

the Journal

THE MEMBER MAGAZINE FOR THE LAW SOCIETY OF SCOTLAND

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CPD EVENTS

Please view website for further details



MAY

- 17 ILG Seminar – Emerging Thinking Conference
- 19 ILG Seminar – Education & Training Roadshow
- 19 CPD for New Lawyers: Court of Session – Commercial Practice – Edinburgh
- 24 Written Pleadings in the Sheriff Court – Glasgow
- 24 Duties of a Company Secretary – Edinburgh
- 26 CPD for New Lawyers: A Practical Guide to Civil Legal Assistance – Glasgow
- 31 Will Drafting Essentials – Polmont

JUNE

- 2 Client Relations Partner Roadshow – Dumfries
- 2 CPD for New Lawyers: Advocacy Skills – Inverness
- 7 Cashroom Partner & Staff Training – Dundee
- 7 ILG Seminar – Employment Law Hot Topics
- 8 Bribery Act – Edinburgh
- 14 CPD for New Lawyers: Skills Exchange Workshop
- 16 Client Relations Partner Roadshow – Aberdeen
- 21 Buying & Selling Rural Property – Perth
- 21 Business Development – Edinburgh
- 23 CPD for New Lawyers: Criminal Legal Assistance – Edinburgh
- 24 New Partners Practice Management Course – Dunblane
- 29 CPD for New Lawyers: Skills Exchange Workshop
- 30 Employment Law

SEPTEMBER

- 6 Law in Scotland – One Profession – Glasgow
- 29 Medical Negligence Conference – Edinburgh

OCTOBER

- 28 ILG Annual Conference and Dinner

Still to come in the Autumn Programme:

- Client Care for the Older Client
- Practical Project Management
- Anti-Money Laundering Road Show/Accounts Rules
- One Stop Shop Road Show
- Consolidated Practice Rules
- Client Relations Road Show
- Criminal Conference
- Licensing Conference
- Manual Bookkeeping & Accounts Rules
- Personal Injury Conference
- Construction Law
- Mental Health & Incapacity
- Registered Paralegal Roadshow
- Transfer of Wealth
- Contract Law
- Business Planning for Growth
- Commercial Property Paralegals
- Human Rights Act
- So You Want to Be an ABS
- Family Law
- The Lawyer in Finance
- The Lawyer in Management
- Practice Management



Please visit our website for seminars details and future dates for CPD for New Lawyers. This series has been specifically for law students, trainee solicitors and solicitors with up to five years' PQE. Diploma students on the student extra scheme can attend these free of charge. Most courses will incur a small charge for all other individuals.

*ILG seminars are open only to In-House Lawyer Group Members. Videolinks available to Aberdeen, Angus, Glasgow, Fort William, Inverness, Isle of Skye, Lerwick, Moray, Motherwell, Scottish Borders and Stornoway.

FOR FURTHER INFORMATION

Details of venues, speakers, programmes and CPD hours are available on our website www.lawscot.org.uk/update. Update's aim is to continue to produce good quality, affordable training for our members and to help develop a comprehensive portfolio of events to support our members' needs. If there are any events you would like us to run in 2011, or any comments you have about the Update events programme, please let us know. Also, if you are interested in speaking at any of our events, we would be more than happy to hear from you.

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The new Government's justice credentials will soon be put to the test

In the in-tray

On the soap box

Once again I have to write this ahead of an election in the knowledge that it won't be read until after all the counting is done – though we may or may not know the final shape of the new Government by publication day.

To my mind the campaign never quite caught fire. I wonder whether this could be partly due to the fact that having had a minority government in office, dependent on the support of one or more opposition parties to get legislation through, the measures that have been passed have been less controversial than might have been the case.

This time the Society held its own hustings, which in the case of the Edinburgh one at least, attracted some of the parties' justice big guns. I am not a fan of politicians seeking to outbid each other to sound tough on law and order in the popular press, something they are regularly guilty of, but away from such an environment our panelists were generally more restrained.

One questioner commented that he was "reassured by the performance of the last Parliament compared with the things said before the last election". Let us hope such realism will continue to prevail. Easy slogans do not so easily become workable practice. The legislation to end automatic early release of prisoners, now passed two elections ago, still awaits commencement!

No sacred cows

There will be important decisions to be taken. Not only will the Gill review have to be taken forward, and further spending rounds be determined in relation to legal aid as well as court funding, but the Carloway review is proceeding apace and its recommendations will be public before the new Government is many months old.

This month's feature on the Carloway review should alert solicitors to the fact that no topics

Editor
Peter Nicholson



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are off limits to the review team. They reason that if the tests for ECHR compliance in fact require different safeguards to be in place to those traditionally enshrined in the law, we should take another look at whether the old rules still serve a purpose. So if you want there still to be a standard requirement for corroboration, you had better make your case. So also if you resist inferences being drawn from a suspect's or an accused's silence; and if you don't want to spend your Saturdays dealing with the previous night's custody cases. And you had better get your points in quickly, because the final date for submissions is 3 June.

Teaching new tricks

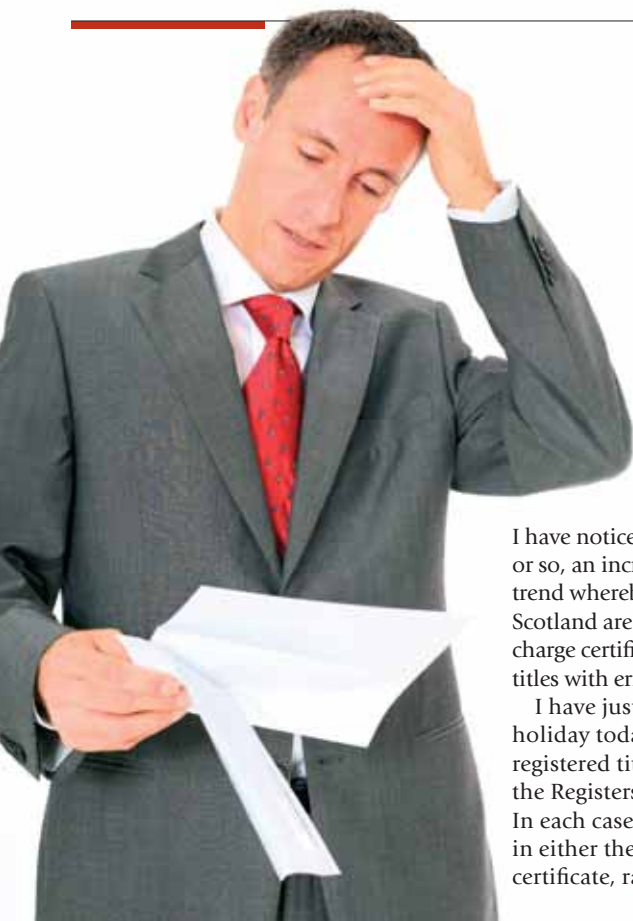
We lead, however, with the new professional training requirements coming in after the summer, which along with the revised CPD regime that will apply from November, will impact to a greater or lesser extent on everyone in the profession. We hope you will take the time to read the articles in full; it is difficult to summarise the content except to say that the aim of the changes has been to achieve more clearly measurable

outcomes at each stage of the process, and to offer more flexibility as to the means of achieving those outcomes. They should be of interest to all.

Rush to judgment

Finally, on the twists and turns regarding the new constitution, is there a lesson from the events leading to the revelation that a second senior counsel's opinion has contradicted the first one received by the Society on the extent of change necessary for the Society to comply with the Legal Services (Scotland) Act 2010? Perhaps for the Society and its officers, that any public statements may be taken down and used in evidence against them, and need to be carefully checked – though where the constitution is concerned, if there is any doubt about the matter, that is enough reason to say that change is necessary. And for the critics, perhaps that it is more difficult to support an allegation of lack of good faith than it is to ask legitimate questions of a position put forward. ■

● Read Peter Nicholson's blog, and others at www.journalonline.co.uk/blogs. Follow the Journal on Twitter at twitter.com/jlised



Errors from the Registers

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I have noticed, over the past year or so, an increasing (and worrying) trend whereby the Registers of Scotland are sending out land and charge certificates for registered titles with errors in either or both.

I have just returned from holiday today to find four registered titles had arrived from the Registers whilst I was off. In each case there was an error in either the land or the charge certificate, ranging from an

incorrect surname for one of my clients to an incorrect percentage/split in relation to ownership.

I wondered if the time had come for the Society to intimate to the Registers that solicitors would now be charging a fee for each incorrect certificate they required to return – I reckon a fee on each occasion of, say, £30 would not be unreasonable!

● Mark B Peggie, MHD Law, Leith, Edinburgh

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Despite all the controversies, it has been an extremely rewarding year as President, helped by colleagues in the profession and the Society's staff

Experience not to be missed

As my term of office draws to an end, I reflect on an amazingly intense year of challenges and achievements. It had been hoped that last year's AGM, under the chairmanship of Ian Smart, would draw a line under the ABS debate, but the controversy continued until the bill passed unopposed through the Scottish Parliament, including key amendments promoted by the Society.

In quick succession during the year we have had: the *Cadder* decision with its implications for criminal practitioners and the provision of legal aid for police station interviews, with the Society representing our members throughout; Lloyds Banking Group panel cuts, which ultimately resulted in firms being invited to reapply following successful representations by the Society; Government spending cuts leading to reductions in funding of legal aid; reduced spend on legal services by central and local government; the spectre of job losses for members in government and the criminal legal aid sector; add to that continuing calls for a separation of the representation and regulation roles of the Society, controversy over the adoption of a new constitution, high-profile resignations from the Council and a complaint to the Scottish Legal Complaints Commission.

You may well ask who would want to be President of the Law Society of Scotland with all that happening; and yet I would not have missed it for the world. Whether you agree with the direction of travel taken by the Society before and during my presidency, we have taken that direction with the belief that it was in the interests of the members. It has been a privilege

President
Jamie Millar



and – the vast majority of the time – a pleasure to be your President.

Thankfully, I was able to knuckle down and get on with the job, thanks to the support of a Council of many talents, which has been an inspiration. I owe an enormous debt of gratitude to the Council and to all our committee members, both for their personal support and for the valuable work they do. The profession is fortunate that so many of our number, together with lay members, give their time and expertise to the work of the Council and its committees.

My thanks also to Lorna Jack, our chief executive, and her staff at the Law Society of Scotland for their sterling efforts on behalf of the profession. It is trite to say so, but until you have been involved in the governance of the Society you have little conception of how much valuable work is done, day in day out, on behalf of the profession by the staff at Drumsheugh Gardens.

Grand finale

There is one more major event before I hand over to Cameron Ritchie at the Council meeting on 27 May, and that is the special general meeting on the same day. Following the AGM, we have

listened to concerns about the new constitution and will seek approval for an amended version. Hopefully, it will address concerns and also resolve any dubiety about the constitutional position of the regulatory committee, over which there have been competing views and opinions. The Council is leaving it for members to decide whether they prefer the option of adopting a new constitution, or amending the existing version in line with the requirements of the Legal Services (Scotland) Act 2010.

I hope to see as many of you as possible at the SGM as I take my leave of the presidency, but if you are unable to attend the SGM, can I encourage you to cast your vote by proxy whether for or against the new constitution, or whether for or against change in the existing constitution. These are important issues and it was disappointing that less than 15% of the membership voted in person or by proxy on the constitutional changes at the AGM in March. It is your Society, so you should take every opportunity to help shape its direction by exercising your right to vote at general meetings.

It has been an exciting and interesting year and one on which I will reflect further as I slip back into the hurly-burly of private practice – older, hopefully wiser, certainly battle-scarred, but proud to have represented my profession.

I hand over to Cameron Ritchie, as President, and to Austin Lafferty, as Vice President, secure in the knowledge that the profession will be in good hands. *Bon chance et bon courage.* ■

The profession is fortunate that so many of our number give their time and expertise to the work of the Council and its committees

Call in the experts

The Supreme Court's decision to remove expert witness immunity from suit will create undesirable uncertainty in Scotland, and the law should be urgently reviewed

Until a few weeks ago, the expert witness enjoyed an immunity, both north and south of the border. In broad terms, civil proceedings could not be brought against the expert for words spoken from the witness box, or for views or advice expressed in expert or technical reports prepared in anticipation of litigation.

The rule had several justifications. In particular, it allowed the expert to speak freely, thereby assisting the court, and without fear of being sued by a client. This had been the law for over a century, and was well understood (see, e.g. the Scottish case *Watson v McEwan* [1905] AC 480, applied in *B v Burns* 1994 SLT 250 and *Karling v Purdue* 2004 SLT 1067). Yet, with the Supreme Court decision in *Jones v Kaney* [2011] UKSC 13, 30 March 2011, all that has changed.

Jones was an English appeal, but the genie is out of the bottle, and it will not be long before the issue begins to create interest in this jurisdiction.

Jones was hit by a car and suffered psychiatric injuries. Kaney, a consultant clinical psychologist, was instructed by solicitors to examine and prepare a report on *Jones* for the purpose of litigation. Kaney opined that *Jones* was suffering from PTSD. The court ordered Kaney and the expert instructed for the driver's insurers to discuss the case and prepare a joint statement under the relevant English rules of court. The experts discussed the case by phone, and Kaney signed, without amendment or comment, a statement prepared by the insurers' expert which contradicted the views she had expressed in her report, and was very damaging to *Jones*'s case. Kaney claimed the statement did not reflect the discussion but she had felt under pressure to agree it.

Jones settled his claim, but then sued Kaney, alleging that but for her

negligence in signing the statement he would have received a larger settlement. Kaney argued that she enjoyed immunity.

The Supreme Court regarded the issue as one of public policy. It held by a 5-2 majority that the immunity could no longer be justified. In the principal speech the President, Lord Phillips, examined the traditional justifications for the rule (such as reluctance to give evidence) and concluded that these were not made out. In essence, the disadvantage to the public in removing the immunity was not such as to justify its retention.

Watson v McEwan is binding on Scottish courts, and the immunity could only be removed by a decision of the Supreme Court, or legislation of the Scottish Parliament. Will Scots law follow the English example? The answer is not obvious. On the one hand, if the Supreme Court has decided that the immunity is outmoded and can no longer be justified, the rationale for retaining it in Scotland is less convincing. On the other, in questions of immunity and public policy, Scottish courts have shown a reluctance to follow their English counterparts slavishly, where reasons of policy demand otherwise (see, e.g. *Wright v Paton Farrell* 2006 SC 404, retaining the advocate's immunity for conduct of a criminal trial, notwithstanding *Arthur J S Hall & Co v Simons* [2002] 1 AC 615).

Furthermore, the effects consequent on the removal of an expert's immunity are uncertain. In *Jones*, the dissenting speeches of Lord Hope and Lady Hale persuasively urge a cautious approach. As Lord Hope put it: "An incautious removal of the immunity from one class of witness risks destabilising the protection that is given to witnesses generally" (para 130).

Both justices identified potentially far reaching and unpalatable



Geoffrey Mitchell QC



Watson v McEwan is binding on Scottish courts, and the immunity could only be removed by a decision of the Supreme Court, or legislation of the Scottish Parliament

consequences. For example, in cases involving children, where their interests are paramount, is it desirable that an expert should be constrained, when expressing views for the benefit and guidance of the court, by fears of being sued by a disappointed client? And what of the expert appointed by a court or tribunal? Or the witness who is not called as an expert *per se* but because they possess specialist skills, and who expresses certain views when giving evidence? In other words, for the purposes of the immunity, how is the "expert witness" to be identified? Both justices thought it preferable that the matter be investigated by the Law Commission.

What was a settled area of our law has been opened up. It seems probable that civil actions against experts will follow. Standing *Watson v McEwan* they are bound to fail; but years will pass before that case can be reviewed by the Supreme Court, and meantime much uncertainty and anxiety will be created, not least among the experts on whom we rely to assist our litigations. It would thus seem appropriate, as Lord Hope suggested, for the Scottish Law Commission to carry out its usual thorough consultation. If, in this difficult area of law and policy, there is pressure to update or modify the law, would the debate and consideration that is triggered by a Commission review not be a sensible and logical first step? ■

● Geoffrey Mitchell QC is a member of Ampersand Advocates

Planning to deliver

Registers of Scotland's newly published Corporate Plan for 2011-2014 contains strategic objectives with customers', and the nation's, needs at their heart

We have just published the Registers of Scotland (RoS) Corporate Plan for 2011-2014. This outlines our strategic objectives for the next three years. Customer service and value for money are the focus of this Corporate Plan.

Sheenagh Adams, Keeper of RoS, commenting on the drivers within the plan, said: "Our customers' needs are at the heart of our business and I believe that in this time of challenge, we must continue to be ready to provide the most effective and efficient services that we can deliver."

Over the next three years, our vision, values, purpose and objectives will enable us to make this plan a reality. Once

again, these are aligned with the Scottish Strategic Objectives, set by the Scottish Government.

Our six strategic objectives are:

- To underpin the Scottish economy and contribute to sustainable economic growth by employing our specialist skills to ensure the integrity of the registers under the Keeper's control and public access to them.
- To run RoS as a commercially sustainable business with adequate reserves to cover operational and investment needs.
- To continue to develop and implement a business model that allows us to meet our

customers' needs.

- To create a culture of continuous improvement that focuses on economy, effectiveness and efficiency.
- To be a leading public sector employer where staff are fully trained and committed to meeting RoS's strategic objectives and value their total reward package.

One area which may have a significant impact over the next three years is new legislation with the possibility that Ministers may agree to bring forward a Bill on Land Registration in the next session of the Scottish Parliament.

● To reduce the environmental impact of our consumption and production.

The Corporate Plan includes our new targets for 2011-2012. Whilst retaining turnaround times and where it is in the Keeper's power, we will complete pre-1 April 2011 First Registrations and a further 32,000 Transfers of Part applications by 31 March 2012. Registration accuracy and customer care will now be measured through a series of customer surveys. **1**

● If you are interested in reading the Corporate Plan, it is available in full on our website at ros.gov.uk/publications/corporate_plan.html

First Registration legacy target outcome

As part of the Keeper's ongoing commitment to reducing registration times, the 2010-2011 legacy target was set to eliminate all pre-March 2010 first registration (FR) casework by 31 March 2011. In absolute numbers the total number of cases that fell within the target was 20,268 FRs*.

RoS despatched 19,133 of the 20,268 applications, leaving a residue of 1,135. The 19,133 applications despatched is the highest ever annual output

for legacy cases. Of the 1,135 applications not despatched, some 608 were for reasons outwith our control (primarily because we were awaiting additional evidence from the submitting agents), leaving a balance of 527 complex cases.

Looking at the remaining cases on a county basis, and including those cases outwith our control, 29 of the 33 counties have a legacy arrear of 50 cases or fewer and, of the remaining four counties, the

highest single legacy arrear is 208.

Overall RoS despatched 35,017 first registrations, which included 11,260 standard FRs which were subject to the turnaround target (80% of such cases to be completed within 60 days, with none taking longer than 120 days). Consequently our opening arrear of FR casework is now under 15,500 applications – the lowest arrear since before 1985. The Keeper intends to maintain the focus on reducing FR arrears and, in particular, on completing those cases remaining from the year just ended.

● * A number of cases inextricably linked with Transfer of Part casework were excluded from the target.

ARTL UPDATE – as at 18 Apr 2011

- 40,032 transactions have taken place
- 590 solicitors' firms are currently on the ARTL system
- 29 lenders are currently on the ARTL system
- 13 local authorities are using the system.

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



ros.gov.uk

After years of consultation and planning, the new qualification and CPD rules for solicitors reach their “Big Bang” after the summer. In a special feature the Journal asks how the changes will impact on legal practices as well as solicitors, practising and intending. The new CPD rules are covered in the next article; here we focus on the traineeship and prior stages

Stars of the future

It has been five years in the making, but in the next few months we will see finally coming to fruition the new improved route to qualification as a solicitor that should establish clear competences and standards from the moment the NQ emerges from their traineeship.

The subtle changes on the surface – the Diploma is now the Diploma in *Professional Legal Practice*; the traineeship remains at two years but now incorporates Trainee CPD (“TCPD”) in place of the Professional Competence Course – tell nothing of the root-and-branch review that has been undertaken with a view to ensuring, first, that the training is as relevant as possible to each individual’s needs, and secondly that there are proper benchmarks against which the intending solicitor’s progress can be assessed at each stage.

When will solicitors now in practice start to notice a difference? Apart from the CPD changes (see p16), that will depend whether or not their firm takes on trainees. Any firm with a trainee starting after 1 September

2011 will have to comply with the new requirements (but those who get in ahead of that date, whether this year’s Diploma graduates or those from earlier, will come in under the current rules). For the rest, they should see a real difference two years down the line whenever they come to employ a NQ solicitor.

Grown in PEAT

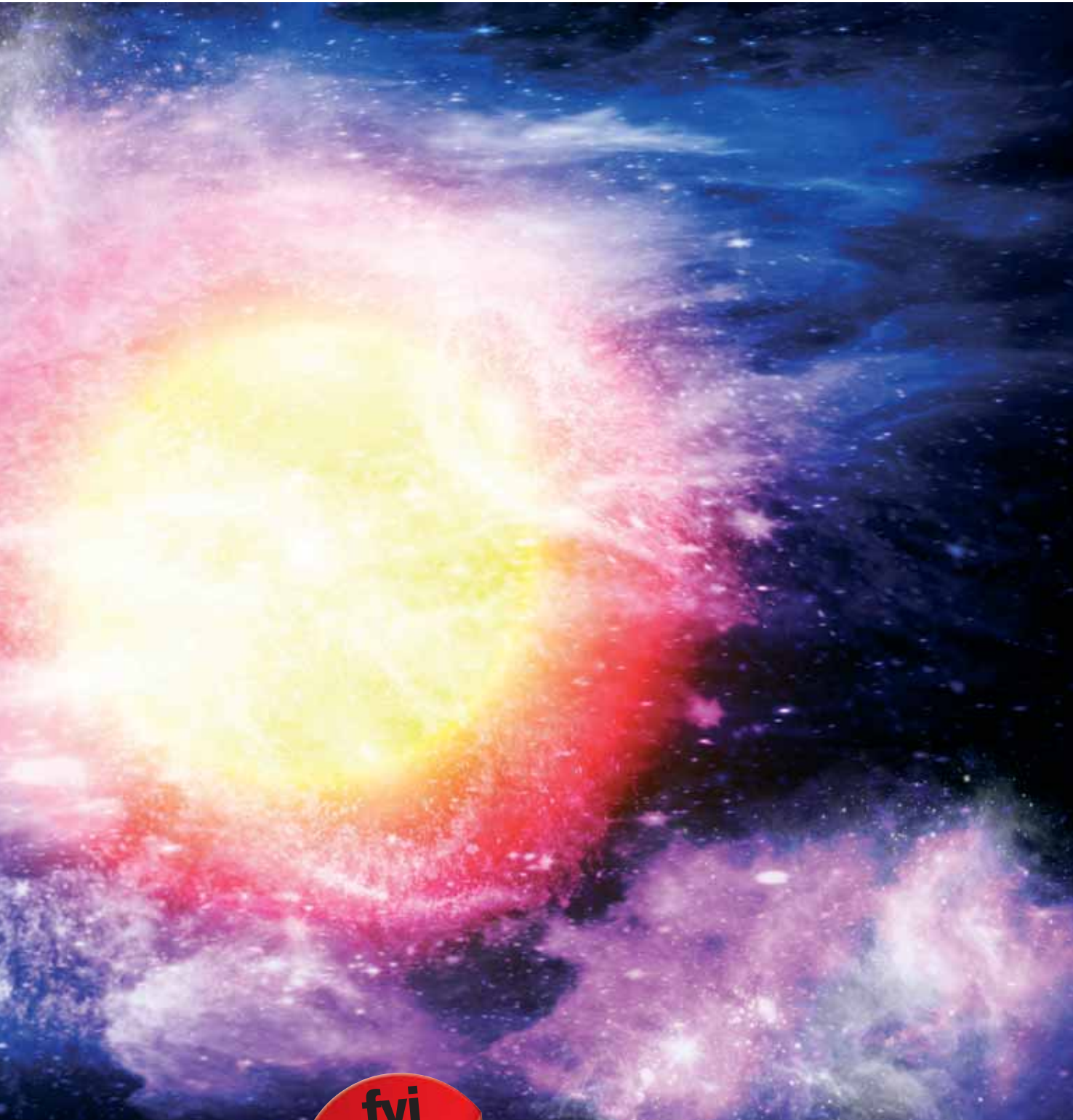
The acronym PEAT – Professional Education And Training – has been adopted as the umbrella term for the new system, to emphasise that it is a continuous progression through to qualification, with each stage following on naturally from the one before. Simply, PEAT 1 is the Diploma stage and PEAT 2 the traineeship. But it isn’t a set of letters that an individual will end up putting after their name. So what are those outcomes that the whole process is designed to achieve?

“For the first time we’re setting out a minimum benchmark standard for what it means to be a solicitor”, says Rob Marrs, senior policy and development manager in the Society’s

Education & Training team. “Very simply, you should not exit PEAT 2, the traineeship, without having met defined outcomes in professionalism, professional communication, professional ethics and standards, business, commercial, financial and practice awareness, and substantive and relevant legal knowledge.”

Guidance to be published by the Society over the summer will set out what trainees have to do over





fyi

Guidance will be published over the summer, setting out what trainees have to do to achieve the defined outcomes

their two years to achieve these outcomes. TCPD should assist that, as should the quarterly performance reviews. The latter will no longer grade the trainees on a 1-9 scale but will focus on the standard that needs to be achieved over the two years, measure the trainee against that and identify areas that the trainee requires to work on, "always focusing on competence, on fitness and propriety to become a

solicitor", says Marrs, "and on what training requirements still require to be satisfied in order to achieve that".

