.

Sheriff Principal Taylor has confirmed that this issue has been looked at by the custody court working group and a solution involving a limited amount of building works has been identified. The work will proceed as soon as the group have confirmation that the necessary funds are available.

Bruce Beveridge moves on

Bruce Beveridge, the Deputy Keeper of the Registers of Scotland, is standing down after four years as a co-opted Council member.

Announcing his decision at the June Council meeting, Bruce told members he was sorry to be leaving at such an exciting time for the Society, adding: “Council has moved on significantly since I joined. The change working through the system is now clear – the progress is visible on a week-by-week basis. I wish Council members well in taking forward further changes and improvements.”

Bruce has served on the Conveyancing Committee, Audit Committee (on which he will continue), Guarantee Fund Committee and Strategy Group.

He is taking up a new position as the Head of Rural Communities Division of the Scottish Government.
Mr Gregory So, the Under Secretary for Commerce and Economic Development in Hong Kong, is pictured with the Society’s Chief Executive Lorna Jack as he addressed a breakfast briefing for legal firms on business opportunities in Hong Kong on 30 June.

The event was part of the Society’s international development strategy, which offers support to members in identifying overseas opportunities and attracting new business to Scotland. It resulted from links made during the Society’s attendance at the Commonwealth Law Conference in Hong Kong in April.

The seminar also featured a presentation by consultant Adela Liew of Invest Hong Kong, giving some first hand practical advice on doing business in and with Hong Kong.

Lorna Jack, the Society’s chief executive, said: “There are already several UK legal firms using Hong Kong as a base for activity in the wider Asia Pacific market. There has been a great response and I would hope that it will help initiate new business opportunities for our members.”

Have you entered the Journal survey?

What do you think of the Journal? Which bits do you read and not read? Does it tell you what you need to know? Does it look good?

Connect Communications, who produce the Journal for the Society, want to hear your views on these and other questions which will help assess how the Society communicates with members.

The Society has emailed members with a link to the survey, which is being conducted online at www.surveymonkey.com/s.aspx?sm=tI3QTImuNOiPCAXOWkRGw_3d_3d. The survey should take about 10-15 minutes to complete; most answers simply require checking of boxes. Run in association with Mercedes Benz, it comes with a prize draw for the use of a luxury Mercedes for a weekend.

The closing date for completing the survey, and for entries to the prize draw, is Friday 24 July 2009. Anyone who has difficulty accessing the survey is invited to contact the editor.
**Professional Practice Committee**

**Note regarding defenders contacting pursuers' agents directly – June 2009**

It has come to the attention of the Professional Practice Committee that there is an increasing tendency for defenders to telephone pursuers’ agents directly to discuss active cases. To date the problem has arisen mainly in relation to repossession litigation situations, but also where defenders telephone firms that are either acting for inhibiting creditors or in relation to mortgage to rent cases.

The essential problem in many of the cases is that the defenders are already represented by solicitors and this is known to the pursuers’ agents. Indeed in some of the cases the defenders’ solicitors have actually (according to the defenders) encouraged the defender clients to telephone the pursuers’ solicitors.

It is clearly unprofessional for a defender’s solicitor to encourage his client to telephone the solicitor on the other side, as this puts undue pressure on the pursuer’s solicitor to act in a manner contrary to his duty under para 14(2) of the schedule to the Standards of Conduct Practice Rules, which sets out the very limited circumstances where a solicitor may communicate with a person known or believed to be the client of another solicitor.

- See www.lawscot.org.uk/Members_Information/Standards/Guideline on confidentiality

The Professional Practice Committee made changes in June 2009 to the Guideline on Confidentiality, in the part headed “3. Criminal Matters”. These changes comprise a new fourth paragraph and a revival of the first sentence of the original fourth paragraph and are as follows:

- If you are presented with a production order by the police you should pay close attention to what is called for in such an order and only deliver that. If asked to give a statement simply confirming that this is the file/these are the papers called for in the order, you should do so.
- If you are asked to give a statement to the police or the procurator fiscal in relation to a matter where the information sought is not already in the public domain (for instance having been disclosed in open court, or published in a public register) but is actually confidential, the Professional Practice Committee view is that you should offer to be precognosced on oath before the sheriff.

**Shereen backs Will Relief**

Will Relief Scotland, the Scottish solicitors’ wills charity which supports relief and development work in the world’s poorest countries, has had the backing of TV presenter Shereen Nanjiani for their event which is happening in September this year. Shereen commented: “I am very pleased to add my support to the excellent work solicitors are doing to encourage people to make their wills and, at the same time, raise desperately needed money for the relief of suffering overseas. I am impressed by the large number of Scottish solicitors who, despite difficult times, are still prepared to give up their time to help those in need overseas. It’s something I feel very strongly about as, having filmed in some of these deprived countries, I’ve seen at first hand the difference aid can make.”

Founder of Will Relief Scotland, retired Oban solicitor Graeme Pagan said that already there were more solicitors on board than for their last event in 2007 and they would be contacting many more solicitors before September.

- Contact Graeme Pagan: tel 01631 563737; email graeme@willreliefscotland.co.uk

**Paralegals announce new committee**

The Scottish Paralegal Association’s AGM and annual conference, held at the Radisson in Glasgow in April, was a great success with over 100 attending, a very reassuring number considering the current climate.

Guest speaker Dawn Robertson of Murray Beith Murray discussed the topical subject of redundancy procedures. Collette Patterson, the Society’s Deputy Director of Education and Training, confirmed the position of the Society’s (then) oversight board on the registered paralegal scheme, which recorded its support for the continuing development of the various streams of work which underpin the scheme, irrespective of the uncertain economic climate, and agreed to revisit the subject in October 2009. This statement confirming the ongoing support of and work towards the formal regulation of paralegals in Scotland by the Society was welcomed.

The SPP’s long-serving champion and President, Christine Lambie, was given a round of thanks and appreciation as she stepped down at the AGM. The following office bearers and committee members have now been appointed: Joint Presidents: Alison Butters, trust and executry paralegal, Mowat Hall Dick, and Karen Leslie, debt recovery paralegal, Stonachl LLP; Vice President: Lorna McCafferty, conveyancing paralegal, McCafferty & Co; treasurer: Dawn Bellamy, corporate paralegal, in-house, Total E & P UK Ltd; website administrator: Eleanor Hendren, conveyancing, family law and civil court paralegal; committee members: Sandra Reid, conveyancing paralegal; Natalie Carmichael, conveyancing paralegal; Wright Johnston & McKenzie; Nicola Brown, commercial conveyancing paralegal, Morton Fraser.

**Protecting bank deposits effectively**

The European Commission has launched a public consultation to review the recently-adopted directive on deposit-guarantee schemes. Directive 2008/14 increases the minimum level of protection afforded to bank deposits across the EU to 50,000 euro. For 31 December 2010 the limit will then be fixed at 100,000 euro, whereas the amount guaranteed previously has been a minimum. Concern has been expressed that this amount is insufficient, for instance when lawyers hold large amounts of client money for short periods. The Commission is obliged to submit an impact assessment on new elements of the directive by the end of 2009. Responses to its consultation are due by 27 July and will feed into this process.

**Let them eat green cake**

The second annual World IP Day (WIPD) conference jointly organised by the Society’s Update team and the Faculty of Advocates, was hosted by the Faculty, and chaired by Roisin Higgins, advocate and Graeme McWilliams, Legal Adviser, Standard Life in Edinburgh on 24 April. A record breaking 68 attendees enjoyed IP-themed presentations from Martin Layton of the Intellectual Assets Centre, Glasgow and Patrick Stewart of Manchester United FC. As well as a very good lunch, there were two WIPD cakes provided, which featured WIPO’s “green innovation” leaf icon and the conference’s green poster.

All present agreed that this year’s conference was bigger and better than 2008 and that the Society and Faculty should consider making this an annual event.

**From the Brussels office**

www.lawscotjobs.co.uk

Roisin Higgins, Graeme McWilliams, Martin Layton, and Patrick Stewart

Above (l-r): Roisin Higgins, Graeme McWilliams, Martin Layton, and Patrick Stewart

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Founder of Will Relief Scotland, retired Oban solicitor Graeme Pagan said that already there were more solicitors on board than for their last event in 2007 and they would be contacting many more solicitors before September.

- Contact Graeme Pagan: tel 01631 563737; email graeme@willreliefscotland.co.uk
Pupils get keen on the law

Ian Smart, President of the Law Society of Scotland, met with senior pupils at Hutchesons Grammar in Glasgow on 17 June, as part of a day long event looking at the law in Scotland.

The pupils also conducted a mock trial at the school, taking on the roles of prosecution and defence, the accused and witnesses in the courtroom.

Ian Smart said: “I was delighted to be asked along to take part in the proceedings today. The Society does a lot of outreach work to encourage debate about the law and the society that we live in. “It’s great to see young people take an active interest in how law and the justice system work in Scotland. I’m sure that some of those pupils taking part in today’s talks and mock trial event will go on to pursue a career in law and I would certainly encourage them in this.”

Immigration law specialists invited

The Law Society of Scotland is inviting applications from solicitors who want to become accredited specialists in immigration law.

This is the latest specialism offered by the Society as part of its accreditation scheme, launched in 1990. Accreditation gives recognition as a specialist across Scotland. Of the 10,000 Scottish solicitors, about 400 are now accredited specialists across 25 areas of law.

A six-strong panel has been created to consider candidates’ applications. It comprises: David Brown, Drummond Miller LLP; Joe Bryce, advocate; Anthony Hughes, Immigration Advisory Service; Nicola Loughran, Livingstone Brown; Charles McGinley, Gray & Co; Patricia Quigley, Patricia S Quigley; Stephen F Winter, McGill & Co.

James Ness, Deputy Registrar of the Society, said: “As a rule, those attaining accreditation as specialists are recognised by their colleagues within, and even outwith, their firms as especially knowledgeable within a particular area of law. They would have dealt with complex or unusual cases, which has allowed them to build on and apply their expertise, and also probably have contributed to the development of the area of law in articles or training.”

Solicitors who wish to apply for accreditation should visit the Society’s website or contact Sharon McFarlane at the Registrar’s Department for information and guidance (tel 0131 476 8151, or email sharonmcfarlane@lawscot.org.uk).

Notifications

Entrance certificates issued during May/June 2009

AIRZEE, Helen Elizabeth, LLB(HONS), DipLP
ANDERSON, Keith Downie, LLB(HONS), DipLP
BROWN, Craig, LLB(HONS), DipLP
BROWN, Shonagh Margaret, LLB(HONS), DipLP
CAMPBELL, Colin John, BSc(HONS), LLB, DipLP
CASSELS, Gillian Allison, LLB(HONS), DipLP
CULLENS, Susie Jeanne, MA(HONS), LLB, DipLP
DANZYSZAK, Carla Joy, LLB(HONS), DipLP
GARDEN, Claire Lindsey Helen, LLB(HONS), DipLP
GORDON, Calvin Andrew Manson, LLB(HONS), DipLP
HENDRY, William, LLB, DipLP
HOPE, Robert, BSc(HONS), LLB, DipLP
JAMIESON, Laura Ann, BSc(HONS), LLB, DipLP
KENNEDY, Mairi Louise, LLB(HONS), DipLP
LENNOX, William Gordon, LLB, DipLP
McGRATH, Karen Margaret, LLB(HONS), DipLP
MACINTYRE, Lynne, MA(HONS), LLB, DipLP
MARTIN, Claire Elizabeth, MA(HONS), MSc, LLB, DipLP
MILLAR, Karen Anne Duncan, LLB(HONS), DipLP
NISBET, Averil Marion, LLB(HONS), DipLP
RODGERS, Iona Joyce Bell, LLB(HONS), DipLP
ROSS, Stephanie Jayne, LLB(HONS), DipLP
SARAVOLAC, Tanja, LLB(HONS), DipLP
SCHOFIELD, Kim Antoinette, LLB(HONS), DipLP
THOW, Lesley Louise, LLB(HONS), DipLP
WATT, Erika Kennedy, BSc, LLB, DipLP
WOOD, Jennifer Curran, LLB(HONS), DipLP

Applications for admission May/June 2009

BENJAMIN, Mark David, LLB(HONS)
BLAIR, Rachel Elizabeth McLeod, BA(HONS), LLB, DipLP
BONE, Helen Muriel Nicoll, LLB(HONS), DipLP
BROADFOOT, Stuart William, LLB(HONS), DipLP
BROWNE, Laura Margaret, BEng, LLB, DipLP
CAMPBELL, Stuart Edward, LLB, DipLP
CHRISTIE, Erin Louise, LLB(HONS), DipLP
COCKBURN, Hannah, LLB(HONS), DipLP
COLE, Aimée Adamson, LLB(HONS), DipLP
DEWAR, Barry George, LLB(HONS), DipLP
FINDLATER, Kirsty Elizabeth, LLB(HONS), DipLP
FINDLAY, Gemma Clare, BA, LLB, DipLP
FOTHERINGHAM, Suzanne, LLB(HONS), DipLP
GRACIE, Laura Sophia, BA(HONS), LLB, DipLP
GRAY, Nicola Jane, LLB(HONS), DipLP
HAMEED, Abrar, LLB, MA, MBA
HANLON, Cheryl Samantha, LLB(HONS), DipLP
JOHNSTONE, Marcia

Professional news Society
Carr is Prince’s ambassador

Robert Carr, chairman of Anderson Strathern LLP, has been appointed by HRH Prince Charles, Duke of Rothesay as his ambassador for corporate social responsibility (CSR) in Scotland.

The annual ambassador award acknowledges the achievements of an outstanding individual who has shown leadership and personal commitment to responsible business practice.

