

# SCOLAG

## LEGAL JOURNAL

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### **About SCOLAG:**

The purposes of the Group are to increase understanding of the law and legal services, and work to improve the legal system for the benefit of those people in Scotland who are economically, socially, or otherwise disadvantaged. It is a registered charity funded by membership subscription.

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## Editorial Comment

### Plus Ça Change?

A ruling party at Westminster was so divided over Europe that a national referendum was held on the UK's membership: oh how different from today things were in 1975 when the Scottish Legal Action Group produced its first journal to promote equal access to justice. That may seem a cheap jibe to make as, of course, an awful lot has changed in the intervening years, but many fundamental issues remain the same, as this five hundredth edition shows.

The composition, construction and tenor of Scottish society are quite different today and our laws in relation to the family, relationships, employment, equality and diversity have changed significantly. And for the past twenty years devolution to the Scottish Parliament has certainly made governance and law making more accessible to the ordinary citizen. Both branches of the legal profession have seen corresponding changes, as the President of the Law Society of Scotland and the Dean of the Faculty of Advocates can testify. But equally, both are clear that striving for greater access to justice remains a constant labour.

We are privileged to be able to present a number of different perspectives on access to justice from eminent authors. Rebecca L. Sandefur offers an impressive, thought provoking view, reframing access to civil justice and leading us to consider legal empowerment. Professor Gráinne McKeever relates important research highlighting the role that law and access to justice play in our response to the complex social problems of destitution and poverty. Ailidh Callander underlines the importance of privacy within such responses and provisions of social protection. John Sturrock QC looks at the use of mediation and the prospects for it improving not just dispute resolution but more broadly to our approach to social, political and global challenges. Andrew Gilmour also broadens the horizon giving a view of access to justice and global human rights.

Over the coming months we hope to bring further articles on facets of equal access to justice. But then, even when not being quite so deliberate, that is precisely what we have been doing for the past five hundred editions of this journal, as each one of those has sought to advance knowledge and understanding of the law affecting people in Scotland. The need to do so continues, and so shall we.

### Not Quite La Môme Chose

The age of austerity has had an impact on all walks of life. Tighter finances, less secure employment and less spare time for many has taken quite a toll on charities and voluntary organisations, generally at a time when they are needed more than ever. With that in mind the Scottish Legal Action Group is looking to affect a few changes in how it works which should improve its ability to advance equal access to justice.

For over twenty years the Scottish Legal Action Group was an unincorporated association, despite being publisher of a periodical. At the turn of the century the Group incorporated as a charitable company limited by guarantee and recognised by the Inland Revenue. That was certainly an improvement for member's peace of mind but more recently it has created a double burden of reporting annually to both Companies House and the Office of the Scottish Charities Regulator (OSCR). Therefore, the board of directors has resolved to convert status of the Group from a limited company to a Scottish Charitable Incorporated Organisation. That should make no difference to members but will require to be put to the Annual General Meeting, or to an Extraordinary General Meeting later in the year.

A more practical change in the administration of the group is the decision of the board to look to delegate specific work to subcommittees or working groups. It is hoped that this will allow for greater flexibility to respond to ad hoc issues and will enable members to volunteer to participate in particular projects that interest them and to which they can bring the benefit of their experience.

As always, the survival of the Group, its work on equal access to justice and the continuation of this journal, rely on the support of subscribing members. Is it hoped that you will continue to support the work of the Group and encourage others to do so.

## Use & Misuse of Drugs

Following its recent call for evidence the Scottish Affairs Committee of the House of Commons has begun taking evidence for its inquiry into problem drug use in Scotland with a session focusing on identifying key trends in drug use in Scotland, the drivers behind problem drug use and alternative approaches to dealing with the issues.

Evidence to the Committee and news of forthcoming hearings can be found on the be found of the Inquiry's page in the Committee's section of the Parliament web site (<<http://bit.ly/pduis>>).

## Law Agents' Opposition to the Robertson Review

The Scottish Law Agents Society has published a 12-point summary of its opposition to the recommendations of the Review of the Regulation of Legal Services, which was chaired by Esther Robertson. Foremost of the objections is to the Review proposal that the Scottish Government appoint members to the proposed new regulator, threatening the separation of powers and the rule of law.

To see the full summary, along with a video presentation and other materials, visit the Society's web site at - <[www.scottishlawagents.org](http://www.scottishlawagents.org)>.

## Vulnerable Witnesses

Legislation to ensure more child witnesses are able to pre-record evidence ahead of jury trials has been passed unanimously by the Scottish Parliament and has received Royal Assent. The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 creates a new rule that child witnesses in solemn cases will record their evidence in advance of trial for a list of offences, including: murder, culpable homicide, assault on the danger of life, abduction, plagiarism, sexual offences, human trafficking, domestic abuse and female genital mutilation.

## Developing a Basic Income

A new report from the Royal Society for the encouragement of Arts, Manufactures (RSA) recommends the development of a progressive civic basic income in place of the current means-tested income replacement benefits. The RSA says this would end the stigma of receiving benefits, and also end the punitive Universal Credit regime. The report has four parts:

- o Showing the failings of the current system of welfare, based on means-testing and conditionality, in reducing poverty and economic insecurity.
- o Reporting on the findings from a series of citizen and stakeholder deliberations in Fife, which is currently exploring a basic income trial.
- o A model of the impact that basic income

could have, conducted by Landman Economics using its Scottish tax-transfer model.

- o A series of scenarios for political, legal, and administrative pathways toward first a Scottish basic income experiment, and then the adoption by Scotland of an initial basic income

A *Basic Income for Scotland* is available via <<http://bit.ly/rsa-bifs>>.

## Succession

The Law Society of Scotland has backed proposals to the law on intestate succession and has stressed the importance of making a will as the best means of ensuring an individual's wishes are met. Gordon Wyllie, Convener of the Society's Trusts and Succession Law Sub-Committee, said: "Aspects of the law covering inheritance rules in Scotland could be made fairer. The government's proposals only relate to cases where an individual has died without a will and we know from research conducted by the Scottish Consumer Council in 2006 that only 37% of people in Scotland had made a will. While we agree that the current approach requires reform, we must stress the importance of making a will as the best way to ensure that an individual's wishes are properly covered."

The Law Society has highlighted anomalies in the current law providing rights to cohabiting couples, which it believes are problematic and disadvantageous to vulnerable and grieving individual people. The Society has also called for clarification of the law where an executor is convicted of a serious criminal offence.

## Historical Injustice Overturned

Men prosecuted for same-sex sexual activity which is now entirely legal will be able to apply to have their convictions erased from October. Legislation passed unanimously by the Scottish Parliament last year will grant an automatic pardon to every man in Scotland criminalised for breaching homophobic laws which have now been repealed.

Following preparatory work with police and other justice agencies, regulations have now been passed to bring the Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018 into force on 15<sup>th</sup> October (See p.134).

## Benefits Causing Rent Debt

The introduction of Universal Credit has greatly increased rent arrears and a Scottish Parliament Committee has called for immediate action to tackle this issue. The Social Security Committee has recommended that the DWP pay the housing element of Universal Credit (UC) directly to landlords as a default and says the minimum five-week

delay for tenants receiving their first UC payment must change to help combat rent arrears.

Concerns are also raised over the cost and condition of temporary accommodation with the Committee report asking for housing benefit in this area to be devolved to help address issues of homelessness and rough sleeping. A widening gap between private sector rents and the amount provided by the social security system is also highlighted in the report. The Committee wants an urgent review of the Local Housing Allowance (LHA) so that rates are increased as required to help tenants afford rents in the private rented sector.

Bob Doris MSP, Convener of the Social Security Committee said: "Our inquiry highlighted a number of issues, including the frankly discriminatory shared accommodation rate which should be abolished immediately. It is also clear that LHA rates are not fit for purpose and are failing to help claimants meet the rising cost of the private rented sector."

## Home Detention Curfew

HM Inspector of Prisons for Scotland has published a progress review of arrangements for Home Detention Curfew within the Scottish Prison Service. It finds that The SPS and the Scottish Government have made good progress with the delivery of the 21 recommendations made by HMIPS.

Revised guidance introduced additional presumptions against granting HDC. That has seen a reduction in its use, from approx. 300 in 2018 to just 60. HMIPS states there would be merit in engaging with additional agencies that may have an interest in evaluating HDC and its potential benefits. This may deliver anew and equally credible model that would allow the numbers released on HDC or electronic monitoring to increase.

The full thematic report, *The Review of the Arrangements for Home Detention Curfew within the Scottish Prison Service - Progress Review*, is available via <<http://bit.ly/HMIPSPubs>>.

## "Digital Divide" in Claiming Welfare Benefits

As many as 1 in 3 people seeking help with Universal Credit do not have access to the internet to make their claim, according to new figures from Citizens Advice Scotland (CAS). In May CAS submitted evidence to Philip Alston, the UN Special Rapporteur on Extreme Poverty and Human Rights, on the introduction of digital technologies to social protection systems. As part of the submission the charity produced new analysis from its client database which shows that, in April 2019, 34% of Scots seeking CAB help with Universal Credit did so because they could not access the internet.

# Our Law and Society

John Mulholland\* writes on pursuing equal access to justice and ensuring it in the future.

Equal access to justice is central to the rule of law. This is the debate that the Scottish Legal Action Group has advanced since 1975, and returns to again in this, its 500<sup>th</sup> journal edition. It's a significant landmark and achievement, an opportunity to reflect on the development of this debate over the last five decades and to look ahead at how equal access to justice can be ensured in the future.

The discussion around equal access to justice in the 1970s was largely centred around legal aid. Though the introduction of the legal aid system in 1950 envisaged both civil and criminal within scope, it took until 1964 for criminal legal aid to be established for High Court and Sheriff Court work. In the year of SCOLAG's first edition, criminal scope was extended to proceedings in the district court. Some of the areas outside scope are now anachronistic, such as breaches of promise of marriage, but the question of which areas the legal aid system should cover remains an active issue today. Even through the economic downturn, the scope of the system in Scotland has been maintained, while other jurisdictions have pared this down, financial savings for human cost.

The challenge for Scotland is less around scope than whether there remains a robust network of practitioners to provide that assistance. The number of registered providers for civil, criminal and children's legal aid has been reducing. For criminal legal aid, for instance, the number of registered practitioners has decreased by 22% in the last five years. Funding is a large part of the challenge in recruiting and retaining practitioners within the legal aid sector. At the time of SCOLAG's first edition in 1975, legal aid fees were set at 85% of the rate available in private client cases, later changed to 90%: in effect, solicitors were subsidising the system in return for surety of payment from public funds. The link between legal aid and private fees was broken in 1984, with fees set independently at a rate approximating 90%. Without any periodic payment review mechanism, legal aid fees have diverged over the generation since, and have remained static or been cut in the last decade.

There may be change ahead. The independent review of legal aid reported last year, the government implemented a 3% increase to fees this April and established a fee framework panel to consider ways to review fees in future. Though these steps do not resolve the challenges that this sector faces, they do look to address these. This review offers the opportunity to place our legal aid system on a more sustainable footing and to place it more holistically within the range of services, initiatives and technologies aiming to provide equal access to justice.

Our justice system should strive to provide access to justice through universal design. The independent review advocated a more person-centred approach to legal aid and this focus will shape the justice system in the years ahead, as well as public services more generally. Devolved social security, for instance, establishes an approach of dignity, fairness and respect, with social security as a human right. The treatment of victims and witnesses through the criminal

justice system has improved in the last decade, particularly the treatment of children. Technology will allow evidence to be video recorded at an early stage, lessening the need for evidence to be tested in court. How to achieve this while also maintaining fairness to an accused – who may also be vulnerable – will require careful balance.

Human rights, particularly because of the terms of devolution, and the mainstreaming of equality duties have transformed our justice system over the last twenty years. This embedding is deepening, with the government currently looking at how to bring the UN Convention on the Rights of the Child into domestic law. This framework of human rights and equalities has seen challenges made to policies that fall below international standards, such as access to legal advice in a police station; that disadvantage particular groups in society, such as aspects of immigration policy. A culture of strategic litigation is likely to broaden, not least because of the ways in which online crowdfunding can galvanise public interest. While many cases will be resolved in court, there will also be a growing movement towards alternative dispute resolution. Simple procedure already requires mediation to be considered and embedding ADR into formal processes will continue.

Ensuring equal access to justice for all can be improved through technology, though it is important to recognise that some people do not have the capacity to participate in these new ways of securing justice. Often these people are the most vulnerable, most marginalised and most in need of help. The same platforms used for video evidence may lead us towards virtual courts. With Civil Online, we now have online processes for the submission of simple procedure claims and in England and Wales, huge capital investment in developing Her Majesty's Online Court for low value civil claims. The results of that investment are already being felt in Scotland, through reserved tribunals, with participation in tax tribunals available by Skype. With over 250 legaltech startups across Europe currently, having secured over £300m in capital investment, the private sector will also innovate in providing access to justice. It will be crucial for the profession to participate in this area, through civitech challenges, hackathons and other solutions.

It will also be critical, as we develop these new processes and ways of working, to maintain the standards that bind us as a profession. A commitment to equal access to justice is part of our shared culture, from the legal aid practitioner on the high street to the solicitor working in-house to the students and solicitors of the future in the burgeoning law clinic network. Over five decades and 500 editions, SCOLAG has been instrumental in hosting this debate around equal access to justice and will remain so as we evolve, design and test the justice system of the future.

\*John Mulholland, President of the Law Society of Scotland

# A View from the Bar

Gordon Jackson QC\* reflects on changes in the profession and the unceasing need to improve access to justice for all.

I became a member of Faculty a few years after SCOLAG started publishing. Much has changed since then. It was very much a boys' club with only four lady members. Ideas like an equality and diversity policy simply did not exist. Zero tolerance of bullying and sexual harassment hadn't been thought of. Perhaps such things didn't happen, but I suspect they did and were largely ignored. And any such problems that did arise could usually be dealt with by the then Dean having a word in the appropriate ear.

There was little interaction with broader civil society. No need really. We had exclusive rights of audience in the higher courts. Judges and sheriffs invariably came from the Bar and the idea of a Queen's Counsel not being a member of Faculty was laughable. We were a protected, self-regulating body and were happy to be left alone, and leave others likewise.

Not so now. We have a Scottish Government which asks for, and I believe values, our views on all kinds of issues. Members of Faculty give a great deal of time and effort to prepare detailed responses to government consultations and in appearing before parliamentary committees. Our monopoly in the higher courts has gone. No longer a protected species, we survive and flourish only on merit and excellence. The Scottish Legal Complaints Commission is there to see that our regulatory systems are fit for purpose in a modern world.

We reach out to schools and universities to explain what an Advocate actually does. Our increased scholarship scheme is helping to attract bright, young people who might have thought being at the Bar was somehow not for them. We are no longer to be perceived as a kind of exclusive club although, from my own experience, I don't actually think we ever really were. We very much want to attract young lawyers with the necessary ability and commitment from all backgrounds. And then we give them an excellent training scheme which I believe can compare favourably with anything similar elsewhere in the UK and beyond.

So why do all this? Not just for survival or personal gain or to boast of our excellence, although it would be naive to deny that all these things are in there. But much more important is our deep-seated belief that some things do matter. In particular, we value hugely that we live in a society where the rule of law is upheld because that is at the very core of any free and democratic society. That simply means that no-one is above the law and all must answer to it no matter how rich or powerful. It also means that no-one, no matter how poor or disadvantaged, is beneath the law or ineligible for its protection. Quite simply, the rule of law means, and must always mean, justice for all.

That is why access to justice is very important. Not just

a slogan or cliché for lawyers to trumpet. Without it, the rule of law is but an empty shell. Without proper access to justice, the rule of law's protection only works for the few. Of course, all politicians believe this, at least in theory, but

I sometimes wonder how deep their understanding and commitment actually is in making sure that the law's protection extends not just to those who can afford it but to everyone who needs it.

An obvious example is the provision of legal aid. Here in Scotland, we are fortunate in comparison to other jurisdictions both throughout the UK and elsewhere. I think it would be difficult to find anywhere with a better

provision for legal services than we have here. Successive governments, and indeed politicians of all parties, have had a good awareness of the importance of providing appropriate legal services to those who most need it. However, vigilance is always required. We are in the midst of a root and branch review of our legal aid system. Inevitably, there will be changes.

Some see this as but a device to reduce public expenditure and thereby reduce access to justice. I tend not to share that view but, as lawyers, we need to make sure that does not happen, even inadvertently. Of course, some will see this as no more than lawyers protecting their own income, but it truly is much more important than that. And this requirement extends to all kinds of legal issues. From criminal law to family law to employment law to housing and consumer issues and much more. Wherever there are legal problems to be solved, rights protected, or disputes settled, it is vital that the whole justice system is available to all who need it.

And that means lawyers. Shakespeare penned the words, "The first thing we do, let's kill all the lawyers", and others might think that not such a bad idea. The truth, however, is that without lawyers there can be no justice system, no access to justice and no meaningful rule of law. In that context, I firmly believe in the value of an independent referral bar, and that nothing should be done to undermine that. A group of individual lawyers with the highest standards, both ethically and in legal practice. With duty to both client and court. Willing to act for anyone, no matter how unpopular, and to do that without fear or favour. Forty years after joining the Faculty, I am glad I did, but no resting on laurels. We all, as lawyers, need to get out there and increase public knowledge and understanding of the law and, above all, its importance in any free society.

Gordon Jackson QC is the Dean of the Faculty of Advocates.