TCPD: flexible options

The replacement of the Professional Competence Course with the TCPD requirement – a minimum 60 hours over the two years – should benefit firms as well as trainees. Firms, because it can be scheduled flexibly and doesn't have to take the

trainee away for a block of days as at present. And trainees, because apart from a mandatory four hours of an ethics course, covering topics such as conflict of interest, confidentiality and anti-money laundering, it can be tailored to the needs of the individual. "Each trainee develops differently and the TCPD they will need will be different", Marrs comments.

● Continued overleaf >

A long road travelled

The changes to the route to qualification and solicitors' CPD, which come in later this year, have been informed by consultation with the profession, the academic community and others with an interest in the education and training of solicitors.

The process began in November 2006, when the Society launched a consultation, *Shaping the Future of Legal Education and Training* (Journal, October 2006, 16), which invited views on the current structure and content of solicitors' education and training and suggestions for the future. That consultation attracted over 900 responses, with many respondents giving detailed free-text comments. The views expressed helped to inform policy development, and in January 2008, the Society consulted on a document entitled *Discussing the Detail*

(Journal, January 2008, 28), which set out key policy considerations and the detail of proposals for each pre-qualification stage and for CPD.

The final consultation stage took place with publication of *The Way Forward* in November 2008 (Journal, October 2008, 36). The policy proposals that emerged were placed before the Society's AGM in May 2009; since then the Society has been working towards the implementation date of September 2011 for the changes to pre-qualification education and training, and November 2011 for changes to solicitors' CPD.

This work would not have been possible without the assistance of numerous members of the profession who have shared ideas and time through involvement in various working parties, focus groups and accreditation panels.

● Continued from page 11 >

There are other significant changes. Of the 60 hours, a minimum of 40 will have to be from an authorised provider, and the Society is currently open to applications for authorisation. These could be from a training firm seeking to offer bespoke TCPD for its own trainees, as well as universities or others intending to offer it to all comers. Web-based courses will be able to count, helping those especially in more rural areas. And up to 20 hours of the 60 can be non-authorised, which may be the CPD solicitors undertake: for example if you are training in family law and there is a change in the law, the CPD available around that is as valuable to the trainee as it is to the qualified solicitor.

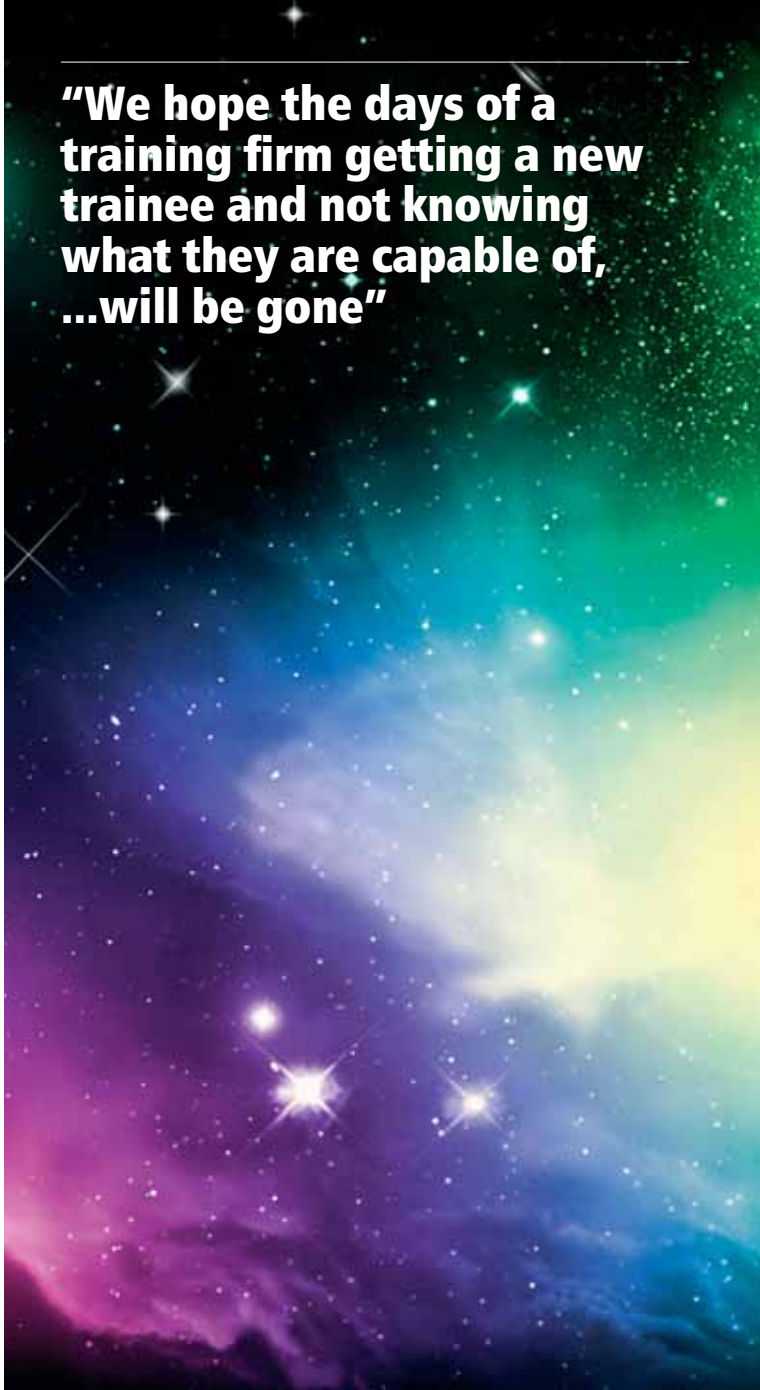
"The purpose of TCPD training is twofold", says Director of Education & Training Liz Campbell. "One, to embed at an early stage the importance of CPD; more importantly for the trainee, it's to assist the trainee in achieving the outcomes. Some trainees may come into your firm very able in one particular area and need less support and

guidance in that area, whereas in another area of practice or of skills development they may need some additional support, and these training needs can be addressed through TCPD.

"The firm will monitor progress, with guidance of the Society, of the trainee across the two years and submit the quarterly performance review. The trainee will also be required to spend some time logging what they are achieving on their traineeship, what their TCPD consists of, what they have learned from that, how have they been able to apply that back to their training and to their development as a professional, and at the end of the two years, all being well, the firm will certify that the trainee is in their opinion fit and proper and competent and has met all the outcomes."

Tailored Diploma

What of the Diploma, consistently viewed as something of a Cinderella of the stages to qualification, despite the best efforts to increase its appeal? How is it being aligned more closely with the traineeship that follows?



"We hope the days of a training firm getting a new trainee and not knowing what they are capable of, ...will be gone"

"As with the traineeship, we are also introducing an exit standard which in many ways is also an entrance standard to the traineeship", Marris explains, "so we hope the days of a training firm getting a new trainee and not knowing what they are capable of, or having unreal expectations of what they are capable of, will be gone. The PEAT 1 outcomes indicate the minimum that a first day trainee can do, but as well as that, the PEAT 1 programme has a number of things that I think firms of all sizes will like to see."

The principal one that will be of interest to intending trainees as well as their firms is the greater element of choice. Whereas at the moment there is only an election between the company/commercial and public administration modules, in the future up to 50% of the Diploma will be elective. "What's particularly interesting is that universities will play to their strengths", Campbell adds. "We know that Diploma providers will offer electives that build upon their strengths and local expertise."



“So students may begin to choose where they go on the nature of the electives, and we may see firms saying to trainees that they have already recruited, it might be an idea if you are coming to an energy law firm, to do the energy elective. Or a litigation firm might say, don't just do the litigation, do the advanced litigation elective as well. So hopefully we will see a much greater channel of communication between academia and the practising profession, and that doesn't have to be big firms, it can be any size of firm, and I think

there has been a real positive belief in all sectors of the profession about that.”

Another point of interest is that tax, that scary subject, will be taught “pervasively” rather than as a discrete unit. In other words, it will be taught in context wherever relevant across the core subjects. Who knows, such an approach may even help to win back business that lawyers have lost to accountants.

It will still be the case that Diploma teaching will give

● Continued overleaf >

CLT AND THE UNIVERSITY OF STRATHCLYDE OFFER TRAINEE CPD

Central Law Training and the University of Strathclyde are leading the way in professional legal training by providing a new, flexible, practical and low cost Trainee CPD (‘TCPD’) programme.

Q. How did the programme emerge?

A. The primary objective in the design of TCPD was to address the results of the Law Society's extensive consultations, which highlighted fundamental concerns the profession had regarding the PCC:

- employers lose trainees from the office for prolonged periods of time.
- law firms vary in size, type, and business, and one size does not fit all.
- the course fees can be high, as are the real costs to the business.

Q. How does the new TCPD design address these issues?

A. The solution responds to the needs of all types of legal practices – regardless of size and practice area - and places employers and trainees in full control:

- it is practical, flexible, and low cost.
- both legal and professional skills courses (designed for trainees) are available throughout the year.
- a variety of platforms are available– conferences, seminars, webinars, and workshops.
- there are no mandatory courses (other than the Mandatory Ethics Course)
- with over 200 webinars to choose from, it is accessible to practices throughout Scotland.
- CLT will offer free consultancy.

Q. How is the programme packaged?

A. There are three options available:

- a package of 40 ‘authorised’ hours. With this package an additional 20 ‘bonus’ hours are offered at no additional cost, ensuring trainees always have access to the highest quality TCPD when fulfilling the 60 hour requirement.
- individual courses costed at a trainee rate.
- bespoke in-house training solutions.

Q. What does the consultancy offered by CLT involve?

A. The programme has been designed from an employer's perspective. To ensure employers and trainees utilise the programme in the best way, to select courses which will develop competent and highly skilled trainees, CLT will offer FREE CONSULTANCY to trainees and employers prior to and throughout the two year traineeship.

The programme is at the time of writing subject to authorisation by the Law Society of Scotland.



● Continued from page 13 >

students the chance to engage in simulated transactions where they can make mistakes without the consequences that would entail in practice. Now, however, there is closer mapping of the desired outcomes across from PEAT 1 to PEAT 2, “so that what we’re saying is that this is a three year process: the Diploma at the vocational stage becomes much more obviously relevant, if it becomes clear that this is where you get to after one year, and in the following two years you build on that knowledge and ramp it up and hone it”, says Campbell.

Benchmarking the LLB

Going back a step further still, the initial law degree has also had an overhaul, so far as those intending to practise are concerned, with all the universities offering the LLB having to apply to the Society for re-accreditation.

Here the big change is a move away from the traditional list of professional subjects which universities required to teach, towards – once again – a set of prescribed outcomes to be met, in this case in knowledge, skills, and values and attitudes. That doesn’t mean you can achieve these without completing your degree – it is still necessary to achieve the number of credits that go with a full degree programme, whether at ordinary or honours level, a minimum amount of which must be in law. The accreditation process requires each university to map their teaching to the Society’s outcomes, as well as satisfying the Society as to general standards like staffing, facilities, assessment mechanisms and so on.

And with up to 50% of LLB students now having no intention of entering the profession, there has been a balancing act to be struck between having a degree that’s part of a professional qualification and one that is a more general liberal arts qualification. “That’s a balance we’ve been trying to strike in our requirements for accreditation”, Campbell explains.

One thing hasn’t changed – yet. The LLB degree remains formally an exemption from having to sit the Society’s exams, a route still followed by between 10 and 15 people a year, on average, in conjunction with a pre-Diploma traineeship. That option remains for the time being, though the content of the exams is also to come under review.

Relevant experience?

With more people seeking to qualify as solicitor having had previous legal-related work experience, for example as a paralegal, is there any more scope for such experience to count in their favour towards reducing, say, the two years of the traineeship, a matter which from time to time has to be considered by the Society’s Admissions Committee?

The answer is that it will still be up to the individual to make a case why they should be given a dispensation, but the defined outcomes should now make it easier for the committee to evaluate their past experience. Marrs explains:

“At the moment the Admissions Committee consider applications for a reduction in length of traineeship on merit and will continue to do so, but in future if you are a paralegal or have other relevant work experience, you may be able to say I do meet some outcomes, I just need experience in other areas. That may

The accreditation process requires each university to map their teaching to the Society’s outcomes, as well as satisfying the Society as to general standards

still not be enough for the committee to agree with the paralegal’s case, but at least the outcomes give them a clearer metric to grade against to make a decision.”

Campbell adds: “It very much depends on individual circumstances; this includes the length of experience and what those individuals have been exposed to, and how it is analogous to the training of a solicitor, because as a paralegal or any other law-related job an individual may have done, they may have been working in a very narrow area with very narrow experience. So it would not be an automatic right to time off the two year traineeship on that basis, and we still have to say that the onus is on the individual to convince rather than on the committee.”

Collective effort

Coming back to where we started, the effects likely to be felt by firms in practice, is there anything apart from the new flexibility surrounding TCPD

to encourage those who have not in the past taken on a trainee, to do so now?

“There is much more assistance and guidance from the Society than there has been before”, says Campbell. “Already we have on the Society’s website, the PEAT 2 training plan, a default plan if you like that explains what firms will need to do. Across the summer we’ll be developing a toolkit, if that’s an appropriate way to describe it, that will be available to the profession if they want to use it. It won’t be mandatory but for anyone seeking to take on a trainee for the first time it will be of help or guidance from the Society around how you undertake performance reviews, how you set objectives, how you assess how your trainee is performing. And towards the end of the summer we’ll be offering Train the Trainer courses which will have practical guidance for those responsible for training in all those areas.”

Marrs adds: “We actually give clear examples in the PEAT 2 training plan of the sort of work trainees might need to undertake or the sort of thing they need to do. Sometimes it’s just observing experienced practitioners; sometimes it’s getting involved in a transaction. It goes into the importance of an induction, the sorts of things that can be done then. It’s a really comprehensive document. It’s labelled ‘draft’, and I think it’s the sort of document that may always be a draft, because whenever we get feedback it will be built in, and hopefully it will be an evolving document that will be of real use to the profession, and the more the profession deal with us and the more feedback we get, the more useful it will be for them.”

Looking back over the whole project, he comments: “We’ve been very grateful to any number of solicitors all over the country from all sizes of firm, and from no firm at all in the case of some retired solicitors, or in-house solicitors, who have given up their time to help in a number of ways: be it TCPD, be it the ‘fit and proper’ test, the PEAT 2 outcomes working party. The input from the profession has been absolutely massive, so it’s a Society project but really it’s the profession’s project. We’re very aware of that and we’re very thankful for it.” ■

● Next month’s issue will feature an interview with a training manager at a leading practice, who has been closely involved in the work leading up to the reforms.

Registered Paralegal Scheme hits the mark

The Society's new scheme, run in conjunction with the Scottish Paralegal Association, is proving popular but still needs to be more widely known

The Society's Registered Paralegal Scheme is on track to achieve its target of 200 members in its first year.

With three months left for experienced paralegals to apply to join the scheme without having to undertake the full qualification process that will apply from August, 157 applicants have made it on to the new register at time of writing.

As a reminder, anyone applying after 15 August this year will have to hold a relevant and formally assessed qualification relating to their area of practice, and then train for a year as a trainee Law Society of Scotland (LSS) registered paralegal, before being admitted to the register. Those who believe they already meet the specified competencies for their area are advised not to leave their application to the last minute.

The five practice areas where guidelines have been created – civil litigation (debt recovery), residential conveyancing, wills and executors, criminal litigation, and liquor licensing – are to be joined soon by two more, one in family law and one related to reparation, though applicants in the new categories are likely to have to go through the



“When the Legal Services (Scotland) Act comes in there could be a bigger demand for paralegals, and it will be worth them getting the qualification”

qualification process.

Applications have come in from across the spectrum of legal firms, from the smallest to the largest, though Lorna McCafferty, Vice President of the Scottish Paralegal Association and registered conveyancing paralegal at the Wishaw practice where her husband is sole principal, still finds a widespread lack of awareness of the scheme.

“There has been quite a lot of media coverage, especially in the Journal, but there are still many firms that don't know much about it”, she said. “It's the same with paralegals: more people are contacting us to find out about it, but they often don't know much so we have to explain it to them.” (For the key features, see Journal, June 2010, 36, also available at www.journalonline.co.uk.)

One solicitor who is very keen on the scheme is Denise Loney of Optima Legal in Glasgow. Part of a larger UK operation, the firm carries out property related work, mainly for lenders, and loan or credit-related litigation.

The firm is heavily paralegal dependent, with about 50 in total, including 20 in Loney's litigation team working with three qualified solicitors. Optima's policy is to take

people on at a junior level, funding their development as their talents emerge, and many of their paralegals already have qualifications such as offered by Central Law Training.

Loney was quick to put herself forward for the Society's committee taking the scheme forward. Why did she feel the scheme was worth encouraging? “I don't have knowledge of how other firms deal with their staff, but I felt that before this scheme came into operation, anyone could give themselves the paralegal badge, irrespective of their experience, which could then undermine the qualifications and experience of those who were properly entitled to wear that badge. The scheme gives proper recognition to the people with experience.”

How many of her own paralegals will she be looking to put through the scheme? “Everyone!” Although her team are already well qualified, she believes that firms who can describe their employees as LSS registered paralegals will have a marketing edge that makes the £100 annual fee per head, plus 10 hours' CPD, money well spent. It will also serve as a boost to staff themselves to see their experience recognised.

McCafferty agrees from a paralegal's perspective: “It's recognition of the work they do and their achievements, and offers them a career path.”

She adds: “I think it will be a little while before we see the real benefits of the scheme, but these will come as it becomes better known and people understand what the qualification means. When the Legal Services (Scotland) Act comes in there could be a bigger demand for paralegals, and it will be worth them getting the qualification to help them market themselves.” **■**

Central Law Training and the University of Strathclyde

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Web: www.clt-scotland.co.uk/peat



Your traineeship, your way

This TCPD programme has been designed to meet the needs of employers and trainees, placing you in full control:

- practical, flexible, and low cost
- legal and professional skills courses available all year
- no mandatory courses, with the exception of the Mandatory Ethics Course
- conferences, seminars, webinars and workshops available

- accessible to practices throughout Scotland – over 200 webinars a year
- FREE CONSULTANCY

Three options:

- 40 'authorised' hours and 20 additional 'bonus' hours – £1,200 + VAT
- individual courses at a trainee rate – £30 + VAT per hour
- bespoke in-house training solutions – quotation available on request

An extra 10% off bookings made by 30 June

The Society has also taken a fresh look at the CPD requirements, and the pending changes should work to solicitors' advantage, as Liz Campbell and Rob Marrs explain to Peter Nicholson

CPD: a personal quest



Despite all the work put into the PEAT 1 and PEAT 2 schemes, for most solicitors already qualified it is the changes to the CPD rules that will affect them most directly.

Not that there should be any cause for alarm; quite the contrary. The bottom line is that the number of hours (a minimum of 20 each year) remains the same, but solicitors will be able to claim credit for a wider range of activities.

They will also find themselves focusing more clearly on their own training needs as individuals, and identifying for themselves the best means of meeting these – perhaps via routes that are good learning experiences but often not

recognised as CPD potential at present.

As Liz Campbell puts it, “Twenty hours is the minimum requirement, and we stress minimum because it’s not a target, it’s a guide: the individual should undertake the amount of CPD that is relevant to their training and development needs. At the moment there are requirements about how much management should be undertaken, how much group study and the like, and even how much management has to be in group study, but those requirements will be relaxed from 1 November and a much wider range of activities can count.”

Your personal plan

For the future, the only

stipulation about how the 20 hours are made up is that at least 15 must be in verifiable activities – that is, those where some kind of certificate of attendance or participation is issued to support the entry on the CPD return. People will also have more flexibility especially with online training, as to which the guidelines are very restrictive at present. From 1 November that activity will be regarded as valid provided it can be verified, for example via a certificate or email confirming that the programme has been completed.

How should you go about planning your personal learning? “Solicitors should be thinking at the start of the CPD year about what their development needs are for the year”, says Campbell.

“They may be practising in an area where they know the law is going to change, and have to be updated on what those changes are: that would be a valid training need. They may be going to practise in an area of law that’s new to the firm, or that they haven’t had much experience in. They may be taking on new responsibilities within the firm: managing staff for the first time, supervising a trainee, becoming risk management partner, money laundering officer, and have training needs around that.

“So at the start of the year, engage in some thinking about your needs, prepare a plan of how you might meet those needs, and that plan can also be flexible during the course of the year. If something new comes up it

can be added in; if something is no longer needed it can be removed."

Having undertaken a CPD activity, she adds, you should also spend some time evaluating what you have learned from it. How will you use that new knowledge? Do you need to change behaviours as a result? If you have acquired a new skill, how will you put it into practice? "That planning and doing and reviewing activity should be captured by the solicitor and there will be an online section of the record where they will have a template to do that."

Making a case

So what can you actually count towards your CPD? Rob Marrs offers the example of the recent SYLA lecture given by Lord Hope of Craighead. "Two solicitors said to me afterwards, I'm going to some CPD sessions next week. I said this surely should be able to count towards your CPD. They asked how, because it wasn't provided by certain organisations and it wasn't labelled as CPD, and I said, well this is one of the Supreme Court judges telling you how law is judged from outside Scotland, how the elements of the law came about, most notably the *Cadder* case, and I think that could reasonably be considered to be part of your continuing professional development. Equally our election hustings, asking cabinet secretaries and potential future cabinet secretaries what their views are regarding the changes that they wish to make or are considering making. Sometimes solicitors do loads of things that they don't actually consider to be CPD."

Other examples could be getting instruction on a new computer system to help you run your office, or preparing materials if you act as a university tutor.

Marrs adds: "If you do one-to-one coaching within the firm, as many firms do and is often

the very best way to learn, that could be counted in the verifiable hours if for example you have a programme of getting a certain amount of coaching when you reach certain levels within the firm. If that's set down and verifiable and recorded as part of the process, there is no reason at all why that could not count. So again hopefully this makes things easier for solicitors rather than harder."

In a nutshell, if something is relevant to your development, you should be doing it. But is there any risk that people will claim for something as CPD and the Society then decides it doesn't count?

"What they will have to do as part of their evaluation is make a case for themselves and how that has benefited them in terms of business or professional development", says Campbell. "As at present we will continue to check a sample of about 5% each year, so records will be called on for 5% of the profession on an annual basis. And if a solicitor is found to have falsified that return in some way, whether including something that is patently irrelevant or in not being able to verify attendance, the procedure will be followed in relation to the fact that they haven't complied with sufficient CPD.

"It shouldn't be about the Society policing solicitors, who are professionals and who should be capable of being trusted to take care of their own development: it's about giving the profession control of their development, so they can say as individuals, as firms, as a profession collectively that they can demonstrate what they do to maintain their competence. So obviously there has to be some element of monitoring by the Society, but we want solicitors to seize control of their development and not do CPD because the Society says they have to do it or because there is a box

to be ticked but because there is a developmental process."

Message to the public

Marrs comments: "The overwhelming majority of solicitors already do more CPD than they need to under the regulations, and the overwhelming majority do it within the spirit of those regulations and will continue to do so. We can't for fairly obvious regulatory reasons say, well you can just do 20 hours' private study; the very small number that do abuse the system would take advantage of that. But I think the message is that the profession is already doing very well. We want them to do as well and better in the future, but we also must be able to show the public how well the profession is doing."

One point to look out for relates to the planning aspect. Whereas at the moment it is possible, if you have already completed your CPD hours by October in a given year, to carry forward any CPD done

in October into the following year, or conversely to carry back any hours done in November in order to complete your 20 for the previous year, that will cease to be an automatic right. Campbell explains: "That doesn't sit comfortably with planning or with undertaking relevant CPD: if it's relevant to your development it's relevant regardless of the time of year. There may be occasions where individuals will have to make that request because of unforeseen circumstances, but it will not exist as an automatic right."

Marrs emphasises that the purpose of planning is maintaining competence as well as projecting to the wider world that the profession's standards are high. "Hopefully it will become more relevant to solicitors' needs; hopefully they will get more from their CPD; hopefully that will help them develop as professionals. Hopefully, and I don't want to beat about the bush about this, it will help them make more money." 

Other examples could be getting instruction on a new computer system to help run your office, or preparing tutorial materials



MSc Mediation and Conflict Resolution

University of Strathclyde Law School is pleased to present Scotland's first graduate level course in mediation.

Mediation is an increasingly common alternative form of dispute resolution deployed across various spheres, including employment, business, family, construction, environment, community and additional support needs. As well as providing a rigorous grounding for mediation practitioners, the course is aimed at those who wish to integrate a more mediatory approach into their existing role, such as managers, lawyers, HR professionals and health workers. As mediation is an activity that is best learned by doing, the course contains both academic and practical elements.

- **Start Date – September 2011**
- **Mode of Study – Full-Time or Part-Time**
- **Courses will be taught by a combination of evening lectures and intensive weekend sessions, to maximise flexibility.**

Contact Dr Bryan Clark on bryan.clark@strath.ac.uk for more details

Website: www.strath.ac.uk/humanities/courses/law/courses/mediation/

Lord Carloway's review of criminal evidence and procedure issues arising in the wake of the *Cadder* case has published a consultation paper which raises some fundamental issues but with limited time to respond.

Peter Nicholson provides an overview

Wha's like us?

"We are talking about the practical investigation of crime and what happens when a person is deprived of his/her liberty during that investigation.

"That is why I am determined that my recommendations will be practical as well as compliant with the general requirements of the European Convention on Human Rights and the needs of justice more generally."

So said Lord Carloway on launching the consultation to inform his review of the law and practice relating to the detention and questioning of suspects, and related matters arising from the *Cadder* decision and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 hastily passed in response.

Though acknowledging that he was dealing with a large and complex area, and stressing the paper's aim of stimulating open discussion rather than presenting draft recommendations, there is only an eight week period for preparation of responses, which ends on 3 June.

This article therefore attempts to flag up the principal questions raised,

with some initial thoughts from solicitors engaged with the process.