Robert Carr is a director of Edinburgh Chamber of Commerce, a director of Scottish Business in the Community and a member of the Prince’s Trust Edinburgh and Lothian fundraising subgroup. He is also President Elect of the Society of Solicitors in the Supreme Courts of Scotland, chairman of the Law Society of Scotland’s Rights of Audience Committee and their Professional Negligence Accreditation Committee, and a member of the Society’s Medical Negligence Accreditation Committee.

The Scottish Law Commission is inviting submissions from solicitors as it considers its proposed Eighth Programme of Law Reform, which runs for five years from January 2010.

For the first time the Commission has launched an online consultation on its law reform proposals. This can be found on the Commission’s website, www.scotlawcom.gov.uk, following the link from the home page.

Topics already suggested include various topics relating to leases, securities and other property law matters; public law topics such as roads and other public rights of way, and compulsory purchase; executries and the administration of estates; the criminal liability of partnerships; a Scottish contract code, based on the European draft Common Frame of Reference; and prescription generally.

Online replies are encouraged. The consultation ends on 31 July.

Alexandria, LLB(HONS), DipLP
JUDGE, Elizabeth, LLB(HONS), DipLP
LEEMING, Anne, LLB(HONS), DipLP
Elaine Frances, LLB(HONS), DipLP
LU, Janine, BA(HONS)
LYNCH, Kieran, LLB(HONS), DipLP
Patrick, John Anthony, LLB(HONS), DipLP
McGUIGAN, Siobhan, LLB(HONS), DipLP
Clare, LLB, DipLP
McKINNEY, Robert, LLB(HONS), DipLP
McLAUGHLIN, Louise Claire, LLB(HONS), DipLP
McLEAN, Lyndsey, LLB, DipLP
Anne, DipLP
MACLEOD, Lisa, LLB, DipLP
Marie, LLB, DipLP
MACLEOD, Sheena, May, LLB
McMULLAN, Jennifer Marie, LLB(HONS), DipLP
McPHERSON, Stephen Peter, LLB(HONS), DipLP
MAHER, Caroline, MA(HONS), LLB, DipLP
MEAKIN, Daniel, LLB(HONS), DipLP
MILLAR, Karen Elizabeth, LLB, DipLP
MILLER, Victoria, LLB(HONS), DipLP
MORRIS, Alison, LLB, DipLP
MURRAY, Lynsey Carol, LLB(HONS), DipLP
NORMAN-THORPE, Karen, LLB, DipLP
OPENSHAW, Ryan, LLB(HONS), DipLP
RADDY, Nicola, LLB(HONS), DipLP
STOCKER, Katherine Marie, LLB(HONS)
STOKES, Catherine Ann, LLB(HONS), DipLP
WALLACE, Christopher John, LLB
WILSON, Victoria Marie, LLB(HONS), DipLP
WOODS, David, LLB
ZOLO, Desmond, LLB, DipLP

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Change the law – online

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Online replies are encouraged. The consultation ends on 31 July.

Email: lawscotjobs@o2.com

A mobile address book makes sense.
On the move

Andrew Buchan (above) is pleased to announce that he has been appointed General Counsel at SCOTTISH EQUITY PARTNERS LLP, a venture capital firm with headquarters in Glasgow and also an office in London. Andrew was formerly an associate with MACLAY MURRAY & SPENS, Glasgow.

W & A S BRUCE, Dunfermline, Kirkcaldy, Burntisland and Dundee, are delighted to announce that with effect from 1 July 2009 Selina Mackay has been appointed an associate of the firm.

DREVER & HEDdle, 56A Albert Street, Kirkwall, Orkney and 7/9 Princes Street, Thurso are pleased to announce that Serena Kelly Sutherland has been assumed as a partner of the firm with effect from 2 June 2009.

THE LINTS PARTNERSHIP, Edinburgh, intimate that Thomas Philip Harris has resigned as a partner with effect from 29 May 2009.

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MOWAT HALL DICK, Glasgow and Edinburgh, wish to announce the departure of Karen Kelso, senior associate, who has decided to take a career break. The firm would like to wish her well in her new ventures. They are delighted to announce that Amanda Masson (formerly of MORTON FRASER) has joined the firm as an associate with effect from 11 May 2009.

Drummond Miller

We are delighted to announce with effect from 1 June 2009, Jacqueline Stroud, Partner, will become Head of Family Law at Drummond Miller. Jacqueline has a great depth of knowledge and expertise in Family Law and is a Law Society of Scotland Accredited Specialist. Jacqueline is based in the Dalkeith office and can be contacted on 0131 663 9568.

This follows on from Fiona Tait intimating her retirement from private practice and Head of Family Law at Drummond Miller. Also from 1 June 2009 we are delighted to announce the assumption as Partner of Elaine Proudfoot. Based in the Edinburgh office Family Law Team, Elaine has many years’ experience in all areas of family law.

We are also delighted to announce the well deserved promotions of Jacqueline Moore to Senior Associate and Victoria Wilkinson to Associate from 1 June 2009. Jacqueline’s area of practice is Immigration law and Victoria practices Civil Litigation in the Court of Session department. Both are based in our Edinburgh office.

Elaine Proudfoot, Jacqueline Moore and Victoria Wilkinson can all be contacted on 0131 226 5151.

Also effective in June 2009 is the appointment of David Brown, a Court of Session Partner and Head of Immigration Law at Drummond Miller, to the Law Society’s Accreditation Panel for the Specialism in Immigration Law. David is based in our Edinburgh office and is one of the country’s leading practitioners in Immigration Law, offering a full range of services to clients. David can be contacted on 0131 226 5151.
Consultations

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

**Tax agents**
HM Revenue and Customs is open to suggestions on modernising its relationship with tax agents. See www.hmrc.gov.uk/consultations/index.htm.

- Respond by 7 August to powers.review-of-hmrc@hmrc.gsi.gov.uk.

**Prisoners’ rights**
Having been found in breach of the obligation to ensure free and fair elections by the European Court of Human Rights in the case of Hirst v United Kingdom (2004), the UK Government is obliged to lift its ban on convicted prisoners voting in elections. The Government’s view, unsurprisingly a restrictive one, is that the right to vote should be linked to length of sentence, with all those sentenced to less than one, two or four years automatically retaining their right and those sentenced to sentences greater than one, two or four years automatically losing that right; or else that those sentenced to between two and four years be subject to some form of judicial discretion in relation to their voting rights. Practical questions also need to be addressed such as how to ensure prison officers do not interfere in prisoners’ votes. See www.justice.gov.uk/consultations/docs/prisoner-voting-rights.pdf.

- Respond by 29 September to simon.meats@justice.gsi.gov.uk.

**Procurement**

- Respond by 21 August to procurementremedies@scotland.gsi.gov.uk.

**More illegal drugs**
As part of its “war on drugs”, which some people think it might not be winning, the UK Government has decided to make some more drugs illegal and it invites comments on this fact. One “consultation” deals with gamma-butyrolactone (GBL) and 1,4-butanediol (1,4-BD), and another with 1-benzylpiperazine (BZP) and a group of substituted piperazines which are increasingly discovered along with MDMA (ecstasy) and amphetamines. Views from “industry and commerce” are especially welcome. Both consultation documents are available via http://drugs.homeoffice.gov.uk/.

- Respond by 13 August to Drugconsultation2009@homeoffice.gsi.gov.uk.
Lawyers should make sure they take their holiday entitlement, and resist any pressure to remain in continuous contact while they are away, says Anna Buttimore of LawCare.

**Clean break**

An email sent by a partner at the London offices of Cleary Gottlieb Steen & Hamilton caused something of a furore after it was leaked to an Australian publication. Writing to other partners, Raj Panasar suggested that lawyers at the firm should be available even when on holiday, and that it was unacceptable for any solicitor to be unreachable by email for more than a few hours, and then only if they were on an international flight.

Cleary Gottlieb is an American firm and there is no statutory paid holiday entitlement in the USA, which may go part way to explain Panasar’s concerns, given the apparently more committed work ethic of his American colleagues. Whilst there is no indication that the other partners at the firm agreed with this view, or that it is set to become policy, it does demonstrate that in our increasingly technological culture it can now seem that there is no escape from the office.

**For the good of your health**

For a few years mobile phones have meant that we can be contacted by telephone at any time; now the arrival of the BlackBerry and similar devices allows us to access and respond to our email without so much as having to find an internet café. It is tempting to let clients know that we are available to them 24 hours a day, especially in the current competitive and challenging market – but is it healthy?

Lawyers commenting on the leaked email on the American Bar Association online forum generally thought not. “SB” said: “I am a young associate and was recently told… that I should be accessible on vacation. Vacations are a time to unwind and come back to the office refreshed. When this isn’t possible, we return like zombies, make mistakes and are constantly depressed. In addition to the toll that a working vacation takes on our health and mental sharpness, consider the families and friends that have to experience ‘more of the same’ while we are supposed to be focused on them for a change!”

An anonymous contributor was more scathing: “And people wonder why lawyers have such health problems. The obsession with total accessibility comes at a price. If you don’t let your people decompress they make mistakes and ultimately you have a less productive and less intelligent worker.”

**How to prepare**

LawCare has long advised lawyers to ensure that they take their full annual holiday allowance each year – the statutory entitlement in the UK is five weeks on full pay, including public holidays. In the light of this email, we may need also to recommend that during holiday times laptops and PDAs are left at home, and mobiles switched off.

If it seems difficult to do this, a little preparation may help in making your break from the office more relaxing:

- Let clients know as early as possible that you are taking some time off, and exactly when you will be away.
- Tell them who will be dealing with your work in your absence, and give them any necessary phone numbers and email addresses.
- Two or three days before you go away, contact clients to remind them that you are going on holiday and update them on the progress of their matter.
- Accept that reasonable clients do not expect their lawyer to be available all the time, and unreasonable clients are welcome to go elsewhere.
- Out-of-office reply is not recommended because it can be used by spammers to harvest your email address, but set your email to forward to your secretary or a colleague.
- Ask this same colleague or assistant to forward anything which is truly urgent to your personal email address, and check this once or twice during the week.
- Even if you are simply going boating on the Norfolk Broads, tell anyone you think may be tempted to pester you that you are going backpacking round Africa and there is no mobile signal.
- Remind yourself that you are not a heart surgeon, and none of the matters on your desk are so life or death that they cannot wait a few days.

The ABA website forum ran a poll asking users: “Are you reachable by email while on vacation?” Nearly half (47%) of respondents checked their email at least once a day; the other 53% said that cutting themselves off from work was the whole point of taking time off. Happily, it seems that outside a few firms, lawyers know that their families, and their mental and physical health, are more important than any client.

Anna Buttimore, administrator, LawCare

LawCare is a charity which offers support and advice to lawyers suffering from stress, depression, addiction and other health issues. The free and confidential helpline is available from 9am to 7.30pm from Monday to Friday, and 10am to 4pm at weekends and on bank holidays. The number to call is 0800 279 6869, and there is also a comprehensive website at www.lawcare.org.uk.
A trainee who has been unable to secure a qualified position asks for advice

Dear Ash,

I am nearing the end of my traineeship but I have so far not been able to secure a permanent job. I am getting anxious about the possibility of not having a secured position after working so hard to attain my degree and traineeship. Through my traineeship, I have gained experience mainly of commercial contracts and employment matters. Is there anything I can do to improve my chances of gaining employment?

Ash replies:

In the current economic climate, employment in the legal sphere seems to have slowed just as much as in other sectors. Consequently, the jobs that are available have more people competing for them.

I suggest that you concentrate first on reviewing your CV – there may potentially be room for improvement. There are many helpful websites offering advice on how to structure your CV correctly. There are also helpful books available on presenting CVs. These can be borrowed from the library in order to save money. Get a friend or indeed a colleague in your department that you trust, to look over your CV as an objective eye is sometimes helpful.

You could also brush up on your interview techniques by asking friends or family to conduct mock interviews with you, in order to highlight any improvements required in your answers or technique.

Alternatively, you may be able to access help and advice from your university careers service for feedback on your CV. I understand that most of the universities support graduates for a few years after graduation.

Other ways of improving your chances of standing out from the crowd may be to undertake some voluntary work in your spare time. For example you may be able to assist at organisations like the citizens’ advice bureau or at a local law centre, in order to expand on your legal experiences and knowledge.

I suggest that you contact some recruitment agencies too. Many good agencies advertise in the Journal, and some provide advice on preparation of CVs and interview techniques. As the agencies have direct access to employers, normally they would only need your CV to be forwarded to the employer, thus cutting out the need for you to spend time completing lengthy application forms.

You may also have to reconsider the type of permanent role you are looking for. In particular, although you have mostly contracts experience it may still be worth considering pursuing other types of legal jobs, e.g. legal roles in the public sector. Such jobs may not necessarily be focused on contracts work, but it may be worth pursuing these avenues if you are determined to remain in the legal field.

Alternatively, if you can afford it, it may be an idea to take a gap year to travel for a bit until the current downturn begins to improve. Depending on the type of travel undertaken, the experiences of such travel can be beneficial in highlighting certain attributes to employers, including independence, decision making skills and the ability to form good relations with people.

The best piece of advice I can give you is to not give up. I know from experience that this is easier said than done, but keep in mind an old saying: “When you feel like giving up, remember why you held on for so long in the first place”. If having a legal career is really important to you, then persevere and you will get there in the end.

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“Ash” is a solicitor who is willing to answer work-related queries from solicitors and trainees, which can be put to her via the editor: peter@connectcommunications.co.uk, or mail to Studio 2001, Mile End, Paisley PA1 1JS. Confidence will be respected and any advice published will be anonymised.