# Access to Civil Justice and Legal Empowerment

Rebecca L. Sandefur\* reframes the understanding of access to justice

Access to civil justice is experiencing a renaissance, both as a movement in the world and as an area of scholarly research (Albiston and Sandefur 2013; Udell 2018). Traditionally, access to justice was understood as primarily a matter of access to formal law – for example, as a crisis of “unmet legal need” (see, e.g., Legal Services Corporation 2017). Field professionals and policy makers advocated for more funding for civil legal aid. Scholars studied who was able to connect with lawyers or courts, to receive legal treatments from legal professionals for their troubles that had legal aspects, or to get binding formal resolution from neutral adjudicators. Research focused on poor people and other disadvantaged or socially excluded groups, and typically documented the *lack* of access (Sandefur 2008).

The new access to justice takes a different approach. It treats justice as a substantive outcome, rather than as the opportunity to experience a particular kind of service or process. Access to civil justice happens when “disputes and problems governed by civil law, like dissolving a long-term romantic partnership or owing several months of unpaid rent, resolve with results that satisfy legal norms,” including substantive norms that govern the rights, duties, and responsibilities of the different parties to a transaction or relationship, like employers and employees, landlords and tenants, siblings whose parents are deceased, or neighbours.... When the relevant... norms govern resolution, that resolution is lawful and we have access to justice, whether or not lawyers are involved in the resolution and whether or not the problem comes into contact with any kind of dispute-resolving forum (Sandefur 2019:50-51).

The crisis is not that there are too few legal aid lawyers. The crisis is much larger than that. One aspect is that access is severely *restricted*, with only some kinds of people and some kinds of justice problems receiving lawful resolution. Another aspect is that access is fundamentally *unequal*, with groups like White people and wealthy people experiencing greater access to justice than people of colour and those with lower incomes. The new understanding of the nature of the problem engages new thinking about routes to solution.

Access to justice can be achieved in more ways than building courthouses, hiring judges, and funding legal aid attorneys. Access to justice can be expanded and equalized by providing a wider range of options for just resolution, some of which may never engage with formal law, lawyers, or courts (e.g., Sandefur 2009). Another means of expanding and equalizing access to justice is legal empowerment.

Legal empowerment emerged as a tool of international development, considered useful as a means for promoting rule of law and the economic benefits believed to flow from that (Golub 2010; United Nations Development Programme 2008). It has since become a movement that seeks to give marginalized and excluded communities the means to know about and act on their legal rights, and even to hold institutions accountable for those rights (NAMATI 2019).

Neither those trying to change the world nor those seeking to understand it have coalesced on a precise idea of what legal empowerment is, but the different perspectives share common elements. One is that legal empowerment is not so much an

attitude, a belief or a knowledge base as it is a *capacity* (Pleasence and Balmer 2019). It involves recognizing life circumstances as problems, understanding that those problems are things that can be acted on, knowing that routes to lawful resolution exist, and having access to the confidence and expertise to navigate those routes (cf. Felstiner, Abel and Sarat 1980-81).

Another common element is that this competence and expertise can be *distributed*. For example, legal empowerment can be nurtured: people can encounter resources or experiences that change them and make them more capable going forward. These capacities can grow in individuals, or in entire communities (Maru and Gauri 2018).

Legal empowerment is related to what sociologist Steven Lukes (2005) called the “third face of power.” In identifying this type of domination, Lukes was concerned with power that was so pervasive and insidious that it shapes even people’s understanding of their own desires and interests. Legal empowerment happens when people can recognize their true interests at stake in a situation and move to organize around those interests. It is not the only route to access to justice, nor will it always be enough to achieve it. But it is a route that resonates powerfully with the democratic values of participation and inclusion under threat in so many communities today. Our efforts, both scholarly and practical, to expand and equalize access to justice should include this approach.

## References

- Albiston, Catherine R. and Rebecca L. Sandefur. 2013. “Expanding the Empirical Study of Access to Justice.” *Wisconsin Law Review* 101-120.
- Felstiner, William L.F., Richard L. Abel and Austin Sarat. 1980-81. “The Emergence of Disputes: Naming, Blaming, and Claiming” *Law & Society Review* Vol. 15, No. 3/4: 631-654.
- Golub, Stephen. 2010. “What is Legal Empowerment? An Introduction,” in *Legal Empowerment: Practitioners’ Perspectives*, ed. Stephen Golub. Rome: International Development Law Organisation.
- Legal Services Corporation. 2017. *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*. Washington, DC: Legal Services Corporation.
- Lukes, Steven. 2005 *Power: A Radical View*, 2<sup>nd</sup> edition. New York, NY: Palgrave.
- Maru, Vivek and Varun Gauri (eds.). 2018. *Community Paralegals and the Pursuit of Justice*. Cambridge, UK: Cambridge University Press.
- NAMATI 2019. “Be a Part of the Movement for Legal Empowerment.” <<https://namati.org/network>>
- Sandefur, Rebecca L. 2008. “Access to Civil Justice and Race, Class and Gender Inequality.” *Annual Review of Sociology* 34:339-58.
- Sandefur, Rebecca L. 2009. “The Fulcrum Point of Equal Access to Justice: Legal and Non-legal Institutions of Remedy.” *Loyola of Los Angeles Law Review* 42(4):949-78.
- Udell, David. 2018. “Building the Access to Justice Movement.” *Fordham Law Review Online* 87:Article 20. <<https://ir.lawnet.fordham.edu/fro/vol87/iss1/20>>.
- United Nations Development Programme, Commission on Legal Empowerment of the Poor. 2008. *Making the Law Work for Everyone: Report of the Commission on Legal Empowerment of the Poor*, vol. 1 (New York: United Nations Development Programme).

\*Rebecca L. Sandefur, American Bar Foundation and Arizona State University

# Mediation: A Look Back and a Look Ahead

John Sturrock QC

Looking back at the July 2002 edition of *SCOLAG Legal Journal* (number 297!), I find a letter from me responding to an article by Sarah O'Neill in which I extol the benefits of mediation in non-family matters. I give numerous examples to show that "the picture in non-family mediation in Scotland is happily getting brighter." I note growing demand for mediation services, positive feedback from users, increased uptake of training, initiatives in universities, judicial awareness and a substantial report from the Royal Society of Edinburgh recommending mediation in medical negligence cases.

I conclude: "It has always been said that the introduction of mediation is a marathon rather than a sprint. It is encouraging that, with significant efforts being made over the past twelve months, a large number of those within and outwith the legal profession are becoming more aware of the benefits of mediation - and are showing an increasing willingness to use it."

A marathon and not a sprint...who would have thought that, 17 years later, Sarah O'Neill and I would be members of an expert group which, by the time of publication of this special edition, will have published a full report recommending much greater use of mediation in the Scottish civil justice system, recognising that mediation has not so far achieved the impact and uptake which we all agree it should.

The draft Report comments that "the use of mediation in resolving civil disputes in Scotland is currently much lower than might be expected. While mediation is now used to a greater degree than in the past, various efforts over the past two decades or so to promote its benefits have not significantly changed a legal culture committed to litigation. Even where objectively it might appear that parties' interests would be better served by mediating their dispute, the default position is generally to litigate."

This follows hard on the heels of a proposal from Margaret Mitchell MSP for a private members' bill to encourage mediation. Reflecting the findings of a recent report by the Scottish Parliament's Justice Committee, the proposal notes that: "... there continues to be evidence of a lack of public awareness of mediation, a patchy uptake of services, and some continued barriers preventing mediation from being more widely used. This includes evidence of inconsistent recommendation of mediation by sheriffs."

In an address to the annual meeting of Scottish Mediation last year, I observed that mediation has not taken root in Scotland as so many of us think it should have done and hoped it would. Progress in this jurisdiction is and has been slow. I looked back over the last fifteen to twenty years in Scotland and noted a real sense of frustration about the relative lack of progress. A "cultural shift" and "step-change" have been in the wind for years but they have not occurred, yet.

Having said that, it is appropriate to acknowledge all the excellent work that has been done by individuals and groups in significant pockets throughout Scotland where mediation is now well received and well recognised. It will be good to

see that work being rewarded with a major breakthrough in 2019, coinciding with this milestone in SCOLAG's history.

Mediation, with its focus on returning autonomy to the parties and on finding mutually acceptable outcomes, is arguably a feature of an open society, an example of democratic ideals. It fits well with a direction of travel which recognises cooperation and civility as essential to human progress and where decision-making is vested in those most affected. However, these ideas are no longer givens in 2019. The need to find ways to protect and preserve the institutions that underpin consensus and the common good is real.

I write this as Britain's planned exit from the European Union threatens to tear the country apart. Brexit has exposed the inability of the traditional process of parliamentary politics in the UK to address the increasingly complex issues of the 21st century. A process built on debate and division, on adversarial argument and binary voting on most issues, and founded on a party-political system which relies on positional and often parochial views, seems no longer suited to the complexities of the modern era.

Around the world, there is increasing populism and confrontation as many people seek to express their frustration and alienation. It seems that traditional norms are being departed from and some very unpleasant polarisation is emerging. Separateness and differentiation from others we don't like or feel uncomfortable with is becoming an increasingly acceptable trend, coupled with violence of language and apparent loss of decency and self-control.

I am struck by these words of Tim Hicks, in his excellent book, *Embodied Conflict*: "It's interesting to think about the violence we see in the world, whether at the level of interpersonal relationships, or at the societal and global levels, as a public health issue."

We seem to have gone, or to be going, from consensus to confrontation. Who would have thought that, nearly 30 years after the Berlin Wall came down, the Soviet Union collapsed, Fukuyama wrote *The End of History?* and the seminal negotiation text, *Getting to Yes*, was published, we would be regressing as we seem to be. The climate is changing in more ways than one.

I recently picked up a book entitled *World Without Borders* by Lester R Brown. Published in 1973, the author dedicates his book to "a world order in which conflict and competition among nations will be replaced with cooperation and a sense of community." The reviews featured on the back cover say that Brown "persuasively argues...that the day of the militaristic-nation state is over, and that a unified global society is the only hope for survival." and offers "convincing evidence that the 'One World' concept may be much closer to realisation than we are aware". How far away that seems now.

If one adds the climate change emergency, rapid and widespread technological innovation, not least AI, eco-system

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# Accessing Justice for Complex Social Problems

Gráinne McKeever\* considers law and access to justice as part of an overall system of social support.

Readers of this journal will be familiar with the argument that law has a role to play in helping individuals navigate their way through difficult circumstances, where basic rights to services and support can often get entangled in bureaucratic blunders and cycles of unforeseen and unfortunate events. The work of organisations like the Scottish Legal Action Group have played a critical role in making this argument, both on paper and in practice, but readers of this journal and SCOLAG stakeholders are already likely to be converts to the cause – lawyers, academics, advice workers and others who advance the argument through their own work. Such converts will also recognise, however, that there are many who see law as the problem rather than the solution. Those who need to be convinced about the value and utility of law are not those who use it to improve the lives of others, but those who cannot see beyond its inadequacies and lack awareness of the integral position of law in a system of social support.

What this article aims to do is to acknowledge the truth about the inadequacies of law, not because as an institution or a mechanism law is inherently ineffective, but because its strengths and weaknesses need to be considered as part of an overall system of social support. Law is at its strongest when it can counteract the weaknesses of other parts of that social system to ensure that the system as a whole functions more effectively. Its weaknesses reflect the inability of the social system to provide basic care for its citizens: where legal powers and actions to support and protect individuals are limited.

My focus in examining this argument is on the complex and devastating problem of destitution, defined by the Joseph Rowntree Foundation (JRF) as going without the bare essentials we all need: a home, food, heating, lighting, clothing, shoes and basic toiletries (Fitzpatrick et al, 2018). Destitution exists when people have lacked two or more of these essentials over the past month because they could not afford them, or if their income is extremely low (defined as being less than £70 a week for a single adult). As part of JRF's focus on defining and measuring destitution in the UK, the Legal Education Foundation (LEF) encouraged them to consider the role that law might have played in the individual pathways into and out of destitution. The result was a project, commissioned jointly by JRF and LEF, to explore links between access to (or lack of) legal advice and representation and pathways into and out of destitution (McKeever, Simpson and Fitzpatrick, 2018). That research, which uses interview data exploring the experiences of destitute individuals, highlights the consequences of a devastated legal aid landscape and emaciated advice services that impact most negatively on individuals in the most vulnerable circumstances. In doing so, the research reveals not just the weaknesses in our social support systems but the need to address both the strengths and weakness of the justice system in providing an effective solution to destitution.

The JRF research on destitution found that one and a half million people were destitute in the UK at some point during 2017, including over a third of a million children. This means they could not afford to have what we all need to eat, stay

warm and dry, and keep clean. The issues that trigger destitution were found to be low levels of social security benefits which were further undermined by benefit sanctions, delays and more stringent eligibility criteria; financial pressures resulting from poor health and disability; high costs for housing and fuel; and harsh debt recovery practices. JRF recommends that the government take three main actions to solve destitution in the UK: ending the freeze on working-age benefits so they at least keep up with the cost of essentials; changing how sanctions are used within Universal Credit so that people are not left destitute by design; and changing how debt is clawed back from people receiving benefits, so they can keep their heads above water.

All of these recommendations are vital and their implementation would undoubtedly help solve destitution. Yet there is another critical piece to the puzzle of solving destitution that would – as the JRF recommendations seek to do – both help to avoid destitution occurring and help people to escape destitution. Our research did three things to set out why law is the missing piece in this puzzle. First, we identified what the legal definition of destitution is, measuring this against the expert-consensual definition constructed by JRF. Second, we examined how legal entitlements to social security were being protected, looking at the legal and procedural safeguards that are designed to enable claimant access to the social security system and how these were failing to achieve their design objectives. And finally, we examined the extent to which individuals in destitution were able to recognise and access their legal rights, identifying where the gaps in justice created vulnerability to destitution. The research does not tell a success story about how the law can save individuals from being destitute; it recognises the law's failure to protect what should be basic human rights and the limitations of legal advice services in being able to deal holistically with the range of problems that face those in destitution. Despite this, however, it finds that while law is not the only answer to the problem of destitution, it is a much more critical part of the solution than those outside the legal sector may realise.

It was clear from our research that the legal definition of destitution does not match up to the JRF's expert-consensual definition of destitution. The JRF definition was constructed by a team of experts, who consulted with the public to establish what the final definition should look like and has the value of achieving public consensus on what constitutes destitution. In contrast, the legal definition of destitution emerges as a disparate collection of legislative provisions and judicial interpretations, intended for the most part to cover only select populations within society, with a predominant focus on asylum seekers. While the legal definition is largely inadequate, what is interesting is that both the JRF and legal definitions each cover the same key domains of destitution – shelter, food, heating, lighting, clothing/footwear and toiletries – with some differences in the 'essential items' under different domains. What the JRF definition lacks is legal enforcement; what the legal definition lacks is the JRF expert-consensual insight. What is required, therefore, is to create a holistic, legal

definition of destitution that mirrors the JRF definition, placing a duty on central and local government as well as public bodies to protect citizens from destitution, creating collective accountability for Ministers to solve destitution. A legislative duty can ensure that people to get access to the rights that governments have determined they ought to be entitled to, to have access to adequate housing, to have enough to eat, to dress and stay clean, and to exist beyond the circumstances of destitution. But there will still be a need for individuals to fight for those rights where they have been denied, and that legal piece of the jigsaw is equally vital.

Our research revealed the stark picture that is common to the arguments underpinning the need to have access to justice. The research participants – defined as destitute under the JRF definition – had a multiplicity of problems spanning housing, welfare, employment services, family support, crime, finance and emergency assistance. The sheer number of problems thwarted efforts to resolve any one of the problems individually. In addition to this, efforts to seek help were undermined by the fragmented nature of the legal advice landscape, which meant that pathways to advice were convoluted and frustrating, with luck and chance the dominant factors in whether individuals ended up with the help they needed. This luck could run out when advisers did not or were unable to look beyond the immediate problem that the individual presented with, in part a casualty of contractual advice services that necessitated limiting the scope of support that could be offered. This barrier was further compounded by the narrative among research participants that legal aid was not likely to be available to them, with a worrying view by some that legal aid no longer existed.

Yet what was also apparent from the research interviews was that the participants' vulnerability to destitution mirrored their vulnerability to a variety of legal problems, stemming from debt, ill health, labour market exclusion, and housing. This meant there were identifiable triggers and intervention points for destitution relating to civil and/or administrative justice problems, inability to access a legal entitlement and the inadequacy of social security payments. The cycle of vulnerability, however, meant that destitute individuals prioritised survival strategies over strategic approaches to problem resolution. We already know that those who lack legal capability – defined as the extent to which an individual possesses 'knowledge, skills and attitudes to deal effectively with a law related problem' (Collard et al) – often fail to act to protect their rights or to prevent a problem escalating in severity. The inability to act swiftly and strategically is exacerbated by geographical, economic and digital isolation and emotional fatigue. The overall effect is to diminish the likelihood of achieving good resolution outcomes.

While lawyers will identify how social problems can generate justiciable issues the general public is less likely to frame such problems as legal, meaning that they will be unlikely to look to legal sources for legal solutions, even where these may be critical to problem resolution. Additionally, dealing with the consequences rather than the cause of problems may be a more rational choice, especially where individuals feel powerless and hopeless, and getting to the root cause of the problem seems futile. But we know also that this perception of futility is not accurate. In social security decision making for example, the success rate at tribunal where the original entitlement decision is being challenged is around 70 per cent. For sickness or disability-related benefits (Personal Independence Payment and Employment and Support Allowance) 74 per cent of claimant appeals are successful, and

63 per cent of Universal Credit decisions are appealed successfully. The inevitable complexity of the social security system, in particular, means this is an area where good advice can be crucial, particularly when other problems – including housing – cluster around social security related issues, and we know that outcomes improve where individuals have specialist support to make an appeal.