The paper (see www.carlowayreview.org) contains 34 questions for discussion, introduced under the headings Key elements of custody; Key stages of custody; Evidence; and Appeals. Lord Carloway is keen that the review should do more than just attempt to correct any flaws in the emergency Act: "It should take the opportunity to re-examine the core principles underlying the procedures of detention, police questioning, charge and arrest, and the implications for concepts such as corroboration and the inference from silence." Sub-text: there are no sacred cows.

Cadder: accept or waive?

"Key elements of custody" concerns the issues closest to a *Cadder* situation. When should a suspect's right to legal assistance arise? Should there be a statutory provision for waiver? What forms of legal advice are sufficient? Should there be any right to a solicitor of choice? What rules should apply to police questioning?

So far as Convention rights are concerned, the first of these questions should be clarified when

the further appeals referred by the Lord Advocate direct to the Supreme Court are decided. At his press briefing Lord Carloway was not proposing to await the decisions before finalising his report – on the view that ECHR jurisprudence is developing all the time – but with the hearing now scheduled for 28-30 June, they may be available around the time the report is produced.

For all the shock waves caused by *Cadder*, information available to the review team suggests that the right to legal advice is only exercised by about one in four detained suspects. "It is unclear why so many suspects do waive their right", the paper states.

Some will have been through the procedure before; many may have made up their minds not to say anything in any event; some may be unconcerned and happy to explain their position; and some, "especially experienced ones", will be concerned that arranging for a consultation will significantly prolong their detention.

John Scott, Vice President (Crime) of the Society of Solicitor Advocates and a member of the Carloway Reference Group, told the Journal: "Despite the new right, many suspects think the old situation still



applies. Perhaps some sort of public education is necessary, or at least clarification for suspects until the change is better appreciated."

The paper suggests that given the importance of the *Cadder* right, it might be prudent to provide expressly for information to be given before a suspect waives the right.

Your call

But how should legal advice be given if requested? It has still to be tested in court whether telephone advice is adequate, although currently over three quarters of consultations consist of short telephone conversations. "This may be because the advice in most cases is likely to be invariable; that being not to say anything", the paper notes.

Opinions vary over the sufficiency of telephone advice. Cameron Ritchie, a member of the Society's working group on the paper and a former procurator fiscal, said: "My personal view is that the vast bulk of cases where legal advice is sought could be dealt with adequately by telephone advice by a solicitor who is competent to give such advice. A personal meeting and advice during questioning should be mandatory (unless refused by a competent adult in writing) in serious cases (murder, rape) and for children and genuinely vulnerable adults."

He conceded that colleagues engaged in defence work are likely to take a different view; and strong contrary views were quoted in the Journal feature, November 2010, 12 at 13.

The paper recognises that legal aid arrangements are an important factor in ensuring that the right to legal advice is practical and effective; and it is a safe bet that this will feature heavily in submissions from the profession.

John McGovern, Past President of the Glasgow Bar Association, believes that recognising the suspect's choice of lawyer is equally important, as stated in the CCBE's recommendations on legal aid. "Without the ability of an accused person to obtain legal assistance from a lawyer chosen by

him, and in whom he has therefore expressed confidence, the rights under the Convention exist merely in theory, or at least without public confidence", he commented.

On this point, the Guide prepared by Justice in association with its Scottish Advisory Group suggests a cautionary approach: "Since the ECHR affords this right to representation, solicitors may wish to be in a position to explain why they thought that a telephone consultation was sufficient in a particular case."

Scott pointed out, however, that the Irish Court of Criminal Appeal recently decided that a telephone call of under 90 seconds was "reasonable access" in that particular case.

A further section deals with children and other vulnerable suspects; space does not permit discussion here.

Detention and beyond

The very first question in the paper asks whether the terms of ECHR article 5 (lawful arrest or detention "on reasonable suspicion of having committed an offence") should be incorporated into Scots law to provide the sole grounds for taking a person into custody. Part 2, "Key stages of custody", takes the matter further. Carloway is considering whether, since *Cadder*, there is any need for the separate concepts of detention and arrest, or should a system of arrest on reasonable suspicion replace them.

And does the police charge serve any useful practical function, if article 6 rights apply as soon as a person becomes a suspect? The suspect might instead be notified that the case is to be referred to the procurator fiscal to consider whether charges should be brought, and if so, what – whether or not he/she is to remain in custody pending a court appearance. Again the issue is raised whether subsequent police questioning should be allowed.

Part 2 also revisits the maximum

● Continued overleaf >

For all the shock waves caused by Cadder, information available to the review suggests that the right to legal advice is only exercised by about one in four detained suspects

● Continued from page 19 >

length of detention, without offering any clues as to likely outcome, but does raise the possibility of conditional release, a power available to the police in England to release a suspect temporarily before the maximum has been reached, and then recall for the balance.

In Ritchie's view, "The vast majority of cases need only and indeed less than six hours' detention. To allow the Crown to lead evidence of self incriminating statements, *Cadder* (not the Act) must be satisfied. The 12 and 24 hours may remain but should be restricted to serious cases and perhaps only limited crimes. The Act should be repealed and a new one enacted after the review."

Scott agrees that the figures accord with the rather poor evidence for a blanket extension to 12 hours, produced ahead of the Act; and on the need for the Act to be repealed

connection is not obvious. However, introducing its section on evidence, the paper observes that since the 2010 Act there has been some public comment that the balance of the system has been tilted too far in favour of the accused.

But that is not the underlying rationale for taking a fresh look at such a fundamental pillar of the Scottish system. Although the corroboration rule has been thought of as an essential safeguard for an accused, *Cadder* made it clear that such safeguards could not be used to overcome any disadvantage from the lack of availability of other rights.

The paper observes: "Since the requirement for corroboration does not exist in any other European jurisdiction, it is reasonable to assume that, were it to be removed, there would be no basis for concluding that this, at least of itself, would result in a breach of article 6. But that is not a good or sufficient reason to remove the requirement if it serves a useful purpose in the

● it can be questioned what degree of practical protection the rule offers where there is a single credible witness supported by limited circumstantial evidence;

● the rule can present a suspect with a difficult choice whether to give an explanation under police questioning that may be taken as corroborating aspects of an offence, such as that intercourse took place, or remain silent in the knowledge that a jury may find the accused's position, e.g. that intercourse was consensual, less credible if advanced at a later date.

The questions under this heading are, simply, should the requirement for corroboration be abolished; and what should the test for sufficiency of evidence be?

Despite the points made in

"If the argument is that corroboration prevents miscarriages of justice, we would like to see where that is coming from, and if it is in fact true"

and replaced with one which properly meets the needs of the majority of cases as well as the more complex exceptions.

Also, should Saturday courts be reintroduced to reduce the burden of dealing with custody cases on a Monday? Current GBA President Ken Waddell says the GBA's initial soundings suggest the move would be as unpopular with Scottish Court Service staff as with defence agents, as well as requiring significant funding through enhanced legal aid rates and increased budgets for SCS, Reliance, court security, the prosecution service, prisons, etc. "The potential impact on witnesses will also have to be carefully considered, including issues such as child care for witnesses, given the reduced availability of child care facilities at the weekend."

Corroboration: a rationale?

Cadder has often been said to have implications for rules of evidence other than admissibility, in particular the requirement for corroboration. The

domestic system."

Among the relevant considerations the paper notes in support of the present rule are:

- the risk in relying on the evidence of a single witness;
- there is a clear and objective test for prosecutors to apply in deciding whether to prosecute, and a "baseline" for judges in considering whether to convict;
- it is not clear how many additional prosecutions and convictions there would be if the requirement were removed.

As against that:

- prosecutors elsewhere make decisions as a matter of routine, based on broad concepts such as the likelihood of conviction and the interests of justice;
- corroboration is less likely to exist in some types of case such as sexual offences, and this has given rise to elaborate rules on what can amount to corroboration, on which juries require to be directed, with potential for misunderstanding;



the paper, there seems to be little support for abolition from the profession. Ritchie commented: "I believe most Scottish lawyers would be loth to diminish corroboration requirements, never mind abolish them. They are a safeguard not just to suspects but also to prosecutors and police. The reality is that more cases would proceed and more would go to trial without corroboration."

He added: "I would find it difficult to advise a plea of guilty based on the evidence of one witness completely unsupported."

Waddell put it this way: "Removal of the requirement for corroboration might require a change in the jury majority required for a guilty verdict. With 15 jurors and a simple majority, the need for corroboration provides a legal hurdle to be

overcome before a jury require to assess matters. Without that hurdle, which is protective in nature and seeks to ensure that the opportunity for miscarriage is minimised, there is a realistic likelihood of increased numbers of miscarriages of justice."

McGovern said simply: The *Cadder* case corrected an embarrassing anomaly in our criminal justice system. There is in my view no necessary linkage between *Cadder* and corroboration."

Scott also queried the suggestion of a need for "rebalancing": "Just because our system was fair in many other ways, but not in relation to solicitor access, that is no reason to say that we must now purposefully set out to make some aspect of it less fair in some other way. That way lies injustice and the potential for many more miscarriages."

"Corroboration provides an important element of quality control in many cases, as opposed to being merely a measure of quantity. Without it we would need some other form of quality control to avoid questionable cases going to juries. In any event I am not convinced that corroboration is absent in other countries as a matter of fact, if not of law. If we skew our system for rape cases, as seems to have been suggested by some, we run a greater risk of miscarriages, but what will be the gain? In England the conviction rate for rapes appears to be only slightly higher than in Scotland."

Questioned on the subject at the press briefing, Lord Carloway said the review team would welcome views on the miscarriage issue. "If the argument is that it prevents miscarriages of justice, we would like to see where that is coming from, and if it is in fact true, given the absence of a corroboration rule in any other system in the West."

More evidence matters

One effect of the decision in *Cadder* has been to move away from the idea that a general test of fairness on its own is sufficient safeguard of a person's Convention rights, in relation to admissibility of statements. The paper therefore raises the question whether it is time for the test and any exclusionary rules to be set out in statute. If so, questions arise as to the treatment of "mixed" statements, as well as those that are wholly exculpatory, if any such rules are to be applied consistently.

Finally on evidence, there is the question of inferences from silence. If there is a right to remain silent under

Carloway terms of reference

The remit of the review, entitled "Access to Legal Advice in Police Detention: Consequences for Law and Practice", is:

1. To review the law and practice of questioning suspects in a criminal investigation in Scotland in light of recent decisions by the UK Supreme Court and the European Court of Human Rights, and with reference to law and practice

in other jurisdictions;
2. To consider the implications of the recent decisions, in particular the requirement for legal advice prior to and during police questioning, and other developments in the operation of detention of suspects since it was introduced in Scotland in 1980 on the effective investigation and prosecution of crime;
3. To consider the criminal

law of evidence, insofar as there are implications arising from (2) above, in particular the requirement for corroboration and the suspect's right to silence;
4. To consider the extent to which issues raised during the passage of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 may need further consideration, and the extent to which the provisions of the Act

may need amendment or replacement;
5. To make recommendations for further changes to the law and to identify where further guidance is needed, recognising the rights of the suspect, the rights of victims and witnesses and the wider interests of justice while maintaining an efficient and effective system for the investigation and prosecution of crime.

questioning, as well as a privilege against self incrimination, is that compromised if it is possible to draw an adverse inference? Or should the court be entitled to interpret silence as common sense permits? What practical difference would that make, especially where silence is maintained on the advice of a solicitor?

McGovern sees no justification for restricting the right to silence, citing the 1994 Scottish Law Commission report which warned that there was no sound basis for such a move: "The only significance of the accused's silence is that the prosecution evidence is uncontradicted. The Commission does not see why it should be possible to draw adverse inferences where the accused has quite justifiably remained silent."

It has never been identified, he adds, how many accused persons, over a stated period, have been wrongly acquitted after exercising their right to silence.

Appeals revisited

On appeals, the paper recognises the problem caused by appeals sought to be lodged late, and the lack of incentive to progress an appeal if the appellant is then allowed interim liberation. Options noted are a stronger test ("likely to succeed") before a late application for leave is granted; a longstop date (say a year) after which the only route would be via the Scottish Criminal Cases Review Commission; and powers of the court, including dismissal and orders in relation to costs, in order to ensure smooth running of appeals.

Other questions include whether it is desirable to remove the possibility of multiple appeal routes (*nobile officium*; bills of advocacy and suspension); and whether to keep the provisions relating to the

SCCRC introduced in the 2010 Act, which increase the discretionary powers of the High Court, arguably at the expense of public confidence in the SCCRC.

John Scott sees that there may be some merit for simplifying appeals procedures, but added: "It is vital that procedural rules and time limits do not strangle appeals with merit. For me and many others, remedying miscarriages of justice is more important than finality. The court's relationship with the SCCRC is also of constitutional significance. This aspect of the Act was perhaps the most worrying and is certainly in need of being revisited."

Something has to give

With the consultation having been published less than a month before this issue went to press, interested bodies were still considering their responses when approached for comment. However they are agreed as to its significance.

"It is essential that members of the Society actively engage in this review", said GBA President Ken Waddell. "The GBA welcome any and all contributions which can be sent, for consideration, to the Association or direct to me at kjw@peacockjohnston.co.uk. Any contribution received will be carefully considered before the GBA written response is finalised and submitted."

Similarly the Law Society of Scotland's own working group would welcome submissions, which can be sent to Alan McCreddie at alanmccreedie@lawscot.org.uk.

Whatever your views on how the system is working at present, change is in the offing. Asked if the law had become "out of kilter" since *Cadder*, Lord Carloway replied: "The short answer is yes." ■

Holyrood: a verdict

As the Scottish Parliament's fourth term opens, a study has recently been published in which legal experts provide a critical appraisal of its law-making efforts in the years since devolution. Elaine Sutherland, one of the co-editors, offers a summary based on the introduction to the collection

When the members of the Scottish Parliament left Holyrood in March – some temporarily, others permanently – and preparations for the elections in May got underway, the Parliament had completed its third term. What has it achieved over those three sessions?

It has moved from temporary accommodation into its permanent home: a home viewed by some as an architectural masterpiece and by others as a blot on the landscape. The unanimous view was that the building had been expensive, but objections on that score have faded – and recently have been overshadowed by the Edinburgh trams debacle. Members of the Scottish Parliament sorted out the business of their own expenses and emerged with rather less ignominy than their colleagues at Westminster. The political fortunes of some soared, while those of others crashed and burned. As the dominant political party changed, the administration rebranded itself. The “Scottish Executive” of the early Labour/ Liberal Democrat years was replaced by the “Scottish Government” of the minority Scottish Nationalist administration. Much of this is the usual stuff of politics, wherever the legislature is located.

A legislature that would be different

But this Parliament was supposed to be different. There was a lot riding on the creation of the Scottish Parliament under the Scotland Act 1998, although the precise aspirations were – and remain – as varied as the political opinions of the population. The sense of reaffirmation of national identity was captured by Dr Winnie Ewing, the Parliament's most senior member, at its first meeting in May 1999 when she declared that “The Scottish Parliament, which adjourned on 25 March 1707, is hereby reconvened”. Of course, this modern Parliament is a very different constitutional animal from its predecessor. No matter. This was the beginning of an exciting new political era for Scotland.

Time for an assessment

As the 10th anniversary of the Scottish Parliament in 2009 approached, a group of academics at Stirling Law School concluded that it was time to offer the first critical analysis of the Parliament's contribution to law making in a number of key areas, and to put this contribution into its wider policy and socio-legal context. There was something delightfully symmetrical about Scotland's newest law school undertaking the task in respect of



this new legislature. A new and still comparatively small law school could not undertake the task alone, but then the Scottish Parliament does not operate in isolation. Fortunately, Scotland has a wealth of talent amongst its legal academics and practitioners.

Approaches were made and each individual who accepted the challenge was asked to pass judgment on the progress made by legislators in his or her field of expertise. Contributors were invited to subject the key legislative themes in their own areas to rigorous critical analysis and also, in this context, to consider whether the Parliament has achieved what had been hoped for when it was established by the Scotland Act. The result is *Law Making and the Scottish Parliament: The Early Years*, newly published by Edinburgh University Press.

Given the wide variety of political and other opinion of the



contributors themselves and the wide range of legislative efforts on which they commented, a degree of caution is called for in drawing general conclusions from the volume. However, it was striking that the overall verdict was one of optimism tempered by experience.

Much legislating but few pyrotechnics

In their first 10 years, the members of the Scottish Parliament demonstrated immense industry, leading to a great deal more legislation being passed by the Parliament than was envisaged originally. On the other hand, there has been relatively little in the way of the legislative pyrotechnics that were anticipated by some when the Parliament first sat in its temporary lodgings on the Mound in Edinburgh in May 1999. But perhaps neither of these features is surprising.

Neither the preceding campaign for a Scottish Parliament nor the

Even the most vociferous advocates for the creation of the Scottish Parliament had never claimed that all of the law in Scotland was in need of wholesale, radical reform

Labour Government's 1997 white paper on Scottish devolution promised sweeping legal reform. Rather, they were premised on the political and social need for Scotland to have a legislature to rectify the so-called "democratic deficit" which had become apparent during the 1980s and 1990s, when UK Conservative Governments were in power with little parliamentary representation from Scotland.

A fundamental problem pre-devolution had been finding the time at Westminster to pass legislation for Scotland. There were important

technical aspects of Scots private law, like heritable property, that were in need of modernisation and more thorough consideration than the Westminster timetable had allowed. It is in this context that the Parliament may have done most in achieving its goals.

On the other hand, even the most vociferous advocates for the creation of the Scottish Parliament had never claimed that all of the law in Scotland was in need of wholesale, radical reform. Devolution was not

● Continued overleaf >

● Continued from page 23 >

a legal “year zero”, and the new Scottish Parliament inherited a body of developed statutory provision from Westminster which was neither appreciably better nor worse than that which had been enacted for the rest of the UK. Indeed, some fields, like the law of evidence and the structure of local government, had received significant attention from Westminster, and the Scottish Parliament’s legislative contribution was largely a continuation of what had gone before.

In addition, although there were important technical aspects of Scots private law that were in need of modernisation and more thorough consideration than the Westminster timetable had allowed, there was little in terms of the actual substance of the law that the general public would have thought to be monstrously unjust or otherwise seriously objectionable.

Effective and competent legislators

In many respects, MSPs have proved themselves to be effective and competent law makers, enacting often weighty and complex legislation in a wide range of areas. A number of the contributors to *Law Making and the Scottish Parliament* express admiration for the Parliament’s legislative skill and respect for its achievements. In particular, the legislation on arbitration, charities, heritable property law and reform of the judiciary reflects well debated, thoughtful and careful technical revision that has significantly improved legal provision for Scotland. In the field of transport, Scotland’s legislators demonstrated that they were not afraid to review and change the ways in which they legislate in the light of experience.

Some disappointments

One hope for the Scottish Parliament was that it would be more accessible, open and responsive

One hope for the Scottish Parliament was that it would be more accessible, open and responsive than Westminster, allowing for greater public participation in law making

than Westminster, allowing for greater public participation in the law-making process. While there has been wide consultation on many aspects of legislative reform, the public petitions procedure has failed to live up to expectations, sometimes because the proposals contained in the petitions were so partisan or flawed.

Further, it is arguable that, although the structure of the Parliament is distinctive and aspects of its procedure are more open and inclusive than the Westminster equivalent, the executive dominates the legislative process as much as it does in London.

It is also the case that politically controversial measures, like recognition of same-sex relationships, have all too often been passed to Westminster under legislative consent procedures, in what amounts to a failure of political leadership.

In the juvenile justice arena, while the Labour/Liberal Democrat coalition indulged in punitive youth crime rhetoric, in contrast to the SNP administration’s emphasis on welfare issues, neither Government has actually legislated very much in the field. In the context of Scotland’s culture, when the Parliament has engaged with particular issues in legislation it has often achieved much, but the leadership and overall vision of the Scottish political class have been disappointing.

The view that there has been a somewhat passive and even supine approach to law making by MSPs is shared by a number of contributors, including some trenchant criticisms of the Parliament’s failure to monitor and challenge the Scottish Government in the area of human rights.

In other areas, like criminal law and legislation on the environment, education and housing, while there has been a glut of law-making over the past 10 years, reform has been implemented in a largely piecemeal, fragmented fashion. In this too, the Parliament would seem to have followed in Westminster’s *ad hoc* footsteps.

A week may be a long time in politics, but 10 years is a very short time in the life of a parliament. The next chapter is being written, not only by the voters of Scotland, but in the form of the Scotland Bill. ■

● Elaine E Sutherland is Professor of Child and Family Law, Stirling Law School, University of Stirling (elaine.sutherland@stir.ac.uk), and Professor of Law, Lewis and Clark Law School, Portland, Oregon (es@lclark.edu).

This article draws on the editors’ introductory chapter in E E Sutherland, K E Goodall, G F M Little and F P Davidson (eds), *Law Making and the Scottish Parliament: The Early Years* (Edinburgh, Edinburgh University Press, 2011). The author is most grateful to Edinburgh University Press, the Edinburgh Law Review Trust and her fellow editors for permission to reproduce parts of the chapter. However, this article does not replicate the chapter and the usual caveat applies. Any opinions expressed are those of the author and do not necessarily reflect those of any other person or body.

The book is reviewed at p50 of this issue.

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Despite the traumas of the past year or two for the profession, incoming President Cameron Ritchie is hopeful that the Society is improving its engagement with its members and other bodies who represent them, as he tells Peter Nicholson

Public ethos



● Continued overleaf >

● Continued from page 25 >

Alternative business structures? Legal aid? The Society's dual role? Or just the intricacies of constitutional reform? Whatever the issue, or issues, each new presidential term at the Law Society of Scotland these days seems to bring its share of controversies to threaten schism within the Scottish solicitor profession.

Yet when all is said and done, the majority of the Society's 10,500 or so members still have as little to do with their professional body as possible. None of last year's highly charged general meetings and referenda achieved more than a 40% turnout. And Cameron Ritchie, who takes over the hot seat at the end of May, has it as one of his goals as President to encourage solicitors to take more of an interest in their professional body's work.

"If you ask people face to face, there is a mixture of things", he says. "They are largely content with what the Society does on their behalf, or unfortunately they see the Society as a background support that doesn't have a great deal of day-to-day impact on their lives. It's the latter group that concern me because even at our best we still have about 60% of the profession who are not engaged on an active basis in anything that we do."

Time to move on

You might think that the Society has enough to do with the ones who do engage. The divisions caused by the big issues of recent times are very real. Would it be fair to say that following the recent row over legal aid and the Society's role in where the cuts fell, they have become deeper than ever?

Ritchie does not accept that that

Cameron Ritchie factfile

- Born and brought up in Paisley; educated at the John Neilson Institution and Glasgow University, from where he graduated in 1972.
- Apprenticed at Wright & Crawford, Paisley, then joined the Procurator Fiscal Service, as it was then called.
- Posted successively to Ayr, Glasgow, Hamilton, Dundee, Stirling – and Fife, where he became area procurator fiscal. Also admitted as solicitor advocate.
- Married with two adult children, he lists his interests as walking, golf and watching rugby – which he used to play but is still suffering from the effects.

"The Act requires the Society to act 'in the interests of' the profession, and the public in relation to the profession. How can you disentangle those interests?"

represents the broader picture, believing for instance that the Society is once again coming to work more closely with the Scottish Law Agents Society, which led the opposition to the ABS reforms in the Legal Services (Scotland) Act. "It's quite clear to me that SLAS for example are now reconciled to the fact that the 2010 Act is in place. We had a lengthy and at times robust debate about whether it should be passed, but now we've reached the stage where it has, they've accepted that. There are still strong differences of opinion, but we see signs of them being prepared to work closely with us to take things forward."

At time of writing the Society is in talks with SLAS and others to seek agreement on a way forward for constitutional change, following the failure to achieve sufficient support for the scheme before the AGM – a project in which Ritchie has been involved since its inception. With senior counsel having since advised that the weakness of the current constitution in relation to the 2010 Act is basically the inability to appoint non-lawyers as full members of Council, does he still believe that adoption of a whole new scheme is the better way forward?

"We started out on this before the 2010 Act was even envisaged, or at least its details. The changes in the constitution are an attempt to bring the rules of governance, the Society's role, its management as an organisation up to date, and make them more modern and capable of working. The Act of course provides us with a situation where certain things need to change, but I really want to stress that that is not what the whole project is about."

Voices being heard

Talk of the constitution leads on to the Society's functions, and the arguments over its dual role. Not a new issue, of course, and one answered quite firmly in favour of



the status quo, in the referendum requisitioned last year. Ritchie points out that the Solicitors (Scotland) Act does not actually use the terms representation and regulation. "The Act requires the Society to act 'in the interests of' the profession, and the public in relation to the profession. How can you disentangle those interests? I would say that as a profession you have to have regard to the public interest."

He regards as absurd the idea that the Government would be willing to negotiate on matters such as legal aid with different groups from around the country, if solicitors individually were free to choose their representative body; and points out that organisations such as SLAS and the Glasgow Bar Association "often give evidence to the Justice Committee for example, and stress their own opinions, and these opinions I believe are listened to".

It is on that legal aid issue that he admits the divisions still run deep, especially with Glasgow members since the row over stipendiary court fees. "One thing that has surprised me has been the degree of personal enmity in some comments I have seen. At one GBA meeting I went to, they had issued a paper beforehand which included comments on my role that made me sound like some kind of government spy!" The irony is that he hasn't even been involved in those negotiations, not having



fyi
The Society has work in hand on a five to 10 year strategic plan, aiming to become the regulator of choice in legal services

dealt with legal aid in his career as a fiscal. He adds however that when he meets solicitors, GBA or otherwise, as individuals, reactions have been more positive.

Strategy matters

His time as Vice President has taught Ritchie not to be too grandiose about the Society's ambitions for the year ahead. "Twelve months ago I might have given you a very grand plan for the future. I'm afraid a year of reality has drawn me back a wee bit and some of our priorities are genuinely quite short term priorities. One is, we need to get changes in to implement the 2010 Act and then move on to the issue of becoming an approved regulator and what that requires."