Please note that letters to Ash are not received at the Law Society of Scotland. The Society offers a support service for trainees through its Education and Training Department. For one-to-one advice contact Education and Training Manager Katie Meanley on 0131 476 8105/8200, or KatieMeanley@lawscot.org.uk.

www.lawscotjobs.co.uk
The Digital Britain final report is a wide ranging document designed to address the country’s lack of capacity, but falls short of offering a convincing blueprint, argues Valerie Surgenor

The UK Government formally set out its stall as to how Britain could benefit from an enhanced digital economy in January 2009, when it published its interim Digital Britain report (Journal, March, 36). Much was said at the time about its lack of vision and just how its objectives would be funded. Now, a few months on, the Government has produced the final Digital Britain report (www.culture.gov.uk/images/publications/digitalbritain-final-report-jun09.pdf), which it describes as “its strategic vision for ensuring that the UK is at the edge of the Global Digital Economy”.

The main aim of the report has always been to provide a “programme of action” that would hopefully drag Britain from behind to the forefront of the digital economy and ensure that we make the most of the new types of media that are available. At 245 pages the report claims to be the “most wide-ranging blueprint ever produced for the future role of technology in the UK”. It covers issues such as universal access to broadband, public service broadcasting, digital radio upgrades and regulatory suggestions with regard to piracy. Granted, it probably is the most wide-ranging discussion about Britain’s future role; whether it is as far reaching as many would like is of course another matter.

In its foreword the report identifies that “Doing nothing or leaving everything to the market would leave Britain behind”. This suggests that at long last the Government has realised that the clock is ticking for Britain and that we desperately need to formulate a strategy at least to keep up with our counterparts in America, Asia and Europe. It notes that the importance of staying ahead of the game is heightened by the severe global downturn from which all markets, including Britain, continue to suffer (nothing earth shattering in this statement!). Although the economic downturn has produced short term economic pressures, the report “primarily seeks to position the UK as a long-term leader in communications creating an industrial framework that will fully harness Digital Technology” (p4).

Nothing is clearer: high growth sectors such as software companies and other content developers need improved infrastructure. Those underserved through poor broadband service will not benefit from such economies and will remain excluded from a social network subset without affordable high-speed broadband, only enhancing, some would argue, the existing inequalities in society today. This article will attempt to examine legal developments that the Digital Britain report has raised in four key areas.

Tackling digital piracy
The issue of piracy (or, more accurately, file sharing) has never been more current. In April, we saw the conviction of the founders of The Pirate Bay, a Swedish online file sharing website, who were each given a custodial sentence and made to pay £3 million in damages; and in June

**Digital Britain: seven objectives**

At p3 the report sets out seven objectives which it seeks to achieve, as follows:

1. An analysis of the levels of digital participation, skills and access needed for the digital future, with a plan for increasing participation, and more coherent public structures to deal with it.
2. An analysis of our communications infrastructure capabilities, an identification of the gaps, and recommendations on how to fill them.
3. A statement of ambition for the future growth of our creative industries, proposals for a legal and regulatory framework for intellectual property in a digital world, proposals on skills, and a recognition of the need for investment support and innovation.
4. A restatement of the need for specific market intervention in the UK content market, and what that will demand of the BBC and its role in Digital Britain. What that means for the future of the C4 Corporation. An analysis of the importance of other forms of independent and suitably funded news, and what clarification and changes are needed to the existing framework.
5. An analysis of the skills, research and training markets, and what supply-side issues need addressing for a fully functioning digital economy.
6. A framework for digital security and digital safety at international and national levels, and recognition that in a world of high speed connectivity we need a digital framework, not an analogue one.
7. A review of what all of this means for the Government, and how digital governance in the information age demands new structures, new safeguards, and new data management, access and transparency rules.
an American woman was also fined £1.2 million for illegally sharing 24 songs in the first US file sharing case to be brought to trial. With such international focus on illegal file sharing, a British response was anticipated to address this issue and provide real progress in safeguarding such intellectual property.

In doing so, the Digital Britain report has introduced targets for internet service providers (ISPs) to make inroads into reducing illegal file sharing. The approach taken is a departure from that of a number of countries including France and New Zealand. The guardian of this proposed new initiative is Ofcom, the broadcast regulator, who will be granted new powers to ensure that ISPs comply with a code of practice to tackle the problem of piracy. As first raised in the interim report, a new "Rights Agency" would develop this code of practice, although where the Agency fails to get off the ground, the task will fall to Ofcom.

Initially, ISPs will be required to notify users who are file sharing illegally that their conduct is unlawful, in a bid to reduce online piracy. The intended aim of such measures is to reduce the level of infringement, amongst those individuals who are notified, by 70% within 12 months of notification. If this reduction is not realised, ISPs then will have the power to gather information in relation to serious repeat infringers and, if a court order is obtained, release this information (including the identity of those offenders) to copyright holders to allow them to take civil action (see chapter 4).

In addition, ISPs will be authorised to use technical measures against serious repeat infringers, such as bandwidth reduction (in an attempt to slow down their internet connection), protocol blocking or port blocking. Interestingly there will be no powers for ISPs to cut off anyone’s internet connection completely (the "three strikes and you’re out" model), an issue which has been a hot topic within Europe recently.

Clearly the measures are a starting point; however there is much discussion as to how effective they actually will be. The report asserts that notification is an effective way of reducing illegal file sharing and that where many people are not aware what constitutes an illegal download. This is a fair point; however the problems do not principally fall to individuals who make infrequent, or even simply one-off, attempts to share. The problem lies fundamentally with the larger and repeat infringers where there is little evidence that either notification or education will make any real impact on their behaviour. Further, the 70% reduction figure is viewed by many to be overambitious and a target that is unrealistic to achieve (Outlaw News, 16 June 2009).

How ISPs come to collect data, and how and when they can share such data, rightly raises piracy concerns as to how ISPs comply with data protection regulations, and until there is further clarification from Ofcom about the nature of data allowed to be obtained, collected and shared, these concerns will not go away.

Finally, the ability of ISPs to interfere and restrict internet access raises several questions. With such policies there are concerns that they will be enforced regardless of the individual who is file sharing illegally. In order to impose these measures the ISPs may apply them in a blanket fashion and may not localise the user. Where there are unsecure Wi-fi networks in operation, any number of people could use them ("piggy-back") to download illegal files, making it difficult to apply these measures appropriately – i.e. they may fail to target the real culprit!

Further still, recent discussions from the UN and rulings from the French courts have confirmed that an adequate broadband connection is as much a human right as access to food, water and shelter (news.bbc.co.uk/1/hi/technology/8102756.stm). Therefore there is a valid argument that interfering with an individual’s internet connection is a violation of their human rights and, in this respect, the ISPs could be treading on murky waters.

Copyright: the framework
The role of Ofcom, as outlined in the report, is an important one and the report sees its responsibility and powers developing and growing in relation to Digital Britain. In conjunction with the report, the Government is undertaking a consultation in relation to copyright infringement which will give Ofcom the power to take action in this area.

Continued overleaf >
This is scheduled to take place by the end of August 2009.

The report views that any IP infringement for profit should be treated as ‘theft’, and as such there should be criminal prosecution for offenders. The report highlights that the copyright framework which governs the UK is now 300 years old, and copyright licensing should be modernised to fit in with Digital Britain and the evolution of what can now be classified as copyright works. It lends support to the Government’s copyright strategy, in conjunction with the Intellectual Property Office (“IPO”), launched in December 2008, which is designed to consult with rights holders to develop the future of copyright protection and move towards a more “strategic vision”. This will be further strengthened by various European Commission proposals which will eventually introduce reform.

An interesting development proposed by the report is in relation to so called “orphan works”. These are works which are still under copyright but have lost their owner, or their owner cannot be identified. There are risks in undertaking any exploitation of such works, as the original owner could turn up and bring with them the threat of infringement claims. The report aims to reduce liability in such cases by allowing the development of commercial schemes which will be set up to allow rights in these orphan works to be obtained without the consent of the missing rights holder. Such schemes will have significant regulation and safeguards, which will run alongside the obtaining of these rights, as set up and monitored by Ofcom in accordance with its new role.

Empowering broadband access
One of the cornerstones of the report is the Universal Service Commitment (USC). Indeed one of the major focuses of the final report is this desire to “empower” every person by making digital services easily and universally available.

The most publicised recommendation made by the report is, of course, in relation to broadband access which is key in relation to the USC. Currently, 11% of homes cannot access 2Mbps or higher broadband, which leaves 2.75 million homes with inferior or non-existent connection (report, p54). It is, of course, a particular problem in rural areas and many would argue that the status of an adequate internet connection is viewed as a human right which should be easily accessible by everyone. The report emphasises the importance of this, and proposes the mechanics behind ensuring that the Chancellor’s 2009 budget pledge, that there will be universal 2Mbps broadband by 2012, will be attained. The way in which this will be achieved is through the development of existing services such as cable, wireless and mobile broadband. This development however will be costly, and in order to raise the significant amounts of finance required, the introduction is proposed of a new levy of 50p a month on each fixed line connection. This levy is intended to create a Next Generation Fund of approximately £175 million on an annual basis, with the fund being administered by Ofcom.

This “broadband tax”, as it has become called, will be used to upgrade and invest in cable, mobile and wireless infrastructure to ensure that Britain has a solid digital foundation. It is however this portion of the report which has drawn much criticism and from many sources. The first is that 2Mbps is just too slow to make a significant difference, and indeed many would argue is yesterday’s speed. The introduction of fibre optic broadband, having a connection of 10, 20 or even 50Mbps is quite commonplace, which has led to criticism that the report is only making empty recommendations in this area.

The introduction is proposed of a new levy of 50p a month on each fixed line connection – the “broadband tax”, as it has become called

It will come as no surprise to hear that the Japanese and the South Koreans have put in place their plans to provide greater access and at a greater broadband speed than that proposed by the report. Not only that, the report fails to acknowledge that a substantial proportion of those individuals who don’t have access to the internet at present, don’t actually want access to it! Furthermore, a portion of this tax will go to update and modernise mobile networks, which will provide funding to operators. There has been comment that major international mobile providers who already have vast resources should not benefit from such funding, which is designed to be an initial investment to get services up to scratch.

It is interesting to note that the Commons Business and Enterprise Committee has, since the report was published, announced that it is to investigate whether the 2Mbps speed is “ambitious enough”, and how fair is the broadband tax. Their report will be published some time after 25 September 2009.

Net neutrality
This is an area which is particularly controversial. With the exception of the commitment to achieve universal internet access by 2012, there is no attempt to move towards net neutrality.

So-called net neutrality is where the access is openly available for user control without Government or ISP interference. Where the Government is taking such an active role in making a basic level of service available to users and where there are penalties imposed for illegal file sharing, this has been claimed by some to be the first step in Government regulation of the internet.

The new obligation placed on ISPs to target and reduce file sharing, coupled with the active role of Ofcom is, for many, a worrying prospect. In particular the powers of ISPs to take measures such as bandwidth reduction or protocol/port blocking place restrictions on internet use and take Britain even further away from net neutrality.

Not so brave
The report is unfortunately not the radical brave new world that many had hoped for but, given the findings in the interim report, this has not come as a surprise. It is a wide ranging report, but its 245 pages could never be expected to address all the issues. Whilst there are a number of recommendations which are to be applauded, unfortunately this is all they are. It is perhaps most lacking in the area of creation of rights and obligations.

I would like to acknowledge the assistance of trainees Arlene Wilson and Kirstin Stobo in preparing this article.

Valerie Surgenor is a senior associate with MacRoberts

July 09
Professional practice  Salary waivers

Advice for those considering salary waivers to help the business they own or work for to survive the recession

Beware salary waiver tax traps

With the downturn in the economy showing few signs of easing, a growing number of businesses are looking at ways to get through some difficult times. For some clients, often owner managers, one option is to waive their salary to alleviate some of this pressure. Such arrangements are generally decided on an ad hoc basis, often at the end of each month, depending on cash available in the business.

A salary waiver occurs when an employee or director gives up their rights to receive salary, for nothing in return. One might assume that if a person has not actually received a salary payment then there would be no tax due. However, this is not always the case.

If the salary has been waived before it is regarded as received for employment income purposes, the waived salary will not constitute taxable earnings of the employee or director. Where the salary waived has already been treated as money earnings received by an employee or director for income tax purposes, there is an obligation for the employer to account for income tax under Pay As You Earn and national insurance contributions.

Broadly, earnings are treated as received for tax purposes when payment is made or, if earlier, when a person becomes entitled to payment of, or on account of, the earnings. For directors, there are additional rules which can result in earnings being treated as received on an earlier date. For example, this would occur where sums on account of earnings are credited in the company accounts or records, irrespective of whether the director can draw down such sums.

As a result, if an employee or director is entitled to receive payment of their earnings before the payment is actually made, they will be treated as having received the earnings as soon as the entitlement to payment of the earnings arises. In such cases, tax is therefore due, regardless of whether the earnings have been received or not.

While a salary waiver may achieve the desired commercial results, a valid salary sacrifice may offer a more appropriate solution. In such cases, an employee usually gives up the right to part of their future cash salary in exchange for a non-cash benefit, such as childcare vouchers or employers’ contributions into a pension scheme. However, the individual also has the option to sacrifice salary in return for nothing.

For a salary sacrifice arrangement to be effective, the terms of the employment contract set out between the employer and employee must be varied to reflect the change in entitlement of the employee, before the changes are implemented.

Fundamentally, salary must be sacrificed before the employee is entitled to it, and so care should be taken particularly where salary is paid in arrears, in whole or in part. There are a number of other considerations when sacrificing salary, including ensuring compliance with national minimum wage legislation. If employees and directors wish to help their business by waiving their right to salary, they should ensure this is implemented as tax efficiently as possible.

Lorna Tutty is an associate with Maclay Murray & Spens LLP and a member of the Tax Law Subcommittee of the Law Society of Scotland.
The content of the Society’s Risk Management Roadshow is designed to raise awareness of the latest claims trends and risk issues affecting the profession, and promote discussion of the most effective strategies for mitigating these risks.