The barriers in accessing justice to resolve problems, however, are multiple. Individuals need the cognitive bandwidth to understand the nature of their problems and the appropriate solutions. They need to have access to advice services that can assist with the range of problems they have. They need time, energy and financial resources to seek out and follow through on advice. They need effective and responsive public services to support their needs, and to be flexible and compassionate enough to respond to difficult circumstances while problems are resolved. And they need to sustain this trajectory of effort across all of their problems that exist. In short, they need the broken parts of the system to work properly to fix the problems caused by system failure.

To return to the argument made at the outset of this piece, it is not the case that law is perfect, but neither is it the case that law is not relevant. Instead, it must be acknowledged that law is a fundamental part of the landscape of solutions to this myriad of problems and that improving the law and access to justice can resolve the problems that other parts of the system create and improve the lives of those in destitution and poverty. We need to use the law as it was intended to be used – as a powerful force for change. Legal advisers and practitioners use law in this way on a day to day basis, but there needs to be a more strategic focus on the capacity of law to protect basic human rights, so they are not left subject to political whim, with almost no political accountability. Some of the legal tools to fight destitution already exist, but individuals need the right support to be able to use them. Resourcing legal interventions to at least tackle the core problems of housing, debt and social security would help deal with the financial and housing insecurity that push individuals into destitution, the very existence of which calls into question the rights of citizens to basic social protections that protect fundamental human dignity. While law is implicated in this failure, in many cases law will still be the only solution to the remaining failures within the system. Building on law's strengths and tackling its weaknesses by creating a legal duty to protect against destitution, combined with an increased ability to help people access their rights is how we make the case for law as a solution to complex social problems.

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## References

- S. Collard, C Deeming, L. Wintersteiger, M. Jones, J. Seargeant, *Public Legal Education Evaluation Framework* (2011) available at: <[www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc1201.pdf](http://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc1201.pdf)>.
- S. Fitzpatrick, Glen Bramley, Filip Sosenko, Janice Blenkinsopp, Jenny Wood, Sarah Johnsen, Mandy Littlewood, Beth Watts, *Destitution in the UK* (2018: Joseph Rowntree Foundation)
- G. McKeever, M. Simpson, C. Fitzpatrick, *Destitution and Paths to Justice* (2018: Legal Education Foundation and Joseph Rowntree Foundation)

# Privacy: A Precondition for Social Protection

Ailidh Callander\*

## Political scandal, stronger regulation on privacy but what about social protection?

In an increasingly digitalised and data driven world, an era of government and corporate mass data exploitation, the right to privacy<sup>1</sup> and data protection<sup>2</sup> and what this means in practice is more important than ever. Surveillance is a power generator and opportunity to exert control. Privacy is a counter-balance, a protector of human dignity, an enabler of autonomy and self-determination – a necessary precondition for democracy.

2018 started off with two major ‘privacy moments’, in March, the Facebook Cambridge Analytica scandal broke,<sup>3</sup> followed in May by the EU General Data Protection Regulation taking effect. These moments brought much needed public and parliamentary outrage and regulation.<sup>4</sup> The effects of which are only starting to be felt.

Yet too often the right to privacy is neglected as governments around the world (often in tandem with companies) rush to introduce new technologies in social protection systems. This exacerbates the risk and the reality that these become systems of surveillance, control, punishment and exclusion. Concerns have and continue to be raised, including in the UK by the Special Rapporteur on Extreme Poverty (UNSR) in his 2019 report on the UK. Among its many criticisms it notes, “The British welfare state is gradually disappearing behind a webpage and an algorithm, with significant implications for those living in poverty.”<sup>5</sup> Similar issues were raised in submissions in preparation for the Thematic report to the UN General Assembly on digital technology, social protection and human rights.<sup>6</sup>

Scotland, at least on the face of it, is trying to do things differently, with legal recognition of the human right to social security and the newly established Social Security Scotland identifying fairness, dignity and respect as core values. Yet what does this mean in practice? As it moves forward on this ‘journey’, Scotland can learn from international examples, where too often trade-offs between rights arise in the context of the application of digital technologies in social protection systems.

## Privacy vs. Social Protection around the world

The right to privacy is crucial in its own right, they are also essential to providing a foundation upon which other rights may thrive.<sup>7</sup> This includes civil and political rights, such as freedom of expression<sup>8</sup> and freedom of assembly<sup>9</sup> (for example, protestors in Hong Kong avoiding using smart transport cards for fear of being tracked<sup>10</sup>) and crucially the spectrum of social, economic and cultural rights.

However, the stark reality is that often, instead of recognising the interdependent nature of human rights and embedding protection for privacy into systems to provide for socio-economic rights, people at their most vulnerable are faced with a trade-off: major intrusions on their privacy through increased surveillance and data exploitation in exchange for social security and protection. This extends to the rights to food,<sup>11</sup> to adequate housing,<sup>12</sup> and health,<sup>13</sup> with

inherent implications from a non-discrimination and equality perspective.

Social protection programmes which integrate technology have been increasing steadily for years. Technological advancements bring potential benefits, and are allegedly introduced for numerous reasons, this may include to facilitate the process, to increase efficiency and ensure equal distribution. However, whether these purported goals are achieved and at what cost to rights is the concern.<sup>14</sup> Over the last decade advancements in technology and data processing capabilities are providing ever increasing powers to collect, process and deploy intelligence. Systems have become founded and reliant upon the collection and processing of vast amounts of data (primarily personal data).<sup>15</sup> Access is often conditional on increased surveillance online and offline<sup>16</sup> and tied to the provision of a unique identifier. The increase in automated decision-making and reliance on profiling, further erodes individual’s control and agency over decisions.<sup>17</sup>

The UK is not alone and there are concerning examples from around the world. One issue of key concern is connecting national identity systems (which in themselves raise rights concerns<sup>18</sup>) with social protection programmes. For example, Aadhaar, India’s national ID system, is linked to bank accounts used for cash benefit payments.<sup>19</sup> It is also increasingly used to access health care.<sup>20</sup> A similar system PhilSys has been set up in the Philippines.<sup>21</sup> In the United States, some states require government issued ID before people can access public benefits, despite more than 21 million adults not having such valid ID.<sup>22</sup> Tied to this is the increased integration of biometric technology into social protection programmes. Biometric data is particularly sensitive, as it is by definition inseparably linked to a particular persona and that person’s life, and has the potential to be gravely abused.<sup>23</sup> In Ireland the Public Services Card (which includes biometric features) is required to access social welfare<sup>24</sup> and in Chile, facial recognition programmes have been deployed to deliver school meals.<sup>25</sup>

Often, as a result of public-private partnerships, access to a social protection programmes is mediated by a smart (debit) cards. For example, until recently in South Africa (in partnership with Mastercard)<sup>26</sup> and in Bangladesh (with support from USAID and the Bill & Melinda Gates Foundation).<sup>27</sup> Closer to home, in the UK, including Scotland, ASPEN cards issued to asylum seekers allow the Home Office to monitor card usage data, i.e. where and on what money is spent, with the possibility of sanctions if the already limited funds are spent on what are deemed “unnecessary” items.<sup>28</sup>

Then there are systems which integrate elements of automated decision-making in social protection systems.<sup>29</sup> In the UK, for example, automation is introduced in registration and eligibility decision-making in relation to Universal Credit<sup>30</sup> or the Department for Work and Pensions’ fraud investigations<sup>31</sup> or with the aim of identifying children at risk.<sup>32</sup>

Without a rights based-approach together with concrete safeguards (including relating to data protection and security) and due process guarantees from the onset – these programmes amplify pre-existing shortcomings and injustice.

As noted in the UNSR report on the UK, "...with automation comes error at scale".<sup>33</sup> This is not just an issue of digital inclusion or exclusion but raises fundamental questions of social protection systems being designed as systems of surveillance, control, punishment and exclusion rather than systems based on human rights, fairness, dignity, equity, inclusion and justice.

### **Rights based services and systems that can be scrutinised and held to account**

When considering a new social protection programme, in tandem with the right to social protection, the right to privacy together with security and data protection safeguards must be considered from the outset, throughout the decision-making process from design and implementation, to review. If they are not, not only will these programmes fail to meet legal standards, but the benefits will be undermined and even outweighed by the risks which emerge.

Social protection systems are complex and may be context specific. However, in a digital age it is increasingly important that they meet certain minimum requirements. This must include taking a human rights-based approach and ensuring that access is not conditional on a trade-off with the right to privacy. Any interference with the right to privacy must meet the standard of in accordance with the law, pursuant to a legitimate aim, in a democratic society.<sup>34</sup>

It is essential that social protection systems are not exempt from data protection laws. Rather they must build in and respect safeguards including the principles of transparency, lawfulness, fairness, data minimisation, accuracy, storage limitation, integrity and confidentiality of data and significantly accountability.<sup>35</sup> Each of these principles is extremely pertinent in the context of a social protection system. Data protection law also provides for limitations on the use of biometric data<sup>36</sup> and rights for individual's in relation to their data.<sup>37</sup> Systems should be secure by design and by default and subject to regular and accessible data protection and human rights impact assessments and audits. As technology evolves it is also essential that there is transparency in relation to any automated (or semi-automated) decision-making, including the system's purpose, impact, policies, inputs and outputs.<sup>38</sup> In the context of social protection there should be limits on such decisions and at the very least a right to human intervention and explainability of any such decision.<sup>39</sup> Similarly, there should be transparency and limitations on the use of profiling.<sup>40</sup>

As with the realisation of all rights, there must be effective scrutiny and oversight of the systems and those responsible for them and there must be accessible and meaningful redress mechanisms.

Today, social protection systems around the world fail to meet these standards and it is vital that we can interrogate and hold them accountable. We, in this case, must be interpreted widely to include those impacted by these systems and decisions, those supporting and representing them, civil society (working to protect both civil and political and socio-economic rights), national human rights institutions, data protection authorities and other regulators and courts tasked with upholding people's rights.

### **Scotland, taking a lead?**

As noted in the introduction, Scotland, does seem to be trying to do things differently. Following the devolution of social security benefits through the Scotland Act 2016,<sup>41</sup> Scotland has the opportunity to address some of these challenges from the outset and some headway has been made. The Social Security (Scotland) Act 2018 includes principles that recognise that social protection is a human right and essential to the realisation of other human rights. The new agency to oversee the system, Social Security Scotland is bound to uphold the Principles and its Charter and has committed to taking a human rights based approach and demonstrating fairness, dignity and respect in all its actions. Social Security Scotland's Digital Strategy also aims to reflect these core values stating that it is based on Security by Design, treating client data with dignity, fairness and respect.<sup>42</sup> There remains much to be done and elements of the much-criticised UK system continue to apply in Scotland.<sup>43</sup> Time will tell how these commitments and the technical systems underpinning much of the service translate to the realisation of rights. However, it is at least promising that some steps are being taken to avoid and mitigate the risks and harms outlined above.

Another important development is the creation of a new national taskforce to lead on human rights in Scotland<sup>44</sup> and take forward the recommendations of the First Minister's advisory group on human rights.<sup>45</sup> These recommendation include an Act which would provide for not just recognition, but enforcement and redress mechanisms for the spectrum of rights, including the right to private life, alongside the right to protection against poverty and social exclusion and the right to social security and social protection.

### **Looking forward**

An attitude of technology as the panacea has created what can be described as a 'government-industry complex' that manages and regulates social protection programmes. Systemic problems include: excessive data collection; opaque systems and infrastructure; decision-making which fails to be open, inclusive and transparent; and lack of accountability. Not to mention security concerns. These are exacerbated by the reliance on third parties for delivery of these services, the lack of prioritisation of data protection and security resources and skills, and the vulnerable and challenging position that those affected by decisions are in, with limited opportunity for support to challenges these systems and decisions. There are also questions around how data is shared for other purposes, for example immigration or law enforcement.

These issues are not unique to social protection systems, we see related problems across the public and private sectors, including in policing, political campaigning, credit scoring and insurance, with implications for individuals and society. When these same techniques and practices are inbuilt into our social protection systems, these bring further risks and harms and exacerbate and amplify existing ones. These include increased surveillance, discrimination and exclusion and can have devastating consequences for those whose rights these systems have a duty to fulfil.

Social protection systems must be designed to protect rights from the onset and where they fail to do so, human rights, data

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protection and other legal tools should and must be used to scrutinise and where necessary challenge them. “All human rights are universal, indivisible and interdependent and interrelated.”<sup>46</sup> We cannot enjoy the protection of one without the others, as is the case with privacy and social protection. This only becomes more pressing as the separation between digital and analogue and online and offline become ever more porous. Can Scotland lead by example?

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1. The right to privacy is recognised in international, regional and national instruments, including Article 12 of the Universal Declaration of Human Rights 1948, Res 217 A, adopted 10 December 1948, Article 17 of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171, adopted 16 December 1966, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5 and Article 7 of the Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C326/02.
2. Data protection and informational privacy is recognised as an essential part of the right to privacy, for example see *Report of the Office of the United Nations High Commissioner for Human Rights, the Right to Privacy in a Digital Age*, 3 August 2018. UN Doc. A/HRC/39/29 and in terms of the European Convention on Human Rights, see for example *S. and Marper v. the United Kingdom*, judgment (Grand Chamber) of 4 December 2008, § 67) It may also be recognised as a separate right such as in the Charter of the Fundamental Rights of the European Union (op. cit.) under Article 8. Going forward the right to privacy refers to both these rights.
3. Cadwalladr, C and Graham-Harrison, E, “Revealed:50 million Facebook profiles harvested for Cambridge Analytica in major data breach”, *The Guardian*, 17 March 2018. Available at: <[www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election](http://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election)>
4. Privacy International, “Cambridge Analytica, GDPR – 1 year on – lots of words and some action”, 30 April 2019. Available at: <<https://privacyinternational.org/news-analysis/2857/cambridge-analytica-gdpr-1-year-lot-words-and-some-action>> and Greenleaf, Graham, “Global Data Privacy Laws 2019: New Eras for International Standards”, 7 February 2019, 157 *Privacy Laws & Business International Report*, pp 19-20. Available at SSRN: <<https://ssrn.com/abstract=3384012>>.
5. *Report of the Special Rapporteur on extreme poverty and human rights on his visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. A/HRC/41/39, 23 April 2019, p. 13. Available at: <<https://undocs.org/A/HRC/41/39/Add.1>>
6. Various submissions available at: <[www.ohchr.org/EN/Issues/Poverty/Pages/SubmissionsGADigitalTechnology.aspx](http://www.ohchr.org/EN/Issues/Poverty/Pages/SubmissionsGADigitalTechnology.aspx)>
7. See for example, *Report of the Office of the United Nations High Commissioner for Human Rights, The Right to Privacy in a Digital Age*, 3 August 2018, UN Doc. A/HRC/39/29, para. 11. Available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/239/58/PDF/G1823958.pdf?OpenElement>>
8. *Report of the Special Rapporteur on the promotion and protection of right to freedom of opinion and expression*, UN Doc. A/HRC/17/27, 16 May 2011, para. 53.
9. See for example, Privacy International’s *Submission to the Human Rights Committee on Article 21 of the ICCPR*, February 2019. Available at: <[www.privacyinternational.org/sites/default/files/2019-03/Submission%20on%20Article%2021%20of%20ICCPR\\_0.pdf](http://www.privacyinternational.org/sites/default/files/2019-03/Submission%20on%20Article%2021%20of%20ICCPR_0.pdf)>
10. Hui, M, “Why Hong Kong’s protestors are afraid to use their metro cards” *Quartz*, 13 June 2019. Available at: <<https://qz.com/1642441/extradition-law-why-hong-kong-protesters-didnt-use-own-metro-cards/>>
11. For example, in Venezuela, see: López, V., “Venezuela to introduce new biometric card in bid to target food smuggling”, *The Guardian*, 21 August 2014. Available at: <[www.theguardian.com/world/2014/aug/21/biometric-venezuela-food-shortages-smuggling-fingerprints](http://www.theguardian.com/world/2014/aug/21/biometric-venezuela-food-shortages-smuggling-fingerprints)>, and Botswana, see: SmartSwitch, “The Electronic Food Coupon System – an African Success Story”. Available at: <[www.smartswitch.co.bw/fcSuccess](http://www.smartswitch.co.bw/fcSuccess)>
12. See for example, Bellafant, G., “The Landlord Wants Facial Recognition in Its Rent-Stabilized Buildings, Why?.” *The New York Times*, 28 March 2019. Available at: <[www.nytimes.com/2019/03/28/nyregion/rent-stabilized-buildings-facial-recognition.html](http://www.nytimes.com/2019/03/28/nyregion/rent-stabilized-buildings-facial-recognition.html)>
13. Hounslow, C and Magalhaes, A, Submission to the UNSR “On Promoting Patient Rights and Algorithmic Accountability in Automated Decision-Making Systems”, 14 May 2019. Available at: <[www.ohchr.org/Documents/Issues/Poverty/DigitalTechnology/UniversityEdinburgh.pdf](http://www.ohchr.org/Documents/Issues/Poverty/DigitalTechnology/UniversityEdinburgh.pdf)>
14. Toh, A., “The disastrous roll-out of the UK’s digital welfare system is harming those most in need, Human Rights Watch”, 10 June 2019. Available at: <[www.hrw.org/news/2019/06/10/disastrous-roll-out-uks-digital-welfare-system-harming-those-most-need](http://www.hrw.org/news/2019/06/10/disastrous-roll-out-uks-digital-welfare-system-harming-those-most-need)>
15. Privacy International, *Submission to the UNSR on digital technology, social protection and human rights*, May 2019. Available at: <[https://privacyinternational.org/sites/default/files/2019-05/PI%20submissions%20to%20UNSR%20Extreme%20Poverty\\_May%202019.pdf](https://privacyinternational.org/sites/default/files/2019-05/PI%20submissions%20to%20UNSR%20Extreme%20Poverty_May%202019.pdf)>
16. See for example, in the US, Heussner, K.M., “Woman Loses Benefits After Posting Facebook Pics”, *ABC News*, 23 November 2019. Available at: <<https://abcnews.go.com/Technology/AheadoftheCurve/woman-loses-insurance-benefits-facebook-pics/story?id=9154741>>; in the UK, Watts, J., “No wonder people on benefits live in fear. Supermarkets spy on them now”, *The Guardian*, Opinion, 31 May 2018. Available at: <[www.theguardian.com/commentisfree/2018/may/31/benefits-claimants-fear-supermarkets-spy-poor-disabled](http://www.theguardian.com/commentisfree/2018/may/31/benefits-claimants-fear-supermarkets-spy-poor-disabled)>; and in Switzerland, “Swiss vote on insurance company spies”, *The Local*, 23 November 2018. Available at: <[www.thelocal.ch/20181123/swiss-vote-referendum-on-insurance-company-spies-switzerland-insurance-detectives](http://www.thelocal.ch/20181123/swiss-vote-referendum-on-insurance-company-spies-switzerland-insurance-detectives)>.
17. *Public Scrutiny of Automated Decisions: Early Lessons and Emerging Methods*, An Upturn and Omidyar Network Report, February 2018. Available at: <[www.omidyar.com/sites/default/files/file\\_archive/Public%20Scrutiny%20of%20Automated%20Decisions.pdf](http://www.omidyar.com/sites/default/files/file_archive/Public%20Scrutiny%20of%20Automated%20Decisions.pdf)>.
18. Privacy International, *Exclusion and identity: life without ID*, 14 December 2018. Available at: <<https://privacyinternational.org/feature/2544/exclusion-and-identity-life-without-id>>
19. Jumar, S., “Want to Avail Government Subsidies? Provide Aadhaar and Get it Easily”, *PaisaBazaar*, 1 May 2018. Available at: <[www.paisabazaar.com/aadhar-card/want-to-avail-government-subsidies-provide-aadhaar-and-get-it-easily](http://www.paisabazaar.com/aadhar-card/want-to-avail-government-subsidies-provide-aadhaar-and-get-it-easily)>
20. In 2018, the health ministry issued a statement to clarify that Aadhaar was “desirable” but mandatory to access a 5-rupee insurance cover for hospitalisation under the Ayushman Bharat scheme. See: Kaul, R., Aadhaar desirable, not must for Rs 5 lakh healthcare scheme, says Centre, *Hindustantimes*, 12 July 2018. Available at: <[www.hindustantimes.com/india-news/aadhaar-desirable-not-must-for-rs-5-lakh-healthcare-scheme-says-centre/story-mvQwqSKzDFYE0rhxLQFbLO.html](http://www.hindustantimes.com/india-news/aadhaar-desirable-not-must-for-rs-5-lakh-healthcare-scheme-says-centre/story-mvQwqSKzDFYE0rhxLQFbLO.html)>
21. Foundation for Media Alternatives, “The National ID Debate: Is the Philippines Ready?”, Available at: <[www.fma.ph/resources/resources-on-privacy/national-id-system/](http://www.fma.ph/resources/resources-on-privacy/national-id-system/)>
22. Brennan Centre for Justice, “Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification”, November 2017. Available at: <[www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf)>
23. The right to privacy in the digital age, op. cit.,
24. Farries, E., “The Irish PSC: Enforced digital identities for social protection services and beyond, Irish Civil Liberties Council”, May 2019. Available at <[www.icli.ie/wp-content/uploads/2019/06/190529-ICCL-digital-technology-submissions.pdf](http://www.icli.ie/wp-content/uploads/2019/06/190529-ICCL-digital-technology-submissions.pdf)>
25. Bastarrica, D., “Junaeb se llena de críticas por aplicación de biometría facial para entregar alimentos”, 17 January 2019. Available at: <[www.fayerwayer.com/2019/01/junaeb-biometria-facial-alimentos/](http://www.fayerwayer.com/2019/01/junaeb-biometria-facial-alimentos/)>.
26. Mastercard, *SASSA Social Benefits Card in South Africa*. Available at: <[www.mastercard.us/content/dam/mccom/en-us/documents/sassa-case-study.pdf](http://www.mastercard.us/content/dam/mccom/en-us/documents/sassa-case-study.pdf)>; Burt, C., “South African biometric grant system suspended to end public sector workers’ strike”, 12 October 2018. Available at: <[www.biometricupdate.com/201810/south-african-biometric-grant-system-suspended-to-end-public-sector-workers-strike](http://www.biometricupdate.com/201810/south-african-biometric-grant-system-suspended-to-end-public-sector-workers-strike)>.
27. Chambers, J., and Rohaida, N., “Seriously, Bangladesh is the country to beat on e-payments,” *GovInsider*, 2 May 2017. Available at: <<https://govinsider.asia/smart-gov/bangladesh-a2i-mobile-payments/>>