Going to press ahead of the election, future timing remains uncertain, though Ritchie believes it likely that the legislation will be in force within the year. "Given that the Act was passed unanimously I think it would be quite difficult for whoever is the Government not to move forward and put the rules in place. But we're ready; we're anticipating what will be in the regulations; we're writing our rules, our framework; we very quickly could put an application together to be a regulator and put the necessary framework in place to move forward."

But the Society is thinking longer term as well, with work in hand on a five to 10 year strategic plan. What is the vision driving that? "We want to

be the regulator of choice for business entities that carry out legal services, that's a strategic vision, and what we have to do then is work within that to provide the sort of framework which would not only allow us to be a regulator but would attract legal services providers to come to us rather than somewhere else."

The work would also try and anticipate such things as IT developments, or the state of the economy: "Some of it's beyond the horizon: we could get it wrong, but it's still this question of just anticipating what's going to happen, both short and medium term, and being prepared for it."

He adds: "I think we've been in the habit for too long of reacting to things after they've happened. The profession's been very bad at that, tending to wake up after something's happened. That might have been the tradition but it's something we want to get away from, to be ready well in advance for anything that goes on and be prepared to move forward."

On recent experience, events within the profession have been as hard to predict as any, but Ritchie would like to improve the Society's ability to anticipate problems in its own backyard, and to respond. That applies equally to things that will lead to good press, such as the Holyrood manifesto with its call for better public education in matters legal, which was given a lot of coverage.

Governing the governor

The practice has been growing recently of candidates for office preparing a personal manifesto. Ritchie did not, and is quite glad of it given the rapid turns of events of the past year. He does however have a clear idea that his public sector experience can offer something different, particularly in working with chief executive Lorna Jack in taking forward the changes to the Society's governance.

"This is a large organisation with a substantial budget. My background latterly was as head of an area procurator fiscal's office that had a similar sort of budget and staff, albeit doing a completely different legal function.

"Externally as well, I find I'm able to bring a different perspective to the way we deal with people. I think it's been very useful in the *Cadder* case discussions to be able to make the point, when we are presenting our views to Government, that not everybody in the Society is a defence solicitor, that it contains prosecutors as well as the defence side and we have higher level objectives."

Conscious of the face that it presents to the public and politicians, the Society is trying to get away from "the image of rather a stuffy little club for a limited number of legal practitioners", and to become "a much broader and wider organisation that reflects the diversity of the whole profession". This, Ritchie believes, has been helped by the recent succession of office bearers which has seen the three roles shared between in-house, small firm and large firm solicitors.

At the end of the day, Ritchie recognises that his term of office isn't so much a case of seeking to achieve certain things within a 12 month period, as working with the other office bearers during his three years at that level, to move the Society forward – and also the wider profession. "That might sound slightly patronising, given there are some very large firms out there with thoroughly modern practices, and I don't want to insult them. But the profession as a whole is still seen by the public as being a wee bit antiquated and a bit conservative with a small c. It would be good to try and get over the view that it's a modern profession that wants to be involved in the whole civic life and business of Scotland and has a great deal to contribute to people." ■

Intimations
for the people
section should
be sent to:

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of Scotland,
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EH3 7YR

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deniserobertson@
lawscot.org.uk



On the move

Andersons Solicitors LLP

Andersons Solicitors LLP are delighted to announce the assumption of **Claire Newcombe** as a partner. Based in the firm's Edinburgh office, Claire joined the firm in 2005 as a senior solicitor, and was promoted to Associate in 2006. She specialises in insurance litigation and dispute resolution and has an in-depth knowledge of Court of Session practice and procedure.



Above (l-r): Frank Hughes, Claire Newcombe and Gilbert Anderson outside the Andersons office

Gilbert Anderson, Chairman and Head of Insurance Litigation and Dispute Resolution, said, "Claire's promotion to partner is thoroughly deserved and reflects her hard work and commitment to the firm. Her appointment further enhances the services which Andersons provide from our Edinburgh office to our growing client base".

Frank Hughes, Managing Partner, added, "We see the Edinburgh office as being integral to the firm's continued growth in insurance litigation and Court of Session business."



Julie
Clark-
Spence

BALFOUR + MANSON LLP, Edinburgh and Aberdeen, is delighted to advise that **Alison Pearce** and **Julie Clark-Spence** have been promoted to associates in the Litigation team.

BOND PEARCE LLP, Aberdeen, is pleased to announce that commercial property specialist **Michael Spence** has joined the company's Aberdeen office as a partner.



Alison
Pearce

BRECHIN TINDAL OATTS, 48 St Vincent Street, Glasgow and Hanover House, 45/51 Hanover Street, Edinburgh, intimate that on 1 April 2011 three of the firm's associates, **Pamela Stevenson**, **Vikki Watt**, solicitor advocate and **Carly Forrest**, solicitor advocate, were assumed as partners of the firm. On the same date senior solicitors **Joanne Farrell**, **Mark McCluskie**, **Jilly Petrie**



l-r: bto's Vikki Watt, Carly Forrest, chairman Willie Young, Pamela Stevenson

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and **Lindsay Urquhart** became associates in the firm.

CROZIERS and LAFFERTY REID are delighted to announce their merger. With effect from 1 April 2011, they are known as CLYDE DEFENCE LAWYERS.

The partners remain **Brian McGuire**, **Philip Lafferty** and **Judith Reid**. Contact details for the Dumbarton and Clydebank offices remain unchanged.

DALLAS McMILLAN, Glasgow, are pleased to announce that their associate **David McElroy** was assumed as a partner in the firm with effect from 1 May 2011.

HM REVENUE & CUSTOMS SOLICITOR'S OFFICE (Scotland) has merged with the OFFICE OF THE SOLICITOR TO THE ADVOCATE GENERAL FOR SCOTLAND, and from 1 April 2011 will carry on business from the following address: HMRC Division, Office of the Solicitor to the Advocate General, Area G-G, Victoria Quay, Edinburgh EH6 6QQ (DX: 557008 Edin 20; tel: 0131 244 7165; fax: 0131 244 1640).

IRWIN MITCHELL LLP, Glasgow, announces that with effect from 26 April 2011, its Scottish business has been transferred to IRWIN MITCHELL SCOTLAND LLP, 123 Elderslie Street, Glasgow G3 7AR (DX GW40 Glasgow), with telephone number 0141 300 4300.

LEDINGHAM CHALMERS LLP, Aberdeen, Edinburgh and Inverness, intimates that on 31 March 2011 **Robin D S Brodie**, **Eunice M McConnach** and **Paul M Lewis** retired as partners. The firm also intimates that on 16 March 2011 **Douglas M Watson** joined as partner and that on 1 April 2011 **Rodney A M Hutchison** was promoted to partner and **Sarah L Londrigan** was promoted to associate, all based in the firm's Aberdeen office.

MURCHISON LAW LIMITED, Inverness, are pleased to announce that **Ian A Tweedie** commenced employment with them as a consultant with effect from 12 April 2011. Ian can be contacted on 01463 709 992 or at ian@murchisonlaw.co.uk

PAULL & WILLIAMSONS LLP, Aberdeen and Edinburgh are pleased to announce that with effect from 6 April 2011, **Chris Arnold** was assumed as a partner in the firm. With effect from the same date, the firm also announces that **Alan McNiven** and **David McLeod** retired as partners in the firm and **Robin Clarkson** resigned from the partnership.



Raymond Mallon and Mark Shepherd of RMS LAW LLP, Falkirk are delighted to announce that **Claire Gillan** joined the firm as an associate on 1 April 2011. Claire (above) will maintain her civil litigation practice with a particular interest in child and family law. She is contactable at Legal Chambers, 8 Lint Riggs, Falkirk FK1 1DG (tel 01324 228587; email Claire@rmslaw.co.uk).

Stephen Webster is pleased to announce the establishment of MACFARLANE WEBSTER LIMITED. Stephen is the principal director of the firm and his contact details are: s.webster@macfarlanewebster.co.uk; 0131 516 3690; Forth House, 28 Rutland Square, Edinburgh EH1 2BW; DX ED59, Edinburgh; LP-67 Edinburgh 2; www.macfarlanewebster.co.uk.



Douglas Watson



Rodney Hutchison



Sarah Londrigan

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

... the point is to change it

Intercountry adoptions costs

The Scottish Government plans to charge a fee of £1,775 per child if adopted from abroad and seeks views on the proposal. See www.scotland.gov.uk/Resource/Doc/345438/0114925.pdf

● Respond by 30 May with completed respondent information form to LookedAfterChildren2@scotland.gsi.gov.uk

Criminal legal aid

The Scottish Government seeks views on whether individuals who are facing the full force of the state by way of a criminal prosecution should pay for their own legal representation. See www.scotland.gov.uk/Resource/Doc/344252/0114506.pdf

● Respond by 1 June to Criminallegalaidconsultation2011@scotland.gsi.gov.uk

Carloway on crime

Lord Carloway is undertaking a review of aspects of the criminal justice system on behalf of the Scottish Government and in the wake of the UK Supreme Court's judgment in *Cadder v HM Advocate* which, his Lordship states, "has had a profound and immediate impact on the Scottish system of criminal justice, as well as raising important constitutional issues". See www.scotland.gov.uk/Resource/Doc/925/0116090.pdf

● Respond by 3 June with a completed respondent information form to carlowayreview@scotland.gsi.gov.uk

Taxi!

Have you heard the one about the Scottish city/town whose taxi firms are run by local gangsters? No, surely not? Anyway, the Scottish Government seeks views on updating its best practice guidance for licensing authorities in relation to taxis and private car hire. See www.scotland.gov.uk/Resource/Doc/347437/0115670.pdf

● Respond by 17 June to Dave.williamson@transportscotland.gsi.gov.uk

Forced marriage

The Scottish Government is consulting on the statutory guidance in relation to preventing forced marriage to be issued to all relevant persons and bodies in Scotland who exercise public functions. See www.scotland.gov.uk/Resource/Doc/347416/0115668.pdf

● Respond by 1 July to eileen.flanagan@scotland.gsi.gov.uk

Society seeks feedback

The Law Society of Scotland's committees consider a number of consultations each month, from a wide range of sources including the Scottish Government, Scottish Parliament, UK Parliament and the SLC.

The Society is keen to engage with members on these and would welcome any comments members would like to offer. Members are invited to visit the website for further details: www.lawscot.org.uk/consultations

The Society's Mental Health & Disability Law Committee is appealing for instances of cases where banks are failing to give proper effect to continuing powers of attorney

Power in name only?

Have you experienced difficulty getting a bank to recognise and give effect to a continuing power of attorney? If so, the Society's Mental Health & Disability Law Committee would like to hear from you. The same applies to certificates of other appointments issued by the Office of the Public Guardian.

Now you might expect any bank to be long familiar with the concept of a power of attorney, and in particular to accept a copy document authenticated by the Office of the Public Guardian following the registration of a continuing power of attorney as required by the Adults with Incapacity (Scotland) Act 2000. Likewise, you would expect them to be familiar with certificates of appointment of withdrawers, financial guardians and persons authorised under intervention orders. But according to committee convener Adrian Ward, the truth is rather different.

Whether in connection with certificates of registration, or withdrawal certificates under the Access to Funds Scheme, it is only too common to find a bank not processing or implementing a certificate properly when it is presented.

"I had a recent case under the Access

to Funds Scheme", says Ward. "I got the certificate of withdrawal but when my client took it to the bank they didn't know what to do with it. They put it into force in part but said they couldn't stop standing orders."

He adds that there are "innumerable cases" of banks not accepting an official copy of a power of attorney document with registration certificate, although it is expressly stated in the Act to warrant the contents of the original. And difficulties can occur with any of the clearing banks or other financial institutions, irrespective of where they are based.

The problem appears to be a part training, part communication issue. Senior managers and advisers are well aware of the position in law; it is staff at the local branches who often appear unfamiliar with the status of the documents.

Although having personal experience of the type of problem, much of the information reaching the committee members is anecdotal. However the frequency of instances appears to be such that they are inviting solicitors to pass them details of specific cases that they can then take up with the banks and other institutions.

Initially it is hoped to meet with the

association representing the banks, to press the case for better consistency of practice. Ward however believes that there could be a discrimination issue involved, and that it might prove to be appropriate to approach the Equality & Human Rights Commission about the possibility of it lending its support if necessary. "If a bank failed to take account of the needs of a wheelchair user, that would clearly be discrimination", he says. "With a mental disability, the certificate is the mechanism to overcome the disability, and if the banks fail to recognise it, the result is in effect the same."

He adds: "Hopefully we will get some case histories that are so clear cut that we can run them as test cases. We want to show there is a generic problem that requires an urgent solution."

But he hopes that the banks and other institutions can be persuaded to act without formal proceedings being taken against them – an outcome that the Commission too would attempt to achieve.

Solicitors willing to pass on details of specific cases should send them to Brian Simpson, Law Reform Department, at the Society (e: briansimpson@lawscot.org.uk).

Senior managers and advisers are well aware of the position in law; it is staff at the local branches who often appear unfamiliar with the status of the documents



PICTURE BY GARY DOAK PHOTOGRAPHY

35 years on the clock

Scott Miller (Edinburgh), Ian Smart (Airdrie, and latterly *ex officio* as Past President) and Bobby Frazer (Edinburgh, but originally Kirkcaldy), who are leaving the Society's Council with a combined total of 35 years' service between them, are pictured with their commemorative quichs presented at their final meeting in April.

President Jamie Millar paid tribute to the dedicated service each had given: Scott Miller particularly to the Remuneration Committee and the Cost of Time Survey; Ian Smart to legal aid, access to justice and then as President; and Bobby Frazer to civil legal aid including the peer review scheme.

New rules for SGM

Consolidated Practice Rules and revised Accounts Rules will be presented to the Special General Meeting on 27 May in the George Hotel, George Street, Edinburgh (from 10am).

At present there are more than 35 individual sets of rules affecting the day-to-day practice of law in Scotland. These were drafted over a period spanning more than 20 years in response to developments in the law and in practice, and inevitably reflect some differences of approach, terminology and style. In particular, the precise categories of individual and entity to which each set of rules applies vary, if not quite from set to set, then frequently enough to make

it difficult to ascertain exactly what rules may apply to whom in any given situation.

The consolidation aims to set out the rules in a logical way, clearly indexed and with greater consistency. It should be more accessible and user-friendly and its aim is to make life easier for members in their day-to-day interaction with the rules.

A first draft of the consolidated rules was posted on the Society's website in November 2010 and there followed a two-month consultation with members.

The draft being presented in May (which now incorporates the revised Accounts Rules) reflects the results of that consultation and incorporates some consequential changes, all as outlined in the Report on the Consultation available on the website.

The accompanying guidance, advice and information provided by the Society is also being reviewed, updated and consolidated.

A review to simplify and where possible streamline the Accounts Rules has been progressed as a separate project, as more substantive changes were proposed. Members' views on the revised rules were sought in a consultation which ran contemporaneously with the consultation on the consolidated rules.

Three working groups were established to review different sections of the rules. All groups included accounting firms with legal clients. Two groups included representatives of SOLAS (the Society of Legal Accountants in Scotland) and the Scottish Law Agents Society. The proposals benefited from a variety of views and perspectives.

Alongside this review, one of the working groups also considered the form and content of accounts certificates and issued proposals for change as part of the consultation process.

Following consultation, changes have been made to the proposals which are now being taken forward as part of the review of all forms in use by the Society.

For further information on all the consolidated and revised rules, please go to www.lawscot.org.uk/members/regulation-and-standards

The SGM is also expected to see further proposals for modernising the Society's constitution, following talks between the Society and the Scottish Law Agents Society and the legal advice received on the need for changes. A second opinion of senior counsel has advised that new provision is necessary in relation to the Regulatory Committee under the Legal Services (Scotland) Act 2010, contrary to advice previously received.

Untraced drivers agreement revised again

Further changes have been made to the rules for recovery of loss caused by untraced drivers, under the agreement between the Motor Insurers' Bureau and the Secretary of State for Transport. The new rules affect property damage claims.

Where an accident occurs on

or after 15 April 2011:

- claims to the MIB in respect of damage to property caused by an identified vehicle are no longer subject to the application of an excess of £300;
- claims for property damage as a result of an accident caused by an unidentified vehicle are no longer excluded if MIB pays compensation for significant personal injury to any victim of the same accident. However an excess of £300 applies to these claims;

- the maximum amount payable for damage to property arising from one accident is increased to £1 million.

Both parties to the agreement are currently designing a process to ensure that the victims of accidents which happened on or after 11 June 2007 and before 15 April 2011 have fair access to a retrospective right of redress. Further information is expected shortly as to how these claims will be processed.

From the Brussels office

Small business review

The European Commission has published its review of the Small Business Act, covering the three key areas of ensuring access to finance, taking full advantage of the Single Market, and "smart regulation". It concludes that more needs to be done by member states: for example more states need to integrate the "think small first" mantra into legislative and policy decisions, and many need to simplify their bankruptcy procedures. The Commission also outlines a need

for further action in five areas including smart regulation, financing needs, market access, and helping SMEs contribute to economic growth.

Rights of the child

"An EU Agenda for the Rights of the Child" follows a wide public consultation and interviews with children from across the EU. It puts forward three general principles: children's rights should be integral to the EU's fundamental rights policy; policy should be based on evidence, and evidence gathering must

be improved; and finally, stakeholders must co-operate through the European Forum for the Rights of the Child. The Agenda sets out 11 concrete actions for the EU, including measures to make EU justice systems more child-friendly, measures to empower and protect vulnerable children, and measures to ensure that children's rights feature in EU external action. This year the Commission will create a single entry point on EUROPA so children can access information about their rights and about the EU.

Law in Scotland – One Profession

The Society's Annual Conference, "Law in Scotland – One Profession", will be held on Tuesday 6 September at the Glasgow Hilton Hotel. This year's event will be structured around six streams, each focusing on highly topical issues for sole practitioners, high street firms, in-house, big firms, legal aid practitioners, and new lawyers. Topics include:

- Winning more business from existing clients and new clients
- Tenders and procurement: what corporates look for in a law firm
- Ensuring your income from legal aid
- Dealing with difficult clients
- Building your professional network
- Your clients want WHAT?

Delegates also have the opportunity to attend an inter-professional networking event the evening before the event.

For more information on this and the Annual Conference, please visit the events section on the Society's website or contact update@lawscot.org.uk.

SPA annual conference – 28 May

The Scottish Paralegal Association is holding its Annual Conference at the Radisson SAS Hotel, Argyle Street, Glasgow on Saturday 28 May 2011 from 12.30pm to 4pm. The main sponsor this year is Stronachs, Solicitors, Aberdeen, with Registers of Scotland, Millar & Bryce, Hays Legal, and Scottish Qualifications Authority also providing sponsorship.

Speakers will include Lorna Jack,

chief executive of the Law Society of Scotland, and Marsh Insurance Brokers, and various exhibitors will be present. The conference is open to SPA members and non-members, and includes a free buffet lunch, CPD and great networking opportunities. If you would like to attend, go to www.scottish-paralegal.org.uk, or contact David Macdougall, at davidmacdougall@lawscot.org.uk.

Special Counsel applications invited

The Scottish Government's Criminal Justice and Parole Division is currently seeking nominations for the appointment of special counsel in relation to Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010.

The Act of Adjournment (Criminal Procedure Rules Amendment No 4) (Disclosure) 2011 has been made by the High Court. This inserts into the Criminal Procedure Rules 1996 a new chapter 7A on disclosure, which provides that special counsel shall be appointed from a list of persons who have been nominated for that purpose by the Lord Justice General. The rule also states that no additional qualifications for special counsel are required.

The statutory disclosure scheme is live on 6 June 2011. It is unlikely

that special counsel would have to be appointed to a case before August 2011 at the very earliest. On the basis that the selection process will not be complete before then, an interim position is available for two solicitor advocates. This position would last until the end of the year and those listed would be put forward for consideration as part of the general selection process for the list.

Persons appointed must undergo security clearance prior to undertaking the role.

● Anyone interested in being nominated, please contact Alan McCreddie, Deputy Director of Law Reform at the Society and secretary to the Society's Criminal Law Committee (e: alanmccredie@lawscot.org; t: 0131 476 8188) by Friday 24 June.

Dewar Debate finalists prepare for battle

Four teams will compete in the final of this year's Donald Dewar Memorial Debating Competition for schools in the Scottish Parliament on 16 June.

Blair Wilson and Mari McGinlay of Braes High School, Falkirk, Charles Houston and Helen Smith of Kirkcudbright Academy, Campbell Finlay and Marcus Buist of Glenalmond College, Perthshire, and Ruaridh Macintosh and Andrew Niven of Stewarts Melville College, Edinburgh, won through their respective semi-finals to book a place at the climax of the tournament, sponsored by the Law Society of Scotland along with solicitors Simpson and Marwick and publishers Hodder Gibson.

Heather McPhee, development officer in the Society's education and training department, said: "The semi-finals are very tricky as the teams are only presented with the motion they are to debate that day so have very little time to prepare their arguments – it really tests their skills as debaters."



PICTURE BY GARY DOAK PHOTOGRAPHY

Candidates grilled at Society hustings

Party justice spokespersons were put through their paces by solicitors at the Edinburgh hustings on Wednesday 13 April and the Glasgow hustings on Thursday 14 April, the first such events held by the Society.

Under the charge of independent chairs, David Lee of the Scotsman (Edinburgh) and Brian Currie of the Herald (Glasgow), the panels were quizzed on a number of issues including cuts to legal aid, court reforms in light of the Gill and Carloway reviews, sentencing, a single police force, and the economy.

World IP Day 2011 cakewalk

PICTURE BY ROD IRVINE



Speakers, chairs and sponsors at the fourth annual World IP Day (WIPD) Edinburgh conference jointly organised by the Society's Update team and the Faculty of Advocates and hosted by the Faculty on 21 April: (l-r) Samantha Campbell, HP (sponsor); Ken Green, consultant, Metis Partners (speaker); Paul Donnachie, district manager, PSG Volume Direct, HP (sponsor); Róisín Higgins, advocate (co-chair with one of the WIPD cakes);

Andrew McLean, company solicitor, William Grant & Sons (speaker); Iain G Mitchell QC, Group board chairman, and Colin Hulme, board member, both SSCL (sponsor); and Graeme McWilliams, legal adviser, Standard Life (co-chair with the other WIPD cake). With over 50 in attendance, everyone enjoyed their cake and yet another successful event, and the fifth annual WIPD conference is already being planned, *Graeme McWilliams reports.*



New research carried out for the Society into experiences of ethnic minority solicitors suggests an improving position but one still far from ideal, as Craig Watson reports

Minority voices

One respondent to previous Society research into diversity and discrimination observed despairingly that it was difficult to imagine how racist attitudes “within all sections of the legal profession” could effectively be addressed. Although the views of that assistant in private practice were far from universal, the research concluded that levels of discrimination – in all its forms – should concern the profession.

Yet, in the four years since publication of the original “profile of the profession” findings – making the Society one of the first professional bodies to produce such a comprehensive analysis of equality and diversity issues – there are some grounds for optimism, while remaining vigilant to a number of problems that undoubtedly exist.

The latest independent research focuses solely on the experiences of ethnic minority background solicitors in Scotland rather than other groups at risk of discrimination. Also, the two studies used different methods and sample sizes and so are not directly comparable. However, bearing those qualifications in mind, the 2007 research recorded that as many as 48% of those of an ethnic origin other than white felt they had been discriminated against at work. By contrast, the latest research found that only “a third of the ethnic minority background solicitors we spoke to feel they have been treated differently, or discriminated against within the profession on the grounds of race and/or cultural background”. Examples of good practice were also identified.

The figure, of course, remains unacceptably high, and there is insufficient evidence to confirm a rapid and extensive

decline in racist behaviour, but the finding might provide some comfort to the concerned assistant who submitted her views four years ago.

Barriers to progress

Jennifer Lambert, director of consultants Blake Stevenson, sounds a cautionary note. “Whilst our research found few examples of direct discrimination against ethnic minority lawyers, a third of those we consulted felt that their ethnicity had affected their professional progress to date and would probably continue to do so in the future. There is no doubt that the profession has better embraced diversity in the past decade, but there is a long way still to go to break down some of the cultural barriers in particular.”

According to the qualitative study, which was carried out to ensure the Society continues to learn about equality and diversity issues from its members, those obstacles to professional progress took various forms. For instance, a number of ethnic minority respondents felt they were treated less favourably than white colleagues – receiving lower pay or heavier workloads; being given less administrative support or fewer development opportunities. Promotion was regarded as less likely, with some also concerned that not fully participating in social and networking events, perhaps for cultural reasons related to drinking alcohol, further impeded professional progress. The research also found examples of ethnic minority respondents being treated more harshly during the recruitment process; subjected to inappropriate comments or teasing; or left out

of communications or client meetings.

In terms of entering the profession, an encouraging 6% of Scottish law students starting their degrees in 2002 were identified as being from minority ethnic backgrounds. However, they appear significantly less likely to go on to become equity partners than their white colleagues. The study also found evidence that some respondents were discouraged from pursuing a career in the law by family members, due to perceptions that it would be difficult to progress or because other professions, such as medicine or business, were regarded as preferable.

Double disadvantage

Other forms of discrimination were also still seen to exist, particularly on the grounds of gender and social or educational background. A number of the female ethnic minority solicitors felt gender compounded incidences of unfair treatment, particularly mothers and those of child-bearing age, a difficulty also encountered by many of the white female solicitors. A number of respondents concluded: “Life is tough in the legal profession if you’re female, Asian and Muslim.”

Worryingly, the bullying of trainees, irrespective of ethnicity, was regarded as an unpleasant and unfortunate inevitability. Some also believed that the current economic climate may disproportionately affect people from ethnic minority backgrounds in terms of recruitment and redundancy, with one respondent suggesting: “Recession has led to greater discrimination – people can now hide behind it

as an excuse for things being competitive or choosing not to recruit someone.”