This year’s Roadshow sessions opened with some sobering facts and figures regarding the recent Master Policy claims experience, and some concerning emerging risks: the increased risk of fraud, both internal and external (as discussed in last month’s Journal article); increased numbers of lender claims; 85% of the sums paid/reserved in the current year are property/conveyancing-related. Property/conveyancing accounts for the highest value claim, the largest number of high value claims and the highest frequency of intimations of any area of practice.

Consequently, many of the case studies in this year’s Roadshow were property related.

“Historical revisionism”
One of the concerns currently being expressed in relation to the impact of the recession, and addressed in the Roadshow material, is that clients experiencing changed circumstances and financial pressures will be prompted to re-examine advice given by solicitors, settlements achieved and contracts documented and, with the benefit of hindsight, allege that risks should have been anticipated, that they should have been better protected, that a better deal should have been achieved for them.

Take the following scenario:
Frisk & Co acted for Mr Cleek in pursuing a claim of damages 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. Mr Cleek appeared to be recovering well from his injuries but the prognosis was uncertain. As Mr Cleek had recently been made redundant, he was keen to settle and to accept the insurers’ offer.

Two years later, Mr Cleek alleges that, since he will never fully recover from his injuries, his claim is worth at least £100,000, and he should not have accepted the insurers’ offer.

This case study was devised in response to a concern recently raised with Marsh by a solicitor. The practice had found that some insurers were making early offers to clients in personal injuries cases of a sufficient amount to tempt clients into agreeing quick settlement. Often these offers were made where no medical report(s) had been obtained. The practice’s concern was to make sure that it had advised clients fully in such circumstances, and protected its position in the event that the client accepted an offer which turned out to be much lower than could have been achieved at a later date, or, conversely, rejected an offer where the ultimate settlement ended up being lower.

To minimise the risk of a claim, or to be in a position to robustly defend a claim in such circumstances, solicitors will want to be able to demonstrate that their client was fully advised of the terms of the offer, and advised that, if they were to accept the insurer’s offer “in full and final settlement” before the long term consequences of the injuries were known, they might be irrevocably accepting a lower settlement figure than the circumstances justify. The most effective means of achieving this is to confirm the advice in writing to the client and ask the client...
to sign and return a copy of the advice and confirming their instruction. Retaining clear file notes of conversations with your client which evidence their acknowledgment of your advice may be the next best option.

Instances of “historical revisionism” are not restricted to personal injury or litigation cases. The Roadshow materials illustrated a range of scenarios across a variety of practice areas, one involving allegations by a “disappointed beneficiary” that, as a result of “poor advice” given to her parents when transferring title to their home, she had received a significantly reduced inheritance. Responding to this sort of allegation will be assisted by having a clearly defined scope of engagement and a well documented file.

Break notices

The claims experience indicates that, in the current economic climate, landlords of commercial premises will more readily take advantage of the slightest deficiency in the giving of notice to exercise a break option in a commercial lease. One of the Roadshow case studies addressed the heightened risk of a purported break notice being ineffective, and what steps could be taken to avoid this type of claim.

Humphrey & Hotspur LLP acted for Lush Developments Ltd in taking a lease of commercial premises. The terms of the lease included a break option which could be exercised at either party’s option after five years. The lease having been successfully finalised, Humphrey & Hotspur closed their file.

Shortly before the five year period was up, Humphrey & Hotspur received a letter from Lush instructing them to serve a break notice in terms of the lease. This was duly done.

Early the following week, as the fee note was about to be issued, a call was received from the MD of Lush saying that the landlord was indicating that the break notice had not been served in accordance with the terms of the lease, and was therefore ineffective. Lush made a claim against Humphrey & Hotspur LLP for the additional rental costs they would incur now that they were bound into the lease for a further five years.

The failure of the break notice could have arisen as a result of any one of a number of defects, including:

- name (identity) and/or address of landlord incorrect. The property may have changed hands since the start of the lease;
- notice not given timeously in accordance with the terms of the lease documentation;
- incorrect method of service.

This case study initiated lively discussion at each Roadshow session. Notwithstanding the successful appeal by Scottish Enterprise against Ben Cleuch Estates in 2008 (on the particular facts of this case, a break notice was held to have been validly served when received by the correct party at the correct address but in his capacity as a director of the wrong company), the strong message is that a “belt and braces” approach should be adopted to drafting and serving break notices. Risk mitigation suggestions included:

- Consider using a checklist to ensure that all the essential elements are addressed thoroughly, including the landlord, time limit, address and method for service. Check the information, and check it again!
- Confirm the identity of the current landlord (consider undertaking property searches to establish the current owner of the property).
- Where the address for service is a company’s registered office, use Companies House to verify the registered office address.
- If the firm acted for the client in relation to the lease itself, it may help manage the client if a sign-off letter issued to the client mentions the importance of allowing sufficient time for the drafting/checking of the break notice and service within the time limit.

All these checks take time, and being instructed at short notice clearly introduces an additional risk factor. Delegates made the point that last minute instructions require careful consideration. Consider whether these are instructions you wish to take on. If you do, consider how best to minimise the risks where time constraints mean that you have to rely wholly on information provided by your client. Ensure that your client is made aware of the potential implications of getting the landlord’s name or address wrong in any respect.

Lender claims

The downturn in the property market in the early 1990s illustrated how professionals (and solicitors in particular) may be the target for claims when lenders suffer losses arising out of mortgage default. Errors or omissions which would have gone undetected or caused no loss on the part of a lender while property prices were rising may become the cause of claims in the current market. Claims by lenders very often allege breach of contract on the basis that the terms of the lender’s instructions have not been fully complied with (for example, a failure to comply with the reporting requirements of the CML Handbook). Lenders often argue that had certain facts been reported to them, they would not have proceeded with the loan.

RSA, the lead insurer on the Master Policy, contributed to the Roadshow materials a series of questions testing delegates’ knowledge of the CML Handbook reporting requirements. Imagine you are acting for both purchaser and lender in a residential property transaction. Should you report if you discover that the property being purchased was bought by the seller three months earlier for 5% more than the clients are now paying? Should you report where the property is to be let to friends of the student child of the clients? Should you report where you become aware that the clients are receiving a cashback discount on the purchase price?

The answer is “yes” in each case. The general rules that emerged were (1) make sure you know what your CML reporting obligations are; and (2) “If in doubt, report”.  

Calum MacLean and Marsh

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

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

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Professional briefing  Civil court

**ASBOs: what standard?**

What constitutes a commercial action, differing decisions on antisocial behaviour orders, and when to apply the Vexatious Litigants (Scotland) Act are among the many matters considered by Sheriff Lindsay Foulis in this month’s civil court round-up.

**Caution for expenses: legal aid**

In *Ballard v Bohannon* [2009] CSOH 56 (17 April 2009), Lord Brodie was moved to order caution to be found by the pursuer in a petition to recall sequestration. His Lordship observed that while an award of legal aid was a factor pointing away from an order to find caution, it carried less weight in the event that the grant of legal aid was made with limited information. Lord Brodie was less than convinced as to the strengths of the pursuer’s case. There were reasons to doubt the pursuer’s credibility, questions as to the manner in which the litigation had been conducted to date and doubts as to what in real terms the present action would actually achieve. Lord Brodie subsequently awarded the defender expenses out of the Scottish Legal Aid Fund in both this action and a related action of reduction: [2009] CSOH 89 and 90 (24 June 2009).

**Summary decree: an admission?**

In *Van Klaveren v Servisair (UK) Ltd* [2008] CSOH 136; 2008 SLT 982 summary decree was granted restricting further issues simply to quantum on the basis of liability having been admitted on a reasonable interpretation of correspondence (see November 2008 article). The decision has recently been overturned in the Inner House: [2009] CSIH 37; 2009 SLT 576. Their Lordships considered that the letter amounted only to an extrajudicial admission which could be withdrawn at any time prior to the record closing. It did not suggest that the defenders were undertaking a binding obligation. Any admission of liability generally was provisional, open to variation in the event of new information emerging, until such times as parties’ positions were formalised. Subsequent correspondence did not contain an acceptance of any offer which the letter might have set out.

**Delay, but no article 6**

Lord Brailsford’s decision in the application by Baden-Württembergische AG (see March article), to allow registration of a foreign charge despite a considerable delay, was upheld in the Inner House on 29 April 2009 ([2009] CSIH 47). In particular their Lordships observed that article 6 of the European Convention of Human Rights had no application to the passage of time between the execution of the instrument and steps being taken to register it.

**Sist pending other actions**

In *Allison v Henry Robb Ltd* [2009] CSOH 83 (12 June 2009) a motion was made to sist actions for damages arising out of the pursuer developing pleural plaques, on the basis that the Damages (Asbestos-related Conditions) (Scotland) Act 2009 was subject to challenge by judicial review. The pursuer argued that the defenders were part of a nationalised industry and the European Convention could not assist them. Lord Hodge granted the motion. In addition to avoiding unnecessary expense and inconvenience, his Lordship took account of the asymptomatic nature of the pursuer’s condition.

**Productions: averments needed**

The mere lodging of a production is in no shape or form significant. In *Aberdeen Joinery Windows and Doors Ltd v Salaam*, Aberdeen Sheriff Court, 30 April 2009 the defender’s agent lodged an expert’s report as a production. Its content was not subject to averment. The defender’s agent sought to cross examine by reference to the content of the report. Objection was taken and upheld. The central parts of the report should have been the subject of averment.

**Proof in replication**

In *Watt v Watt*, 29 April 2009, Lady Smith was moved to allow proof in replication after submissions had commenced. Her Ladyship considered such a course of doubtful competency, and further that a party who had moved to submissions without seeking proof in replication might well have waived any such right. By that time all evidence had been led; thus a party knew everything concerning the evidence and was able to consider his or her position and determine whether further evidence was necessary. If a party did not make such a motion but moved on to submission there was an attraction in the argument that any right to lead further evidence was waived. Different considerations applied to a motion to lead additional evidence as a result of new information.

**Appeals: whether leave required**

In *Brown v Brown*, Ayr Sheriff Court, 11 May 2009 Sheriff Principal Lockhart
determined that it was not necessary to seek leave to appeal against an interlocutor which varied a residence order moving the children from one parent to the other: implicit in such an order was an order ad factum praestandum since implementation required delivery of the children. The sheriff principal further observed that there was no absolute rule prohibiting a residential parent from moving with the children to another jurisdiction; in the present case it was appropriate that the mother be given the opportunity to present a fuller picture regarding the children.

Family actions: interim interdict
In **DM v JM** [2009] CSOH 65 (8 May 2009), a divorce action, the second defenders sought the recall of an interim interdict against them disposing of trust property. The pursuer contended that the first defender had transferred significant funds into the trust with a view to defeating the pursuer’s claims for financial provision. Lady Clark of Carlton considered that the grant of an interim interdict against a third party fell within the ambit of s 18 of the Family Law (Scotland) Act 1985 and an amended interim interdict remained in place.

Commercial actions: missives
In **Stewart Milne Group v Cruickshank**, Aberdeen Sheriff Court, 26 May 2009 the issue considered by Sheriff Tierney was whether an action of implement of missives was a commercial cause. The pursuers were in the business of constructing and selling residential properties. The defenders were not so engaged in any way, albeit there was a question of the purchase being for the purposes of “buy to let”. Sheriff Tierney, having considered the background to the introduction of commercial actions, considered that the definition was a wide one. The crucial factor was not the relationship between the parties but the underlying transaction or dispute. Did it have a commercial or business nature? Sheriff Tierney did not consider that the definition of “consumer contract” in the jurisdictional context assisted. That had a special function. He decided that the actions were commercial causes. The purpose behind the purchase was a further reason for reaching that conclusion. The sheriff further observed that had he decided that the action was not a commercial cause, he had difficulty in considering that the appropriate disposal was dismissal. Commercial causes came under the general umbrella of ordinary causes.

Antisocial behaviour orders
In **Glasgow City Council v Ferguson**, 22 May 2009 Sheriff Beckett, granting an antisocial behaviour order, concluded that the standard of proof was on balance of probabilities. In considering whether the order was necessary, the fact that there had been a change in the defender’s behaviour after the grant of an interim order was not crucial. The potential consequences of such an order and of a breach of the interim order would be a primary motivation in the defender moderating his behaviour. The order was necessary when account was taken of the nature and frequency of the defender’s previous behaviour.

In **Stirling Council v Harris** 2009 GWD 19-301 Sheriff Cubie came to a different conclusion, deciding that the standard of proof was beyond reasonable doubt. Whilst the behaviour complained of could be described as unpleasant and confrontational, in the context of neighbours having a marked difference of opinion, it did not amount to antisocial. Even if it was, the pursuers had taken no steps to resolve matters prior to instituting procedure and thus it had not been established that the order was necessary. In addition the terms of the order were too inspecific.

Jurisdiction: Insolvency Act
In **Gerard (Hynd’s Tr)** [2009] CSOH 76; 2009 GWD 20-333 the issue was whether an application for an order in terms of s 426 of the Insolvency Act 1986 should be made to the sheriff court or could be made to the Court of Session. This question arose because the sheriff court now had exclusive jurisdiction over petitions for sequestration, courtesy of the Bankruptcy and Diligence etc (Scotland) Act 2007.

Lord Glennie considered that the application, for a declaration that the bankrupt’s interest in property in Dundee formed part of his estate in English bankruptcy proceedings, could be entertained in the Court of Session. The recent legislation gave the sheriff court exclusive jurisdiction only in petitions for sequestration. Further, jurisdiction was based on the debtor’s residence. In an application under s 426, the connection would be under the property. If there was more than one property in different places, a number of applications might be required if the Court of Session had no jurisdiction. Further, as the application was for enforcement of an English bankruptcy order and the manner of enforcement was not stipulated, there was no reason to suppose that the court had no jurisdiction. In the case of an application in terms of s 426(4) for assistance from courts in other parts of the UK, the appropriate court might well depend on the assistance sought.