28. See for example, Home Office "Spying on asylum seekers by tracking debit card use", *Independent*, 27 January 2019. Available at: <[www.independent.co.uk/news/uk/home-news/asylum-seeker-home-office-spying-debit-card-aspen-hostile-environment-a8748781.html](http://www.independent.co.uk/news/uk/home-news/asylum-seeker-home-office-spying-debit-card-aspen-hostile-environment-a8748781.html)> and "Note to all ASPEN card users", The Unity Centre, 22 April 2017. Available at: <<https://unitycentreglasgow.org/aspencard/>>.
29. *Public Scrutiny of Automated Decisions: Early Lessons and Emerging Methods*, An Upturn and Omidyar Network Report, February 2018. Available at: <[www.omidyar.com/sites/default/files/file\\_archive/Public%20Scrutiny%20of%20Automated%20Decisions.pdf](http://www.omidyar.com/sites/default/files/file_archive/Public%20Scrutiny%20of%20Automated%20Decisions.pdf)>
30. Toh, A., "The disastrous roll-out of the UK's digital welfare system is harming those most in need", Human Rights Watch, 10 June 2019. Available at: <[www.hrw.org/news/2019/06/10/disastrous-roll-out-uk-digital-welfare-system-harming-those-most-need](http://www.hrw.org/news/2019/06/10/disastrous-roll-out-uk-digital-welfare-system-harming-those-most-need)>.
31. Evensad, L., "Department for Work and Pensions uses artificial intelligence to crack down on benefits fraud", *Computer Weekly*, 2 July 2018. Available at: <[www.computerweekly.com/news/252444049/Department-for-Work-and-Pensions-uses-artificial-intelligence-to-crack-down-on-benefits-fraud](http://www.computerweekly.com/news/252444049/Department-for-Work-and-Pensions-uses-artificial-intelligence-to-crack-down-on-benefits-fraud)>.
32. McIntyre, N., and Pegg, D., "Councils use 377,000 people's data in efforts to predict child abuse," *The Guardian*, 16 September 2018. Available at: <[www.theguardian.com/society/2018/sep/16/councils-use-377000-peoples-data-in-efforts-to-predict-child-abuse](http://www.theguardian.com/society/2018/sep/16/councils-use-377000-peoples-data-in-efforts-to-predict-child-abuse)>.
33. *Report of the Special Rapporteur on extreme poverty and human rights on his visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. A/HRC/41/39, 23 April 2019. p14. Available at: <<https://undocs.org/A/HRC/41/39/Add.1>>
34. Article 8 of the European Convention of Human Rights and Article 7 of the Charter of Fundamental Rights of the European Union as well as other international and regional human rights instruments.
35. Article 5 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (GDPR)
36. Article 9 GDPR op-cit
37. Articles 12 to 22 of GDPR op-cit
38. *Public Scrutiny of Automated Decisions: Early Lessons and Emerging Methods*, An Upturn and Omidyar Network Report, February 2018. Available at: <[www.omidyar.com/sites/default/files/file\\_archive/Public%20Scrutiny%20of%20Automated%20Decisions.pdf](http://www.omidyar.com/sites/default/files/file_archive/Public%20Scrutiny%20of%20Automated%20Decisions.pdf)>.
39. Decisions which fall within Article 22 of GDPR must have safeguards in place, see Article 29 Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, As last Revised and Adopted on 6 February 2018. Available at: <[https://edpb.europa.eu/our-work-tools/general-guidance/gdpr-guidelines-recommendations-best-practices\\_en](https://edpb.europa.eu/our-work-tools/general-guidance/gdpr-guidelines-recommendations-best-practices_en)>
40. Defined in Article 4(4) of GDPR
41. Part 3 of the Scotland Act 2016, covering Welfare benefits and Employment support
42. See, Social Security Scotland "Digital". Available at: <[www.socialsecurity.gov.scot/what-we-do/digital](http://www.socialsecurity.gov.scot/what-we-do/digital)>, and "Social Security Scotland: digital and technology strategy 2018 -2021", 28 September 2018. Available at: <[www.gov.scot/publications/social-security-scotland-digital-technology-strategy/pages/15/](http://www.gov.scot/publications/social-security-scotland-digital-technology-strategy/pages/15/)>
43. Auditor General for Scotland "Social security, Implementing the devolved powers", Audit Scotland, May 2019. Available at: <[www.audit-scotland.gov.uk/uploads/docs/report/2019/nr\\_190502\\_social\\_security.pdf](http://www.audit-scotland.gov.uk/uploads/docs/report/2019/nr_190502_social_security.pdf)>
44. Scottish Government, "New National Taskforce to lead on human rights in Scotland", 12 June 2019. Available at: <[www.gov.scot/news/new-national-taskforce-to-lead-on-human-rights-in-scotland](http://www.gov.scot/news/new-national-taskforce-to-lead-on-human-rights-in-scotland)>
45. First Minister's Advisory Group on Human Rights Leadership, "Recommendations for a new human rights framework to improve people's lives", Report to the First Minister, 10 December 2018, Available at: <<https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>>.
46. Vienna Declaration and Programme of Action UN Doc. A/CONF.157/23, 12 July 1993. Paragraph 5. Available at: <[www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx)>

and species breakdown, mass migration and other growing international tensions, making up what is known as the VUCA (Volatile, Uncertain, Complex and Ambiguous) world, we must ask if the conventional paradigm for political decision-making and policy-making is fit for purpose?

I would argue that mediation may hold, at least in part, a way to help to rebalance things, to move us back to the necessary state of cooperation without which our very future as a species seems to be at risk. There is no room for positional bargaining anymore when it comes to the environmental risks. There is no us and them, we're all in it together and an interest-based approach seems to be the only way to deal with it.

Extending these ideas to ways of problem solving more generally, including of course the world of dispute resolution, we know that adversarialism is costly. Whether in our justice systems, national politics or international diplomacy, we must find ways to move away from binary, right/wrong, right/left, win/lose, in/out, yes/no decision making. Zero sum outcomes do not serve us well.

We need a more enlightened, expansive, constructive, creative way to sort out our difficulties. This applies to prevention and reduction as well as to resolution. We need, in the jargon, to find durable, efficient, least damaging methods to manage and resolve the effects of differences between people, groups and nations.

It is arguable that our need to discover, or rediscover, consensual ways of handling difficult issues is therefore, in this century, a matter of survival. We need to really listen to each other, understand the deep underlying issues, explore the real needs and interests of people, communities and the planet, identify and develop creative options, use objective criteria to assess them, and help each other to make innovative decisions.

What I have just described are classic attributes of effective mediation. Mediators have the knowledge and experience to offer a constructive way of doing things. We have a calling to help people to find resolution in the most intractable of disputes. We do it week in, week out.

We can and must use our mediation skills, and all we understand in that regard, to do what we can to help manage and resolve disputes and differences in a sustainable and environmentally friendly way, in the broadest sense of that term, in our communities and commerce, in our workplaces and families and in the wider global issues, including when we address the impact of climate change and the polarisation of and within politics.

The proposals at last emerging in Scotland point us in a more enlightened and constructive direction. That 2002 letter seems a long time ago. I hope that, in 2036, someone will look back and write of the preceding seventeen years that 2019 was the turning point when Scotland grasped the opportunity to bring mediation into the mainstream.

\*John Sturrock QC, Founder and Senior Mediator, Core Solutions

# Global Human Rights – A Scots View from the UN

Andrew Gilmour

Much attention is rightly focused on the current state of the world: the climate and pollution crisis; the extinction crisis; the democracy crisis; the migration crisis; the security crisis. Less well known – but no less alarming – is the human rights crisis.

Last year saw the 70th anniversary of the landmark Universal Declaration of Human Rights. At the risk of sounding nationalistic, it is remarkable how many of the ideas contained in it were expounded nearly two centuries before by the thinkers of the Scottish Enlightenment.

Most people accept that the period between the late 1970s until the early 2010s saw an uneven, but nevertheless pronounced advance in several areas of rights, in much of the world. To take one example, in 1977 just 16 countries had abolished the death penalty; the figures now stands at 140.

But for many reasons - including the financial crisis and austerity policies; the growth of international terrorism following the Iraq war and the counter-terrorist reaction; and the rise of populism, nativism and xenophobia in the wake of increasing arrivals of refugees and migrants – that progress has now stalled, giving way to a pronounced push-back against the human rights agenda. Two areas where this is especially evident are women’s sexual and reproductive rights, and LGBTI rights. Violent homophobia and other forms of intolerance are on the rise, even at a time when the acceptance of same-sex marriage has significantly advanced in North and South America and Western Europe.

## Counter-terrorism

Terrorism and counterterrorism are twin sources of growing violations. In many countries confronting a terrorist threat, the greatest recruiting tool for extremist groups turns out to be the brutal and illegal responses to that threat by governments. Targeting and violating the rights of minority groups suspected of sympathizing with terrorists is desperately short-sighted, as it only increases their sense of exclusion and alienation, from which it is sometimes only a short leap to embracing violent extremism. This is so obvious, and yet many governments - Western, African, Arab, Asian and others - persist in policies that lead to the creation of more terrorists.

In addition, we see another tendency. That of governments (often the same ones) to try to tarnish – through specious accusations of “terrorism” – any opposition to their rule or occupation. Thus, peaceful opposition and genuine human rights defenders are regularly arraigned on terrorism charges in China, Israel, the Gulf states, Egypt and many other countries.

To be successful, preventing violent extremism requires addressing the root causes and in strict adherence to the rule of law. One part of the world where the UN Human Rights Office is actively pushing this North and West Africa, where a number of governments are confronting the gravest threats from terrorist groups. With the financial support of the European Union and others, we are working with the militaries of the five concerned countries on a “human rights compliance framework” in the Sahel. The purpose of this compliance framework is to enable those countries’ security forces to fight terrorist groups in a more effective way, reducing human rights

violations committed by those forces and thereby also gaining the support of the civilian population in the areas affected. The adoption of a rule of law approach also enables international donors to feel more confident that the assistance they are providing these security forces (because Europe has a huge vested interest – both in terms of security and migration – in defeating the extremist groups) is not used to commit atrocities. Screening of troops to prevent those known to have committed violations in the past, training, planning and rules of engagement to protect civilians, are all key to the compliance framework. So is accountability, and here it is crucial that the military recognize mistakes they have committed, take action against those responsible, and allow access to justice for individuals and communities who have been wrongly targeted or abused by the security forces.

## Access to justice

While this work in the Sahel is a new approach for the UN Human Rights Office, improving access to justice in general has long been a priority. We see it as an essential method of addressing key drivers of poverty and inequality, and therefore also violent conflict. Similarly, access to justice helps governments achieve the UN’s Sustainable Development Goals, for which “leaving no one behind” is a cardinal precept. If women, children, those living in poverty, and various minorities, are unable to have access to justice systems that work for them, then the goal of not leaving them behind cannot be met.

I was recently in Kenya, where I met leaders of new Social Justice movements representing millions of slum-dwellers. Though they lack access to water, decent housing, schooling, healthcare, and live in some of the worst conditions I have ever seen, their primary concern - as they repeatedly expressed it to me - was not their poverty. It was fear of police brutality, even extra-judicial killings, committed with total impunity - and lack of access to justice. In this atmosphere, they felt unable even to demonstrate to improve their miserable living conditions, as they feared it would mark them out as community activists who might be targeted by the police. For me, this was one of the clearest examples of how lack of accountability and access to justice are directly linked – in a vicious cycle of cause and effect – with deep poverty.

One way our office promotes human rights and access to justice is through the monitoring of trials through our field presences either on specific cases of concern or more systematically. Examples include Cambodia, Libya, South Sudan, Iraq, Tunisia, Guatemala, where the goal is to ensure due process for the guilty, as well as the innocent. It can help to identify weaknesses in the judicial system, such as bias or stereotyping, police brutality, and inhumane prison conditions.

## Countering torture

Another priority is to achieve greater recognition that torture is not just inhuman, illegal and immoral, but also useless - indeed counterproductive. There is so much evidence that information received under duress is unreliable, and can even set back efforts to prevent future crimes and terrorism, because people undergoing torture are liable to say anything that they

think could reduce the indescribable pain and humiliation, regardless of whether there is any truth to it. What we are seeking is increased understanding from beyond our usual supporters: the human rights movement and parts of the legal profession. Until interrogators and the people to whom they report also understand that non-coercive interrogation is likely to lead to more actionable information than torture, and that widespread torture not only undermines the search for truth but also discredits the entire police and justice system of a country, then the brutal methods will continue.

There are moves afoot to secure agreement on a set of international guidelines that could bring practical guidance on how to implement international human rights instruments. In this instance, we will be working with a broader coalition of justice, police and interrogation officers who can see that human rights are not an impediment to them in how they are used to going about their work. Rather, a more humane approach based on respect for human rights – apart from being more civilized – would enable law enforcement officers and other authorities to secure better information, while also creating greater legitimacy for the police and justice sectors they work for.