However, it is worth pointing out that around two thirds of ethnic minority solicitors, including representatives from public, private and in-house legal services, felt their ethnicity had played no part in their professional progress. And examples of good practice were highlighted too, such as anecdotal evidence of an employer ensuring a Muslim solicitor had time and privacy for daily prayer.

Pointers to action

Farah Adams, convener of the Society’s Equality and Diversity Committee, agrees that even small changes can help to raise awareness and improve understanding of issues. “Coming from an ethnic minority myself, I can see how there’s an underlying feeling of unfair treatment, even if it is difficult to quantify. But there is no doubt that small changes in behaviour can make a big difference in ensuring everyone has the same opportunities to fulfil their potential.”

She acknowledges that the Society has a major role to play in eliminating discrimination in the profession, as stressed in the report, which made 14 recommendations. She says: “Some of the recommendations relate to work already underway – for example, issuing guidance on equality-related matters to firms, and continuing the work of our equality strategy.

“Various new ideas were also identified in the study, which the Society now intends to pursue. These include exploring further the idea of an informal network of solicitors from a minority ethnic background, trying to make minority ethnic solicitors more visible through CPD and Journal content, and working to encourage solicitors from an ethnic minority background to stand for the Council and our committees. We will also be looking to run workshops for human resources on employment issues and considering how we can further promote good employment practice.” ■

Law reform update

Taxi and private hire car licensing

The Licensing Subcommittee is currently considering a consultation paper on best practice guidance for licensing authorities. The Scottish Government first published guidance in December 2007. This paper updates the earlier guidance in light of legislative changes since then. There is a June deadline for responses.

Building a Fairer Britain

This paper seeks comments on the Government's plans to reform the Equality and Human Rights Commission to ensure it can focus on its core role as an equality regulator. The Equalities Subcommittee is currently considering this paper and will respond by 15 June.

Carloway Review

The Society's board working group (the Society's Vice President Cameron Ritchie, and Bill McVicar and Gerry Considine from the Criminal Law Committee) is currently considering this consultation paper and will submit comments ahead of the deadline in June.

Pensions Law Subcommittee

The subcommittee is currently considering three consultation papers, including a Department for Work and Pensions paper "A State Pension for the 21st Century".

Child maintenance

"Strengthening families, promoting parental responsibility: the future of child maintenance", a paper produced by the

DWP, sought views on a strategy for reforming the child maintenance system. The Family Law Subcommittee submitted a comprehensive response to this paper last month.

Policing in Scotland

The Criminal Law Committee submitted a response to this Scottish Government consultation in April. In its response the Committee notes that it cannot provide a view on the options contained in the paper, with regard to a unified police force, a regional model or retention of the eight police forces in place at present, as this is ultimately a political decision. However the committee highlights that any reform implemented by Government of whatever nature should result in an independent and democratically accountable police service whose operations properly reflect the interests of justice.

Resolving workplace disputes

This consultation was conducted by the Department for Business, Skills & Innovation, and the Ministry of Justice's Tribunals Service. It is the first step in taking forward the Government's review of employment law. The consultation paper contains a number of questions regarding workplace mediation. The Employment and Equalities Law Subcommittees submitted a response in April.

Patent documents

The IP Subcommittee submitted a response last month to the UK Intellectual Property Office

consultation "Amending the Patents Acts to provide online patent document inspection". The committee included a number of comments for consideration, but noted that overall it supports the introduction of this inspection at the IPO.

Judicial factors

A number of the Society's committees were involved in forming a response to this Scottish Law Commission discussion paper. The paper recognised that the law relating to judicial factor is no longer fit for purpose and offered two possible options for reform. The Society is in favour of the first option, to keep the existing structure but to modernise it and make it more efficient by updating the powers and duties of judicial factors. A response was submitted in April.

Legal services providers

"Ownership and control of firms providing legal services under the Legal Services (Scotland) Act 2010", a consultation paper published by the Scottish Government, sought views around s 49 of the Legal Services (Scotland) Act 2010 concerning which professions should be regarded as regulated professionals for the purposes of owning licensed legal services providers. The Society sought members' views on the three questions contained within the consultation paper and submitted a response this month.

You can view the consultation responses submitted by the Society at: www.lawscot.org.uk/consultations



Time to dust down the clubs

I am very pleased to confirm that a new venue has been found for this year's Scottish Solicitors Benevolent Fund golf outing, which is once again sponsored by Legal Post and The First Scottish Group.

The Earl of Mar championship course at the exclusive Mar Hall Hotel & Spa Resort is a wonderful Dave Thomas-designed course set within 240 acres of the historic Mar Estate on the banks of the Clyde, with mature woodland, strategically placed bunkers and USGA specification greens, with spectacular views of the River Clyde and the Kilpatrick Hills beyond. Have a look at their website on www.marhall.com to see the treat that is in store.

Last year's winners from The Land Register proved that they could still put pen to paper in signing for the winning scores, and it is hoped that this year they will return with an even stronger team to defend their title. Teams of four drawn from firms, faculties and indeed any alternative business structure with even the remotest connection with the legal profession are very welcome to come along and play Scotland's newest championship golf course on Friday 26 August 2011.

Thanks to the continued sponsorship of Legal Post and The First Scottish Group, an attractive package has been negotiated to play this exciting new course. Entry forms for teams of four, and further information, are available from Ross D Ireland, Williamson & Henry, 13 St Mary Street, Kirkcudbright (LP-1 Kirkcudbright; t: 01557 330692; e: rireland@williamsonandhenry.co.uk). Numbers are restricted, so please get it in your diary now and book early to avoid disappointment. The last date for entries is 22 July.

● Ross Ireland, SSBF Golf Organiser

Election of Members of Council 2011

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

● **Sheriff Court District of Aberdeen:** Jane MacEachran, Aberdeen City Council; Graham Matthews, Peterkins, Inverurie.

● **Sheriff Court District of Airdrie:** Colin Dunipace, Dunipace Brown, Cumbernauld.

● **Sheriff Court Districts of Dumfries, Kirkcudbright and Stranraer:** Peter Matthews, A B & A Matthews, Newton Stewart.

● **Sheriff Court District of Edinburgh:** Bruce Beveridge, Scottish Government; Ruthven Gemmell, Murray Beith Murray; Kim Leslie, Digby Brown; Ross MacKay, HBJ Gateley Wareing (Scotland); Christine McLintock, McGrigors; Eilidh Wiseman, Dundas & Wilson.

● **Sheriff Court Districts of Hamilton and Lanark:** Oliver Adair, Adair & Bryden, Larkhall.

● **Sheriff Court Districts of Stonehaven, Peterhead and Banff:** Norman Banski, Banski & Co, Laurencekirk.

● **By-election for the constituency of Glasgow & Strathkelvin:** Dominic Sellar, Dominic Sellar & Co; and appointed under article 10 of the Society's Constitution: John Flanagan, D & F Solicitors.

A note from the Insurance Committee on a question regarding intimation of circumstances

Quinn Direct – when to intimate?

It has come to the attention of the Insurance Committee that some concern has been raised as a result of *obiter* remarks in the recent case of *Quinn Direct Insurance Ltd v The Law Society of England & Wales* [2010] EWCA Civ 805.

In brief this case involved an attempt by Quinn to have access to the entire file and database of a firm which had in effect been placed in the English equivalent of a judicial factory. Unfortunately, although the case was fact specific and related very much to English legislation and English indemnity arrangements, reference was made in passing that a solicitor may be prohibited from intimating circumstances (as opposed to an actual claim) to their indemnity insurers, as this could potentially be classed as a breach of legal professional privilege and client confidentiality.

For the avoidance of doubt this issue does not arise in the case of an actual claim being made by a client, as it is accepted that in such an event the client is implicitly waiving any rights to confidentiality as a result of taking such action. The concern expressed was specifically in relation to circumstances only, where solicitors are required by the terms of their indemnity insurance to relay facts to their insurers regarding the possibility of a future claim without the authority, express or implied, of their client.

Whilst we believe that to date this has never actually caused any practical difficulty, the issue has been raised with the committee. Our view is that the points which have been raised do not alter the requirement that circumstances are intimated to Marsh as Master Policy brokers whenever necessary. It is of course a

requirement of Master Policy cover that circumstances are intimated timeously, and it would be a matter of substantial regret to all concerned if unnecessary caution were to prevent timeous intimation in breach of policy conditions.

The committee would however suggest that if there is a concern about disclosing to insurers what may be confidential information or breaching legal professional privilege, this can be dealt with by “anonymising” the intimation by removing reference to specific clients or other identifying factors. It would be necessary however for the intimation to provide the firm’s file/matter reference as an identifier to enable the insurers to be satisfied that the subject matter of a claim that subsequently arises is the same as the subject matter of the earlier intimation of circumstances. If any firm does have concerns in this regard they should feel free to contact Marsh informally to discuss matters in more detail.

As always, there may also be the possibility of dealing with such issues within a firm’s terms of engagement by providing for any client (by agreeing to the terms of business) waiving confidentiality/privilege in such circumstances. The committee does feel however that there are issues regarding both the effectiveness and desirability of such an approach at this time and does not recommend it.

Finally, it should be noted that the lead insurers, RSA, are well aware of the terms of the *Quinn* case and we understand that it is not their intention at this time to seek any modification to Master Policy provisions regarding disclosure of circumstances.



Entrance Certificates Issued during March/April 2011

ANDREWS, Stacey Graham
BALE, Amy Kathleen
CAHILL, Iain Patrick
CUNNINGHAM, Conleth Martin
DEUTSCH, Hilary Barbara
GAUGHAN, James Foster
GAUGHAN, Lindsay Ann
GILLIES, Angus Macdonald
HUNTER, Iona Louise Arrol
HUTCHISON, David Simpson

KAUR, Amerdeep
LEIPER, Iain James
McGINTY, Edel Margaret
MARSHALL, James Thomas
MORTON, David Michael
PATTERSON, David William
PENTECOST, Toni
PRESLY, Victoria Katie
SINCLAIR, Bruce William
SOMERS, Gary
TAGHIZADEH, Elika

Applications for admission March/April 2011

BRIODY, Sara Imelda
DAVIE, Jennifer Margaret
GIEL, Andrew Philip
HUSSAIN, Mohammed Imran
McKAY, Claire Christine
NORRIS, Louise Dorothy

ORMISTON, Rachael Catherine Yuille
SOKHI, Lekh Paul
STEWART, Hannah Frances
WOLSTENHOLME, Catriona Louise

Obituaries

AINSLIE JAMES WILLIAM NAIRN, WS (retired solicitor), Edinburgh

On 13 January 2011, Ainslie James William Nairn, WS, formerly partner of Aitken Nairn, Edinburgh.

AGE: 80

ADMITTED: 1954

GORDON WEBSTER McCASH NEILL, SSC (retired solicitor), Arbroath

On 17 March 2011, Gordon Webster McCash Neill, SSC, formerly partner, Neill & Mackintosh, Arbroath, and latterly consultant, Thorntons, WS, Dundee.

AGE: 91

ADMITTED: 1947

EVE COCHRANE CROWE, WS (retired solicitor), Berwick Upon Tweed

On 23 March 2011, Eve Cochrane Crowe, WS, formerly partner of Alston, Nairn & Hogg WS and latterly solicitor at the Scottish Legal Aid Board, both Edinburgh.

AGE: 67

ADMITTED: 1967

Name your price

With clients increasingly seeking fixed fee quotations, can legal practices respond and still remain profitable? Peter Nicholson sounded out the views of solicitors and consultants around the country

In an ideal world, solicitors would be able to tell their clients in advance how much a transaction will cost, there would be no unexpected turns of events along the way and both sides would come away satisfied. Life isn't like that. But increasingly, clients still want the certainty of knowing in advance what they will have to pay. So how can law firms offer their clients fixed fees without jeopardising profitability?

When the question was posed recently by a solicitor in the LinkedIn group for the Law Society of England & Wales *Gazette*, a lively debate ensued that attracted over 100 comments from other members. Do the same issues arise in Scotland? We thought it worth asking a cross section of practitioners and consultants.

"Undoubtedly clients are increasingly seeking fixed fees as well as putting pressure on the hourly rates", commented Ian Turnbull, managing partner of Edinburgh firm Gillespie MacAndrew. "Given this is what they want, I believe we should respond constructively and in many cases it is possible to give the certainty desired based on our experience of the typical job. We make sure that all our lawyers are aware of the fee levels and look to deliver within the quote."

Ian Smart, sole principal of a Cumbernauld practice, put it this way: "Fixed fees can (and indeed in summary criminal legal aid obviously do) work when you have a bulk supply that allows for the swings and roundabouts. Most solicitors now take a similar view regarding fairly standardised work such as domestic conveyancing, undefended divorces or straightforward wills. The clients like it and the certainty of cost undoubtedly secures business, even when inside knowledge might suggest time and line might potentially have worked out cheaper."

Although much corporate work

is put out to tender, Johnston Clark, managing partner of Blackadders, Dundee, added that "we like them or a collar and cap type arrangement for corporate transactions, where the client typically already has a budget figure in mind".

Making them pay

Clark also argues that fixed fees don't mean less profit. "Fixed fees should virtually guarantee you your target margin for the matter concerned, or else you have made a decision to earn less. We usually find that a fixed fee achieves that better than an hourly rate will, because we generally know what is involved and can delegate to the lowest level of economic competence."

Kim Leslie of reparation practice Digby Brown, and convener of the Society's Civil Justice Committee, observed that clients value the certainty for budgeting purposes. "However, you should not assume that a fixed fee is necessarily going to be cheaper than an hourly rate account. The fixed fee will be based on a number of assumptions to ensure that the work remains profitable."

Fiona Westwood, consultant with Westwood Associates, agreed. "Fixed fees do not have to mean cheaper and unprofitable. Charging by the hour does not reward people who are good at their job and work quickly. We need to focus on what clients value and charge on that basis."

She commented: "Clients complain to me that law firms say that they are 'experts' in a certain type of work yet when asked for a fee quote say 'that depends...'. Clients see this as either disingenuous or a way of trying to milk them, arguing that if the firm has so much expertise then surely they know how much a typical example will cost."

But to make them profitable, you have to understand the real cost to

your business of carrying out the work, which some lawyers still find difficult. A solicitor who asked to remain anonymous responded: "There is a common misconception that fixed fees must mean a drop in profitability. In fact, a rigorous approach to financial modelling and appropriate structuring of the work can mean the opposite. The last thing clients want is for their lawyers to work on an unsustainable business model."

Discussions with clients should cover value as well as cost, said Westwood. "Solicitors are not good at talking about money. We hid behind scale fees, and when they went, we used the hourly rate to avoid talking about actual likely costs. Solicitors have to get better about talking about fees with clients and to do that, we need to know the value of what we can achieve for clients in relation to direct benefits to them."

Business models

Not everyone accepts that fixed fees are necessarily the way forward – you should also have a clear idea of where you wish to position yourself in the market, a stance taken by some respondents in the English debate who maintained that there are still enough clients willing to pay for a bespoke service.

Bruce de Wert of Georgesons in Wick made the comparison: "I think the question raised is an agonised one, emanating from England, from those who are being hit by conveyancing competition. The conveyancing market there is dominated by estate agents. The estate agent pockets his commission and, as part of his marketing, offers conveyancing as a cheap 'extra'. What you learn from that is that the estate agent has done his marketing and the solicitor who accepts low price conveyancing has not."

He added: "If what I am saying is gobbledegook, then my advice to you is the same as I gave myself: 'You were never taught anything about business, so go back to university and do a part-time business course.' For me it was a wonderful revelation.

"Law firms can offer fixed fees without jeopardising profitability,

"Charging by the hour does not reward people who are good at their job and work quickly. We need to focus on what clients value and charge on that basis"

but whether they want to do so is a complicated question. Do they want to be in that market? Should they be the size they are? Should they be in that geographical area? Those are just some of the questions raised. It isn't easy."

Westwood commented on the education point: "I wholeheartedly agree with him. Solicitors need to take the management of their businesses seriously if they are move forward positively. Many are doing a great job using their instincts, but getting to grips with the best of management theory and learning how to use proper business tools will make a huge difference to how firms perceive what needs to be done."

Good information

One of the first to embrace the fixed fee approach was Stephen Gold, who built up a very substantial property practice based on the concept. Now a consultant to others, he believes fixed fees still represent an opportunity waiting to be seized.

"Far from being the death knell of profitability, they are an opportunity for firms prepared to be entrepreneurial, embrace new approaches and invest in the skills and resources to make them work.

"The first step is to map the process, so you have a clear understanding of what is involved, the likely time it will take and the resources, human and other, it will need. If you do not have these skills in-house, it is worth outsourcing, especially for work which is recurring."

Having done that, he continued, you should ask:

- Is there a simpler, more efficient way I can do this? Can I use technology to help me do the work more cheaply and efficiently, and perhaps at the same time deliver a quicker, better service to clients?
- Who should do the work? From partner to paralegal, assigning the right person is crucial to profitability and competitiveness.
- With corporate/commercial clients, can I use fixed fees as a carrot to extract other benefits from offering competitive fixed fees – for example a long-term arrangement in which the firm is used as a predominant or sole supplier? The more swings and roundabouts, the lower the risk.
- Can I help my clients be more efficient – something of mutual benefit? In-house legal teams and professional managers are under extraordinary pressure to deliver and will always appreciate constructive,



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innovative and realistic suggestions.

- Can insurance help? For example, employers can insure against the risk of being taken to a tribunal, and non-lawyer providers of employment law services have used this to construct fixed annual retainer models for all non-advocacy work.

Turnbull agreed that management information is the key to profitability. "The biggest risk in our experience is the matter which overruns, perhaps because of unexpected delay on the way and perhaps because of unexpected additional work arising or changes in client instructions. We deal with this by scoping the work at the outset and where appropriate take care in explaining to our clients at the earliest opportunity the reasons for any additional costs, and in virtually all cases a satisfactory arrangement can be achieved."

Scoping the job

Yorkshire based consultant Andrew Otterburn, who analyses the Society's Cost of Time Survey returns, agreed that these are the matters that pose challenges.

"The problem is that you need different skills when working on a fixed fee basis, skills that many firms lack. In particular, firms need to be good at:

- scoping the work and

understanding what is, and what is not included in the fixed fee;

- communicating back to the client so the client also understands;
- identifying when the matter has extended beyond the fixed fee and having the confidence to let the client know, and the cost of the additional work;
- supervision and identification of appropriate staff to do the fixed fee work, in particular for volume matters."

He added that particular issues can arise concerning post-completion work that has to be written off.

Others have made the same point regarding matters that do not conclude.

Gold endorsed the scoping point. "The need to adjust the fee upwards in the event of the spec changing must be clearly spelt out at the beginning, not when the problem arises. We can learn much from builders, plumbers and the construction industry generally – as most of us know to our cost, overruns and variations are a significant contributor to their profits."

Fixed fees of course make it easier for clients to compare quotes from different practices – in which case it is especially important to be clear about whether offers cover the same work.

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Contentious matters

Even with these provisos, there are limitations, particularly in contentious business. "The exceptional case provisions of the summary criminal fixed fee regime recognise that", Smart pointed out. "And no one would be mad enough to do something like a contact action on an open ended basis for a single payment."

Family law practitioner Liz Welsh is quite at home with fixed fees for, say, an undefended divorce following a minute of agreement – though includes in her letter of engagement a caveat should an unforeseen difficulty arise – but is certain that family law "does not readily lend itself to the use of fixed fees much of the time".

"In a practice such as mine, where I deal with a great number of contentious cases, a fixed fee is often simply not feasible. The information from my client may indicate that there are no tricky issues to deal with, but the opposite number may have different ideas."

Citing a case where her client's repeated offers to settle were refused and the ultimate award was lower than any of them, she continued: "Rather than offer to work on a fixed fee in that sort of case, I will often suggest a capped fee approach. I will agree to take the case as far as possible for a fixed amount. If the matter has

not concluded by the time the fee is exhausted, the client has the option of deciding whether or not to proceed.

That sometimes helps focus attention on the issues that are worth pursuing and those which are not worth the cost. The fee review can even be a useful tool to bring matters to a conclusion.

"What is really unsatisfactory is having a client throw in the towel on a good case for want of funds. An option when that seems to be a possibility is to agree to take payment of fees from the settlement. To do that you have to be very sure of success and of the costs of achieving it, and obtain a clear mandate, which deals with the possibility of the client transferring to another solicitor. I will also ask that all outlays are met as we go along. Such arrangements are useful but can play havoc with cashflow if used in too many cases at once!"

And even that approach is not an option in a non-financial case, such as contact – where there are also uncapped charges by those appointed to prepare reports for the court. "Clients have to know about the risks of starting a case they may not be able to take to conclusion, particularly liability for expenses. All of this explains why family lawyers use a number of approaches to try to keep clients out of court!"

Clark suggests as respects contentious business: "The best way to deal with that is an agreed budget

"The information from my client may indicate that there are no tricky issues to deal with, but the opposite number may have different ideas"

which can be reviewed and a worst case scenario discussed before actions are raised or defences lodged."

Variations on a theme

Capped fees, i.e. with an agreed upper limit, have their supporters, as the English debate revealed. Westwood agreed that they go some way towards meeting her point about claims to expertise: "Offering a capped fee at least makes the client feel that the firm is putting its money where its mouth is."

Whether fixed fees can be adapted to more scenarios, said Smart, "depends on the steadiness and ubiquity of work coming to a firm in any given area. They certainly could be adapted to stages of transactions with the firm reverting to hourly charging in the less predictable bits but, while that might suit the lawyers in terms of ease of feeing and reduced time recording, I'm not sure if the variable element makes the whole thing any more attractive to clients than classic time and line".

Leslie added: "One of the constraints I can foresee for fixed fees is the reliance on external resources, which the business has no control over. Unless your external resources are prepared to work in the same way, an element would have to be built into the fee structuring to reflect this variable."

However some English comments did regard hybrid, or alternatively "segmented" arrangements (fixed fees quoted for different potential stages of a case), as offering advantages.

Gold pointed to other ways of using fixed fees to generate business, again with reference to England. "Offering advice online only and in bite-sized chunks for low fixed fees is an accelerating trend. See for example <http://clicklaw24.com>, which launched last month, a partnership between a law firm and a barristers' chambers. Not only is the cost of supply kept low, but clearly the hope of the owners is that their initial advice will be a hook which leads to more lucrative conventional instructions. I think this two-stream approach for law firms will become an increasingly common feature of the market, as firms try to compete with ABS providers."

Or as Leslie summed up: "Flexibility and innovation will undoubtedly be necessary within business to deliver value to the client without diminution of quality or service." ■

Views from the south

A few more comments from the English discussion:

"Interestingly working on a fixed fee case causes changes in the way my team work. They are much more proactive in trying to bring about a resolution of the case. I put my most senior fee-earners on fixed fee matters as they have the experience and gravitas to really get to grips with the problem and solve it. Surely this has to be a 'win-win' situation for both us and our clients?"

[Response to a doubting family lawyer:] "You have two real options I think:

"1. Break down the whole case into those items that you can fix a price on and those that you can't. This may sound of little value but clients will accept that that some aspects are not really possible to fix a

price on in advance. "2. Keep loads of records of cases and time needed to complete to identify an average, and pitch slightly ahead of this. Some you'll gain on and some you'll lose but overall you should be ahead. This is called an aggregated profit model and is quite common in other professions."

"There are always going to be cases that are not suitable for fixed fees but equally there are many that are. By offering various different methods of funding depending on the circumstances of the case at hand, firms may even enjoy a greater scope of work from clients that otherwise would not have instructed them."

"For the majority of 'traditional' legal practices – don't compete just on price. Get onto the same

planet as clients and make sure that they value everything you do for them... Just push yourselves and your historic information as far as you can. Not many firms do."

"Because it is fixed rate we bill more or less half the amount more or less halfway through the process and the final bill is issued toward the end of the process. This gives certainty and a structure which is good for us and good for the client."

"Some of our competitors charge such low fees they have to do three to four times the work we do to earn the same."

"The real opportunity for lawyers is in being transparent about what you will be providing. Good communicators always do well."

Ask Ash

Should I be expected to attend work social and team bonding events in addition to putting in long hours?

Dear Ash,

I have been spending increasing hours at work recently due to having to cope with additional workloads. I appreciate that I have to put in the hours in order to progress with my career; however I resent the added pressure to then have to spend additional time socialising with work colleagues too. Our manager always seems to be keen for a bunch of us to go out to lunch together and then even suggests after-work drinks too, even though I'm more concerned about getting home to spend time with family and friends. Recently we have been advised that we will also require to attend some team bonding sessions which have been organised over a number of weekends. I don't mind putting in the hours at work but I am not happy with having to sacrifice my spare time for such events and wonder whether I should speak to my manager about this?

Ash replies:

With the uncertainty and indeed increasing vulnerability evident in today's job market, employees are increasingly feeling under pressure to undertake additional duties and to demonstrate their commitment to their employers. The issue about non-work time is even more significant in the circumstances.

I can therefore appreciate that as you have been putting in additional hours at work, the last thing you may want to do is to then spend even more time with colleagues socialising. However, from your employers' perspective, they may be signalling their appreciation for your extra efforts by highlighting the social activities at work. A good employer will always strive to strike a balance of work and social activities in order to try to improve staff morale and satisfaction levels. It would seem however that in your case you may feel that there is too much emphasis on the social activities.



If there are personal issues which prevent you from attending all these sessions, have an informal chat with your manager explaining your circumstances but emphasising your commitment

I suggest that perhaps with regard to lunch and after-work drinks sessions, you attempt to politely decline such events if you have other plans or indeed want some time to yourself. By reluctantly agreeing to go along to such events on a regular basis, you are effectively building resentment towards your employer due to feeling forced into such situations. This will not in the long term be any good for you, or indeed for your employer who will be in danger of having to deal with a disgruntled employee.