Vexatious litigants
In **Lord Advocate v McNamara** [2009] CSIH 45 (4 June 2009) the Inner House considered the terms of s 1 of the Vexatious Actions (Scotland) Act 1898. Their Lordships observed first that the purpose of the legislation was to anticipate potential future abuses of process. The institution of proceedings included counterclaims, but the Inner House had doubts as to whether an appeal would ordinarily fall within the definition. Proceedings were vexatious if they were devoid of reasonable grounds for their institution. The fact that previous actions had failed or were abandoned did not necessarily mean that they fell within that category. Whether a person had habitually and persistently raised such actions went beyond the number of proceedings. It was necessary to look at the whole history of a litigant’s activity in the courts. If some actions raised were not vexatious, this might have a bearing on the issue as to whether vexatious proceedings were commenced habitually. In considering whether an order should be made, the party’s conduct in other proceedings, the need to protect persons from further unfounded actions, the drain on a court’s resources, the prima facie right to raise an action and the availability of other powers to deal with any abuse of process were all factors to be taken into account in the exercise of discretion.

**Update**

Since the last article Mulhern v Scottish Police Services Authority (May article) has been reported at 2009 SLT 553, J A McClelland and Sons (Auctioneers) Ltd v J R Robertson and Partners Ltd (March) at 2009 SLT 531, Luo Properties Ltd v Schuh Ltd (March) at 2009 SLT 553, Kevan M Smith Ltd v Tevendale and B v B (Both November 2008) at 2009 SLT (Sh Ct) 21 and 24 respectively, Mono Seal Plus Ltd v Young (May) at 2009 SLT (Sh Ct) 31, and Black v Black (January) at 2009 SLT (Sh Ct) 43.

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Professional briefing  Licensing

It now looks as if many licensed outlets will not have the necessary premises and personal licences in place in time for the 1 September deadline.

Scotland the unready

There are many dates which stick in one’s memory, be they birthdays, anniversaries, memories of heroic triumphs or cataclysmic disasters. I suspect that most of my fellow licensing lawyers are anticipating 1 September 2009 with considerable dread.

Scotland is simply not ready. Out of the hundreds of premises licences which I have successfully applied for, I have seen only two, both from Glasgow. Come 1 September my clients will be committing an offence if the summary of their licence is not on display at their premises. As an aside, the two summaries which I have seen extend to eight pages. Add these to the statutory notices about children, and it is clear that very little natural daylight will be able to filter into the average pub. One presumes that the law enforcement agencies will have to adopt a pragmatic approach in these circumstances, but the same may well not apply to other problems which can be laid at the feet of the licensees themselves.

Who is in charge?

A premises licence will not be effective unless there is a designated premises manager. That person must be the holder of a personal licence. A personal licence holder must possess a relevant licensing qualification. That all sounds terribly simple. Yet I have encountered many licensees who believe that having their ServeWise or BII certificate means that they have a personal licence. Even more frighteningly, there are many in the trade who only now are signing up for the training courses.

Once you have your personal licence, what then? A very good question. Some boards allowed you to nominate a premises manager even if he or she did not have a personal licence at the time of application, then play catch up. Some boards have forms to be completed; some are happy with a letter; others require a minor variation. All of these ancillary matters are rendered more confusing by the absence of any assistance in the regulations, and the fact that each board has been left to invent its own procedures and forms.

Licensed to train?

Training is another issue which will cause huge problems. If you are a board member, you may sit for three months before undertaking training. Remarkably, if you are a licensing standards officer, you have 18 months. But if you are a student looking to supplement your allowance by some part-time bar work, not one solitary pint may you pull without having undergone a training programme. This training must be given by the holder of a personal licence, or by someone holding a qualification "accredited for the purposes of [the relevant] regulation by the Scottish Qualifications Authority".

There is some confusion about this. It would seem daft if persons who were accredited to train people to personal licence standard were not allowed to do staff training; however, one of Scotland’s top licensing lawyers is of the view that at present, only a personal licence holder may carry out the training. Written records must be kept on the premises at all times for inspection on demand by police and LSOs. Holders of personal licences will remember that failure to produce their licences when they are at work will result in conviction, fine and possible endorsement of licence.

Time for a rethink

This process started promisingly, with the excellent Nicholson report. The primary legislation was quite a decent piece of work; however, the subsequent regulations, with their petty and ill considered provisions, do make one wonder whether all the expense and stress of the last 18 months will really have been worth while.

Tom Johnston, Young & Partners LLP, Dunfermline

All of these ancillary matters are rendered more confusing by the absence of any assistance in the regulations, and the fact that each board has been left to invent its own procedures and forms.
The limits of listing

Whether a structure falls within the curtilage of a listed building may be a difficult question requiring advice ahead of any planning application or acquisition.

Listing is a mechanism designed to manage and safeguard any changes made to buildings of a special architectural or historic character. If such a building appears on the statutory listing, you must obtain listed building consent from the relevant planning authority if you wish to demolish, alter or extend internally or externally a listed building in any manner that would affect its character as a listed building. It is a criminal offence to carry out such works without this consent.

The listing applies to the whole building or structure at the address named on the list, and covers both the interior and exterior of the building. However, just because a structure is not individually listed does not exclude it from also falling within a listing category. The Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, s 1(4)(b) states that a listed building also includes “any object or structure within the curtilage of the building which, though not fixed to the building, forms part of the land and has done so since before 1st July 1948”.

The bounds of “curtilage”

The term “curtilage” is not defined in this, or any other, pieces of legislation – which often results in difficulties in ascertaining what exactly comprises part of a listed building, and thereafter what may require listed building consent for alterations.

Examples of ancillary structures falling within the curtilage of a listed building include farm steadings, boundary walls, gate lodges, garages and estate buildings. An examination of the listing schedule (available on Historic Scotland’s website) may be helpful but is not conclusive. Such structures are often the subject of development proposals (particularly for housing), and the utmost care should be taken to establish whether they lie within the “curtilage” of a listed building. If so, listed building consent in addition to planning permission will be required.

Four tests

Historic Scotland have set out four tests which are usually applied by the planning authority to determine if a structure falls within the curtilage of a listed building. These are as follows:

- **Were the structures built before 1948?** This test follows the requirement in the legislation that for a structure to comprise part of the curtilage, it must have formed part of the land of the main listed building since 1 July 1948. Anything built on the land after this date will automatically not form part of the curtilage of the listed building.

- **Were they in the same ownership as the main subject of listing at the time of listing?** One of the primary tests in assessing curtilage is the ownership of the buildings at the date of the statutory listing. This criterion is demonstrated in Watts v Secretary of State for the Environment and South Oxfordshire District Council (1991) 62 P & CR 366, which concerned a farmhouse, wall and barn. These buildings once formed part of one entity and were subsequently split by separate ownership. Judgment on the extent of the curtilage and listing of the farmhouse was made on the basis of ownership and physical occupation, and the fact that listing of the farmhouse took place after the property was divided.

- **Are the structures still related to the main subject on the ground?** This factor requires consideration of the physical layout and structure of the buildings. For example, examination of the buildings to see whether they are divided by any modern road that would redefine the relationship (e.g. the curtilage of a farmhouse may extend to the steading, although this may not be the case where the farmhouse is separated from the steading by a public road).

- **Do the structures clearly relate in terms of their original function to the main subject of the listing?** The leading case of Methuen-Campbell v Walters [1979] 1 QB 525 states at p 544 that for one piece of land to fall within the curtilage of the other, “the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter”. This will be determined by a combination of factors including the physical layout, purpose and current ownership of the buildings in question.

In the event of uncertainty, you must consult with the planning authority and/or Historic Scotland.

Further details on these criteria can be found in the Historic Scotland Memorandum of Guidance, currently being replaced by the Scottish Historic Environment Policy.

Until a further policy or legislation is drafted, for any guidance as to whether a property will fall within the curtilage of a listed building rests on these four tests, relevant case law and a detailed examination of the site location.

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**Ancillary structures are often the subject of development proposals (particularly for housing), and the utmost care should be taken to establish whether they lie within the “curtilage” of a listed building.**

**The leading case of Methuen-Campbell v Walters [1979] 1 QB 525 states at p 544 that for one piece of land to fall within the curtilage of the other, “the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter”. This will be determined by a combination of factors including the physical layout, purpose and current ownership of the buildings in question.**

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**Alastair McKie, Head of Planning and Environment, Anderson Strathern LLP**
One year since the latest reforms to the Scots law of bankruptcy came into force, the insolvency trade body R3 has identified a number of areas of uncertainty surrounding the law where it believes clarification is needed.

Debt traps

The bankruptcy reform provisions of the Bankruptcy and Diligence etc (Scotland) Act 2007 came into force on 1 April 2008. A year on, how are the reforms playing out in practice? Change has taken place against the backdrop of a battered economy in which credit has largely dried up, and it is difficult to identify the influence of reform in the increased number of sequestrations being initiated.

Starting off
Entry requirements remain a mess. The qualifying threshold for a creditor petition is now £3,000, but remains £1,500 for a debtor petition. But the threshold for a concurring creditor to a debtor petition is £1,500, not £3,000 (reg 13, Bankruptcy (Scotland) Regulations 2008, for purposes of s 7(1)(d), Bankruptcy (Scotland) Act 1985). This means that a creditor owed more than £1,500 can serve a statutory demand which if not satisfied may constitute the apparent insolvency of the debtor, but only the debtor can seek sequestration based on this; the creditor has to find another creditor or creditors to aggregate in excess of £3,000 before the apparently insolvent debtor can be sequestrated.

Confused? Try explaining that to a creditor who knows he can petition for liquidation of a company which owes him more than £750!

The act and warrant previously issued to a trustee is now no more. The prescribed forms in the 2008 Regulations refer to the date of award of sequestration, and there is no reference to vesting. In time the profession may adjust to having no explicit evidence that the debtor’s assets have vested in his trustee; but for the moment, the debate needs to be had every time assets are being disposed of. There is no indication that the Accountant in Bankruptcy (“AiB”) is prepared to indulge the profession by amending the forms to include a reference to vesting, and the profession will need to accept that vesting occurs by virtue of the award.

Sequestration for rent has been abolished, although the landlord’s hypothece remains. Practitioners remain unclear how a security shorn of its enforcement or perfection mechanism is to work, and no guidance has been given as to how the authorities believe it is to work. It is accepted that it may give a landlord ranking in processes where there is ranking, but how and in what circumstances, and the nature of the ranking, are less than clear. A case for seeking judicial guidance? Time will tell.

Taking over
Section 18(2)(g) of the 1985 Act permitted an interim trustee to close down a debtor’s business. This has been repealed. The interim trustee must however still take control of the debtor’s assets to preserve the estate. Complex questions about liability and indemnity arise if the interim trustee allows the debtor to continue to trade; but is that possible if the trustee controls the assets? Presumably it is not intended that the interim trustee requires to trade whatever the commercial situation and imperatives. The reason for repeal of the right to close the business remains obscure, although the AiB has expressed the view that it would be inappropriate to “close down the business as sequestration might not be awarded, so presumably her intention is that the interim trustee does trade the business in all circumstances.

The 2008 Regulations stipulate forms 21 and 22 for use by an insolvency practitioner and the AiB respectively to record abandonment of heritage. These are to be recorded in the Register of Inhibitions (the register in which the sequestration is recorded). Since these affect heritable property it would appear logical that such abandonment be (also) recorded in the Register of Sasines or Land Register, but it is unclear whether the Keeper will accept the form for registration.

Meantime, given that the form includes a consent to registration for publication, it would seem wise to record it in the Books of Council and Session.

Section 21A of the 1985 Act (which deals with the statutory meeting of creditors) has been amended. Subsection (2) requires the trustee not later than 60 days after the date on which sequestration is awarded to advise creditors whether he intends to call the statutory meeting. If he so intends, subs (6) requires him to call the meeting within 28 days of his giving notice of his intention; if he does not so intend, creditors may subject to the conditions in subs (4) and (5) request that he do so and the same time limit applies. Notwithstanding all of this, subs (7) requires the trustee not less than seven days before the date fixed for the meeting to advise every creditor known to him of the date, time and place of the meeting.

It would seem sensible that a trustee intending to hold a statutory meeting should simply call the meeting (by notice giving place, date and time) within 60 days of the award of sequestration, but such a combined notice is certainly not compliant with the statutory provisions, which appear to require three separate communications to creditors. Efficient and creditor-friendly communications to creditors.

Agreements and orders
Bankruptcy restriction orders and undertakings were introduced to great fanfare. Applications for an order may only be made by the AiB, and one searches in vain for provisions dealing with the consequences of breaches of
undertakings or orders. Since these are intended to remain in effect long after the debtor has been discharged of his debts and the trustee may have been discharged of his administration, this begins to look like the proverbial toothless tiger.

An income payment agreement (“IPA”) can be made voluntarily by debtor and trustee following form 20 annexed to the 2008 Regulations, prior to the debtor’s automatic discharge (s 32(4D), applying s 32(2XA) as it applies to an income payment order (“IPO”) made by the sheriff). It may be enforced as if it were an IPO except that s 32(2ZA) is disapplied, meaning that failure to comply with an IPA is not an offence rendering the debtor liable to a fine or imprisonment.

That suggests the only remedy is for the trustee to apply to the sheriff to convert the IPA to an IPO under s 32(4L), which specifically requires the sheriff to make an IPO on the same terms as the IPA. This in turn suggests that a second application would then be required for a variation to take account for example of any default by the debtor. Whether any missed contributions on a three year IPA or IPO can be collected, and if so how, remains obscure; the AiB is of the view that an IPO cannot be extended to collect missed contributions. There may be issues to be resolved as to the liability of a trustee who allows a debtor to miss more than one contribution – what indulgence is reasonable if there is no mechanism to collect any missed contributions on a three year IPA or IPO can be.