### New challenges

In a world where the rate of change has dramatically increased, human rights need to evolve like everything else. Although George Orwell was writing *1984* on the island of Jura at the exact time Eleanor Roosevelt, Charles Malik, Hansa Metha and others were putting their signatures to the Universal Declaration of Human Rights, the latter probably could never have imagined the human rights challenges that we are currently seeing with artificial intelligence, social media, and cyber-security. It is true that some of these advances represent new tools for human rights defenders – whether it is US police in some states being obliged to wear body-cameras, or real-time twitter calls for mass demonstrations for freedom in Khartoum.

But new technology also presents tremendous opportunities for big violators of rights too. On the one hand, it is possible to whip up violent pogroms through social media – and we saw this with Facebook prior to the massive explosion of bloodletting, rape and expulsion of the Rohingya from North-western Myanmar in 2017. Similarly, governments like China and others have mastered the arts of the Great Firewall, all-embracing on-line censorship, as well as facial recognition and internet surveillance.

Another relatively new area for human rights concerns climate justice. As the planet hurtles towards unprecedented warming, it is remarkable how little understood are the implications on the rights of tens of millions of people affected. Access to the most basic human rights – to life, food, water, health, housing, livelihoods – will likely be severely curtailed in the coming years. It will also lead to vastly greater migration flows – and even now the response to migration on both sides of the Atlantic is frequently shameful: whether it is the separation of children from their families on the southern border of the United States, or the drowning of tens of thousands of African refugees and migrants in the Mediterranean or exposure to systematic torture and rape in Libyan detention centres.

The squeeze on human rights and their defenders is evident on many levels. Several countries have over the past seven years passed harsh laws designed to limit the activities, funding and effectiveness of civil society and non-governmental organizations, especially human rights ones. In an even larger number of countries we are finding that state agents practice various forms of reprisals against human rights defenders, a phenomenon we find especially troubling.

Within the United Nations itself, one can see a trend of trying to silence human rights defenders and even of UN human rights staff in such forums as the Security Council, as well as incessant efforts to cut the small funding (human rights accounts for less than 4% of the total UN budget) available. Amongst the membership itself, there seems to be increased politization of human rights – with, for example, some countries very willing to criticize the atrocities committed by the Syrian and Myanmar governments, but refusing to do the same with violations carried out by, for example, the Israelis and Saudis. Or vice versa. Such obvious double standards on the part of governments undermine the legitimacy of human rights work everywhere.

Humankind is living through a very difficult period. Of the many challenges we are facing, probably the second biggest threat (after climate change) is the one represented by the rise of cynical populist leaders who almost invariably blame the ills of society on vulnerable minorities – whipping up further hatred and discrimination, and then often issuing threats against the press, the judiciary and NGOs.

Human Rights defenders I have spoken to in many parts of the world acknowledge greater threats to their security, and more hostility to their agenda (which critics claim is used to promote “terrorism”, “treachery” or “debauchery”), than they have seen in years. Meanwhile, many governments increasingly seem reluctant to challenge the world’s greatest human rights violators, and indeed have retreated into a much more negative stance on domestic rights and freedoms, including hostility to migrants and refugees.

If governments are not ready to do more, then concerned citizens need to use their collective power – as voters, consumers, investors or even just voices – to stand up to defend the defenders, to speak out against violations, and draw a line against creeping authoritarianism, discrimination and brutality. It is noteworthy that in the United States it is at times like this that we see a surge in activism, whether Black Lives Matter (against police violence), Me Too (against sexual harassment), or Enough (against unrestricted gun ownership). Equally noteworthy, on the global stage, is the inspirational and courageous visibility of three young women campaigning for rights: Malala (right to education), Nadia Mourad (accountability for sexual violence); Greta Thunberg (on climate). There is much to be emulated here. These and others of their ilk can play a major role in what the UN Secretary-General has said needs to be a “push back against the pushback”.

As a Scot with an international perspective, I can say – as I have been doing at the UN over the past two years – that the vocal position of the Scottish Government on a number of acute contemporary human rights issues is a matter of pride. All the more so, as it seems to be bucking the trend in so many countries of Europe and the wider world. The giants of the Scottish Enlightenment – Gershom Carmichael, David Hume, Adam Smith, Adam Ferguson and others – would presumably have been gratified to know that their human rights legacy was being sustained at a time when it is needed most. In a global context of myriad interlocking crises, that seems to me to present us some sliver of hope.

\*Andrew Gilmour, the senior Scot working for the United Nations, is currently Assistant Secretary-General for Human Rights in New York. Prior to that he was Political Director in the Office of the UN Secretary-General. He has worked for the UN for 30 years in a wide variety of positions in Afghanistan, Iraq, West Africa, South Sudan, the Balkans, Palestine, and Geneva.

For a full list of Scottish Government consultations and texts see <[www.gov.scot/Consultations](http://www.gov.scot/Consultations)>  
for UK Government consultations see <[www.gov.uk/government/publications](http://www.gov.uk/government/publications)>

SCOLAG Legal Journal is happy to include all types of consultations. Our pages are open to campaigning groups, voluntary and statutory bodies, MSPs and others. Please send details to:  
[consultations@scolag.org](mailto:consultations@scolag.org)

### Children's Services Planning

Closing 17/06/19

As part of the Children and Young People (Scotland) Act 2014, the Scottish Government provided statutory guidance on Part 3, Children's Services Planning. In advance of the next reporting cycle, and to support the programme of strategic engagement with local children's services partners, the Scottish Government wishes to formally consult to test whether the content, scope and format of the statutory guidance is still helpful, fit for purpose or whether this should be modified, amended or improved to further enhance and build on the support available. See <<http://bit.ly/csprosgc>>.

Contact C&F.StrategicEngagement@gov.scot or 0131 244 8055.

### Energy Efficient Scotland

Closing 17/06/19

This consultation seeks to gather evidence which might support a change to the proposed timeframe to deliver standards for all properties across Scotland. See <<http://bit.ly/ees-c>>.

Contact [energyefficientscotland@gov.scot](mailto:energyefficientscotland@gov.scot) or 0131 244 6194.

### New-Build Homes (Buyer Protection) (Scotland) Bill

Closing 27/06/19

Graham Simpson MSP invites views on his proposal for a Bill to establish standard missives for the sale of new-build homes, to include redress for purchasers in respect of defects in construction. The Bill would also provide a clear route for redress, possibly through a New Homes Ombudsman. For the full paper, see <<http://bit.ly/nbhbbc>>.

Contact Graham Simpson MSP, The Scottish Parliament, Edinburgh, EH99 1SP; 0131 348 6984; or [graham.simpson.msp@parliament.scot](mailto:graham.simpson.msp@parliament.scot).

### Human Rights Priorities

Closing 28/06/19

The Scottish Human Rights Commission is developing its strategic plan for 2020-24 and to help set its priorities would like to hear from people and organisations from across Scotland. The consultation document describes the Commission and its powers and duties. It also sets out four draft strategic priorities, which represent our initial thinking about where the Commission sees itself contributing to a human rights culture in Scotland over the next four years. The paper contains questions the SHRC would welcome views on. It is available from - <[www.scottishhumanrights.com](http://www.scottishhumanrights.com)>.

Contact Scottish Human Rights Commission, Bridgeside House, 99 McDonald Road, Edinburgh EH7 4NS; or [hello@scottishhumanrights.com](mailto:hello@scottishhumanrights.com).

### Wheelchairs (Short-term access) Bill

Closing 30/06/19

Jackie Baillie MSP invites views on her proposal

for a Bill to ensure the provision of wheelchairs to anyone assessed as needing one on a short-term, as well as a long-term, basis. The paper is available to download via <<http://bit.ly/wsta-c>>.

Contact Jackie Baillie MSP, Room M1.13, Scottish Parliament, Edinburgh, EH99 1SP; or email - [jackie.baillie.msp@parliament.scot](mailto:jackie.baillie.msp@parliament.scot).

### Online Harms White Paper

Closing 01/07/19

This paper sets out the UK government's plans for a package of online safety measures that also supports the digital economy. This package comprises legislative and non-legislative measures and will make companies more responsible for their users' safety online, especially children and other vulnerable groups. The White Paper proposes establishing in law a new duty of care towards users, which will be overseen by an independent regulator. Companies will be held to account for tackling a comprehensive set of online harms, ranging from illegal activity and content to behaviours which are harmful but not necessarily illegal. Internet services and their regulation is a reserved issue, therefore the proposed framework is to apply on a UK-wide basis. The paper can be found via <<http://bit.ly/UK-ohwp>>.

Contact Online Harms Team, DCMS, 100 Parliament Street, London, SW1A 2BQ; or email - [onlineharmsconsultation@culture.gov.uk](mailto:onlineharmsconsultation@culture.gov.uk).

### National Islands Plan

Closing 06/07/19

This consultation supports the development of the National Islands Plan as set out in Part 2 of the Islands (Scotland) Act 2018. The Plan will set out how the Scottish Government, local authorities and other public agencies might work to improve outcomes for island communities. Ministers will be asked to report back to the Parliament every year on progress towards the goals included in the Plan. See <<http://bit.ly/NIP-c>>.

Contact The Islands Team, Consultation, Scottish Government, Scottish Government Agriculture and Rural Economy, Government Buildings, Tankerness Lane, Kirkwall, KW15 1AQ. 0131 244 3770 or [info@islandsteam.scot](mailto:info@islandsteam.scot).

### Houses in Multiple Occupation

Closing 08/07/19

This consultation proposes adding new categories to the definition of HMO, the policy intention of the changes focus on ensuring that contract and transient workers - who often have no choice as to where they stay when working away from home - are afforded the same health and safety rights as those who live in a shared rented property as their only or main residence. See <<http://bit.ly/HMO-def>>.

Contact Houses in Multiple Occupation Consultation, Scottish Government, Victoria Quay, Private Rented Sector Team, Edinburgh, EH6 6QQ; or [HMOconsultation@gov.scot](mailto:HMOconsultation@gov.scot).

### Public Health Scotland

Closing 08/07/19

This Scottish Government consultation document invites views on the proposals for a new national public health body, to be known as 'Public Health Scotland'. Public Health Scotland will have an important role in translating public health intelligence and evidence into policy and practice; and realising the value of data to influence ever

more meaningful connections locally, nationally and with communities to improve health and wellbeing.

Contact [publichealthreform@gov.scot](mailto:publichealthreform@gov.scot).

### Alcohol Licensing Fees

16/07/19

The purpose of the consultation is to consult on whether to raise the fee for an occasional licence from the current price of £10, and if it is agreed, seek views on what that new fee level should be; and seek views on considering a limit on the number and duration of occasional licences for premises licence holders and personal licence holders.

Contact Licensing Team, Area GW14, St Andrew's House, Regent Road, Edinburgh, EH1 3DG; or [licensing.consultation@gov.scot](mailto:licensing.consultation@gov.scot).

### Fire Safety for High Rises

Closing 17/07/19

The Scottish Government is gathering information and views on proposed actions to strengthen fire safety for people who live in high rise domestic buildings. The proposed actions are aimed at delivering the five recommendations from the *Review of the Fire Safety Regime for High Rise Domestic Buildings in Scotland*. Everyone who lives in, or is responsible for fire safety in, high rise domestic buildings is encouraged to respond to the consultation. For the full paper see <<http://bit.ly/sfshr>>.

Contact Fire & Rescue Unit, Scottish Government, 1 West, St Andrew's House, Edinburgh, EH1 3DG; or [FireSafetyConsultation2019@gov.scot](mailto:FireSafetyConsultation2019@gov.scot).

### Short-Term Lets

Closing 19/07/19

This consultation asks for your views on the regulation of short-term lets in Scotland. The paper sets out the factual background, describes the issues arising, outlines local authorities' current powers to address them and presents an overview of regulatory approaches elsewhere in the world. A regulatory approach might involve registration and/or licensing of short-term lets and enable different areas to tailor the approach to their local needs and priorities, with the possible addition of a market-based mechanism to control numbers. Responses to this consultation will help the Scottish Government shape the regulatory approach to short-term lets. The paper is available via <<http://bit.ly/STL-C>>.

Contact Short-Term Lets Team, Scottish Government, 2J North, Victoria Quay, Edinburgh, EH6 6QQ; or [shorttermlets@gov.scot](mailto:shorttermlets@gov.scot).

### Stalking Protection (Scotland) Bill

Closing 21/07/19

Rona Mackay MSP invites views on her proposal for a Bill to increase protection for victims of stalking by giving police the power to apply for stalking protection orders on behalf of victims. These SPOs will be broadly similar to those that are available to the police in England & Wales under the Stalking Protection Act 2019 to protect stalking victims there. The consultation paper is available via <<http://bit.ly/SPSB-c>>.

Contact Rona Mackay MSP, Room 4.15, The Scottish Parliament, Edinburgh, EH99 1SP; 0131 348 5789; or [rona.mackay.msp@parliament.scot](mailto:rona.mackay.msp@parliament.scot).

### Gender Representation on Public Boards

Closing 04/08/19

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This consultation seeks views on implementation of the Gender Representation on Public Boards (Scotland) Act 2018. Specifically, it seeks views on 2 elements of implementation: draft regulations setting out the arrangements for reporting on progress under the Act; and draft guidance on the operation of the Act. The full paper can be found via <<http://bit.ly/grpbdr>>.

Contact Gender Equality Team, Equality Unit, The Scottish Government, Area 3H-North, Victoria Quay, Edinburgh, EH6 6QQ; or email - eileen.flanagan@gov.scot.

#### Proposed Fair Rents (Scotland) Bill

Closing 06/08/19

Pauline McNeill MSP invites views on her proposal for a Bill to protect private sector tenants by introducing measures to limit rent increases and to increase the availability of information about rent levels. The paper and survey link are available via <<http://bit.ly/pfrsb-c>>.

Contact Pauline McNeill MSP, Room M1.14, The Scottish Parliament, Edinburgh EH99 1SP; or pauline.mcneill.msp@parliament.scot.

#### Rights of the Child

Closing 14/08/19

In line with the *Programme for Government 2018-19* commitment, this consultation looks at how a new Act could incorporate the United Nations Convention on the Rights of the Child into the law of Scotland. The paper is available via <<http://bit.ly/uncrc-c>>.

Contact UNCRC Incorporation, Scottish Government, 2B South, Victoria Quay, Edinburgh, EH6 6QQ; or UNCRCIncorporation@gov.scot.

#### Debt Arrangement Scheme

Closing 16/08/19

Following the Accountant in Bankruptcy's (AiB's) 2018 consultation *Building A Better Debt Arrangement Scheme*, it is proposed that where AiB is nominated as payment distributor, it will charge the statutory administration fee for this function but will only seek to recover its costs. Any excess funds will be re-invested in the free money advice sector. Opinion is sought on which of the options detailed in this consultation would work best and why. The paper *Debt Arrangement Scheme: Returning Funds to the Free Advice Sector* is available via <<http://bit.ly/DAS-fc>>.

Contact DAS Team, Accountant in Bankruptcy, Scottish Government, 1 Pennyburn Road, Kilwinning, KA13 6SA; or email - lisa.ledinghampark@aib.gov.uk.

#### Proposed Mediation (Scotland) Bill

Closing 20/08/19

Margaret Mitchell MSP invites opinion on her proposal for a Bill to increase the use and consistency of mediation services for certain civil cases by establishing a new process of court-initiated mediation that includes an initial

mandatory process involving a statutory duty mediator. The full paper on the proposal is available via <<http://bit.ly/msb-p>>.

Contact Margaret Mitchell MSP, M2.11, Scottish Parliament, Edinburgh, EH99 1SP; or Margaret.Mitchell.msp@parliament.scot.

#### Regulation of Pre-Paid Funeral Plans

Closing 25/08/19

This HM Treasury consultation seeks views on the governments proposed regulatory framework for bringing funeral plans within the remit of the Financial Conduct Authority. The full paper and related documents can be found via <<http://bit.ly/fp-r>>.

Contact funeralplans@hmtreasury.gov.uk

#### Female Genital Mutilation (Protection and Guidance) (Scotland) Bill

Closing 30/08/19

The Scottish Parliament's Equalities and Human Rights Committee (EHRiC) is seeking views on the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill. The purpose of the Bill is to create a new protection order related to female genital mutilation (FGM), to protect those at risk of FGM, or to prevent further harm to victims of FGM. The Bill also provides for statutory guidance in relation to FGM, including protection orders. The call for evidence is available on the Parliament web site via <<http://bit.ly/cfv-g>>.

Contact Equalities and Human Rights Committee, T2.60, Scottish Parliament, Edinburgh EH99 1SP; or equalities.humanrights@parliament.scot.

#### Proposed Whole Life Custody (Scotland) Bill

Closing 30/08/19

Liam Kerr MSP seeks views on his proposal for a Bill "to give Scottish courts the power to sentence the worst criminals to custody for the rest of their lives". The paper is available via <<http://bit.ly/wlcsbp>>.

Contact Liam Kerr MSP, Room 3.16, Scottish Parliament, Edinburgh EH99 1SP; or liam.kerr.msp@parliament.scot.

#### Human Trafficking

Closing 06/09/19

The Scottish Government has issued this *Consultation on section 38 of the Human Trafficking and Exploitation (Scotland) Act 2015: Duty to notify and provide information about victims*. Section 38 of the Act places a duty on specified Scottish public authorities to provide information to Police Scotland about a person(s) who is, or appears to be, a victim of human trafficking or of slavery, servitude and forced or compulsory labour. Once Police Scotland receive this information they must notify a third party about the person who is, or appears to be, a victim of either section 1 or 4 offence. This consultation offers the opportunity to provide views on:

- o Who should be named in Regulations as a

Scottish public authority that will be subject to the duty;

- o What information should be included in notifications both to and from the Police;
- o Who the Police should pass information on to; and
- o What other bodies the Scottish Government should work with who cannot be named in Regulations

The paper is available via <<http://bit.ly/HTESAn>>.