By not having to attend all the regular lunchtime and after work drinks events, you may then feel more appreciative of the team building sessions organised by your employer. I suggest that you do attend the team building events, if you are able, but if you feel that there are personal issues which prevent you from attending all these sessions then certainly have an informal chat with your manager, explaining your circumstances but emphasising your commitment to

the job and highlighting the effort you have put into your work of late. Certain research suggests that we spend more time on average with work colleagues than with our families, and therefore it is vital to build good relations at work. Accordingly social activities are an important tool in building on such relations, but as with anything in life, good in moderation! ■

● "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 Registrar's Department. For one-to-one advice contact Katie Wood, Manager in the Registrar's Department on 0131 476 8105/8200, or katiewood@lawscot.org.uk

Communication breakdown – a major risk issue

Russell Lang of Marsh explains why communication is a major risk issue for solicitors and considers how the risk of claims and complaints arising from communication failures may be minimised

Solicitors do not only have to get the technical aspects of legal work for clients right. They also need to deliver the service that clients want and expect, and that largely depends on getting communication right.

Many complaints and claims across all practice areas arise from allegations of failure to inform, report, advise or warn – and frequently the cause can be traced to ineffective communication.

Client engagement – managing expectations

Do you have clients who bombard you with emails on a daily basis and who complain if they do not get an instant response? Or clients who complain they haven't heard from you since the letter you sent them the previous week?

Many clients have preconceived ideas of how often they expect to hear from their solicitor. In some cases, the client's expectations may be unrealistic. You can manage clients' expectations from the outset if you make it clear how and how often you will communicate with them and then reinforce that with appropriate wording in your terms of engagement. Thereafter, it is important that you do in fact communicate with them in accordance with what has been agreed – in other words, do what you said you were going to do.

Assumed knowledge

Effective communication is not simply about the process and frequency of client updates. It is all too easy to make assumptions regarding the knowledge and expectations of the client regarding the legal process and timescales. Allegations of delay are more commonly the subject of complaints rather than claims. Sometimes, the delay complained of is not a delay at all, but is simply part and parcel of the process:

The practice had acted for several years for a particularly demanding client who produced regular work for the firm's commercial team. He instructed the firm's trust and executry partner to wind up his late mother's estate. Months later, the client relations partner received an email from the client complaining that "If it takes the firm six months to wind up a simple estate, I have to question the firm's ability to handle my other business properly."

Problems like this can be avoided if the client is given at the outset (in writing) an indication of the likely timescale and the factors that may influence that timescale. This can be updated as necessary to take account of changing circumstances.

It is hard to bear a complaint about a delay which is not a delay at all. A complaint about a delay which is nothing to do with you and not your fault is equally hard to bear:

A solicitor was furious at the content

of a letter he had received from his executor client blaming him for the "several months' delay" in obtaining the funds from the bank account of the client's late father. In fact, it had not been the solicitor's fault at all. He had been pressing the bank at very regular intervals to have the funds released.

The issue was that he had not told the client about the "problem" with the bank nor, in consequence, about his regular attempts to resolve the matter.

As this example shows, it can be only too easy for clients to assume, if they do not hear from you, that nothing is happening in their transaction/case because you are doing nothing. Clients need to be kept regularly informed of the progress of their transaction/case, even if that means reporting and explaining lack of progress.

Failure to report

A failure to report some matter which should have been reported can be used by clients to allege that "if only I had known X, I would (or wouldn't) have done Y". This may be particularly true in periods of challenging economic conditions, where the temptation to find someone to blame for an unfortunate decision is heightened.

Reporting certain facts to clients is often a requirement which lies at the heart of the solicitor's role. In residential property purchase/loan transactions, solicitors will have obligations to report to purchaser clients and lender clients on facts material to their respective interests:

Solicitors were instructed by a client, Cherie, in the purchase of a flat which Cherie was buying from her uncle. The solicitors were also acting for Cherie's lender. In the course of the transaction,

A failure to report some matter which should have been reported can be used by clients to allege that "if only I had known X, I would (or wouldn't) have done Y"



they flagged to Cherie:

- an outstanding statutory notice
- a possible concern regarding ground contamination mentioned in the survey
- that the qualified acceptance stated that no guarantee was being given that the white goods (included in the sale for an additional £1,000) were in working order.

Cherie explained that she already knew about the statutory notice, and that her uncle would “see her right” about any costs. She had also spoken to a surveyor friend, and had been assured that this was just another case of surveyors covering their own backs, and so Cherie instructed her solicitor to go ahead with the purchase, with the inclusion of the additional white goods.

The solicitors appear to have fulfilled their obligations to report to their purchaser client, Cherie, but which of these facts should they be reporting to their lender clients? (Answer this question, along with other questions relating to this article with our online quiz, worth 0.5 units of CPD – see details in the panel above.)

Claims by lenders who have incurred losses following borrower default have involved allegations of failure to comply with the reporting requirements of the CML Handbook, in particular the reporting requirements relating to:

- deposits passing directly between the parties
- “back to back” transactions
- incentives given by developers to the borrower/purchaser.

In order to minimise the risk of claims from lenders, risk management controls need to ensure that:

- relevant fee earners in the firm are aware of the terms of the

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lender's instructions, including the reporting requirements in the CML Handbook; and

- these reporting requirements are built into working practices – whether by way of workflow or case management software or incorporated into a checklist or *aide mémoire*.

Failure to advise

Solicitors acting for clients in the purchase of a house entered into missives on their behalf. Later the clients wanted to withdraw from the transaction but were told they could not do so without incurring a liability in damages. They then intimidated a claim against the solicitors, alleging that they had not been advised about the binding effect of missives.

One impact of the recession is that clients faced with changed financial circumstances, or a transaction that hasn't turned out as hoped, may seek to find fault with advice given to them by their solicitors and allege that the terms of the settlement/contract they entered into failed to protect them in some way.

In many cases, solicitors will argue that the client's allegations are unfounded and maintain that, far from failing to advise the client on a particular matter, they did so during a meeting or a telephone call. Often, however, it is the solicitor's word against the client's because the advice was not recorded in writing either in a file note or a letter/email.

Solicitors acted for the wife in connection with the preparation of an agreement dealing with the sharing of the parties' matrimonial property on separation. The client subsequently alleged that her solicitors had failed to advise her in relation to her spouse's pensions and, in particular, that if

she settled on the basis set out in the agreement she would be giving up her rights to make a claim on the spouse's pension rights.

The defence of allegations of failure to advise is assisted by making sure that all significant advice is recorded in writing and, in appropriate cases (perhaps particularly where the client wishes to proceed against your advice), acknowledged in writing by the client.

Key risk management points to consider

- Agree how and how often you will communicate with or report to clients, and confirm that agreement in your terms of engagement/service standards
- Keep your client informed/updated on a regular basis even where there is no progress to report
- Record significant advice in writing
- Record instructions given by your client in writing
- Make contemporaneous file notes of meetings and telephone calls. **1**

Russell Lang and Marsh

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Interested parties

The Inner House decision in the pleural plaques litigation contains important observations on matters of title and interest to sue, one of the topics in this month's review of recent civil litigation by **Sheriff Lindsay Foulis**

Title and interest to sue

In *AXA General Insurance Ltd v Lord Advocate* [2011] CSIH 31 (12 April 2011) the First Division made certain observations regarding title and interest as they applied to the challenge of the Damages (Asbestos-related Conditions) (Scotland) Act 2009. Their Lordships observed that title and interest to sue was often determined as an issue separate

from the merits of any action. The petitioners as insurers were members of a class of persons who risked being directly affected by the legislation. They, effectively, were the persons who defended the actions which would follow the legislation. These litigations would be fought on their instructions. Some of the companies who had employed the claimants no longer

existed in any event. If the insurance companies could not challenge the legislation in these proceedings, it was difficult to see how they could otherwise challenge it. Any actions for damages would be raised against the actual employers of the claimants. At common law, the Scottish Parliament had a duty to act in conformity with the law.

In relation to the title and interest of actual claimants to resist the challenge, the Inner House decided that they had no such title and interest. Whilst they were beneficiaries of the legislation, the identification of such potential beneficiaries was virtually impossible. Further, it was for the proposer of the legislation to support its validity.

The claimants had no such title and interest. Whilst they were beneficiaries of the legislation, the identification of such potential beneficiaries was virtually impossible

Separate defenders and unconnected grounds of action

In *Ruddy v Chief Constable of Strathclyde Police* [2011] CSIH 16 (2 March 2011) the Inner House considered an appeal from a decision in an action of damages raised in Glasgow Sheriff Court. The action was raised against the chief constable on the basis of the pursuer having been the victim of an assault by police officers. These allegations were still in issue at the time of the appeal. The pursuer also sought to claim damages in the same crave in respect of a breach of article 3 of the ECHR (diminishing his human dignity as being the subject of degrading treatment).

The pursuer further sought damages as a result of the investigation of his complaint of ill treatment being reported to the procurator fiscal, whose investigation was criticised by the pursuer. Following the investigation no prosecution was initiated and no disciplinary action was taken against any officer. These acts and omissions were alleged to breach the pursuer's rights in terms of article 3 of the Convention. A second crave for damages sought jointly and severally or severally against both defenders was founded on these allegations.

The Inner House raised the issue of competency *ex proprio motu* and queried the competency of this approach in which several claims were pursued in one action. The alleged breaches of the pursuer's Convention rights were dependent on his first proving that he had been assaulted, a matter which had not been established. Further, many of the allegations regarding the inadequacies of procedure raised issues of administrative law which arguably should be the subject of proceedings for judicial review. In considering the issue of competency the Inner House concluded that the craves were directed against different defenders based on different causes of action. The pursuer sought to address three distinct issues, distinguishable in fact and law, against two separate defenders. In such circumstances one action could not be raised, albeit separate actions might be conjoined. In the present litigation the pursuer sought to pursue two parties in respect of unconnected wrongs. To do so invited complexity and lack of good order.

Interim interdict

In *Smyth v Rafferty* [2011] CSIH 27

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The Inner House raised the issue of competency *ex proprio motu* and queried the competency of this approach in which several claims were pursued in one action

(1 April 2011) the Inner House noted that at the stage of determining the grant or refusal of interim interdict at the commencement of an action it was necessary to consider whether there existed a *prima facie* case. However, consideration had to be given for the stage of proceedings. Averments could be substantially strengthened as a result of the adjustment process. If the order was recalled the object of the action would be defeated.

Minutes to sist

In *B v B* 2011 GWD 13-291 a child, who was 12 years of age, applied to be sisted as a party to an action between his parents in which s 11 orders were sought. The parents agreed that it was in the child's best interests that he have contact with his father. Five days of proof had taken place. A curator *ad litem* had previously been appointed in respect of the child, albeit the child indicated that he had lost confidence in the curator. The sheriff refused the application, determining that the boy could still express his views through the curator. The basis for the child's alleged loss of confidence could be examined in evidence.

This decision was appealed but Sheriff Principal Bowen refused the appeal. To allow a new party to enter the process at this stage of procedure when two principal witnesses had given evidence was a significant factor in the refusal. To do otherwise might well require the witnesses to be recalled. The child had a means not only to express his views but to have his position put forward through the curator. To become a party to the action would expose the child to the pressures of the litigation and this might well not be in his interests. In considering such an application the court should consider whether the child could cope with the consequences of becoming a party to such an action and had the ability to give sufficiently objective instructions. The court had real doubt as to whether the child could give anything other than restricted instructions.

Appeals

As a general rule an interlocutor pronounced of consent cannot be appealed. There can be exceptions. In *Thomson Roddick and Laurie Ltd v Katalyst Projects Ltd*, Dumfries Sheriff Court, 18 March 2011 Sheriff Principal Stoddart allowed an appeal which had been taken following an interlocutor pronounced of consent. The action was one of implement which failing damages. The sheriff had found the pursuers entitled to implement, but instead of granting decree had continued the case to be addressed on issues such as the period allowed for implement, the consequences of non-implement, and if damages ultimately were necessary, whether a further proof was required. Following this subsequent hearing, the interlocutor from which was pronounced of consent, the defenders appealed.

The appeal was held to be competent. The sheriff principal indicated that the interlocutor appealed, albeit pronounced of consent, followed inevitably from the sheriff's decision on the merits. It really was more in the form of tying up procedural matters which flowed from the prior interlocutor on the merits. It was the former interlocutor that the defenders sought to challenge in any appeal. The defenders had not acted in any way to suggest that they had acquiesced in the terms of that interlocutor. As an aside, the note by the sheriff which followed the lodging of the note of appeal went much further than the reasons for pronouncing the interlocutor, including matters such as the competency of the appeal and potential courses open to the defenders. Such matters were for the sheriff principal to determine and should not form part of such a note. **■**

Update

Since the last article *Grant v Barnett* (November 2010 article) has been reported at 2011 SLT (Sh Ct) 13.

The law regarding maintenance obligations with a cross border element in the EU is about to change

Support from afar

From 18 June 2011, the provisions of Council Regulation (EC) No 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Co-operation in Matters relating to Maintenance Obligations ("the Maintenance Regulation") will apply.

What is it?

In essence, the Maintenance Regulation replaces Brussels I (Council Regulation (EC) No 44/2001) in respect of family law maintenance obligations.

Its aim, per recital 9, is to permit a maintenance creditor "to obtain easily, in a member state, a decision which will be automatically enforceable in another member state without further formalities".

While not defining the term "maintenance obligation", the Regulation covers "all maintenance obligations arising from a family relationship, parentage, marriage or affinity". It applies to child support orders, but not to assessments of domestic child support agencies. It does not apply to divorce and nullity proceedings, jurisdiction in which continues to be governed by Brussels II (Council Regulation 2201/2003).

The Regulation contains provisions on jurisdiction, conflict of laws, recognition and enforceability, enforcement, provision of legal aid, and co-operation between central authorities. The UK has not opted into all of its provisions.

Grounds of jurisdiction

The Maintenance Regulation extends the grounds of jurisdiction contained in Brussels I. Under Brussels I, the court with jurisdiction was the court of the member state in which the maintenance debtor or creditor resided. If the various grounds of jurisdiction did not result in any member state having jurisdiction, national law applied.

The Regulation introduces a new, subsidiary ground of jurisdiction, permitting the creditor to raise in

"the court that has jurisdiction for proceedings regarding the status of a person or parental responsibility provided that the matter concerning maintenance is related thereto".

In a situation where none of the parties resides in the EU and no divorce or parental responsibility proceedings are pending in a member state, an application for maintenance may be brought before the court of a member state of which both parties are nationals (or domiciled, in the case of the UK and Ireland).

The Regulation goes even further, however, providing that if no other member state has jurisdiction and proceedings cannot reasonably be brought or conducted in a third (non-EU) state, the dispute may be heard in a member state which has "sufficient connection" with the dispute.

It also contains provisions defining the seising of jurisdiction, *lis pendens*, and related actions.

Prorogation in agreements

In terms of Brussels I, parties to a pre- or post-nuptial agreement concerning maintenance could designate any court with which there was a connection as the court having jurisdiction to deal with a maintenance dispute arising under the agreement.

The Maintenance Regulation, however, deals with the matter of prorogation in greater depth and bears careful reading for anyone engaged in drafting such agreements.

Any attempt to prorogate jurisdiction where the obligation concerns a child under 18 is invalid. Otherwise, parties may designate that the courts of a particular member state shall deal with a maintenance dispute, provided it is:

- the court of a member state in which one party is either habitually resident or a national; or
- the court which has jurisdiction to settle the parties' dispute in matrimonial matters; or
- the court of the member state in which the parties last had a common

place of residence for at least one year.

These conditions have to be met either at the time the agreement is concluded or the time the court is seised.

Choice of applicable law

This is the bit of the Regulation to which the UK did not subscribe. In other member states it is possible not only to nominate the courts of a particular member state as having jurisdiction to deal with a maintenance dispute, but also to choose which member state's law shall be applicable. There are member states that already adopt the doctrine of applicable law to a considerable extent, for example in relation to financial provision on divorce. However, this was felt to be inimical to the approach of the UK courts, which apply only local law. Accordingly, article 15 of the Regulation shall not apply in the UK.

Easier enforcement

The most significant achievement of the Maintenance Regulation is the abolition in most member states of *exequatur*, i.e. the requirement for a declaration of enforceability before an order can be enforced in another member state. However, this is closely bound up with the issue of applicable law, with the result that *exequatur* has now been abolished in all member states other than the UK and Denmark. Consequently, any maintenance order emanating from the UK will require a declaration of enforceability before it can be enforced in a different member state. However, a decision issued in another member state will be enforceable without the need for a declaration from a UK court. ■

A decision issued in another member state will be enforceable without the need for a declaration from a UK court



● Rhona Adams,
Partner, Morton
Fraser LLP

Plus ça change?

Some practical challenges for legal firms and their clients posed by the TUPE Regulations, in relation to client tenders and other potential service transfers

Contracts to provide services, when transferred, will generally fall under TUPE. The Service Provision Change (SPC) concept introduced in 2006, covering situations where outsourcing, insourcing/in-housing or re-tendering exercises take place, has raised interesting issues for lawyers to grapple with, not just when advising their clients but also when planning for their own firm's provision and use of services.

In order for a service provision change to occur, the post-transfer activities must be substantially the same as the pre-transfer activities, but need not be identical. A SPC may occur where a client ceases to carry out activities on its own behalf and assigns them to a contractor; the activities are reassigned to a subsequent contractor or contractors; or activities carried out by a contractor or subsequent contractors are brought back in-house to the client.

An employment tribunal decision in 2009, *Royden v Barnett Solicitors* (see Journal, June 2009, 52) caused much excitement in the legal press. It held that two employees of a solicitors' firm, who spent the majority of their time on work referred by one particular client, transferred by way of SPC to another firm when it took over that client's work. This case seemed to highlight the worst fear of the SPC provisions that a team of employees might transfer from one firm (or any organisation for that matter) to another following a client's decision to change provider, regardless of whether either firm wanted that to happen or whether the client's decision to change provider was due to dissatisfaction with the team of employees in the first place. It should be remembered however that as a first instance decision this did not set a precedent that such a change would always result in a transfer.

The issue was raised again last year in *Ward Hadaway Solicitors v Love* (see Journal, September 2010, 52),



In order for a service provision change to occur, the post-transfer activities must be substantially the same as the pre-transfer activities, but need not be identical

and further guidance has emerged. The EAT upheld a tribunal's decision that no SPC occurred when a legal services contract was switched from one firm of solicitors to another. The tribunal found that only the work that the outgoing firm actually received, not its expectation of and availability to do other work, counted as "activities" that could be caught by the TUPE Regulations.

Crucial, then, is the meaning of "activities". An SPC involves "activities" ceasing to be carried out by one person and subsequently being carried out by another, e.g. by outsourcing. There is, however, no definition of "activities" in the 2006 Regulations.

The EAT has given guidance that a tribunal should ask itself "as a matter of fact and degree" whether the activities carried on by the alleged transferee are "fundamentally or essentially the same as those carried out by the alleged transferor". It expressed the view that Parliament could not have intended to exclude transfers entailing some minor differences in the nature of the tasks carried on or the way in which they

are performed, from the new concept of an SPC. The EAT suggested that (i) relocation of the activities, or (ii) the fact that a new contractor performs some additional duty or function, would both be such minor differences. However, it saw no need for a formal list of factors which the tribunal must consider before it can decide whether or not there was an SPC transfer.

The types of service provision changes listed in the regulations all envisage activities carried out by one person before the transfer being carried out by a different person afterwards. This means that the post-transfer activities must be identifiable as the pre-transfer activities for a service provision change to occur. Evidence about the content and performance of the two contracts is likely to be pivotal. *Ward Hadaway* illustrates the reluctance of the EAT to interfere with the findings of fact by the original tribunal, and in particular how the "activities" are defined.

In practical terms, while each case will have to be looked at on its own facts, it appears that a client deciding to change its advisers and requiring all open files to move across to the new adviser may trigger SPC, whereas a new firm joining a panel of advisers and/or only receiving new instructions will be less likely to be caught. From a resourcing standpoint, firms need to be aware of the risk of loss of staff where client teams have been assigned to servicing a particular client, and the contract is lost. Conversely, staff who are split across client teams are unlikely to be transferred on a single client loss, but may be under-utilised after that loss, leaving the firm with the cost of redundancy. While resourcing decisions cannot revolve around risks of transfer at a future date, firms should be aware of the potential consequences of client procurement decisions. ■

● Jane Green, partner, Employment, Maclay Murray & Spens LLP; convener, employment law specialist panel

Where the state has to stop

What the Protection of Freedoms Bill 2011 means for Scotland

The Protection of Freedoms Bill is currently at committee stage in the House of Commons. This bill forms part of a key statement in the coalition agreement that the Government would “implement a full programme of measures to reverse the substantial erosion of civil liberties and roll back state intrusion”.

The bill includes major reforms for England & Wales. However, it also includes some significant proposals which extend to Scotland, and it is these which are considered below.

Biometric material

A Commissioner for the Retention and Use of Biometric Material will be appointed by the Secretary of State to review the retention of DNA by national security determination under terrorism legislation or s 18G of the Criminal Procedure (Scotland) Act 1995, and the uses to which such material is being put. If the Commissioner deems that retention is not necessary, destruction of the material may be ordered.

The Secretary of State will issue guidance on such national security determinations.

Regulation of surveillance

The bill amends the Regulation of Investigatory Powers Act 2000. This Act sets out the framework for lawful interception of communications, surveillance and the use of intelligence sourced from undercover agents. There have been concerns that disproportionate use is being made of these powers in name of counter-terrorism. The bill inserts a new requirement for judicial approval to be obtained by local authorities for the use of these powers, adding an independent assessment of proportionality, as well as improving accountability and transparency.

Protection of property

The bill allows for orders to be made to repeal unnecessary powers of

entry, add safeguards in respect of the exercise of such powers, or replace such powers with new powers, subject to additional safeguards. Each cabinet minister will be placed under a duty to review existing powers of entry in order to consider whether this power should be exercised. Furthermore, a code of practice will be put in place in relation to future powers of entry granted by the UK Parliament.

Counter-terrorism

Part 4 amends two controversial aspects of the current counter-terrorism powers. The maximum pre-trial detention period is reduced by half from 28 to 14 days. This change follows unsuccessful attempts by the previous Government to raise the limit to 90, and then to 42 days.

Stop and search powers under the Terrorism Act 2000 are also to be amended, following the finding by the European Court of Human Rights that the current powers infringe article 8 of the Convention (*Gillan and Quinton v UK* (2010) 50 EHRR 45).

The amendments will restrict searches, on the whole, to where there is a reasonable suspicion of terrorism. Searches will be permitted without a reasonable suspicion that the person/vehicle in question is involved in terrorism within a specified area. However, there must be a reasonable suspicion that an act of terrorism will take place in that area, and the search must be deemed necessary to prevent such an act occurring. The bill also restricts the extent of such an area, and the duration for which the area can be specified for this purpose. Additionally, the purpose of searches carried out in such an area will be to discover evidence of terrorism, rather than, as at present, searching for articles “which could be

used in connection with terrorism”.

The bill further provides for the publication of a statutory code of practice providing guidance on the use of stop and search powers.

Freedom of information

The bill also proposes changes to the Freedom of Information Act 2000 (FOIA) and the role of the Information Commissioner.

The FOIA will be amended to require that public authorities publish datasets in a format which allows for their reuse. This prevents the publication of information in PDF format only, which cannot be reused for analysis by the recipient. The bill further amends the FOIA to broaden the definition of a publicly owned company, to include companies wholly owned by one or more bodies from the wider public sector. It will also bring bodies including the Financial Ombudsman Service and the UCAS under the FOIA.

The bill strengthens the independence of the Information Commissioner, through changes to the Commissioner’s appointment and tenure. Additionally, the requirement for approval of the Secretary of State in relation to certain functions of the Commissioner will be removed.

Only a first step

These are welcome protections to freedoms; however, the bill does little more than tackle a list of some of the most problematic or high profile erosions of liberties. The bill is a positive first step in the coalition’s “full programme of measures” to protect civil liberties, but does not equate to a full programme, and further measures will be necessary if that aim is to be achieved. ■

● Jennifer Dunlop, Scottish Human Rights Law Group



More details have been published about the National Employment Savings Trust, an option for employers when pension provision for employees becomes compulsory next year

A NEST egg?

The Pensions Act 2008 imposes a duty on employers to enrol all employees who meet the criteria into a qualifying pension scheme and also to make contributions into that scheme for those employees. The operative date is staged and will apply to the largest employers from 1 October 2012. The aim is to increase pensions saving for retirement.

The landscape against which this auto-enrolment will apply is the limited success in voluntary saving for retirement (particularly amongst low to middle income employees), coupled with improvements in longevity, the increase in cost to the state in providing pensions, increasing state pension age, abolition on 1 October 2011 of the default retirement age, and in March this year the ECJ decision in the *Test-Achats* case (*Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres* (C-236/09)), that from December 2012 gender cannot be used as a factor when pricing insurance products, which is likely to impact on the cost of pension annuities.

This automatic enrolment:

- applies to qualifying employees working or ordinarily working in the UK aged between 22 and state pension age (although other employees can ask to be enrolled);
- relates to qualifying earnings, basically all income relating to the employment, including commission, bonuses, overtime, statutory sick pay, and maternity, paternity and adoption leave pay;
- does not require employees to complete any forms;
- requires employers to provide specified information to employees within a month of the statutory requirements applying to them;
- requires employees and employers to pay contributions;
- has very few exemptions: there is no minimum number of employees, and employees drawing a pension

are not excluded;

- permits employees to opt out of auto-enrolment at any time by completing an opt-out notice in prescribed form. If a valid opt-out notice is received by a scheme then the scheme must refund contributions paid;
- requires automatic re-enrolment in the scheme every three years. So if an employee had opted out then he or she would be automatically re-enrolled three years later and would have to repeat the opt-out process;
- requires employers to use a registered pension scheme, to keep records, and to pay contributions on time;
- will be regulated by the Pensions Regulator. Employers will have to provide information to the Pensions Regulator. There are sanctions and penalties for non-compliance and inducing employees to opt out.