The time factor

Accounting periods for sequestration are now intended to be of 12 months’ duration, but the wording of the requirements for accounts leaves a lot to be desired in terms of clarity. Whilst s 32(8) allows for adjustment to the length of the second or subsequent accounting period, there appears to be no mechanism to vary the statutory requirement that the first accounting period be 12 months from date of award of sequestration, and apparently none is intended.

Section 12 as amended now expressly allows a sheriff to continue a petition for sequestration in two circumstances: per subs (3B), for no more than 42 days if he is satisfied that the debtor “shall... pay or satisfy the debt in respect of which he is apparently insolvent and any other debt due to the petitioner and any concurring creditor” within 42 days; and per subs (3C) if satisfied that a debt payment programme has been applied for and not yet approved or rejected, for such period as he thinks fit.

It is not clear whether these provisions are intended to be mutually exclusive, or whether they could be granted consecutively. This would not matter a great deal were it not for the fact that the date of sequestration is backdated (if awarded) to the first warrant to cite when the petition is to the sheriff court. How long might such delays eat into the 12 months before automatic discharge? The AiB is of the view that this is a matter for the discretion of the sheriff, so we will need to wait and see how this may be exercised (if at all).

Finally, an interesting but possibly obscure point. An undischarged bankrupt or a person subject to a BRO may not act as a company director without leave of the court (s 11, Company Directors Disqualification Act 1986), which for these purposes is the court in which sequestration was awarded. Whither the bankrupt who applied for his own sequestration to the AiB?  

Pre-packs: judicial guidance

In Re Kayley Vending Ltd [2009] EWHC 904 (Ch), directors petitioned for an administration order after HMRC lodged a winding-up petition over a debt of £19,000 (Alistair Burrow writes). An out-of-court appointment by the directors pursuant to para 22 of sched B1, Insolvency Act 1986 is not competent if a winding-up petition has been presented (para 25). HMRC had previously voted down a proposed voluntary arrangement, but took no position on the petition. The court was satisfied the company was unable to pay its debts, but noted that (a) it was important that the petitioning creditor was sufficiently well informed by the information lodged to be able to decide whether or not to oppose the application; and (b) the court required to be satisfied by that information that an administration order was appropriate. If made, the winding-up petition is dismissed.

The judge noted that the (English) insolvency rule 2.42(3)(b) required the applicant in general terms to provide information on matters which in their opinion would assist the court to decide the application. Here the applicants disclosed that with the proposed administrator’s assistance, the directors were negotiating with two parties unconnected with them for sale of the business as a going concern. The court was satisfied that there was a reasonable prospect of achieving a better return for creditors as a whole from such a pre-pack sale when compared with the likely outcome of a liquidation, and nothing which favoured refusal of an administration order. The application was therefore granted.

The court also authorised the proposed administrator’s pre-appointment costs being treated as an administration expense, exercising its discretion under para 13 of sched B1 (power to make any other order the court thinks appropriate), rather than as applicant’s costs. In so doing, the judge noted that the English insolvency rule 2.42(1)(c) (ranking of expenses in administration) did not apply, and “provides a useful benchmark for considering the extent to which a sliding scale of payment would be appropriate”.

The court also decided that the judge should be able to decide whether a pre-pack was a reasonable prospect of achieving a better return for creditors after more information was available on the going concern nature of the business and its potential sale.

The court was satisfied that the debtor was to continue to trade and that the personal compensation of the administrators could be paid.

The judge then had to consider the court’s approach to pre-packs in light of the recent Statement of Insolvency Practice (SIP) 16, and suggesting that in a pre-pack situation the evidence in support of an application should be pretty similar to the SIP16 requirements for reporting to creditors, save that some matters may be commercially confidential prior to completion, and always subject to what is known and ascertainable at that stage. He also set out fairly fully his reasons for authorising the pre-appointment costs as an administration expense. He declined however to give guidance to the profession in light of SIP16 and the continuing debate over pre-packs.

Note: Practitioners with answers on any of these points are invited to contact the writer.

Alistair S Burrow, Head of Recovery, Tods Murray LLP
If someone hangs a brass plaque outside their door proclaiming them to be a private client solicitor, you might have a reasonable idea of what to expect if you engage their services, but can the same thing be said about investment funds?

Many investors, whether private clients or trustees, are attracted to the idea of an investment that gives some exposure to the potential upside from equity markets while restricting the downside when markets crash. Given the market turmoil between 2000 and 2003, and the collapse of world stock markets from mid-2007 to date, it is not hard to see why investors would be attracted to such an idea.

To help investors compare funds, the Investment Management Association (IMA) groups similar funds into sectors. One sector which might appear to meet the needs of cautious investors needing long-term growth in excess of inflation is the Cautious Managed sector.

Diverse sector
There has been an explosion in the growth of Cautious Managed funds in recent years. The sector now includes 147 funds managing over £18 billion of client money, although this is heavily concentrated in a small number of big name funds. The top three funds in the sector control 25% of all assets, while the top 10 funds account for almost half of investors’ money.

Cautious Managed funds are certainly popular, but do they “do what they say on the tin”? Before answering this question, it is important to realise that every investor has a different definition of “cautious”. For example, one prudent trustee might deem a fall in capital value of less than 10% in any year to be acceptable in return for the real growth potential offered by some exposure to equities. They might be happy with a fund which invests no more than 50% of its assets in equities. Another trustee might deem any fall in value unacceptable.

Table 1 shows the average asset allocation between four major asset classes along with the highest and lowest weightings across the entire Cautious Managed sector. You can see that there is a wide range of views on asset allocation within a single sector of supposedly similar funds. Two funds hold their entire portfolio in cash and fixed interest, while three funds hold only

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<tr>
<td>Cash &amp; fixed interest</td>
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</tr>
<tr>
<td>Maximum</td>
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<td>Minimum</td>
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* A negative value is technically possible if a fund has engaged in short selling.

Table 2

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<tbody>
<tr>
<td>Total Number of Funds in sector</td>
<td>138*</td>
<td>114</td>
<td>92</td>
<td>73</td>
<td>53</td>
<td>45</td>
<td>31</td>
<td>26</td>
<td>22</td>
<td>20</td>
</tr>
<tr>
<td>Maximum Return</td>
<td>11.9%</td>
<td>20.9%</td>
<td>15.3%</td>
<td>13.4%</td>
<td>21.1%</td>
<td>24.0%</td>
<td>52.0%</td>
<td>4.1%</td>
<td>10.1%</td>
<td>7.1%</td>
</tr>
<tr>
<td>Minimum Return</td>
<td>-10.5%</td>
<td>-37.4%</td>
<td>-7.1%</td>
<td>-2.8%</td>
<td>7.2%</td>
<td>5.1%</td>
<td>6.9%</td>
<td>-47.7%</td>
<td>-20.2%</td>
<td>-2.8%</td>
</tr>
<tr>
<td>Sector Average Return</td>
<td>1.4%</td>
<td>-15.8%</td>
<td>1.4%</td>
<td>7.0%</td>
<td>12.6%</td>
<td>9.4%</td>
<td>14.4%</td>
<td>-11.8%</td>
<td>-4.9%</td>
<td>1.1%</td>
</tr>
<tr>
<td>Gap between best and worst funds</td>
<td>22.4%</td>
<td>58.3%</td>
<td>22.4%</td>
<td>16.2%</td>
<td>13.9%</td>
<td>18.9%</td>
<td>45.1%</td>
<td>51.8%</td>
<td>30.3%</td>
<td>9.9%</td>
</tr>
</tbody>
</table>

* There are now 147 funds but only 138 of these were active at the start of the year.
equities. One in 10 funds holds 70% of assets in cash and fixed interest. This would certainly seem consistent with a “cautious” mandate, but it may leave investors exposed to the risk of inflation, eroding purchasing power in the long run. The wide range of views on property is also worth noting, and surprisingly some funds disclosed a negative exposure to alternative assets. While 60% of funds have no exposure to hedge funds or structured products, 10% of funds hold a quarter of their portfolio in such assets.

**Extremes of performance**

There is considerable academic research to support the view that asset allocation is the biggest determinant of portfolio returns. With such a massive variance in asset allocations, it is hardly surprising that the range of returns has also been extreme. Table 2 shows the annual returns for discrete calendar years as well as the year to 31 May 2009. Along with the sector average, you can see the returns for the best and worst performing funds each year.

A number of points jump out of the table. First, the average Cautious Managed fund lost 15.8% in 2008, which seems quite a lot for a fund with a “cautious” mandate. This may give cause for concern for our fictitious trustee who viewed a 10% loss as the maximum acceptable. However, much more worryingly, the worst fund in the sector lost 37.4% of investors’ money. I am not sure which definition of “cautious” this manager was using but, considering that the FTSE All Share Index of UK equities only lost 29.9%, it certainly doesn’t seem cautious to me.

Secondly, the performance differential between the best and worst funds was 58.3% in 2008. This wasn’t an isolated incident either. The gap has been as high as 61.4% in the past, so funds in the Cautious Managed sector do not appear to be similar, and some are certainly not cautious.

**Alternative focus**

In an ideal world, trustees and their advisers would have been able to pick the best performing fund each year (ignoring the effect of costs and taxes), the trust fund would have grown to £718,970 by the end of 2008. However, had trustees invested in the worst fund each year they would have been left with just £27,850. Unfortunately, there is no reliable way of picking the winning funds and avoiding the losers. Trustees should focus their efforts on reducing fund management fees and controlling overall asset allocation, rather than trying to pick top performing funds.

Trustees should not assume that, just because a fund is categorised in the Cautious Managed sector (or has the word “cautious” in the title), it will provide stable low risk returns. Trustees need to dig beneath the surface and look at the underlying asset allocation if they are to fulfil their duty of care over the trust’s assets and protect themselves against disgruntled beneficiaries should the fund fail to perform as expected in future.

Alan Dick is a member of EBIS Group (Evidence Based Investment Solutions) and partner at Forty Two Wealth Management

www.ebisgroup.org
Scottish Solicitors Discipline Tribunal

This month’s cases concern the continuing validity of an appeal, failure to comply with undertakings and misleading others, and failure to keep CPD records.

**Appeal under s 42A: A C White**
An appeal under s 42A of the Solicitors (Scotland) Act 1980 was made by Messrs A C White Solicitors, 23 Wellington Square, Ayr (“the appellants”) against a determination and direction made by the Council of the Law Society of Scotland. The Tribunal heard a debate on whether or not there was a valid appeal before it. The lay complainant had made a reference to the Ombudsman which resulted in the Ombudsman recommending reconsideration by the Society of the whole matter. This was done and the Society made a different determination which became a final decision. The Tribunal found that the first decision of the Society had been wholly supplanted by the second decision. The Tribunal further found that accordingly all rights flowing from the first decision had fallen and that there was no longer any valid appeal before the Tribunal, and accordingly nothing for the Tribunal to rule on.

**John Gerard O’Donnell**
A complaint was made by the Council of the Law Society of Scotland against John Gerard O’Donnell, solicitor, 15 Clarkston Road, Glasgow (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of his failure to comply with undertakings given to an individual and that individual’s solicitor, his unreasonable delay in having a lease completed and registered, his misleading the individual and the individual’s solicitor in that regard and his failure to advise the individual and the individual’s solicitor of the true position, his failure to comply with the Guidelines on Mandates 1998, his misleading the Society and his unreasonable delay on a number of occasions in responding to the reasonable enquiries of the Society. The Tribunal censured the respondent and directed in terms of s 53(5) of the Solicitors (Scotland) Act 1980 that for a period of five years, with effect from 1 June 2009, any practising certificate held or issued to the respondent shall be subject to such restriction as will limit him to acting as a qualified assistant to such employer as may be approved by the Council or the Practising Certificate Committee of the Council of the Society.

The Tribunal was concerned that as well as delaying in dealing with matters, the respondent had also misled the Society and an individual and another firm of solicitors with regard to what he had or had not done. The Tribunal felt that the respondent had shown contempt for the Society and others by his failure to be candid and failure to reply and to deal with matters. The Tribunal was not convinced by the explanation that this was wishful thinking on the part of the respondent. It is imperative that solicitors are honest at all times for the public to have confidence in the profession. The Tribunal noted the undertaking given on behalf of the respondent to wind up his practice within a period of three months. The Tribunal however considered that given the respondent’s health problems, there was a risk to the public in allowing him to continue to operate as a principal in private practice. The Tribunal has a duty to ensure the protection of the public and accordingly considered it appropriate to impose a restriction on the respondent’s practising certificate for a period of five years. This however would not take effect until 1 June 2009, by which time the respondent should have made arrangements to wind up his practice as per the undertaking given to the Tribunal.

**David John Roberts Tod**
A complaint was made by the Council of the Law Society of Scotland against David John Roberts Tod, solicitor, Tod & Mitchell, Solicitors, Terrace Buildings, The Cross, Paisley (“the respondent”). The Tribunal found the respondent guilty of professional misconduct in respect of his failure between 1 November 2005 and 31 October 2006 and between 1 November 2006 and 31 October 2007, to keep a record of his compliance in undertaking the required hours of continuing professional development and his failure to produce a record of compliance on demand. The Tribunal censured the respondent and fined him in the sum of £2,000.

The Tribunal was concerned that the respondent had failed in two consecutive years to keep a record of his compliance with the continuing professional development requirements. It is imperative, if the public is to have confidence in the legal profession, that solicitors keep themselves up to date and are able to show that they have undertaken the required hours of continuing professional development as directed by their professional body. In the circumstances the Tribunal considered that a censure plus a fine of £2,000 was an appropriate penalty.
Searching under cover

The web review comes up with some leads on finding a private investigator

In the words of Dire Straits, private investigations involve “checking out the report, digging up the dirt … For the usual fee – plus expenses”. This month, the web review goes to work tracking down private investigators online…

Institute of Professional Investigators

www.ipi.org.uk

The Institute of Professional Investigators is an international membership body which aims to “assist, regulate or control those engaged in investigation”. It has a code of ethics to which members are required to adhere.