Contact Human Trafficking Team, Scottish Government, GWR, St Andrew's House, Regent Road, Edinburgh, EH1 3DG; or human.trafficking@gov.scot.

#### Energy Efficiency in Private Lets

Closing 13/09/19

Through this consultation on The Energy Efficiency (Private Rented Property) (Scotland) Regulations 2019, the Scottish Government is seeking awareness of the standards proposed and the means by which they will be introduced in advance of formal parliamentary consideration of the Regulations to follow later this year. It is also seeking views on the nature of the guidance to support the Regulations and ensure that users are confident that sufficient information is available to them to begin the implementation of the standards required. For further details, including links to the Regulations and guidance see <<http://bit.ly/eepr-c>>.

Contact katie.chan@gov.scot

#### Surrogacy Law

Closing 27/09/19

The Scottish Law Commission and the Law Commission (England & Wales) are conducting a joint consultation on *Building Families Through Surrogacy: A New Law*. The full paper, summary and link to the online response form can be found on the SLC web site via <<http://bit.ly/SLC-c>>.

Contact Surrogacy Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG; or surrogacy@lawcommission.gov.uk.

#### Heritable Securities

Closing 30/09/19

The Scottish Law Commission has published *Discussion Paper 168 - Heritable Securities: Pre-default*. It is the first of two such papers planned for this Project. The Commission intends to publish a second paper on post-default (enforcement) in late 2020. This Discussion Paper sets out 61 proposals or questions and it proposes replacing the Conveyancing and Feudal Reform (Scotland) Act 1970 with a new statute regulating heritable securities. The full paper, summary and link to the online response form can be found on the SLC web site via <<http://bit.ly/SLC-c>>.

Contact Andy Crawley, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR

**SCOLAG**  
LEGAL JOURNAL

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# Legislation Update

Continuing the monthly update of relevant legislation last appearing at 2019 SCOLAG 96

## Recent Acts of the Scottish Parliament

(At 15/06/19)

- Age of Criminal Responsibility (Scotland) Act 2019, asp7

Royal Assent 11/06/19

An Act of the Scottish Parliament to raise the age of criminal responsibility to 12 years and to make consequential changes to the law on the disclosure of criminal records and of other information relating to individuals working or seeking to work with children or certain adults; on the provision of information by the Principal Reporter to persons adversely affected by the behaviour of children; on the taking of certain children to a place of safety by the police; on the search of certain children by the police; on police interviews with certain children; and on the taking of forensic samples from certain children by the police; and for connected purposes.

- Health and Care (Staffing) (Scotland) Act 2019, asp 6

Royal Assent 06/06/19

An Act of the Scottish Parliament to make provision about staffing by the National Health Service and by providers of care services.

- Hutchesons' Hospital Transfer and Dissolution (Scotland) Act 2019, asp5

Royal Assent 31/05/19

An Act of the Scottish Parliament to transfer the property, rights, interests and liabilities of The Royal Incorporation of Hutchesons' Hospital in the City of Glasgow to a successor Scottish Charitable Incorporated Organisation; to dissolve the Incorporation; and to repeal the Hutchesons' Hospital Act 1872.

- Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, asp 8

Royal Assent 13/06/19

An Act of the Scottish Parliament to make provision about the use of special measures for the purpose of taking the evidence of child witnesses and other vulnerable witnesses in criminal proceedings; to make provision about the procedure relating to taking evidence by commissioner; to make provision about the procedure for authorisation of standard special measures; and for connected purposes.

## Recent Acts of the UK Parliament

Selected Acts of the UK Parliament affecting or of interest to Scotland.

(At 15/06/19)

For details see 2019 SCOLAG 53

- European Union (Withdrawal) Act 2019, c.16

Royal Assent 08/04/19

An Act to make provision in connection with the period for negotiations for withdrawing from the European Union.

- Offensive Weapons Act 2019, c.17

Royal Assent 16/05/19

An Act to make provision for and in connection with offences relating to offensive weapons.

The purpose of this Act is to help reduce violent crime. Specifically, it:

- o prohibits the possession of certain corrosive substances in a public place s.6 & 11); and the sale of corrosive products to those aged under 18 (ss. 1 – 5)
- o strengthens the arrangements for the online sale of bladed articles and corrosive products;
- o prohibits the possession of certain offensive weapons (ss. 43 – 47);
- o prohibits the possession of certain firearms (s.54).

This Act makes provision in respect of matters in relation to England & Wales, Scotland and Northern Ireland, see s.69 and Explanatory Notes.

## Bills Before Westminster

Selected Bills before the UK Parliament affecting or of interest to Scotland; for a full list see <http://services.parliament.uk/bills/> (At 16/06/19)

- Agriculture Bill

Government Bill introduced by Michael Gove MP on 13/09/18

For details see 2018 SCOLAG 231.

- Financial Services (Implementation of Legislation) Bill (HL)

Government Bill introduced by Lord Bates on 22/11/18

For details see 2019 SCOLAG 8

- Fisheries Bill

Government Bill introduced by Michael Gove MP on 25/10/18

For details see 2018 SCOLAG 256.

- Holocaust (Return of Cultural Objects) (Amendment) Bill

Private Members' Bill introduced by Theresa Villiers MP on 13/03/18

For details see 2018 SCOLAG 68

- Immigration and Social Security Co-ordination (EU Withdrawal) Bill

Government Bill introduced by Sajid Javid MP on 20/12/18

For details see 2019 SCOLAG 96.

- Trade Bill

Government Bill introduced by Liam Fox MP on 07/11/17

For details see 2017 SCOLAG 257

## Bills Before Holyrood

(At 15/06/19)

- Census (Amendment) (Scotland) Bill  
Government Bill introduced by Fiona Hyslop MSP on 02/10/18

Lead Committee: Culture, Tourism & External Affairs

Awaits Royal Assent (passed 12/06/19)

For details see 2018 SCOLAG 280

- Children (Equal Protection from Assault) (Scotland) Bill

Member's Bill introduced by John Finnie MSP on 06/09/18.

Lead Committee: Equalities & Human Rights  
At Stage 2

For details see 2018 SCOLAG 231.

- Children and Young People (Information Sharing) (Scotland) Bill

Government Bill introduced by John Swinney MSP on 19/06/17

Lead Committee: Education & Skills

At Stage 1

For details see 2017 SCOLAG 144

- Climate Change (Emissions Reduction Targets) (Scotland) Bill

Government Bill Introduced by Roseanna Cunningham MSP on 23/05/18

Lead Committee: Environment, Climate Change and Land Reform

At Stage 2

For details see 2018 SCOLAG 134.

- Consumer Scotland Bill

Government Bill introduced by Derek Mackay MSP on 05/06/19.

Lead Committee: TBA

At Stage 1

A Bill for an Act of the Scottish Parliament to establish Consumer Scotland and provide for its functions as a consumer advocacy and advice body; and to require regard to be had to consumer interests.

The Bill establishes a body to be known as Consumer Scotland with the general function of providing consumer advocacy and advice with a view to achieving certain specified objectives. It also imposes a duty on relevant public authorities, when making decisions of a strategic nature, to have regard to the impact of those decisions on consumers in Scotland and the desirability of reducing harm to consumers in Scotland.

- Disclosure (Scotland) Bill

Government Bill introduced by John Swinney MSP on 12/06/19.

Lead Committee: TBS

At Stage 1

A Bill for an Act of the Scottish Parliament to restate and amend the law relating to the disclosure of criminal history and other information by the Scottish Ministers; to make amendments to the Protection of Vulnerable Groups (Scot-

land) Act 2007; and for connected purposes. The Bill reforms the system of disclosure of criminal records administered by the Scottish Ministers through their executive agency Disclosure Scotland. Disclosure functions are currently performed under Part 5 of the Police Act 1997 and Part 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 ("the PVG Act"). The Bill proposes to repeal and replace Part 5 of the 1997 Act, amend the PVG Act and make provision for new disclosure products. It will also make amendments to the provisions in the PVG Act under which the barring service and the Protecting Vulnerable Groups Scheme operate, and for connected purposes. The Bill also allows scope for digital processes to improve safeguarding and accessing disclosure so that people who would prefer to do so can carry out their disclosure tasks online, including making applications and viewing disclosures.

- **Female Genital Mutilation (Protection and Guidance) (Scotland) Bill**  
Government Bill introduced by Shirley-Anne Somerville MSP on 29/05/19.  
Lead Committee: Equalities & Human Rights  
At Stage 1  
A Bill for an Act of the Scottish Parliament to provide for female genital mutilation protection orders and for guidance in relation to such orders and in relation to the prevention of female genital mutilation generally; and for connected purposes.
- **Fuel Poverty (Target, Definition and Strategy) (Scotland) Bill**  
Government Bill introduced by Angela Constance MSP on 26/06/18  
Lead Committee: Local Government & Communities  
Awaits Royal Assent (passed 11/06/19)  
For details see 2018 SCOLAG 151.
- **Human Tissue (Authorisation) (Scotland) Bill**  
Government Bill introduced by Shona Robison MSP on 08/06/18  
Lead Committee: Health & Sport  
Awaits Royal Assent (passed 11/06/19)  
For details see 2018 SCOLAG 151.
- **Management of Offenders (Scotland) Bill**  
Government Bill introduced by Michael Matheson MSP on 22/02/18.  
Lead Committee: Justice  
At Stage 3  
For details see 2018 SCOLAG 49
- **Non-Domestic Rates (Scotland) Bill**  
Government Bill introduced by Derek Mackay MSP on 25/03/19  
Lead Committee: Local Government and Communities  
At Stage 1 (to be completed by 11/10/19)  
For details see 2019 SCOLAG 72.
- **Period Products (Free Provision) (Scotland) Bill**  
Member's Bill was introduced by Monica Lennon MSP on 23/04/19.

Lead Committee: Local Government and Communities  
At Stage 1  
For details see 2019 SCOLAG 96.

- **Planning (Scotland) Bill**  
Government Bill introduced by Angela Constance MSP on 04/12/17  
Lead Committee: Local Government and Communities  
At Stage 3  
For details see 2018 SCOLAG 9
- **Referendums (Scotland) Bill**  
Government Bill introduced by Michael Russell MSP on 28/05/19.  
Lead Committee: Finance & Constitution  
At Stage 1  
A Bill for an Act of the Scottish Parliament to make provision for the holding of referendums throughout Scotland; to make provision about such referendums and other referendums held under Acts of the Scottish Parliament.
- **Restricted Roads (20 mph Speed Limit) (Scotland) Bill**  
Member's Bill introduced by Mark Ruskell MSP on 21/09/18.  
Lead Committee: Rural Economy and Connectivity  
The Bill fell at Stage 1 on 13/06/19  
For details see 2018 SCOLAG 256.
- **Scottish Biometrics Commissioner Bill**  
Government Bill introduced by Humza Yousaf MSP on 30/05/19.  
Lead Committee: TBA  
At Stage 1  
A Bill for an Act of the Scottish Parliament to establish the office of Scottish Biometrics Commissioner and to provide for its functions in relation to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes.
- **Scottish National Investment Bank Bill**  
Government Bill introduced by Derek Mackay MSP on 27/02/19  
Lead Committee: Economy, Energy and Fair Work  
At Stage 1 (to be completed by 27/09/19)  
For details see 2019 SCOLAG 54
- **South of Scotland Enterprise Bill**  
Government Bill introduced by Fergus Ewing MSP on 24/10/18.  
Lead Committee: Rural Economy & Connectivity  
Awaits Royal Assent (passed 05/06/19)  
For details see 2018 SCOLAG 256.
- **Transport (Scotland) Bill**  
Government Bill introduced by Derek Mackay MSP on 08/06/18  
Lead Committee: Rural Economy & Connectivity  
At Stage 2 (to be completed by 28/06/19)  
For details see 2018 SCOLAG 152.
- **UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill**

Government Bill introduced by John Swinney MSP on 27/02/18.  
Lead Committee: Delegated Powers & Law Reform  
Passed 21/03/18, the Supreme Court [2018] UKSC 64, found s.17 to be outwith the legislative competence of the Parliament. The Bill cannot be submitted for Royal Assent in its unamended form.

## Legislative Consent Memorandums

(At 17/06/19)  
Recent Legislative Consent Memorandums lodged in the Scottish Parliament.

- **Wild Animals in Circuses (No. 2) Bill**  
SPLCM-S05-24, lodged 15/05/19  
Lead Committee: Environment, Climate Change & Land Reform  
S5M-17690 was agreed to 13/06/19  
The Bill before Westminster extends to England & Wales only, except for an amendment to s.5(2) of the Dangerous Wild Animals Act 1976, removing the exemption of circuses from the requirement to hold a licence for any dangerous wild animals in their keeping.

## Recent Proposals for Members Bills

- (At 16/06/19)
- **Fair Rents (Scotland) Bill**  
Proposed by Pauline McNeill MSP on 14/05/19  
Consultation closing 06/08/19  
A proposal for a Bill to protect private sector tenants by introducing measures to limit rent increases and to increase the availability of information about rent levels.
  - **Mediation (Scotland) Bill**  
Proposed by Margaret Mitchell MSP on 28/05/19  
Consultation closing 20/08/19  
A proposal for a Bill to increase the use and consistency of mediation services for certain civil cases by establishing a new process of court-initiated mediation that includes an initial mandatory process involving a statutory duty mediator
  - **New-Build Homes (Buyer Protection) (Scotland) Bill**  
Proposed by Graham Simpson MSP on 04/04/19  
Consultation closes 27/06/19  
For details see 2019 SCOLAG 97.
  - **Stalking Protection (Scotland) Bill**  
Proposed by Rona Mackay MSP on 26/04/19  
Consultation closes 21/07/19  
For details see 2019 SCOLAG 97.
  - **Wheelchairs (Short-term access) (Scotland) Bill**  
Proposed by Jackie Baillie MSP on 05/04/19  
Consultation closes 30/06/19  
For details see 2019 SCOLAG 97.

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- Whole Life Custody (Scotland) Bill Proposed by Liam Kerr MSP on 28/05/19 Consultation closing 30/08/19  
A proposal for a Bill to give Scottish courts the power to sentence the worst criminals to custody for the rest of their lives.

## Recent Petitions

(At 16/06/19)

For the Scottish Parliament petitions pages see <<http://bit.ly/SP-petition>>.

- Equal Rights in the Legal System PE01724 – closing 25/07/19  
Petition by Bill Alexander, calling on the Scottish Parliament to urge the Scottish Government to carry out a review to ensure there are equal rights for all legal professionals, including Commercial Attorneys and Party Litigants in the legal system.
- Review of Fire Safety Stay-Put Policy PE01719 – lodged 08/05/19  
For details see 2019 SCOLAG 97.

## New Scottish Statutory Instruments

For a full list of statutory instruments see <[www.legislation.gov.uk/ssi](http://www.legislation.gov.uk/ssi)>. (At 16/06/19)

- The Children and Young People (Scotland) Act 2014 (Modification) (No. 1) Order 2019 (2019 No. 206)  
In force 01/08/19  
This Order modifies the Children and Young People (Scotland) Act 2014. Part 6 of the 2014 Act makes provision for early learning and childcare. Article 2(2) modifies s.51(1)(b) of the 2014 Act to require that early learning and childcare made available by education authorities is by way of sessions which are each of 10 hours or less in duration.
- The Children and Young People (Scotland) Act 2014 (Modification) (No. 2) Order 2019 (2019 No. 207)  
In force 01/08/2020  
This Order modifies the Children and Young People (Scotland) Act 2014. Part 6 of the 2014 Act makes provision for early learning and childcare. Article 2(2) modifies s.48(1)(a) of the 2014 Act to increase the mandatory amount of early learning and childcare from 600 hours to 1140 hours each year.
- The Energy Act 2011 (Commencement No. 2) (Scotland) Order 2019 (2019 No. 181 (C. 5))  
In force 01/07/19  
This Order brings sections 54 to 65 of the Energy Act 2011 into force. These provisions relate to energy efficiency in the private rented sector in Scotland.
- The Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018 (Commencement) Regulations 2019 (2019 No. 205 (C. 7))  
In force 15/10/19  
These Regulations bring into force those provi-

sions of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018, which are not already in force. The Act provides for pardons for those convicted of certain historical sexual offences relating to consensual sexual activity between men and for a scheme enabling individuals to apply for such convictions to be disregarded (Parts 2 and 3 of the Act). References to disregarded convictions will be removed from certain official records (section 10 of the Act), ensuring that they are not revealed in connection with disclosure checks of that person's background.

- The Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) etc. Amendment Order 2019 (2019 No. 171)  
In force 08/06/19  
This Order relocates the justice of the peace court for the sheriff court district of Airdrie from Coatbridge to Airdrie. Article 2 of the Order amends the Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) etc. Order 2009 to affect this relocation.
- The Private Landlord Registration (Information) (Scotland) Regulations 2019 (2019 No. 195)  
In force 16/09/19  
These Regulations prescribe the information that a person must provide in order to make a valid application for registration as a landlord or for details of a person's registration to be amended. The information prescribed is in addition to that prescribed in the Antisocial Behaviour etc. (Scotland) Act 2004 and will not be available to members of the public.
- The Scottish Crown Estate Act 2019 (Commencement No. 1) Regulations 2019 (2019 No. 170 (C. 4))  
In force 01/06/19  
These Regulations bring into force sections 2 (meaning of "Scottish Crown Estate", "asset" and "manager"), 22 (strategic management plan), 23 (review of strategic plan), 37 (power of Ministerial direction), 38 (Ministerial guidance), 40 (provision of information or advice to the Scottish Ministers) and 41 (research and other activities) of the Scottish Crown Estate Act 2019.