NEST building

An option for employers is to use the National Employment Savings Trust ("NEST"), established by the Pensions Act 2008 and also available from 1 October 2012.

NEST is a trust-based scheme designed for people who are new to saving for retirement, with each member having a retirement fund with investment choices. The administrator which will run the scheme, a company, is to provide administration services and the first fund managers have already been appointed.

NEST's first investment strategy and Statement of Investment Principles were published in March. The investment objective for the default fund is a net return above inflation.

So, will employers opt for NEST?



Those with pension schemes may make adjustments to those schemes to meet the requirements for auto-enrolment. There will also be competition from other providers. The first private sector alternative has been announced and others will no doubt follow. Many employers have found themselves with multiple arrangements, so may use NEST (or an alternative):

- as a "bolt-on" scheme for some employees; or
- as a "reception" scheme, where there is a waiting period before an employee can join an employer's main scheme; or
- running in parallel with another scheme to meet the basic statutory requirements, with the other scheme being used for contributions in excess of minimum levels.

Other employers may decide to use NEST (or an alternative) as the only scheme to meet auto-enrolment requirements, if the workforce meets the criteria.

Auto-enrolment and NEST are being introduced at a time of transition in the workplace from either employment or retirement towards staged retirement for an increasing number of people. The introduction of compulsion is not unexpected and the new regime addresses many of the structural weaknesses, but the continuing absence of incentives to save plus other financial challenges for employees, and the recalibration of working practices due to the changes outlined at the beginning of this article (and no doubt other changes also), are likely to continue to pose obstacles to material increases in saving for retirement. ■

Employers will have to provide information to the Pensions Regulator. There are sanctions and penalties for non-compliance and inducing employees to opt out

● June Crombie, partner, Pensions, Biggart Baillie LLP

This month's cases consider a situation of conflict of interest following a domestic fallout, and a finding of no misconduct where the *Sharp* test was not met

Scottish Solicitors Discipline Tribunal

Richard Allan Sandeman

A complaint was made by the Council of the Law Society of Scotland against Richard Allan Sandeman, solicitor, of Messrs Sandemans Solicitors, 256 Main Street, Camelon, Falkirk ("the respondent"). The Tribunal found the respondent guilty of professional misconduct in respect of his acting where there was a conflict of interest in that he acted for a client in a conveyancing transaction when he was acting for the client's former cohabitee and co-proprietor, in circumstances where the former cohabitee and co-proprietor was seeking decree for an interdict against the client and was seeking to obtain and recover judicial expenses from the said client.

The Tribunal censured the respondent.

The Tribunal considered that a court action cannot be disposed of until a final interlocutor is granted, and the parties were in an active adversarial position. It was clear that the respondent felt uncomfortable with regard to acting in the conveyancing transaction, probably on the basis that he was aware of the potential conflict of interest. The Tribunal considered that a solicitor who takes on a case with two people who have clearly had a huge fallout should have ensured that everything was clarified so that there would be no difficulty with either party. The Tribunal accordingly considered that whether or not the respondent was aware of the Society's guidance, he was clearly aware of the desirability of having a written minute of

agreement in such circumstances. It has always been the case at common law, whether or not there is any guidance covering the position, that solicitors should not act in a conflict of interest situation and indeed this is set out in clear terms in the Code of Conduct 2002. If there had been a written minute of agreement, all the matters to be deducted from the free proceeds of sale would have been detailed in this agreement. Anything not included in the agreement could have not been deducted from the free proceeds of sale and the position accordingly would have been clear. The Tribunal accordingly found that the respondent acted where there was a conflict of interest and considered that this was contrary to the Code of Conduct for Scottish Solicitors 2002 and was conduct which could bring the profession into dispute.

The Tribunal noted that the previous findings against the respondent were not analogous and one was some considerable time ago. The Tribunal also took into account the fact that the respondent had already had to pay compensation and refund of fees in respect of the matter. The Tribunal also accepted that there was no ulterior motive behind the respondent acting in the way that he did and considered that in the whole circumstances it would be proportionate to merely censure the respondent.



The Tribunal considered that a solicitor who takes on a case with two people who have clearly had a huge fallout should have ensured that everything was clarified so that there would be no difficulty with either party

The findings were appealed to the Court of Session, which refused the appeal.

Paul Saunders Jardine

A complaint was made by the Council of the Law Society of Scotland against Paul Saunders Jardine, solicitor, Jardine Phillips LLP, 205 Morningside Road, Edinburgh ("the respondent"). The Tribunal made no finding of professional misconduct.

The Tribunal must be satisfied that the respondent's conduct was sufficient to amount to professional misconduct in terms of the *Sharp* test, *Sharp v Council of the Law Society of Scotland* 1984 SC 129. The Tribunal considered that there was a failure by the respondent in respect of his oversight in failing to record the deeds. The failure from December 2005 however was partly explained by Mrs O's daughter's failure to return the stamp duty form. The respondent also explained that the oversight in recording the deeds after June 2006 was due to him moving firms. This is not an excuse and the respondent's conduct was regrettable, but the Tribunal had to consider whether it was sufficiently serious and reprehensible so as to amount to professional misconduct. It would appear that the respondent's conduct did not have any impact on the inheritance tax situation and accordingly his client was not disadvantaged by what had happened. In the whole circumstances the Tribunal could not be satisfied beyond reasonable doubt that the *Sharp* test was met by this one oversight by the respondent. ■

Don't know much about history

A brace of websites looking at the law from many years ago

Roman Law Resources

www.iuscivile.com

Hosted by the Law School at the University of Glasgow, this site "provides information on Roman law sources and literature, the teaching of Roman law, and the persons who study Roman law". Never having studied Roman law myself, I was naturally curious.

The site begins with a disclaimer that having been formerly the subject of regular attacks by "malicious people" unnamed, it has moved to a new server and is therefore incomplete. While that sort of statement always raises the suspicion that it has remained (or will remain) incomplete for some considerable time, this one actually does appear to be quite recent so we will give it the benefit of the doubt.

Complete or not, there is still some very useful material to be found here. Largely a collection of links, these have nonetheless been organised in such a way as to operate like a large

Who writes this column?

The website review column is written by Iain A Nisbet of Govan Law Centre e: iain@absolvitor.com
All of these links and hundreds more can be found at www.absolvitor.com.
Absolvitor is also now on Facebook: <http://bit.ly/absolvitor>

cyber library of Roman law sources, journals, websites, discussion etc. I would perhaps have liked an introductory statement or two to the area of Roman law, but perhaps the site isn't designed with the newcomer in mind.

There is also a collaborative exercise of sorts involving the translation of Justinian's digest into English and the submission of proposed corrections thereto.

For those of you with an interest in this area, it's a definite bookmark candidate, and don't forget to take a peek at the "legacy" pages (www.iuscivile.com/legacy/reprints/), which aim to make certain academic works easily available and do so by allowing the visitor to download them directly as PDF files.

It's a very straightforward site and could perhaps benefit from some additional widgets (e.g. a wiki platform for the corrections project?), but it seems to work very well and is small enough to get away with the elementary site construction and navigation.

The Stair Society

www.stairsociety.org

The Stair Society, as I'm sure you're aware, was instituted in 1934 to encourage the study and to advance the knowledge of the history of Scots law. I know that because it's in large letters just under the words "Stair Society" when you arrive at the home page. Unfortunately, because those words are frozen within an image, which doesn't contain an "alt" or "longdesc" attribute, no-one with a visual impairment will ever know that – and neither will Google (unless they scroll down the page a bit). This makes me very sad – especially as it is so easily fixed.

The site looks a little bit like it was designed in the 1930s – but not in an altogether bad way. It eschews a lot of the modern web design fads which seem to scream for your attention, in favour of a gentler, more polite approach.



There is much information which is of interest primarily to members or prospective members of the Society, including details of the very reasonable annual subscription fee, and a copy of the constitution.

There is a page of links, all relating to legal history – from Scotland and further afield. However, the links page does not seem to be maintained very closely. In the first section three out of the seven listed links were broken, which was a real disappointment.

The real treat in this site is almost hidden away, under the enigmatic heading "MSS" – clicking here takes the visitor to scanned copies of two very ancient legal texts, complete with extensive historical introductions: the Berne Manuscript (13th century) and the Ayr Manuscript (14th century), both of which are beautifully penned, even if completely indecipherable (at least to me).

SEO success

A very brief sidenote just to mention that when Googling "scots law", the first law firm to rate a search engine listing (on the third page of results, no less) is Ballantyne & Copland (www.ballantyneandcopland.com) from Motherwell. There is no prize awarded for this, but it may send a few extra clients their way – so well done to the firm and their web designers for that.



Law Making and the Scottish Parliament: The Early Years

Elaine E Sutherland,
Kay E Goodall, Gavin
F M Little and Fraser P
Davidson (eds)

PUBLISHER: EDINBURGH UNIVERSITY PRESS
ISBN: 978 0 748640195
PRICE: £60

On 12 May 1999, Dr Winnie Ewing at the opening of the Scottish Parliament stated: "The Scottish Parliament, which was adjourned on 25 March 1707, is hereby reconvened".

This collection of essays critically analyses "the first 10 years of law making by the Scottish Parliament". The areas addressed and considered are diverse and wide ranging. The editors have gathered essays from a number of Scotland's leading academic and practising lawyers in public, criminal, family, property and environment law.

Standing their socio-legal effect, the areas of criminal justice, human rights and the judiciary within the post-devolution constitutional settlement of Scotland are particularly considered here.

In her well observed essay, Professor Pamela Ferguson records that the Parliament has enacted 147 statutes of which over a third are related to criminal procedure, sentencing, and the creation of substantive criminal law, creating over 400 new offences, in areas as diverse as sexual crimes (35 offences), sunbed operators, and even ploughing. Ferguson concludes that there has been an unwelcome *ad hoc* approach to law making in the area of criminal justice and calls for codification of criminal law, echoing the view of Professor Eric Clive. A similar conclusion, that

law making has been "piecemeal and fragmented", is offered by the authors of the chapters on education, the environment and housing.

Within this section of the collection, Professor Little offers a rigorous analysis of the significant reform of the Scottish judiciary with its maintenance and reinforcement of judicial independence, subject of course to the new powers of inquiry into judicial conduct and behaviour vested in the Lord President. Little offers the view that as the (mis)conduct of the judiciary is overseen by the judiciary itself, it reinforces judicial independence as free from executive interference, although some have questioned whether that function itself is a potential constraint on the exercise of judicial independence (contrast Aidan O'Neill's view that one benefit of the opportunity to appeal to the Supreme Court is that that very possibility is a means to keep judges and practitioners "sharp" and "more careful in how and what they decide").

O'Neill offers a searing critique of what he regards as a legislative deficit through the absence of any committee or the Parliament itself to hold the executive to account on the human rights compatibility of legislation, especially when Alan Page offers the view that the legislative programme is more executive-led than was anticipated. O'Neill observes the absence of public law human rights challenges due to the civil law requirement of title and interest (*D & J Nicol v Dundee Harbour Trustees* 1915 SC (HL) 12), commenting on the impact of Lord Gill's review and its aspiration on class actions. O'Neill concludes that the Supreme Court's appellate jurisdiction provides a more pervasive "benefit" than that offered

Suggestions for future books

The Book Review Editor is David J Dickson. Books for review should be sent

c/o The Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh EH3 7YR

● Turn to page 18 for more on the Scottish Parliament

by the Strasbourg and Luxembourg jurisprudence, but acknowledges that this view is not universally shared by the Scottish judiciary.

O'Neill's suggestion that the role of the Lord Advocate has been traduced to that of a Scottish DPP is somewhat undermined by Page's considered analysis in his crafted overview of the legislative process. Within that process the Lord Advocate must provide a statement that proposed legislation is within devolved legislative competence, and is a member of the cabinet subcommittee on legislation which is "at the heart of the government's legislative machinery".

This is a thoroughly considered, approachable book from which practitioners of every discipline will find something of interest, upon which they will be able to reflect but, perhaps most importantly, will find a resonance whether it be the background to a piece of legislation (why was change necessary), the mechanism by which legislation is developed through to enactment (how we ended up with what we work with), or putting the legislation or policy reform in its policy or socio-legal context. Anyone who wants to know how the new Scottish Parliament creates legislation and the effect it has had (and may yet have) on the Scottish legal landscape need look no further than this illuminating set of essays.

Rarely can it be said that a book not only ought to be on the bookshelf of every lawyer interested and concerned in the development of law but ought to be read and savoured. This is such a book. ■

● David J Dickson, Solicitor Advocate

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Cybercrimes: A Multidisciplinary Analysis

Sumit Ghosh and
Elliot Turrini (eds)

PUBLISHER: SPRINGER
ISBN: 978 3 642135460
PRICE: £126

This book wants you to take cybercrime seriously. Very seriously indeed. In chapter 1 the sub-chapters are given aggressive headings such as “the battle to control the computing process”; “the nature of the battle”; “the Cyberbattlefield”; “the attacker’s tools”; “the defender’s tools”; and so on. You’d be forgiven for thinking you were reading a book about the terrifying future of warfare, not the future of crime.

However, if the reader can summon the courage to progress from the smoke and wreckage of chapter 1, there’s plenty of interesting

information to be found. The chapters have been authored by various writers and co-edited by Professor Sumit Ghosh (chair of the computer science department at the University of Texas) and Elliot Turrini (assistant US Attorney for the District of New Jersey, where he is responsible for various high-tech and intellectual property prosecutions).

Although the book is presented as a reference work for practitioners, academics and scholars worldwide, I would agree with the authors’ assertion that it is written to appeal to a much wider audience. Some content is great and really accessible.

The chapter on the formidable challenges posed by cybercrimes is thought-provoking, the condensed history of the development of malicious code is informative,

and the summary of the international dimensions of cybercrime is also very engaging.

Other chapters are inevitably less useful. Personally I found the discussion of the psyche of cybercriminals to be fairly irrelevant, while 20 pages speculating on “the nature of cyberattacks in the future” is intellectually amusing, but probably inappropriate in a reference work.

For the practitioner, and especially the practitioner in Scotland, the book is realistically going to be of very limited usefulness. The authors are prone to the occasional flights of fancy that are beloved of the academic but frowned upon by the paying client. A monitoring tool is ridiculously likened to the tech spec of the death star embedded in R2D2 in *Star Wars*; the phrase “cyber-punk” is

deployed without any apparent recognition of just how silly it sounds; and the plot of Bruce Willis’s *Live Free and Die Hard* is offered up as an example of the kind of rampant cybercrime that really could happen in the imminent future. There is a single paragraph on “licenses [sic] and legal agreements”, a brisk treatment of “content protection efforts”, and a summary of civil and criminal penalties which is concentrated on US law.

This isn’t to say that I would recommend against practitioners reading this book. On the contrary, I think it will provide any reader a greater understanding of the world we now live in, and many will enjoy it a lot more than they expect at the outset. **I**

● John D McGonagle, Senior Solicitor, Brodies LLP, Edinburgh

The Boundaries of the Criminal Law

R A Duff, Lindsay
Farmer, S E Marshall,
Massimo Renzo and
Victor Tadros

PUBLISHER: OXFORD
UNIVERSITY PRESS
ISBN: 978 0 199600557
PRICE: £50

It has been common in recent years to hear claims that the United Kingdom faces a crisis of “overcriminalisation”; that governments are addicted to creating vast swathes of new criminal offences. No one quite knows how many criminal offences actually exist, but Tony Blair’s New Labour Government was established to have created almost one new offence for every day in office, ranging from the delightfully obscure (disturbing a pack of eggs when instructed not to by an authorised officer) to the positively frightening

(creating a nuclear explosion). How people slept soundly prior to the reassurance of the Nuclear Explosions (Prohibition and Inspections) Act 1998 remains something of a mystery.

While various Government departments (the worst offender, perhaps surprisingly, seems to have been the Department for Environment, Food and Rural Affairs) have been busy expanding the boundaries of the criminal law, the Government has been generous enough (through the Arts and Humanities Research Council) to offer a group of academics funding to study the phenomenon of criminalisation. This book, a collection of essays by leading scholars, is the first fruit of that project, and is to be followed, remarkably, by

a further half-dozen books in future years.

This volume contains 10 essays, including an introduction by the editors. Doing it justice would take an essay in itself, but they explore the theory of what

Paradoxically, at the same time as enormously expanding the scope of the criminal law, New Labour was remarkably keen on subverting it

it is that justifies resort to criminal law in particular. What does it mean for something to be marked out as a public wrong by the criminal law, and how is such wrongness to be identified? And how does the overuse of the criminal law, particularly the creation of offences which the state lacks the resources to

prosecute or punish, affect the discretionary decisions of those who actually have to operate the law in practice?

Overcriminalisation, as Duff’s discussion of “subversions of criminal law” explains, is not

the full story. Paradoxically, at the same time as enormously expanding the scope of the criminal law, New Labour was remarkably keen on subverting it. Criminal law is designed to safeguard liberty in a way that civil law does not, imposing requirements such as a higher standard of proof and stricter rules of evidence. These are inconvenient, and devices such as the ASBO are designed to avoid them, by allowing resort to the civil in place of the criminal courts. Here, as the essay by Ashworth and Zedner explains, we have a problem of under-criminalisation: the protections established in the criminal process are circumvented.

So in sum: too much criminal law, and too little. Seven books are unlikely to solve the problem, but they should at least help us to understand it better. **I**

● Dr James Chalmers, University of Edinburgh

After one false start, the Bribery Act 2010 has now been confirmed as coming into force on 1 July 2011 and the Government's Final Guidance has been published, clarifying a number of areas previously in doubt. Sebastian McMichael provides a guide to the guidance

Above board

Further to the article at Journal, February 2011, 54, the Government confirmed on 30 March 2011 that the Bribery Act 2010 will come into force on 1 July 2011. The announcement was accompanied by the Government's finalised guidance on adequate procedures ("the Final Guidance"), which applies across the UK, along with non-statutory "quick start" guidance. Also on 30 March 2011, the Serious Fraud Office (SFO) and the Director of Public Prosecutions (DPP) issued their joint guidance on how they will exercise their prosecutorial discretion in enforcing the Act in England & Wales.

This article will assess the Final Guidance and its impact on the issue of "adequate procedures". It will also highlight the potential impact of the Act on the Scottish legal profession and other professional advisers, and what law firms may need to consider going forward. Finally, it will seek to highlight measures that the Crown Office may consider to assist Scottish commercial organisations, the public sector and individuals to assess their risk and stay on the right side of the law.

The importance of adequate procedures

By way of recap, the issue of adequate procedures is a critical issue for "a relevant commercial organisation", which under s 7 of the Act can face prosecution for failing to prevent bribery by an "associated person". It will be a defence for a commercial organisation to show that it had adequate procedures in place to prevent unlawful conduct.

The Final Guidance (buttressed by the SFO/DPP Guidance) is more prescriptive than the draft of September 2010. It provides a greater number of illustrative case studies (11 rather than five), and does, as noted below, seek to provide more

concrete guidance to businesses on certain key areas of concern.

As with the draft guidance, adequate procedures are to be based on six guiding principles, but these have been articulated in a more user-friendly manner. Most importantly, the Final Guidance stresses in principle 1 that while anti-bribery procedures are to be clear, practical, accessible, effectively implemented and enforced, they are also to be proportionate to the bribery risks faced. Indeed, proportionality is viewed as the "core principle" to be applied in considering adequate procedures and is a concept that permeates the guidance, reflecting in turn a clear governmental endorsement of a risk-based approach to managing bribery risks.

The other five principles can be summarised as follows and do not come as any great surprise:

- There should be **top-level commitment** to anti-bribery measures, fostering a culture within the organisation in which bribery is never acceptable.
- The commercial organisation should carry out, on a periodic basis, a **risk assessment** of the bribery risk faced.
- **Due diligence** procedures should be in place, relative to persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.
- Internal and external **communication** measures (including training) should be in place to ensure that bribery prevention policies and procedures are embedded and understood throughout the organisation.
- The commercial organisation should **monitor and review** anti-bribery procedures on an ongoing basis.

Shades of grey

The Final Guidance seeks to grapple with a number of grey areas. The

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following can be noted, in particular:

- Departures from the suggested procedures contained within the Final Guidance will not in itself give rise to a presumption that an organisation does not have adequate procedures.
- The application of bribery prevention procedures is of particular importance if an organisation wishes to report an incident of bribery to the regulatory authorities. The commercial organisation's willingness to co-operate with a 2010 Act investigation and to make a full disclosure will also be taken into account in any decision as to whether it is appropriate to commence criminal proceedings (though ultimately this will remain, in Scotland, a matter for the Lord Advocate to decide).
- The Final Guidance explicitly recognises that reasonable and proportionate corporate hospitality (e.g. tickets for a sporting event) is unobjectionable unless the circumstances suggest otherwise. It also offers some useful comment on when other types of business expenditure (e.g. arranging for visits by foreign public officials) may be objectionable.
- In relation to bribery of a foreign public official (FPO), the Final Guidance notes that the Act does not require proof of intention relative to improper performance. However, it stresses that it is not the Government's intention to criminalise behaviour where no underlying mischief occurs. Rather, the focus of the Act is principally on preventing a FPO's decision making being improperly influenced by personal enrichment.
- Non-UK incorporated bodies that do not have a demonstrable business presence in the United Kingdom will not be caught by the Act. Indeed, the Government's view is that the mere fact that a company's securities are



traded on the London Stock Exchange will not in itself qualify that company as carrying on a business or part of a business in the UK. Likewise having a UK subsidiary will not, in itself, mean that a parent company is so carrying on business, the Final Guidance noting that a subsidiary may act independently of its parent or other group companies.

● Due diligence of business partners should be focused primarily on those over which an organisation is likely to exercise control. Further, the Final Guidance recognises that due diligence is only necessary in relation to persons who will actually perform services for or on behalf of the organisation, which is unlikely to be the case in relation to someone who simply supplies goods.

● While the Final Guidance confirms the unacceptability of facilitation payments, it does also recognise the problems that commercial

The Final Guidance goes somewhat further than many anticipated in providing greater clarity and comfort to businesses grappling with compliance issues

organisations face, in this respect, in some parts of the world. The SFO/DPP Guidance usefully lists a number of factors tending in favour of prosecution (e.g. large or repeated payments), and a number of factors tending against prosecution, including where the payments come to light as a result of a genuinely proactive approach involving self-reporting and remedial action.

All in all, the Final Guidance goes somewhat further than many anticipated in providing greater clarity and comfort to businesses grappling with compliance issues. While there remain a number of areas where careful thought will be required to ensure compliance, the final guidance does provide, as one would hope, an extremely useful frame of reference.

Impact on the professions

Law firms and lawyers are undoubtedly “associated persons” within the meaning of the Act, carrying on as they do services for or on behalf of their clients.

Accordingly, it is no surprise that lawyers are being asked by clients (as part of their own due diligence requirements in terms of adequate procedures) to confirm their anti-bribery/anti-corruption credentials, often via a request for the firm’s anti-bribery policy and procedures. This is also being seen in the context of tenders (particularly in relation to public sector work). Evidently, regulated as the profession is, lawyers should represent low risk and, as such, law firms should be in a position to take a proportionate, light touch approach to the Act: for example, by bolting revised policies and procedures onto pre-existing

money laundering, FSA and similar policies and identifying their commitment to anti-bribery in, for example, engagement letters and website notices.

Lawyers also need to bear the Act in mind when instructing third parties (e.g. local agents/foreign lawyers). Again, a light touch approach is likely to be appropriate given the normal pre-instruction checks law firms carry out, but the Act is something that should be covered off for the sake of prudence and risk mitigation.

What is sauce for the goose is sauce for the gander. Accountants and other professional service providers also need to integrate anti-bribery issues into their standard risk compliance measures. And for both lawyers and analogous advisers, careful consideration has to be given to POCA: the SFO has made it clear, for instance, that it would expect auditors to report suspected bribery infringements to SOCA.

Crown Office comfort?

Based on our discussions, we understand that Crown Office is considering whether or not to publish Scottish enforcement guidance of a type similar to the SFO’s. Evidently, on a practical basis, one would expect Crown Office to consider the SFO’s approach (and vice versa) in determining whether or not to proceed with prosecutions in Scotland, though of course this will always be a ultimately a matter for the Lord Advocate’s discretion.

In relation to the (criminal) cartel offence under the Enterprise Act 2002, Crown Office has entered into a memorandum of understanding (“MOU”) with the OFT, which sets out how the two bodies will co-operate in investigating and/or prosecuting individuals in Scotland. The MOU has a tartan tinge, allowing the Lord Advocate to retain her discretion while providing, particularly, whistleblowers and self-reporting companies a degree of comfort as to how the Scottish prosecutor will proceed.

It is understood that Crown Office is not minded to enter into a MOU relative to the 2010 Act. Be that as it may, as noted in the February article, requirements of legal certainty militate in favour of a joined up approach to enforcement of the Act. ■

● *Sebastian McMichael is a solicitor with the Regulation and Markets team of Shepherd and Wedderburn LLP.*

Where to find them

The Government’s Final Guidance: www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf
Non-statutory “quick start” guidance: www.justice.gov.uk/guidance/docs/bribery-act-2010-quick-start-guide.pdf
Serious Fraud Office/Director of Public Prosecutions joint guidance on exercising prosecutorial discretion in England & Wales: www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/bribery-act-prosecution-guidance-published.aspx

Ruaig an Fhèidh

The land rights dispute between the Pairc Estate crofters and their landlord on the Isle of Lewis reflects the crofters' struggles of past centuries, says **Malcolm Combe**, as he considers the prospects for a challenge to the legislation on which the crofters rely

The Highlands and Islands loom large in any discussion of landownership and land reform in Scotland. One prominent silhouette is formed by the Isle of Lewis. It has a chequered history, involving the common Gàidhealtachd mix of clearance, resistance and eccentric lairds (the last being provided by the Mathesons and Lord Leverhulme, who built their respective fortunes on opium and soap).