The website is well designed and laid out and is a good place to visit if you wish to become a member – courses and events are advertised here as well as a guide for those who are thinking of becoming a private investigator.

If on the other hand you are looking for an investigator, the online directory allows you to search by geographical area (there are plenty of Scottish members), name or area of expertise. I was amused to note that you can ask for a firm that specialises in blackmail and extortion – although I assume that it is the detection of such criminal practices which is offered and not their commission!

Association of British Investigators

www.theabi.org.uk

Run along similar lines, with a less impressive-looking website, is the ABI. Again there are a series of courses available for budding private investigators as well as those involved in related pursuits.

Usefully, the ABI site provides a series of articles which focus on various legal aspects of the investigations trade, e.g. data protection, money laundering, and whether a “pretext enquiry” is permissible following changes to the law.

The directory (again with options for UK and overseas investigators) is well stocked, but allows the user to search only by location and not by specialist. There are a goodly number of members based in Scotland, and the display does provide (for some) details of their Disclosure Scotland certificates.

I was surprised to see such a range of activities, and enjoyed the coy use of language in the matrimonial section where they offer to “obtain the relevant evidence by means of a direct approach” and state that matrimonial surveillance is also on a “peace of mind” basis.

The site offers a lot of detail about the qualifications and experience of the investigators as well as details of the spy equipment they use. There is also a contact form if you wish to make an enquiry.

Nor-West Caledonian

www.norwestclad.co.uk

While this site has a slightly more professional feel to it, I did not like it as much. First of all the colour scheme (light blue on dark blue) made me squint, and was difficult to read. Secondly there was very little in the way of detail. For example, the firm offers computer forensics, but does not offer any explanation of what this involves or why it might be useful. The whole site also seems strangely anonymous – but then maybe that’s what people hiring a private investigator are looking for?

Enquire International

www.enquire.biz

This is a pretty horrible little website. It looks like it’s been designed by an eight year old in 1999 and not updated since. All of the text is actually one big picture of some text, with no alt tag, which means that the entire content is practically invisible to anyone with a visual impairment, anyone trying to view the site on a mobile phone, and Google herself (other search engines will also search in vain for this site).

I’m pretty sure this is not just some ironic game that private investigators play where you have to track them down before they will help you track someone else down. And if it’s not that, it’s really bad instead.

Lewis Investigation Services

www.lewisgroup.co.uk

Lewis Investigation Services do much of the standard repertoire of the commercial private investigator, including tracing debtors etc. Their website is part of the larger Lewis Group site and is very attractive and modern – easily the most inviting of those reviewed today. While the section on investigative services is relatively brief, it does a good job of explaining itself and the links used serve to reassure the browser rather than to confuse (as with some others).

Most impressive of all, however, is the availability of a web-based service called LIS-Online which enables existing clients to submit new instructions, view progress and access all reporting requirements. So now you can harry your debtors without even having to leave the comfort of your laptop and hot chocolate!
A Guide to Mediating in Scotland

Ewan Malcolm and Fiona O’Donnell

PUBLISHER: DUNDEE UNIVERSITY PRESS
ISBN: 1 84586 052 3
PRICE: £30

This book aims to provide a clear, succinct and useful guide to mediating in Scotland. It is aimed not just at mediators but at those referring clients to mediation, advising and supporting them through the mediation process and implementing the outcomes achieved.

Its strength lies in the short and focused chapters, each of which deals with a particular type of mediation, written by an experienced practitioner in the area concerned. It is a key resource for guiding practitioners as to whether a particular dispute is suitable for mediation, and if so, how to identify an appropriate mediator and guide a client through the process.

The development of mediation in Scotland over the last 30 years has been phenomenal. As a jurisdiction we are at the forefront of innovation in this area of dispute resolution. Mediation has a success rate of over 80% in some sectors. The key criteria to success are the appropriateness of the referral, the parties’ expectations of the process and the preparatory work undertaken for the first session.

Information is also provided regarding the valuable work done by the Scottish Mediation Network, which maintains the Scottish Mediation Register, an online resource listing all individual mediators and services in Scotland. Mediators on the register practise within a code of practice, meet training requirements, and have appropriate insurance cover together with a complaints procedure.

I particularly commend to practitioners David Semple’s chapter on commercial mediation. Commercial mediation commonly involves two mediators, one of whom has experience in the relevant field. The parties are usually accompanied by their advisers, who can assist the mediators by focusing the issues, providing a factual summary of the case, an outline of the legal issues, and a note of the areas of common ground, the points in dispute and the history of negotiations prior to mediation. Copies of key documents and background information require to be collated, and it is helpful for the parties to have an estimate of the likely time frame and cost of litigation.

The term “commercial mediation” covers a wide umbrella of family business disputes, partnership dissolutions, corporate issues, construction disputes, professional negligence claims etc. The process allows for flexible, creative and sophisticated arrangements which are future-focused and allow the option of preserving professional relationships rarely open to those involved in litigation, while also saving significant time and cost. The confidential nature of mediation is also often of value to clients.

The timing of a referral to mediation can be critical. John Moffat’s chapter on employee/workplace mediation will be of interest to many engaged in advising employers on the prospect of early intervention as an option to avoid employment tribunals and claims which can have a huge impact on their clients’ business in terms of time, resources, morale, performance levels and damage to reputation.

Marjorie Mantle’s chapter provides a pragmatic guide for those advising clients in disputes with a value of under £3,000 on the option of in-court mediation, as an alternative to instructing advisers, where the fee is likely to be disproportionate to the value of the claim, or attempting to present a small claim proof as a party litigant, neither of which will provide an appealing option to a client who may well provide other valuable sources of business to your firm. The flow charts and case studies in this chapter are particularly helpful for setting out the options and procedure to clients.

The chapters on family mediation, additional support needs mediation, and peer mediation in schools will be of interest to family lawyers who may have focused to a greater degree on collaborative law as an alternative to mediation in family law disputes. While collaborative law is a good option in many cases, it should not be forgotten that mediation is the only option which focuses on allowing the parties to take responsibility for their own solutions and emphasises the value of improving communication between the parties as a basis for avoiding future disputes.

This book provides a valuable service by informing practitioners of the mediation resources available in a broad range of contexts. Its pragmatic focus allows solicitors to identify whether a particular dispute is suitable for mediation and, if so, how to make a referral to an appropriate mediator and how to better understand their role in supporting and advising clients throughout the mediation process and achieving the best possible outcome.

Wendy Sheehan, Sheehan Kebey Oswald, Edinburgh
Conflicts of Interest
Third edition

Every book has its individual strengths and weaknesses. When a title reaches its third edition, it is an indication that, for a significant proportion of readers, it is the strengths which predominate. It is easy to see why that should be in the case of the new edition of Conflicts of Interest.

The book’s area of strength is conflicts of interest as they affect lawyers and accountants in commercial practice, especially mergers and acquisitions. In that area, the work is highly impressive, as one might expect from a silk at the English commercial bar and a former accountant turned barrister.

The significance of the House of Lords decision in Prince Jefri Bolkiah v KPMG [1999] 2 AC 222 is something of a theme running through the book, and other important cases are also dealt with in detail. Particular notice is taken of the more recent House of Lords authority, Hilton v Barker, Booth and Eastwood [2005] 1 WLR 567. The defendant solicitors had acted for one Bromage in connection with company management offences and his associated bankruptcy. On his release from prison, Bromage sought to acquire land for development of flats with the plaintiff, Hilton. The defendants were instructed in three transactions: the purchase of the land by Hilton; the purchase of the flats by Bromage once they were built; and a contract whereby Bromage sold on the flats to a third party without Hilton’s knowledge. The solicitors did not tell Hilton about Bromage’s conviction or bankruptcy because they considered they owed a duty of confidentiality to Bromage. They arranged for Hilton to be advised and represented by one of their junior employees. The third party disappeared without completing the purchase and Hilton ended up sustaining a massive loss.

The Lords were scathing about the solicitors’ conduct, emphasising the principle in Moody v Cox [1917] 2 Ch 71: “if a solicitor is unwise enough to undertake irreconcilable duties it is his own fault, and he cannot use his discomfiture as a reason why his duty to either client should be taken to have been modified”.

Bolkiah, Hilton and other cases such as Marks and Spencer plc v Freshfields Bruckhaus Deringer provide the context in which Hollander and Salzedo provide detailed and impressive analysis of the conflicts which can arise in the commercial world. For those whose interests lie in that world, the book is an obvious purchase.

There are, however, relative weaknesses. One is the treatment of Scots cases. Of course, it would be unreasonable to expect a book about English law to offer comprehensive analysis of the position in Scotland. Perhaps, though, it is not too much to ask that English authors should get the basics right when they refer to Scots authorities. The treatment of Stairs v Ruxton 2000 JC 208 is disturbing. The case is described as unreported, when it is reported in three Scots series and in two series of human rights reports with UK wide coverage (a similar mistake is made with Kearney v HM Advocate 2006 SC (PC) 1). The authors assert incorrectly that the case was before the Court of Session (and initially refer to a “Deputy Sheriff”). They also report the argument as though it was the ground of decision and, as a result, overemphasise (by comparison with what was decided) the Lord Advocate’s role in the appointments and renewal process.

The significance of this is not that it irritates Scottish reviewers but that it calls into question the reliability of the treatment of cases from other jurisdictions outside England & Wales. These are of some importance in the analysis. Beyond that, it is also part of a general relative weakness in the treatment of the human rights aspect of the subject. The book is generally characterised by detailed and incisive analysis but, by comparison, the treatment of the Straubourg jurisprudence on judicial independence feels rather superficial.

The same is true of the rather brief coverage of the reporting obligation under s 330 of the Proceeds of Crime Act 2002. In considering the position of solicitors, one might have expected some treatment of Ordre des barreaux francophones et germanophones v Conseil des ministres (Case C-303/05, 26 June 2007), which deals with the interaction in European law of the duty of confidentiality to the client with the requirement to report facts indicating potential money laundering.

Nore is there very much coverage of the position in criminal cases. Woodside v HM Advocate [2009] HCJAC 19, which postdates the book, exemplifies the sort of conflicts which can arise in criminal and general litigation practice. It is disappointing not to find some consideration of the English cases R v Saracoglu [2003] EWCA Crim 2244 and R v Morris [2005] EWCA Crim 1246, in both of which the defendant’s solicitor also acted for his proposed incarnitme, with catastrophic results. In Saracoglu the Court of Appeal observed: “The mere fact that solicitors or counsel may have accepted instructions or continued to act in a situation where a conflict of interest exists between their client and a co-defendant represented by the same solicitor cannot in itself be regarded as a ground of appeal. The question must always be whether that fact or some step taken or omitted as a result of, or influenced by, that fact, has given rise to unfairness in the course of the trial and/or affects the safety of the conviction”, and in R v Morris the court pointed out that important material was not put to certain witnesses “because the entire defence strategy and effort was pervaded by the conflict of interest” which a solicitor had allowed to arise.

So the book has strengths and weaknesses. Its strengths are impressive and they justify the investment. For those who seek a detailed consideration of the law on conflicts of interest in commercial practice, or of the philosophical underpinnings of the law, it is outstanding. It does, however, have to be read with an awareness that (like most books) its content is influenced significantly by its perspective.

Dr Alastair N Brown, solicitor advocate
Procurement remedies take shape

Draft regulations have been published to implement the EU Remedies Directive relating to public contracts

A second Scottish Government consultation on implementing the EU Remedies Directive 207/66/EC, intended to improve the effectiveness of review procedures concerning the award of public contracts, is currently underway.

The consultation, published on 3 June at www.scotland.gov.uk/Publications/2009/06/03095738/0, sets out the Government’s intentions regarding implementation in light of responses to the previous consultation, and includes the relevant draft regulations.

Three main changes are introduced by the directive, which must be implemented by 20 December 2009:

- standstill arrangements following a contract award decision are harmonised;
- “ineffectiveness” and other special penalties become remedies for certain serious breaches of the procurement rules;
- procurement procedure is automatically suspended on a court challenge.

For contracts falling within the Procurement Directive, member states are to ensure that decisions taken by contracting authorities can be reviewed effectively, and as rapidly as possible, at the instance of any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. To avoid unduly complex procedures, ministers have opted not to require the complainer first to seek review with the contracting authority.

The draft regulations adopt the minimum “standstill” periods in the directive of 10 calendar days from the day following the date of notification of a decision, if fax or electronic means of communication are used, or 15 days if by post (the regulations propose the 15 days where at least one tenderer is notified by post). The contract may not be concluded within this period.

Permitted derogations will be taken up for contracts not requiring prior publication in the Official Journal, contracts where there is only one tenderer, and contracts based on a framework agreement or a dynamic purchasing system.

Review proceedings must be brought “promptly” (which can never mean in less time than the relevant standstill period), and in any event within three months unless good reason is shown.

A breach rendering a contract “ineffective” will result, in Scotland, in prospective rather than retrospective invalidation. The court will also have a discretion not to render a contract ineffective if there are good reasons for its effects to be maintained, but in that case “effective, proportionate and dissuasive” alternative penalties must be available, such as a financial penalty on the contracting authority (also to be imposed if an order for ineffectiveness is made), or a shortened contract term. The financial penalty is to be separate from any damages awarded, and will go to public funds.

The European Commission itself may bring proceedings if, prior to a contract being concluded, it believes there has been a serious breach of Community law.

In addition to a general request for feedback on the draft regulations, the paper poses certain specific policy questions and also raises some transitional matters. The consultation runs until 21 August 2009.