## New Statutory Instruments

For a full list of statutory instruments see <[www.legislation.gov.uk/uksi](http://www.legislation.gov.uk/uksi)>. (At 15/06/19)

- The Cyber-Attacks (Asset-Freezing) Regulations 2019 (2019 No. 956)  
In force 11/06/19  
These Regulations make provision relating to the enforcement of Council Regulation (EU) 2019/796 of 17th May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States (OJ L 129 I, 17.5.2019, p.1). The measures include the freezing of funds and economic resources of any persons and entities listed in Annex I to the Council Regulation and ensuring that funds and

economic resources are not made available to them or for their benefit.

- The Firearms (Amendment) Rules 2019 (2019 No. 963)  
In force 10/06/19  
These Rules make amendments to the Firearms Rules 1998 (S.I. 1998/1941).
- The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019 (2019 No. 964)  
In force 23/05/19  
This Order, made under the Scotland Act 1998 (c.46), provides for certain functions of the Secretary of State, so far as they are exercisable by that Minister in or as regards Scotland, to be exercisable concurrently by the Scottish Ministers.  
Article 2, made under s.30(3) of the 1998 Act, specifies that certain functions of the Secretary of State are to be regarded as exercisable in or as regards Scotland so that they are transferable under s.63 of the 1998 Act.  
These are the Secretary of State's power to make regulations under s.2(2) of the European Communities Act 1972 (c.68) as designated by the European Communities (Designation) Order 2008 (S.I. 2008/301). This designates the Secretary of State in respect of the environment to implement Directive 2014/52/EU (OJ L 124, 25.4.2014, p.1) of the European Parliament and of the Council of 16 April 2014 (as it amends Directive 2011/92/EU (OJ L 26, 18.1.2012, p.1)), on the assessment of the effects of certain public and private projects on the environment, as regards the construction etc. of generating stations consented under s.36 of the 1989 Act in respect of the Scottish part of the REZ. The "Scottish part" of the REZ was designated by the Renewable Energy Zone (Designation of Area) (Scottish Ministers) Order 2005 (S.I. 2005/3153).  
Article 3, made under s.63(1)(b) of the 1998 Act, confirms that the functions defined in article 2 are to be exercisable by the Scottish Ministers concurrently with the Secretary of State.  
Article 4, made under s.124(2) of the 1998 Act, provides for the general modification of enactments in connection with provision made by this Order.
- The Welfare Reform Act 2012 (Commencement No. 31 and Savings and Transitional Provisions (Amendment)) Order 2019 (2019 No. 935 (C. 25))  
In force 14/05/19  
This Order amends the Welfare Reform Act 2012 (Commencement No. 31 and Savings and Transitional Provisions and Commencement No. 21 and 23 and Transitional and Transitory Provisions (Amendment)) Order 2019 (S.I. 2019/37 (C. 1)). The amendments are technical in nature and provide for the availability of benefit where universal credit is or would be unavailable to a member of a mixed-age couple of state pension credit qualifying age.

# Family Law Update

Brian Dempsey\* continues the regular digest, last appearing 2019 SCOLAG 38

## Part 1: Significant or Illustrative Cases

Siblings; Right to respect for private and family life; Children's hearings

### *XY, Appellant*, [2019] CSIH 19, 27 March 2019

This case concerns the vexed question of how the Scottish Children's Hearings system and the courts should recognise the Article 8 European Convention on Human Rights right to respect for private and family life of siblings. Over the years there has been a slow but perceptible recognition of the Article 8 rights of children caught up in the Hearings system with respect to their siblings.

Here Lord Malcolm usefully summarises the current state of the law as found in the Inner House decisions of *ABC v Principal Reporter* 2018 SLT 1281 and *DM v Locality Reporter* 2018 SLT 1308. The court's comments under the heading of "Postscript" are of particular assistance in understanding the outcome of this case.

### Relevant legislation

Sections 79 and 81 of the Act 2011 provide in relative part –

s. 79 Referral of certain matters for pre-hearing determination

...

(2) The Principal Reporter

(a) must refer the matter of whether a particular individual should be deemed to be a relevant person in relation to the child for determination by three members of the Children's Panel selected by the National Convener (a "pre-hearing panel") if requested to do so by

(i) the individual in question,

(ii) the child, or

(iii) a relevant person in relation to the child,

...

s. 81 Determination of claim that person be deemed a relevant person

(1) This section applies where a matter mentioned in s. 79(2)(a) (a "relevant person claim") is referred to a meeting of a pre-hearing panel.

...

(3) The pre-hearing panel must deem the individual to be a relevant person if it considers that the individual has (or has recently had) a significant involvement in the upbringing of the child.

### Giving the judgment of the court, Lord Malcolm found -

[1] XY is an adult brother of three younger sisters who are the subject of compulsory supervision orders and are now in foster care. While he has contact with them, there have been ongoing issues in respect of its nature and extent. Along with the children's parents he is strongly in favour of family reunification.

[2] In August 2017 a pre-hearing children's panel declined an application that XY be deemed a "relevant person" in terms of s. 81(3) of the Children's Hearings (Scotland) Act 2011 (the 2011 Act). This decision was overturned on an appeal to the sheriff. One of XY's sisters appealed to the Sheriff Appeal Court, which restored

the original decision. In June 2018 a further application by XY to be granted relevant person status was refused by a pre-hearing panel. The sheriff heard an appeal against that decision. Arguments were presented based on the legislation's alleged incompatibility with Articles 6 and 8 of the European Convention on Human Rights (ECHR). Although those submissions were not before the Sheriff Appeal Court, the sheriff considered himself bound by its decision. As a result he simply refused the appeal.

[3] The sheriff has prepared a stated case setting out various questions for the opinion of the Court of Session. The case was sisted for a period pending the outcome of other appeals. The sist having been recalled, the court heard submissions on behalf of XY in support of the appeal, and on behalf of the Locality Reporter and, separately, the Lord Advocate in opposition.

[4] Senior counsel for the appellant indicated that she was asking the court to consider only questions 6 and 8 in the stated case. They are in the following terms:

"Q.6 Are the provisions of the 2011 Act with respect to who is treated as a 'relevant person' not within the competence of the Scottish Parliament and accordingly 'not law' in terms of s. 29(2)(d) of the Scotland Act 1998 on the ground that they are incompatible with Convention rights (this being a devolution issue in terms of s. 98 and sch. 6 to that Act)?

"Q. 8 Should the decision as to whether the applicant is to be treated as a relevant person be returned to the children's hearing for a fresh determination on the basis of an interpretation of the 2011 Act that is compatible with Articles 6 and 8 of the ECHR?"

[5] In a note of argument for the appellant it was stated that the appeal is based on a single proposition, namely that:

"The test of 'significant involvement in upbringing' adopted by the 2011 Act for involvement in procedure relating to children under that Act is too narrow to satisfy the procedural requirements of Article 8 and 6 of the ECHR."

It was explained that the complaint concerns what was described as a "structural defect" in the legislation. The restriction of deemed relevant person status to those who complied with the statutory test is too narrow. It is too restrictive in respect of other family members' Article 6 and 8 procedural rights given the potential for interference with their private and family life. Reference was made to various cases, including *W v UK* (1987) 10 EHRR 29, *McMichael v UK* (1995) 20 EHRR 205, *S v Miller* 2001 SC 977, *Knox v S* 2010 SC 531 and *Principal Reporter v K* 2011 SC (UKSC) 91.

[6] At the outset of her submissions counsel for the Lord Advocate helpfully focused the appellant's position along the following lines: a family non-parent member who possesses Article 8 rights in respect of a referred child, but who has not been significantly involved in his or her upbringing, cannot obtain the maximum level of participation in the children's hearings concerning

that child; this amounting to an incompatibility with their Article 8 rights, and therefore to a structural defect in the legislation. It was submitted that this proposition is not vouched by any authority; on the contrary the jurisprudence both domestically and in Strasbourg contradicts it. It wrongly assumes that all persons whose Article 8 rights might be interfered with are entitled to the same level of protection as parents and others who fall within the terms of the deemed relevant person status test. No separate issue arises under Article 6.

[7] We do not consider it necessary to rehearse the detailed submissions of the parties. The key issues raised in this appeal have been addressed and decided in two recent decisions of this court, namely *ABC v Principal Reporter* 2018 SLT 1281 and *DM v Locality Reporter* 2018 1308. While those opinions should be referred to for their full terms, the following summary may be sufficient to address and deal with the single proposition presented on behalf of the appellant:

(i) Where decisions are taken which affect the Article 8 rights of a relative other than a parent, generally this will not require the same level of involvement in the whole process as that of a parent. (*ABC* paragraph 13)

(ii) The intention of the UK Supreme Court in *Principal Reporter v K* was to extend relevant person status to unmarried fathers and a limited class of others who had a significant involvement in the upbringing of the child, much as subsequently enacted in s. 81(3). (*ABC* paragraph 17)

(iii) In respect of other family members, exactly what is required to comply with the procedural protections afforded by Article 8 will vary depending upon the particular circumstances; however the system is sufficiently flexible to allow their legitimate interests to be taken into account. (*ABC* paragraph 20, *DM* paragraphs 13 and 16)

[8] The decision in *ABC* was that neither the Convention nor case law required that the petitioner be afforded relevant person status or the opportunity to apply for such. There had been no violation of Article 8 rights. Senior counsel for the appellant sought to distinguish the present case from both *ABC* and *DM*, but presented no basis for doing so. Failing that, and while recognising that this court cannot revisit or overturn its earlier decisions, the submission was that they were wrongly decided, in essence because any remedies based upon discretion rather than formal right are illusory and theoretical.

[9] For the reasons explained in the opinions in *ABC* and *DM*, we are satisfied that there is no merit in the appeal. (For completeness we confirm that no separate issue arises under Article 6.) The two questions mentioned earlier will be answered in the negative and the appeal refused.

#### Postscript

[10] It is clear from the recent procedural history of the children's hearings in respect of the appellant's sisters that he is being given opportunities to have a say in decisions in which he has a legitimate interest. No doubt this explains why the submission in support of the appeal was made at a high level of abstraction and without reference to any specific grievances, or even the particular circumstances of the appellant. It was submitted that this rendered the proceedings hypothetical and incompetent, or at least misconceived.

The court sees force in this, but given that there is no merit in the primary proposition, it is not necessary to decide the point.

[11] The court was given an insight into the particular circumstances of the children and the workings of the children's hearing system in the course of a brief oral submission from their safeguarder. She is concerned as to their privacy rights if their brother is made a relevant person, which would give him full access to personal and confidential information concerning his sisters. She sees no need for multiple relevant persons all pursuing the same objectives. The parents of the referred children and the appellant are fully engaged as relevant persons and share his desire for family reunification, failing which adequate contact arrangements. The safeguarder is troubled by the number of people, including lawyers, attending the hearings. They are held frequently (there have been 18 hearings in the past 18 months), and are lengthy and disputatious. The children find them stressful and intimidating, and so sometimes leave or do not attend. It was stressed that their best interests should be paramount, however "the needs of the children are being lost in the system." The court shares all these concerns.

#### Comment

Almost twenty years ago, when *S v Miller* 2001 SC 977 was before the courts, there were some involved in Scotland's Children's Hearings system who claimed that making children's rights real would destroy all that was good about the system. The Children's Hearing system, they asserted, was not about anyone's rights but rather about the welfare of the child, determined in private by a panel of three well-meaning lay persons.

In *S v Miller* the child was before the panel as a result of an allegation that he has been involved in a very serious assault. The Inner House ruled that, albeit the child was not facing a criminal court, the denial of access to legal aid so that he might have his rights protected by a solicitor was, in the circumstances, a breach of his Article 6 right to a fair trial. *S v Miller*, and, indeed, the earlier case of *McMichael v UK* (1995) 20 EHRR 205 where it was determined that discrimination within the Children's Hearing system against unmarried fathers and their children was a breach of the parent's Article 8 rights, did not in fact cause the sky to fall.

The panel has extensive powers to regulate a child's life including, where necessary, determining where and how the child will live, which familial ties will be maintained and which broken and even the placing of the child in secure accommodation. Leaving such profoundly significant decisions in the hands of a lay panel may have been taken to be acceptable in the 1960s but no longer. Indeed, the Children's Hearings (Scotland) Act 2011 contained a number of provisions which recognised the need to respect children's rights within the system.

On the other hand, taking every disputed matter to court, or even simply having all parties legally represented within the Hearing system, may cause significant harm to individual children. The matters referred to within the judgment under the heading of "Postscript" reflect the concerns with taking an overly legalistic approach. Legal rights notwithstanding, the appellant has not been excluded from the Hearing process and has been "given opportunities to have a say in decisions in which he has a legitimate interest", albeit at the discretion of the panel or the reporter. In addition, the fact that the children's parents are also involved, and that the appellant seems not to

be raising different issues to those raised by the parents, should be noted. The safeguarder's concern about the number of different persons (especially those outwith the family) who are involved in the process, the number of hearings and the detrimental effect this has on the children's wellbeing and ability to engage with the process rightly troubles the court.

Children's rights to maintain contact with their families, including with their siblings, are to be protected by the European Convention on Human Rights (Art. 8) and the United Nations Convention on the Rights of the Child (primarily Art. 8 with arts 3 and 16). The European Convention on Human Rights has found that family life can exist between siblings (e.g. *Moustaquim v Belgium* (A/193) (1991) 13 E.H.R.R. 802 and *Mustafa and Armađan Akın v. Turkey* (4694/03) 6 April 2010 unreported), though a lesser degree of protection may be afforded to adults seeking to maintain their relationships with their siblings unless there is evidence of a particularly strong or significant bond (e.g. *Onur v United Kingdom* (27319/07) (2009) 49 E.H.R.R. 38 and *Khan v United Kingdom* (6222/10) (2012) 55 E.H.R.R. 30).

The Children and Young People's Commissioner for Scotland has stated clearly that the Children's Hearings system and the courts in Scotland are failing to respect children's ECHR and UNCRC rights to maintain contact with their siblings when they are removed from their families (see <[www.cypcs.org.uk/policy/sibling-contact](http://www.cypcs.org.uk/policy/sibling-contact)>). The United Nations General Assembly Guidelines for the Alternative Care of Children state that "...every effort should be made to enable siblings to maintain contact with each other, unless this is against their wishes or interests" (this and other relevant material can be found on the Clan Childlaw website at <[www.clanchildlaw.org/sibling-contact](http://www.clanchildlaw.org/sibling-contact)>).

The determination of when it will be right to emphasise the legal rights of the children and the families who find themselves before a panel over the discrete exercise of power supposedly in the child's best interests will remain a difficult, though not Solomonic task. I think we can say we have made some progress in the last quarter of a century.

## Part 2: Legislation

### Acts of the Scottish Parliament

None

### Acts of the UK Parliament

None

### Bills and proposed Bills in the Scottish Parliament

#### Age of Criminal Responsibility (Scotland) Bill, SP Bill 29

See 2018 SCOLAG 265 for details.

#### Children (Equal Protection from Assault) (Scotland) Bill, SP Bill 38

See 2018 SCOLAG 265 for details.

#### Children and Young People (Information Sharing) (Scotland) Bill, SP Bill 17

See 2018 SCOLAG 265 for details.

#### Female Genital Mutilation (Protection and Guidance) (Scotland) Bill

A Bill for an Act of the Scottish Parliament to provide for female genital mutilation protection orders and for guidance in relation to such orders and in relation to the prevention of female genital mutilation generally; and for connected purposes.

This Scottish Government Bill was introduced by the Cabinet Secretary for Social Security and Older People, Shirley-Anne Somerville MSP, on 29 May 2019.

#### Fuel Poverty (Target, Definition and Strategy) (Scotland) Bill, SP Bill 37

See 2018 SCOLAG 265 for details.

#### Human Tissue (Authorisation) (Scotland) Bill, SP Bill 32

See 2018 SCOLAG 265 for details.

#### Period Products (Free Provision) (Scotland) Bill

A Bill for an Act of the Scottish Parliament to secure the provision throughout Scotland of free period products.

This Member's Bill was introduced by Monica Lennon MSP on 23 April 2019. Lead Committee: Local Government and Communities Committee.

#### Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill, SP Bill 34

See 2018 SCOLAG 265 for details.

#### Proposed Fair Rents (Scotland) Bill

A proposal for a Bill to protect private sector tenants by introducing measures to limit rent increases and to increase the availability of information about rent levels.

This proposal for a Member's Bill was lodged by Pauline McNeill MSP on 14 May 2019.

#### Proposed Free Personal Care (Persons under 65) (Scotland) Bill

See 2018 SCOLAG 266 for details.

#### Proposed Mediation (Scotland) Bill

A proposal for a Bill to increase the use and consistency of

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mediation services for certain civil cases by establishing a new process of court-initiated mediation that includes an initial mandatory process involving a statutory duty mediator

This proposal for a Member's Bill was lodged by Margaret Mitchell MSP on 28 May 2019.

#### **Proposed Post-Mortem Examinations (Defence Time-Limit) (Scotland) Bill**

A proposal for a Bill to make the right of defence counsel for a person accused of homicide to instruct a post-mortem examination of the alleged victim subject to an extendable time-limit in order to minimise delays and uncertainty for victims' families.

This proposal for a Member's Bill was lodged by Gil Paterson MSP on 8 January 2019.

#### **Proposed Stalking Protection (Scotland) Bill**

A proposal for a Bill to increase protection for victims of stalking by giving police the power to apply for stalking protection orders on behalf of victims.

This proposal for a Member's Bill was lodged by Rona Mackay MSP on 26 April 2019.

#### **Bills before the UK Parliament affecting Scotland**

##### **Access to Welfare (Terminal Illness Definition) Bill (HC Bill 253)**

A Bill to amend the definition of terminal illness in the Welfare Reform Act 2012.