The idea of resistance to landed power has been fortified (or perhaps sentimentalised) in Gaelic folklore and literature, examples of which can be found in the radical poems *Ruaig an Fhèidh* ("The Deer Drive", poet unknown) and *Bodach Isgèin* ("The Old Man of Eishken", Donald MacCallum), both available in Donald Meek's collection *Tuath is Tighearna* (*Tenants and Landlords*, 1995). These poems relate to the deer raid at Pairc, in the South Lochs area of Lewis. The raid was carried out by destitute cottars in November 1887, not long after the passage of the watershed Crofters Holdings (Scotland) Act 1886, for reasons of abject poverty as much as an attempt to prevent the creep of the deer forest into what was viewed as traditional lands.

Those *au fait* with Hebridean history would not have been surprised that two Lewis communities were the first to make use of the absolute right to buy provisions contained in Part 3 of

the Land Reform (Scotland) Act 2003 (all statutory references are to this legislation unless otherwise stated). One community, Galson, was saved the legislative obstacle course by a capitulating landowner, allowing the sale to the community to proceed on a consensual basis. The second community may have hoped for a similarly steady course to community ownership, but any such hopes have been dashed. Fate may have decided it fitting that the community left to fight on was Pairc.

On 21 March 2011, Scottish Ministers decided everything was in order with The Pairc Trust's application to buy part of the Pairc Estate from Pairc Crofters Ltd, a confusingly named company operated by an individual called Barry Lomas. As shall be seen, Lomas has not been a submissive transferor. He has been fastidious and litigious in exploring and exhausting any rights and remedies to prevent or hobble the sale. There are now indications that he is challenging the Scottish Ministers' decision at Stornoway Sheriff Court, while simultaneously engaging in a judicial review action at Edinburgh in relation to Part 3 as a whole.

Legal background

Only a cursory look at the mechanics of the crofting community right to buy



fyi

On 21 March Scottish Ministers decided that everything was in order with The Pairc Trust's application to buy

is possible here (more detail can be found in the author's "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?" 2006 JR 195 at 208-209). Part 3 only applies to the crofting counties. It allows properly constituted crofting community bodies (who must comply with the formalities of s 71) to purchase eligible croft land, contiguous land and certain additional rights (ss 68-70), provided ministerial consent and approval by local ballot has been obtained (all as set out in chapter 2 of Part 3). Assuming the process is followed, the landowner is not at liberty to refuse to convey the land when the community furnishes the independently set price (valuation being provided for in s 88).

This is not the first time land disputes at Pairc have reached the courts. In 2004, a 75-year lease of the Pairc estate was granted by the landowner to an associated



The Inner House was not willing to hold that there are no circumstances in which the Court of Session could strike down legislation of the Scottish Parliament on common law grounds

Trust Ltd 2007 SLCR 166. Aware of this avoidance scheme, the Scottish Parliament rendered the first two issues largely academic by enacting the new s 69A, introduced by the Crofting Reform etc Act 2007, which gives a crofting community body the right to buy the interest of an interposed tenant. Unsurprisingly, The Pairc Trust promptly sought to acquire this interest along with the land, with approval also being granted by the Scottish Ministers on 21 March 2011.

Potential arguments

Without wishing to prejudge any dispute that is, or will be, *sub judice*, it appears there are three possible arguments for the landowner to run. The first relates to human rights jurisprudence stemming from article 1 of Protocol 1 to the European Convention on Human Rights, which provides that “no-one shall be deprived of his possessions except in the public interest”. By any conventional analysis, a compulsory transfer with or without compensation is a deprivation, but would the deprivation be in the public interest? It is submitted it would. A line of authority going back to *James v UK* (1986) 8 EHRR 116 suggests that the forced transfer from one private citizen to another “in pursuance of a policy calculated to enhance social justice within the community can properly be described as being in the ‘public interest’” (at para 41).

What chance might a wider attack on the legislation itself have? Case law, this time domestic, is tantalising. In the Outer House case of *Adams v Advocate General* 2003 SC 171, Lord Nimmo Smith opined that traditional common law grounds of judicial review are not appropriate for Scottish legislation (in relation to the Protection of Wild Mammals (Scotland) Act 2002). The more recent Inner House decision of *AXA General Insurance Ltd v Lord Advocate* [2011] CSIH 31 was not willing to hold that there are no circumstances in which the Court of Session could strike down legislation of the Scottish Parliament on common law grounds, but the court did not regard the Damages (Asbestos-related Conditions) (Scotland) Act 2009 as a suitable candidate for judicial attack.

Whether or not Part 3 is ripe for attack is pure speculation, but it is difficult to place what any such attack would be based on. (This and the human rights issue are discussed in the author’s abovementioned article at 209-211.)

Lastly, the landowner may trawl through the approval process documentation in an attempt to find some kind of administrative failure. If one is unearthened, the sheriff court decision of *Hazle v Lord Advocate* (Kirkcaldy Sheriff Court (ref B270/07), 16 March 2009) in relation to the Part 2 right to register provisions (giving a right of pre-emption to rural land) suggests that even slight flaws in the community’s documentation can scupper any statutory right. That is not to say that a re-application could not take place, but it may give the landowner a chance to unearth yet another obstacle to the purchase (see further the author’s “Access to Land and to Landownership” (2010) 14 EdinLR 106).

Historic parallel?

Notwithstanding this serious test of the crofting community right to buy, it can be seen that Part 3 has had a definite impact on the pattern of landownership in the crofting counties. Places like South Uist, North Harris and Galsion would not be owned by their respective communities had there not been the threat of compulsory sale lurking behind any negotiations.

The residents of Pairc have no choice but to show that the threat is not empty. The concluding verse of the poem *Ruaig an Fhèidh* still resonates today, where it notes that the people will not rest until they have won the estate with joy and honour. Fitting or otherwise, resonance with poetry and illicit deerstalking will only get you so far in 21st century Scotland. Is the same true of the 19th century? The Scottish Land Court decision of 2007 was not the first Pairc dispute to end in the courts either. In 1888, six raiders appeared at the High Court in Edinburgh for their actions. They were acquitted. ■

● *Malcolm Combe, solicitor, is a lecturer in the School of Law at the University of Aberdeen*

company, interposed between the landowner and the crofting tenants. The affiliate in turn granted a sub-lease over the common grazings to a developer for the erection of a wind farm. The developer’s rent was pinned to the installed capacity of the wind farm, but in terms of the interposed lease only a nominal amount was payable by the interposed tenant to the landowner. If the interposed lease was invulnerable to the application of Part 3, the community would have been denied a valuable income stream on acquisition of the land.

The Scottish Land Court was therefore called on to decide whether interposed leases are valid in the crofting context (they are); whether Crofters Commission consent is needed for such an interposal (it is not); and the ancillary point of whether watercourses on common grazings are “eligible croft land” for the purposes of s 68 (they are): *Scottish Ministers v Pairc*

New arguments have been emerging in property litigation in consequence of the recession, says **Eric Baijal**, but one recent decision has negated an attempt to seek payment of the price without entry having been taken

The price of breach

One of the side effects of the recession and consequent dip in the property market has been the increasing ingenuity of arguments employed by those involved in litigation concerning heritage, seeking to avoid their obligations under missives. The writer has experience of arguments being formulated on the basis that dates of entry never arrive under contractual mechanisms, on the suitability of insurance guarantees provided, on issues of implied terms of "expeditious progress", and many similar points which are often taken in an effort to negotiate a settlement.

The case of *AMA (New Town) Ltd v McKenna*, Sheriff Principal Bowen, Edinburgh Sheriff Court, 28 February 2011, unreported (available on www.scotcourts.gov.uk), is different and important for a number of reasons. First, not many, comparatively speaking, of the recession cases, if they may be called that, have actually made it to proof. Secondly, rather than a defender coming up with inventive arguments, the interest in this case centres around an argument employed on behalf of the pursuers.

Unusual choice

Broadly speaking the factual background in this case was very similar to many others affected by the recession. The defender had entered into missives with the pursuers to purchase a property in Edinburgh. In terms of the bargain he agreed to pay a certain amount on conclusion of missives and a further £141,850 on the date of entry. The date of entry was calculated (and the mechanism does not seem to have been challenged), as 23 December 2009. At some stage before that date, it appears that the defender intimated to the pursuers that he was not in a position to proceed with the purchase.

A few years ago in a rising market

we would have had sellers looking for any opportunity to resile and resell at a higher price. In the writer's experience these days, one normally would expect to find the sellers, following such an intimation, either raising an action of implement, or alternatively raising an action for damages in respect of losses incurred as a result of the purchaser's breach of contract.

It can be said very generally that in Scots law a pursuer in such a case has the right to elect whether to sue for damages or alternatively for implement. Equally, however, it is highly unlikely that a court would compel implement on the part of a defender if that party was unable (so in this case, for example, had insufficient funds) to obtemper their obligations under the contract.

In this case, the pursuers elected to follow neither of the normal courses of action. Instead they raised an action for payment in the sum of £141,850, being the balance of the price claimed still to be due. This raises an interesting legal point. After argument Sheriff Holligan accepted that it was competent for the pursuers to adopt such a course. The defender appealed.

As Sheriff Principal Bowen put it: "The question which arises in this appeal, which I perceive to be both controversial and one of general importance, is whether someone in the position of the pursuers – that is to say the seller of heritable property who is told that the purchaser does not intend to proceed with the bargain – has the right to obtain decree for the price in unqualified terms."

Implement or payment

In the event the sheriff principal disagreed with the sheriff's view that, properly interpreted, there

Eric Baijal



was little difference between a crave for payment of price and a crave for implement.

The sheriff principal began by looking at the basis of the action. He identified that for that action to be successful there would have to be some contractual right to payment. However, in his view, while there was a contract between the parties, it remained an uncompleted contract given the fact that notwithstanding performance had been offered by the pursuers in exchange for payment of the price, delivery of the disposition had not actually been effected.

The sheriff principal went on to consider the relevant background law, and in particular the fact that while a non-repudiating party in Scotland had the right to disregard repudiation and insist that the defaulting party implement the contract, his right to do so was limited in cases where the defaulting party was contractually due to pay money. The sheriff principal said:

"It is against that legal background that the normal practice in cases where a purchase price has not been forthcoming in a contract for the sale of heritage is for an action to be raised seeking an order for implement of the contract by payment within a specified period in exchange for a valid disposition of the subjects, with an alternative demand for damages in the event of non-payment."

A case distinguished

The sheriff principal then considered the case of *Bosco Design Services Ltd v Plastic Sealant Services Ltd* 1979 SC 189. The sheriff had to a great extent based his decision on *Bosco* where, it was said for the pursuers and respondents, the First Division had "endorsed" the approach and

● Continued overleaf >



The sheriff principal disagreed with the sheriff's view that, properly interpreted, there was little difference between a crave for payment of price and a crave for implement



● Continued from page 56 >

tactic taken in the present litigation. That is to say it was argued that suing for payment of the price rather than implement, which failing damages, was perfectly competent.

In *Bosco*, missives had been concluded for the purchase of office premises. However, in that case the defenders had taken entry at settlement and also delivered a cheque apparently obtempering their obligation to pay the purchase price, but which was in due course dishonoured by the bank. An action was then raised seeking payment of the price and also damages in relation to the pursuers' estimated loss on resale. It appears that in the Outer House it was held that such an approach was incompetent, with a party only being able to take one approach or the other. However, in the division an observation was made that "decrees in terms similar to those in conclusions 1 and 2 of this action [referring to the crave for payment] are frequently sought and granted".

The pursuers in the present action therefore argued that their approach and crave had been endorsed by the division. The sheriff principal disagreed that this was the ratio of *Bosco*. He said: "taking the decision as a correct one – which I am bound to do – it does not appear to me to be authority for more than the proposition that the pursuers were entitled to proceed to the alternative remedies when they had failed to recover the purchase price. Whatever may have been said about the practice of obtaining decree in terms 'similar' to the first conclusion I do not consider the case to be authority for the proposition that one can sue for the contract price on the basis of an uncompleted contract".

The sheriff principal thereafter went on in very brief and straightforward terms to distinguish *Bosco* as set out in his quote above (for example, he concluded that it was relevant in *Bosco* that the defenders had taken entry to the property), and thereafter to hold

that it was not open for pursuers to seek a "straightforward decree for payment in circumstances such as the present". He held that no contractual debt upon which action had been raised had been relevantly averred. Thereafter, he allowed the defender's appeal, holding effectively that the approach employed could not succeed here.

Consequences

Where then does that leave us? In the writer's view, the sheriff principal's decision is the correct one. If the sheriff's decision had been upheld, all sorts of consequences might have flowed from it. For example, if a pursuer in a case such as this had obtained a decree for payment, and it had been satisfied by the defender, presumably a disposition would have been delivered (in terms of the contract). On the other hand, if the defender had not been in a position to obtemper the decree then potentially they might have been subject to insolvency proceedings when hypothetically it is possible (for example in a rising market) that the pursuer had not actually suffered any loss.

Another difficulty with the approach adopted by the sheriff in the current case is that the position would not, in the writer's view, be clear if a decree was obtained and remained unsatisfied, and meantime the pursuers sold the property. At that stage theoretically they would be in a position to enforce a decree, which would, certainly initially, result in a windfall to them.

Given the rising numbers of breach of missive cases the writer is encountering, it is helpful to have some further clarity on the correct approach pursuers ought to be taking. It now seems clear from the sheriff principal's judgment that the settled and traditional remedy and approach is the correct one. So the answer to the question identified by the sheriff principal is implement, not payment. ■

● *Eric Baijal is a partner with BBM Solicitors, Wick*

"I do not consider the case to be authority for the proposition that one can sue for the contract price on the basis of an uncompleted contract"

Registers of Scotland Turnaround times as at 23 April 2011

The final year end position of the 2010-2011 turnaround times will not be known until all applications received during 2010-11 have been processed. As at the end of March, sasine and non-ARTL dealings with whole and DWs and first registrations had hit their turnaround times, but a very small percentage (less than 0.2%) of ARTL applications had not been completed within the 24 hours.

The Keeper's turnaround targets for 2011-2012, endorsed by Scottish Ministers, have been informed by the outcome from our most recent customer survey, where our customers have indicated that undertaking first registration work more quickly is their highest priority. The targets and performance are as follows:

Where it is in the Keeper's power and is legally appropriate:

Target: To complete the registration of sasines writs within an upper limit of 40 days. 80% will be completed within 20 days.

3,197 sasine writs received since 1 April 2011

705 sasine writs or 22.1% despatched within 20 working days

No sasine writs have been despatched beyond 20 working days

2,492 sasine writs or 77.9% are currently in the arrear and their average age is less than seven working days.

Target: To complete the registration of dealings with whole carried out as ARTL transactions within 24 hours.

All of the 972 dealing with whole carried out as ARTL transactions were completed within the 24 hours.

Target: To complete the registration of dealings with whole that are not carried out as ARTL transactions, and standard first registrations, within an upper limit of 120 days. 80% will be completed within 60 days.

11,822 standard first registrations and dealings with whole not carried out as ARTL transactions received since 1 April 2011

848 standard first registrations and dealings with whole not carried out as ARTL transactions, or 7.2%, despatched within 60 working days

No dealings with whole or standard first registrations have been completed in more than 60 days

10,974 standard first registrations and dealings with whole not carried out as ARTL transactions, or 92.8%, are in the arrear.

Note: the percentages achieved will always be lower at the start of a financial year as the availability of working days to process each of the products has not yet elapsed.

REGISTERS OF SCOTLAND





Corporate insolvency and restructuring

The Journal's next Who's Who feature will publish in July 2011, on Corporate Insolvency and Restructuring. Expressions of interest on the part of those wishing to be included in the feature should be sent to the Editor at peter@connectcommunications.co.uk.

Calling all rising stars

In August the Journal plans to feature recently qualified lawyers (up to five years), in any discipline, who stand out as potential future leaders in their field or in the profession. Firms wishing to nominate their brightest and best prospects should also contact the Editor.

Other planned special features of likely interest to advertisers as well as readers (covering the subject area rather than individual practitioners) include:

- June:** Rural property
- September:** Renewables
- October:** IT
- November:** Charities
- December:** Employment survey

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Blamer v Disclaimer

Manus Straw's idiosyncratic take on some of the past month's legal stories

Capturing votes

Prisoners don't like being in the spotlight (it tends to hamper the escape attempts). However, they have been in the news because the European Court of Human Rights has given the Government until October to end the blanket ban on prisoners voting in the UK.

While I am all for human rights, I can't help wondering if all this has been thought through properly. For example, which constituency are prisoners going to be permitted to vote in? The one in which they're imprisoned? The biggest prison in the UK is Wandsworth, which holds 1,665 prisoners. The smallest Parliamentary majority is in the seat of Fermanagh and South Tyrone, which is held by Michelle Gilderne with a majority of 4. It doesn't take Carol Vorderman to see that prisoners could have a substantial say in swinging parliamentary seats.

What would happen if, say, a party ran with a manifesto to halve prison terms? I'm sure this has all been taken into consideration – it's not as if Europe has ever made a daft law.

Cookie d'oh!

The European Union has made a daft law! The E-Privacy Directive will force companies to obtain "explicit consent" from web users before they make use of cookies. Maybe those companies can just gorge on doughnuts instead.

Ed. cross

Charities' approach to combating fraud is significantly less robust

than that found in the private and public sectors, according to a new study by PKF and the Centre for Counter Fraud Studies at University of Plymouth. Maybe it's just my skewed world view, but my generous contribution is that maybe charities should be a bit less fussy about fraud, as the whole operation is essentially devoted to giving cash away!

Angry letters highlighting the gaping holes in this extremely shaky logic should be addressed directly to the Editor.

Inflationary stationery

A new study by PWC indicates that financial crime is on the rise within the public sector. The survey of over 110 senior representatives of government and state-owned enterprises found that "accounting fraud encompassing fraudulent applications for credit and unauthorised transactions has, for the first time, overtaken asset misappropriation as the number one economic crime in the public sector". I think what PWC really wanted to write was "look: folk at the council have nicked stationery and will always nick stationery, but they're now claiming the odd wonky expense too". However, that sort of straight-talking insight might not have justified their fee.

Sheriff scores with "mugshot of the day"

Sheriff Joe Arpaio of Maricopa County, Arizona is facing up to wrongdoers by releasing a series of mugshots online. The lawman



Sheriff Joe Arpaio of Maricopa County, Arizona is facing up to wrongdoers by releasing a series of mugshots online

believes that allowing members of the public to browse through the photos on his website and vote for the "Mugshot of the Day" will help solve crimes by making people more aware of local offenders. Personally I'm not convinced, but I have no doubt that Sheriff Arpaio will have spent long sleepless nights ruminating upon Youngjae Lee's extensive research on recidivism and the impact that "Mugshot of the Day" may have.

On a more lighthearted note, Sheriff Arpaio claims he has a face like a million dollars (I hope that doesn't mean he's grubby, green and wrinkly). He also claims to be widely acknowledged as being "America's toughest sheriff". (I just hope this epithet isn't self-awarded, a bit like how Richard Blackwood used to go on talk shows and claim to be an incredibly sceptical public that he was "the UK's answer to Will Smith".)

Lax machine

Spanish police have arrested a man who twice escaped from Madrid jails by having his wife send fake faxes ordering his release. A spokesman for Arganda del Rey courthouse said: "We are all deeply embarrassed and promise that this won't happen again. From now on we won't release somebody by mistake unless we receive a fake email, sent from an iPad."

Jose Carlos Serna, 57, was found hiding in a hollowed-out sofa at his home. His wife is denying charges that she sat on his hiding place. ■

● Manus Straw is the pen name of a practising solicitor

From the Journal archives

50 years ago

From "The Solicitor's Profession", May 1961 (address by Sir Hugh Watson DKS to Edinburgh University Law Society): "If you become a practising lawyer you will almost certainly before long become a partner in a firm and there will, I can assure you, be many vacancies in firms and many opportunities for capable

young men. The number of solicitors who take out Practising Certificates in Scotland each year is now much less than it was before the War and also the number coming into the profession is substantially less".

25 years ago

From "From the Editor", May 1986: "This month we extend a warm

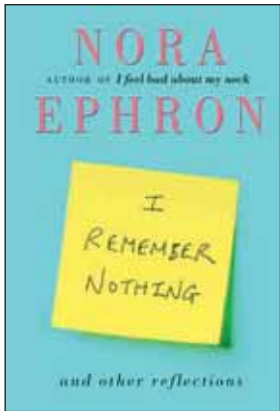
welcome to a new Scottish legal publication, the *Glasgow Legal Review*, otherwise known as *The Journal of the Glasgow Bar Association*... It is printed in newspaper format, and extends to twelve pages or so... It includes an irreverent correspondence column and an utterly tasteless but extremely



funny 'Agony Aunt' column which will be hard to maintain at its present (or any other) standard. It is eminently readable." ■

A selection of leisure time reading reviewed by Fiona Kennedy, Cornelia Riehle, Joy Barnard, Jane Ferrier, and Susan Dickson

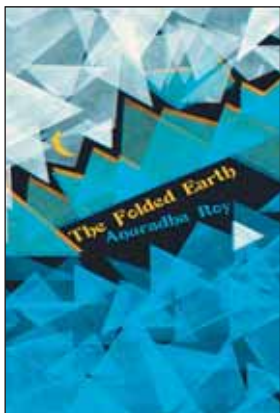
Something for the Girls



I Remember Nothing
(Nora Ephron:
Doubleday:
£12.99)

Perhaps better known for her screenplays (*Silkwood*, *Sleepless in Seattle*), Nora Ephron began her career in the mailroom at *Newsweek*

and has climbed through the ranks of writers ever since. This collection of essays is shrewdly observant yet written with warmth and humanity, a bit like *Grumpy Old Women*, but with class. The chapters deal with many aspects of life: relationships, friendships, bereavement, getting on in life, getting the most out of life. A good book to dip into, it's a reminder that age brings invaluable experience as well as the wrinkles!



The Folded Earth
(Anuradha Roy:
Maclehose Press: £10.99)

Indian literature can often seem daunting, weighty tomes filled with complex cultural nuance

sometimes making the narrative all but impossible to the simple western mind. *The Folded Earth* could not be more different. It is a beautifully written tale of Maya, a young widow, coming to terms with her husband's sudden death on a climbing trip in circumstances which have never been fully explained, and her journey to a life in the foothills of the Himalayas in search of peace. From a privileged background in the bustle of the south, she discovers a simple life amongst farmers, and an older generation which, despite the current-day setting of the novel, is still coming to terms with the fall of the Raj and the loss of status and stability which

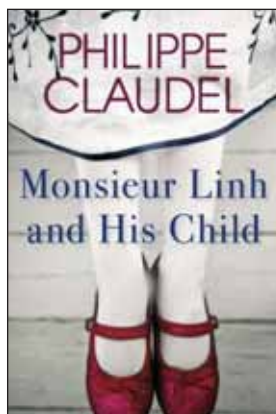
the British instilled. The narrative explores Maya's friendships with her young illiterate neighbour, and her landlord, a failing former Nawab. There are themes of love and betrayal set in a dramatic landscape which is a constant reminder of how cruel and unpredictable life can be. The language of the book is lyrical but unsentimental and, as all good novels should, it has a devastating sting in its tail.



The Union Quilters
(Jennifer Chiaverini:
Dutton:
£15.40)

It may not appear an obvious choice for a gripping read, but the Elm Creek Quilts novels are exactly

that, particularly when based on historical events, here the American Civil War. Even a history duffer like me can appreciate the thorough research, revealing the effects of the war on those who fought, but also those left behind. A compelling story of love, loss and quilting, it says much about the politics and social etiquette of Pennsylvania in the 1860s. Historians, stitchers and anyone who enjoys a well told tale will not be disappointed.

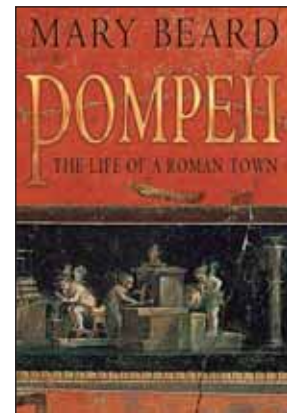


Monsieur Linh and his Child
(Philippe Claudel:
Maclehose Press: £12)

This is a little gem, really a novella that can be read at one sitting. The author is a university lecturer and

film director, who also wrote the screenplay for *I've Loved You So Long*, starring Kristin Scott Thomas. Not a single word is wasted here, and yet the imagery is powerful and at times disturbing, as we experience

Monsieur Linh's gradual awakening from the nightmare of war in his homeland, helped by his new friend Monsieur Bark. Emotional without being sentimental, the book delivers a couple of satisfying twists and keeps the reader entertained right to the end.



Pompeii
(Mary Beard:
Profile Books:
£9.99)

Famous classicist Mary Beard has brought Pompeii's streets and everyday existence back to life, describing pedestrian

areas, apartments to let, graffiti, wallpaper, bankers and bakers, election posters, spa relaxation, racing, priests, street life, homes, decoration, city administration. It is simply amazing that her illustration of a Roman city actually takes place in 79BC and not today.



The Last Brother
(Nathacha Appanah,
trans
Geoffrey Strachan:
Quercus:
£7.99)

The Last Brother tells a story of loss and the guilt that Raj, now an elderly

man, feels because of events in his childhood in Mauritius, during the Second World War. Raj seeks escape from his abusive father and heartbroken mother in his friendship with David, a 10 year old Hungarian Jewish refugee interned in Mauritius, with tragic consequences. A sense of foreboding hits the reader almost immediately, and runs through the beautifully descriptive prose. Appanah deals eloquently with the themes of loss and the guilt of those who have survived disasters. A moving read. **D**