In-house team to send work overseas

UK mining giant Rio Tinto has announced a legal services outsourcing agreement with CPA Global under which a team of lawyers in India will support Rio Tinto’s in-house legal function on a global basis. The move is projected to save Rio Tinto up to 20% annually in legal costs. Initially, the work concerned will include contract review and drafting, legal research, and document review. However, it is anticipated that the scope of work will expand to cover other routine legal services work traditionally handled in-house by Rio Tinto or shared amongst the company’s panel of law firms.

Rio Tinto’s managing attorney, Leah Cooper, said: “We took a long hard look at our internal costs and the amount we were spending with outside counsel and saw an opportunity to make significant changes to the way we deliver legal services to the group. We have developed a groundbreaking legal model with CPA Global that will generate tremendous savings and serve the business without compromising quality. “By shifting work to CPA Global our internal team will be freed up to get involved in some of the more complex and challenging legal matters, which in the past might have been sent to outside counsel at significant cost... We will have more time to spend with the business, develop stronger relationships and understand what we can do to prevent legal issues developing in the first place with a stronger focus on prevention rather than cure.”

Founded in Jersey, Channel Islands in 1969, CPA Global currently employs more than 1,200 people in 16 offices in eight countries.

A breach rendering a contract “ineffective” will result, in Scotland, in prospective rather than retrospective invalidation.

Peter Nicholson

The Scottish Government has published a guide for its officials involved in the development, negotiation, implementation and monitoring of EU obligations, intended to bring clarity and transparency to the Government’s processes for the benefit of the Parliament and all sectors affected by EU legislation: www.scotland.gov.uk/Publications/2009/06/04143736/2
Edinburgh-Glasgow agreement could point the future for standard missives

Clauses become more standard

Standard missives in Scotland have taken another major step forward with the signing of a common version agreed by representatives of Edinburgh and Glasgow conveyancers.

Following discussions by a joint working party which began work in March 2008, members of the Edinburgh Conveyancers Forum (ECF) and the Royal Faculty of Procurators in Glasgow (RFPG) have signed the declaration to which is attached the new standard form, to be known as the Combined Standard Clauses. The working party comprised three office holders of the ECF and two members of RFPG including the recently elected Dean.

The initiative marks the first inter-regional collaboration in Scotland over a form of standard missives.

At the original exploratory meeting convened by three professors of conveyancing or property law (Professors Brymer, Reid and Rennie) with representatives of the ECF and RFPG, it was common ground that the two cities’ styles were largely similar. The 2005 Glasgow standard missives were deliberately modelled on the basis of the then existing Edinburgh style but with minor changes to take account of different practices in the west and wording with which Glasgow solicitors were more familiar. The ink was not yet dry on the revised 2008 Glasgow version when work began. Edinburgh for its part had adopted some of the wording in the 2005 Glasgow version.

The meeting had no difficulty deciding in principle that a set of combined clauses was a desirable objective, and the working party was tasked with exploring whether it was possible to agree a common wording. The professors (now also including Professor Paisley of Aberdeen) were happy to be involved in the project and suggested that if there were areas of contention as to which style was to be preferred, they could adjudicate on the differences.

Few matters in the event required to be referred to the professors to adjudicate... arguably the matter which was most contentious was the choice of name of the combined style. 'Harthill Missives' was the working title but there were a large number of possible names. The 'S' word, i.e. 'Scotland' did not make it, but the eventual choice was unanimous. It is described as a combined regional missive. It is hoped that the word 'Combined' may make it easier for other regions to adopt it.

The signing ceremony took place on 23 June and the Combined Standard Clauses are intended to go live on 1 October this year. Seminars are planned for both cities in advance of the starting date. There will also be a client guide and a practitioners’ guide.

As with the existing standard clauses, adoption is not obligatory – it is understood that while the Edinburgh style is in universal use in the capital, just over half of Glasgow practitioners use their current form – and the clauses can be modified as circumstances require. Work will continue on keeping the clauses up to date. However both sides believe that this is a significant first step towards a style with more general application than the present regional standard missives.

Peter Nicholson

Registers of Scotland

Turnaround times as at 20 June 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.

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<thead>
<tr>
<th></th>
<th>2009-10 Target</th>
<th>Performance as of 20 June 2009</th>
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<tbody>
<tr>
<td>31,750 received since 1 April</td>
<td>13,922 despatched of which 11,357 (81.6%) within 20 working days</td>
<td>13,192 received since 1 April</td>
</tr>
<tr>
<td>438 despatched of which 100% within 70 working days</td>
<td>2,565 (18.4%) despatched within 31 to 100 working days</td>
<td>9,423 despatched of which 9,277 (96.5%) within 20 working days</td>
</tr>
<tr>
<td>0 despatched in more than 70 working days</td>
<td>17,828 (56.2%) are in process</td>
<td>146 (1.5%) despatched between 21 to 40 working days</td>
</tr>
<tr>
<td>2,533 (85.3%) received since 1 April are in process</td>
<td>0 despatched in more than 100 working days</td>
<td>3,769 (28.6%) are in process</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0 despatched in more than 40 days</td>
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How I learned
to love the law

Pretty early in my traineeship I twiggled that Days Out with the rest of the firm deserved to be branded “Danger Days Out”. They could be funny – but they were also fraught with danger.

Surveying the insane mix of arrogant partners, aspiring associates, disgruntled trainees, tonnes of booze, and ladies from the office generally looking far more glamorous and shiny-legged then they ever did on a wet Wednesday afternoon, you just knew that things would get dangerous.

As always, I became alert to the danger the hard way. On my first firm Day Out a balding chap approached me and sneeringly made a big commotion of offering me his comb. This was intended, I think, to be a reference to my slightly unruly...
Sidelines  Letter from somewhere else

Alistair Bonnington gives his impressions of the city behind the famous view

Sydney up close

It would have been wrong to visit our former colonies in the Antipodes without seeing Sydney, as I did last November. There can be few cityscapes better known all over the world than the Opera House and the Harbour Bridge.

As you would expect of a sophisticated global boulevardier, I am a member (by association I grant you) of the Sydney Royal Automobile Club – so on my visit my bedroom windows looked directly onto the bridge.

Now up close the Opera House is far from beautiful. It has that neo-communist 1960s style of breezeblock and cement, quite horrible. (But the auditorium is fine.)

The tortuous tale of the building’s construction is almost as shameful as that of the Scottish Parliament. New South Wales has a long history of incompetence and corruption in civic matters: while all other states went into the present recession financially sound, NSW was bust.

Seemingly there is a well known quote from Ned Kelly, the infamous Australian outlaw, berating the NSW police force of his day for corruption! (I can’t help wondering why Scottish lawyers took the NSW model of regulatory regime when setting up the new system in our native land.)

Did we just not read all the articles which say that the NSW lawyers’ regime doesn’t work?)

Like Vancouver, there is a lot of water around Sydney. The ferries which ply to and fro from the pier near the Opera House are a pleasant way of seeing some of the city’s sights from the water. But you can also take little sightseeing cruises from private companies too, down to Botany Bay and the like.

Sydneysiders take great pride in their public buildings – they are beautifully cleaned and well presented. Many were commissioned by the first Governor of NSW, Lachlan Macquarie from Mull. His grave on Mull is tended to this day by the Australian Government.

One of the most interesting of the Victorian era buildings in the city is a shopping mall from 1896. Having seen this, I can say that we really haven’t departed much from this original model. Princes Square in Glasgow pretty well follows the architecture of the Sydney mall.

Open air relaxation is to be enjoyed in the city’s fine parklands – an odd feature of which is the colonies of fruit bats hanging upside down (as bats do) from tree branches. Familiar with the tiny bats we have at home, these yellow bunched monsters were a strange sight to me. They looked as if they must consume several tins of pineapple chunks per day, including the tin, to grow that big. If they lost their footing and landed on your head, a severe crushing would result (for you, that is). Wearing a crash helmet for this walk is advisable.

I was lucky enough to be in Sydney for Melbourne Cup day. You may be wondering why a three-minute horse race in Melbourne is of such significance in Sydney! Well, it’s treated as hugely significant all over Australia. A very informal society most of the time, the Australians really dress up for Melbourne Cup – and that’s even if all they’re doing is watching it on TV in a restaurant or at some corporate binge.

At lunchtime the Sydney offices began to empty onto the city’s streets, with lots of dolled-up ladies in high heels and big wedding/hat graduation hats.

Now Australian females are formidable big boned sporty types who can drink most men under most tables. But they can’t walk in high heels to save themselves – they’re not used to them. So around 5pm I was treated to the sight of Aussie girls, in full battledress and slightly pissed, trying to negotiate the cobbles down on the harbourside in what my mum used to call “peery heels”. The A & E unit in the hospital must have been inundated – I imagine leave for all bone surgeons is cancelled on Melbourne Cup day!

My visit coincided with Rupert Murdoch’s first “Boyer lecture”. Basically this is the Australian equivalent of the Reith lectures. It was given at the Opera House and to commemorate the occasion the city laid on a celebratory firework display on the Harbour Bridge. Perhaps it was not as spectacular as the Millennium display we all saw on TV, but to be right up close was a great experience.

Murdoch spoke of the Australian settler/outback origins and ingenuity, and the values these had instilled into the Aussies of his generation. Although he lamented the partial passing of the values he so much admired, my observation of the Australians of today is that they are a courteous, considerate people who care for the fellow man. Perhaps because of their more outdoor rugged upbringing, Aussies seem to me a very grown-up, self sufficient people. They are to be admired – as is the city of Sydney. 

www.lawscotjobs.co.uk
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One summer many years ago a middle-aged male procurator fiscal was in court. The weather was hot and the court stuffy. It had been a long day and the defence agent and sheriff were deep in discussion about some point or other. He could see sunlight and blue sky outside despite the high windows, and a branch of a tree in blossom. His reverie was not immediately interrupted by the sheriff’s first polite enquiry but was by the second barked one. Responding automatically, as he had for years in such circumstances, he replied: “Sorry, Darling?”

It was with this story in my mind that I sat in M Sheriff Court one afternoon. As I repeatedly mopped my brow just below my wig, I mused that so many of our splendid court houses, although cold and draughty in the winter, become ovens on the one or two days a year that the summer sun shines in our watery clime. Few concessions to the seasons are made by us lawyers. We do not change into summer wigs and gowns but remain in heavy dark clothing, which is to be fair generally an advantage even in what we call summer.

'It’s clear when you are sitting on an uncomfortable chair for hours on end, who the people are with an effective trade union. I could see the clerk sitting on a new chair which at least looked ergonomically designed for its purpose, enjoying the draught from a fan positioned beside him.

Have you ever done a heritable court in a hot room? One that lasts case on case from 10 until 4 … If Dante had been a modern lawyer, this would be one of the levels of hell.'

My thoughts drifted back to the court. How do these arrears get so large? Why is hardly anyone ever thrown out? Why do cases continue for years to monitor payments that never seem to come? So many, many questions I could not be bothered to ask.

One sheriff told me that he had come across an action that had been raised six years earlier. Numerous hearings had been fixed and discharged, arrangements made and broken, the case continued to monitor payments that sometimes came and often didn’t. He was asked once more to continue it into the new century and responded, dismissing the case, that the tenancy had like a marriage existed through thick and thin for six years. Neither party was terribly happy with the other, but it looked as if for better or worse and for richer or poorer it would continue for some time yet. Come back, he said, when it is really over!

“Granted, granted, granted, proof on reasonableness, granted, granted…”, I muttered as I caught sight of a white cloud from the corner of my eye. Was that birdsong I could hear?

Scott Rettie is the pen name of a solicitor who sits as a part time sheriff
While we regularly hear of solicitors from the big corporate firms undertaking feats of endurance for charity, those in smaller practices probably find it more difficult to arrange the time away.

Thus we were pleased to hear of Alistair Mackie, a consultant with Dunbar solicitors Brooke & Brown, who as we write is setting off to walk the Haute Route, a high-level trek in the Pyrenees along the border between France and Spain.

Alistair, who aims to complete the 500-mile trek in six weeks, is raising funds for Cancer Research, having seen two brothers in law, a personal friend and a respected former professional colleague all succumb to the disease.

While Alistair has trekked in Pakistan, the west coast of America, Europe and Reunion Island, this will be his biggest challenge yet and realises a long held ambition. “I’ve long admired the Pyrenees for their remoteness, vastness, magnificent scenery and history”, he said.

Supporters will be able to keep abreast of his progress at Brooke & Brown’s offices. Donations can also be made through http://www.justgiving.com/amackie. And the winter speaking tour on his experiences follows, for the same cause.

You’ve been framed!

Bungling offender of the month award goes to the Moscow man reportedly caught speeding at over 100mph. Once in the fuzzskis’ car, he tried to bribe them out of charging him, and when that failed, threatened to sue them for beating him up – punching himself repeatedly in the head. The officers were, we assume, quite happy to let him carry on with this self inflicted punishment, as they were able to point out in due course that he was on camera.

From the Journal archives

50 years ago

From “The Printing Dispute”, July 1959: “The slightly altered form of this issue of the Journal is a result of the temporary arrangements which have had to be made for its publication in consequence of the present dispute in the printing industry. It is to be hoped that this unfortunate dispute will be settled in the near future.”

The August issue indeed reverted to the regular, much more legible, typeface.

25 years ago

From “Dealing with Children in Need of Care”, an address by Lord Mackay of Clashfern, reprinted July 1984: “It is a token of the confidence which the Procurator Fiscal Service now has in the children’s hearing system that whereas in its early days fiscals tended to prosecute in most cases falling within the area of choice, the tendency more and more is to refer cases to the reporter. This is very much in keeping with the current general trend in the fiscal’s work towards keeping offenders out of court by way of alternatives to prosecution.”