##### **Asylum Seekers (Permission to Work) Bill (HC Bill 313)**

A Bill to make provision for certain asylum seekers to be granted permission to work.

##### **Benefits and Public Services (Restriction) Bill (HC Bill 53)**

A Bill to make provision to restrict the entitlement of non-UK citizens to publicly-funded benefits and services.

##### **Civil Partnership Act 2004 (Amendment) (Sibling Couples) Bill (HL Bill 25)**

A Bill to amend the Civil Partnership Act 2004 to include sibling couples.

##### **Destitution Domestic Violence Concession (Eligibility) Bill (HC Bill 361)**

A Bill to require the Secretary of State to report on extending eligibility for the destitution domestic violence concession to European Economic Area nationals and persons other than those granted immigration entry clearance as a partner.

##### **Equality Act 2010 (Amendment) (Disabled Access) Bill (HL Bill 9)**

See 2018 SCOLAG 266 for details.

##### **Fetal Dopplers (Regulation) Bill (HC Bill 110)**

See 2018 SCOLAG 266 for details.

##### **Food Insecurity Bill (HC Bill 136)**

See 2018 SCOLAG 266 for details.

##### **Hereditary Titles (Female Succession) Bill (HC Bill 349)**

A Bill to make provision for the succession of female heirs to hereditary titles.

##### **Human Fertilisation and Embryology (Welfare of Women) Bill (HC Bill 189)**

A Bill to amend the Human Fertilisation and Embryology

Act 1990 to make provision about the welfare of women undergoing any medical, surgical or obstetric treatment services provided for the purpose of assisting such women to carry children.

##### **Immigration and Social Security Co-ordination (EU Withdrawal) Bill (HC Bill 309)**

See 2019 SCOLAG 41 for details.

##### **Immigration (Time Limit on Detention) Bill (HC Bill 302)**

A Bill to make provision for a maximum period of detention under the Immigration Act 1971 of 28 days ...

##### **Legalisation of Cannabis (Medicinal Purposes) Bill (HC Bill 108)**

See 2018 SCOLAG 266 for details.

##### **National Living Wage (Extension to Young People) Bill (HC Bill 26)**

A Bill to extend the National Living Wage to people aged 18 to 24.

##### **Parental Leave and Pay Arrangements (Publication) Bill (HC Bill 220)**

See 2018 SCOLAG 266 for details.

##### **Refugees (Family Reunion) Bill (HC Bill 246)**

See 2018 SCOLAG 266 for details.

##### **Registration of Marriage (No. 2) Bill (HC Bill 124)**

See 2018 SCOLAG 266 for details.

##### **Representation of the People (Young People's Enfranchisement) Bill (HC Bill 24)**

See 2019 SCOLAG 41 for details.

##### **Representation of the People (Young People's Enfranchisement and Education) Bill (HC Bill 15)**

See 2018 SCOLAG 266 for details.

##### **Shared Parental Leave and Pay (Extension) Bill (HC Bill 167)**

See 2018 SCOLAG 266 for details.

##### **Social Justice Commission Bill (HC Bill 213)**

See 2018 SCOLAG 266 for details.

##### **Unaccompanied Asylum-Seeking Children (Legal Advice and Appeals) Bill (HL Bill 53)**

See 2018 SCOLAG 266 for details.

##### **Universal Credit (Application, Advice and Assistance) Bill (HC Bill 132)**

See 2018 SCOLAG 266 for details.

##### **Unpaid Trial Work Periods (Prohibition) Bill (HC Bill 18)**

See 2018 SCOLAG 266 for details.

##### **Unpaid Work Experience (Prohibition) Bill (HC Bill 202)**

A Bill to make provision for the prohibition of unpaid work experience exceeding four weeks ...

##### **Voting Age (Reduction) Bill (HL Bill 35)**

See 2018 SCOLAG 266 for details.

### Part 3: Policy & analysis

#### Child abuse/protection

CYPCS, *Briefing for MSPs on equal protection of children* (May 2019)

SPICe, *Research Briefing: Children (Equal Protection From Assault) (Scotland) Bill* (February 2019)

Who Cares? Scotland, *Supplementary Evidence on Restraint for the Equalities and Human Rights Committee Inquiry on the Children (Equal Protection from Assault) (Scotland) Bill* (February 2019)

Who Cares? Scotland, *Response to Equalities and Human Rights Committee Call for Evidence for the Children (Equal Protection from Assault) (Scotland) Bill* (January 2019)

#### Children & young people

CYPCS, *Submission to UN Committee on the Rights of the Child: Children's rights in the digital environment* (May 2019)

Scottish Government, *Children and young people's voices matter: progress report* (February 2019)

Scottish Government, *Children's rights and wellbeing impact assessments: guidance* (March 2019)

Scottish Government, *Children's services planning: provision of statutory guidance – consultation* (March 2019)

Scottish Government, *Children's social work statistics 2017-2018* (March 2019)

Scottish Government, *Schools: personal and social education review* (January 2019)

Who Cares? Scotland, *Our Lives, Our Stories, Our Lives; A records access campaign* (March 2019)

#### Cohabitation

Law Society of Scotland, *Rights of Cohabitants* (March 2019)

#### Criminal justice

CYPCS, *Briefing for MSPs on international standard for the Minimum Age of Criminal Responsibility* (May 2019)

CYPCS, *Response to the Equalities and Human Rights Committee Call for Evidence: Age of Criminal Responsibility (Scotland) Bill* (January 2019)

CYPCS, *Submission to the Committee on the Rights of the Child: Draft revised General Comment No. 10 on children's rights in juvenile justice* (January 2019)

Scottish Parliament Justice Committee, *Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill* (January 2019)

#### Disabled persons

Scottish Government, *Additional support for learning: experiences of pupils and those that support them* (March 2019)

Scottish Government, *Adults with Incapacity (Scotland) Act 2000: principles* (March 2019)

Scottish Government, *Disability assistance in Scotland: consultation* (March 2019)

#### Domestic abuse

CYPCS, *Response to Scottish Government consultation: Protective orders for people at risk of domestic abuse* (March 2019)

#### Human rights

Norrie K McK, "Case Comment, *Lee v Ashers Baking Co Ltd*" 2019 *Juridical Review* 88

Scottish Government, *Gypsy/Travellers and the planning system: action plan* (March 2019)

Sutherland E E, "Scots child and family law: liberty, equality and protection revisited" 2019 *Juridical Review* 33

#### Marriage, civil partnership and divorce

Mair J, "Divorce law in Scotland: not entirely without fault: *LV v IV, X v Y* and *Douglas v Douglas*" 2019 *Edinburgh Law Review* 236

#### Miscellaneous

Families Outside, *Response to A Connected Scotland: Tackling social isolation and loneliness and building stronger social connections* (February 2019)

Scottish Government, *Scottish charity law: consultation* (January 2019)

Scottish Government, *Law of succession: consultation* (February 2019)

Scottish Parliament Health and Sport Committee, *Stage 1 Report on the Human Tissue (Authorisation) (Scotland) Bill* (February 2019)

#### Poverty/welfare

CAS, *Briefing: Social Security and In-Work Poverty Scottish Parliament debate* (April 2019)

CAS, *Briefing: The draft Scottish social security Charter Evidence to the Scottish Parliament Social Security Committee* (January 2019)

CAS, *Response to call for evidence on the Universal Credit Claimant Commitment* (April 2019)

CAS, *Response to consultation on Job Grant Scottish Government consultation* (April 2019)

CAS, *Response to consultation on local connection and intentionality (homelessness)* (April 2019)

CAS, *Submission to Social Security Support for Housing inquiry* (March 2019)

SPICe, *Research Briefing: Housing and Social Security* (February 2019)

SPICe, *Research Briefing: Transitions of Young People With Service and Care Needs Between Child and Adult Services In Scotland* (March 2019)

Scottish Government, *Continuing Care (Scotland) Amendment Order 2019: consultation analysis* (January 2019)

Scottish Government, *Draft guidance on funeral costs consultation: analysis of responses* (February 2019)

Scottish Government, *Funeral Expense Assistance regulations: our response to consultation* (January 2019)

Scottish Government, *Local connection and intentionality provisions in homelessness legislation: consultation* (January 2019)

Scottish Government, *Persistent poverty in Scotland: 2010-2017* (March 2019)

Scottish Government, *Poverty and income inequality in Scotland: 2015-2018* (March 2019)

Scottish Parliament Social Security Committee, *A report by the Social Security Committee on social security and in-work poverty* (February 2019)

Scottish Parliament Social Security Committee, *Social Security and In-Work Poverty* (February 2019)

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# Housing Law Update (Part 3)

Adrian Stalker\* concludes the first of this year's updates, parts 1 and 2 appearing at 2019 SCOLAG 82 and 108 respectively.

The following is part 3 of the Housing Law Update, which focusses on several English cases reported or decided between August 2018 and May 2019. Readers should approach English authorities with care due to the differences in the legislation and common law between the two jurisdictions. Full texts of the cases cited can usually be found on the web, in particular at <www.bailii.org>.

## Case Law

### English Cases

#### Intention in Eviction Proceedings

##### *S Franses Ltd v. Cavendish Hotel (London) Ltd* [2018] UKSC 62

This is a decision of the Supreme Court on a matter arising from an English commercial lease, which, in the author's view, has significance for the operation of part 1 of schedule 3 to the Private Housing (Tenancies) (Scotland) Act 2016. Schedule 3 of the 2016 Act sets out the grounds for possession of a Private Residential Tenancy. It is in four parts, the first of which contains seven grounds under the heading, "Let Property Required For Another Purpose" Grounds 1, 3, 4 and 6, which are all mandatory grounds, contain the requirement that the landlord "intends" to do something: sell the property (ground 1); refurbish it (ground 3); occupy it himself (ground 4) and use it for a non-residential purpose. Ground 5, which is a discretionary ground, contains a requirement that "a member of the landlord's family intends to occupy the let property". In all of these cases, the Tribunal is required to consider whether the landlord (or the family member) has the relevant intention. The concept of intention thus assumes considerable importance in the 2016 Act; more so than in the previous legislation. In the 1988 Act, only ground 6 (demolition, reconstruction or substantial works) requires the landlord to show that it "intends" something. None of the grounds for possession in the 1984 Act refer to intention.

*S Franses Ltd v Cavendish Hotel (London) Ltd* concerned the application of the statutory test in section 30(1)(f) of the Landlord and Tenant Act 1954, which relates the renewal of business tenancies in England and Wales. Under that Act, the tenant is entitled to a new tenancy at the end of the original tenancy, unless the landlord establishes one of seven grounds of opposition under section 30(1). One of those is section 30(1)(f): "that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding . . ." The courts have always applied a test to the landlord's "intention" in such cases. This originated in the speech of Lord Justice Asquith in *Cunliffe v Goodman* [1950] 2 KB 237. The test has two parts. The landlord has to prove: (i) that it has an intention which is both "genuine" and "firm and settled" to carry out qualifying works; and (ii) that it would be able to carry out those works.

The reason for the court insisting on an intention which is "genuine" and "firm and settled", was expressed with typical clarity in Lord Denning's judgment in *Fisher v Taylors Furnishing Stores Ltd* [1956] 2 QB 78:

For this purpose the court must be satisfied that the

intention to reconstruct is genuine and not colourable; that it is a firm and settled intention, not likely to be changed; that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession; that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at once and not after a time. Unless the court were to insist strictly on these requirements, tenants might be deprived of the protection which Parliament intended them to have. It must be remembered that if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention.

The second leg of the "intention" test (whether the landlord is able to carry out the work) is usually considered by reference to the legal and practical restraints upon the landlord, such as planning permission, requisite funding, etc.

The key elements of the statutory test in section 30(1)(f) are the same as statutory ground for repossession of residential property under the 1988 Act (ground 6) and the 2001 Act (ground 10). Thus, in the Scottish case *City of Edinburgh Council v Middlemiss* 2007 HousLR 70 and in the Court of Appeal's decision in *Wansbeck District Council v Marley* (1988) 20 HLR 247 the Court recognised the applicability of the approach in *Cunliffe v Goodman*, to actions for recovery possession of residential property, on the statutory ground that the landlord "intends" to carry out demolition or substantial works. Accordingly, it is reasonable to suggest, given the generality of the dicta in *Cunliffe* and *Fisher*, that the same approach to "intention", as being subject to the two-part test, will be applicable to grounds 1, 3, 4, 5 and 6 under the 2016 Act.

*S Franses Ltd v Cavendish Hotel (London) Ltd* concerns the first part of the "intention" test: whether the landlord has a genuine firm and settled intention to carry out the works. The tenant was a textile dealership which occupied the premises on the ground floor and basement of a property. The remainder of the building was occupied and managed by the landlord as a luxury hotel. In 2015, the tenant served statutory notices requesting the grant of a new tenancy. The landlord served counter-notices opposing the grant of a new tenancy under s.30(1)(f) on the basis that it intended to demolish or reconstruct the premises and could not reasonably do so without obtaining possession. The landlord accepted that the proposed works had no practical utility and had the sole purpose of obtaining vacant possession. It gave an undertaking to commence the works as soon as vacant possession was obtained. The judge at first instance found that the landlord genuinely intended to carry out the works and that the ground of opposition in section 30(1)(f) was made out. The issue was whether it was open to a landlord to oppose the grant of a new tenancy under section 30(1)(f) if the works which he "intended" to undertake had no purpose other than to obtain vacant possession and would not be undertaken if the tenant were to leave voluntarily.

On that matter, the Court reiterated and developed the previous case law, articulating the following principles:

- There has to be a genuine firm and settled intention on the part of the landlord to carry out the relevant work.
- It does not have to be the landlord's only intention, or even its primary intention, provided that it is a firm and settled intention.
- The landlords' motive for carrying out the works were irrelevant, save as material for testing whether such a firm and settled intention exists.
- Since the statutory test assumed that the landlords' intention was being obstructed by the tenant's occupation, that intention could not be conditional on the works being necessary to get the tenant out of the premises. Rather, the test had to be whether the landlord would intend to do the same works if the tenant left voluntarily.

Accordingly, the court found in favour of the tenant.

In this case, the landlord was candid in its position that the sole purpose of proposing the works was to obtain vacant possession. However, the Court recognised that in some cases, ascertaining the landlord's true position might be a matter of inference.

Let us say that the landlord of a PRT applies to the FTT for an eviction under section 51 of the 2016 Act, on ground 4. That requires the Tribunal to be satisfied that "the landlord intends to occupy the let property as the landlord's only or principal home for at least 3 months." In a case in which the Tribunal finds that the landlord is adopting this position for the purpose of obtaining vacant possession, and would not occupy the property were the tenant to leave, then on the basis of the decision in *Franses*, it could find that the ground was not made out.

### Lease or licence?

#### ***Camelot Guardian Management Limited v. Khoo* [2018] EWHC 2296 (QB)**

This case concerns the use of so-called "property guardian" arrangements, which is widespread in England. A company (such as Camelot in this case) provides a service to owners of temporarily vacant properties. They arrange for the properties to be occupied by a "guardian", being a person who lives in the property, and guards it against trespass, arson, squatters and so on. The guardians are not employees. They receive no payment. Instead, they are provided with accommodation (the vacant property) which they are allowed to occupy at a relatively low cost, under a licence granted to them by the company (rather than the owner of the property). Usually the licence can be granted by the company, because it has the owner's consent under an authorisation agreement, or similar. The guardians therefore have no direct contractual relationship with the owner of the property. The owner pays the company a management fee for the provision of its services.

In this case, the property was an office space not designed for residential accommodation. The owner of the property was Westminster City Council. In April 2015, the council entered into a contractual agreement with Camelot which granted a right of possession of the property to the company to secure it against trespassers and to protect it from damage. That agreement contained, among other provisions, a requirement that Camelot should arrange for suitable guardians to occupy the property under licences. In December 2015, Mr Khoo entered into a "licence agreement" with Camelot. Subsequently, on 11 September 2017, Camelot served a notice terminating its agreement with him, as at 11 October 2017. Mr Khoo argued

that the reality of his occupation indicated a tenancy, rather than a licence. He maintained that he had exclusive possession of one room and two storage rooms at the property and, as a result, his occupation of those spaces took effect as an assured shorthold tenancy. When shown around the property prior to signing the agreement, he was taken to specific rooms which he understood that he alone would occupy.

Finding in favour of Camelot, Mr Justice Butcher concluded that the agreement itself did not create a tenancy. It was clearly designed carefully to avoid doing so. In reading its terms in the context in which it was agreed, he considered both communications on Camelot's website and Mr Khoo's initial viewing of the property. Although the former used the word "let", the website provided an overview of property guardianship in some detail and underscored itself as an "alternative, and a more social one, to private rental". On the latter, the fact that Mr Khoo had been shown to specific rooms during his initial visit to the property, prior to signing the agreement, was not sufficient to indicate that he was to have exclusive possession of those spaces. Mr Justice Butcher also rejected the argument that the agreement was effectively a "sham device". After the agreement was entered into, although Mr Khoo did occupy particular spaces within the office block, there would be nothing to stop other guardians from deciding to sleep in a different room to the one originally indicated in discussions on first viewing. The fact that this did not happen was not enough to evidence that terms to this effect in the agreement were not available.

Commenting on this case in the *Journal of Housing Law* ("Khoo do you think you are? Licensees v tenants in the property guardianship sector" J.H.L. 2019, 22(2), 24-27), Dr Jed Meers suggests that the most interesting element of the judgment is the court's willingness to consider "property guardianship" as an alternative form of occupation. The thrust of the court's interpretation of the agreement is that the guardian here knew what they were letting themselves in for. Also, the court's consideration of the Camelot website demonstrates that the way in which the sector presents itself to potential guardians can be important in the later construction of the arrangement.

Property guardianship is not as common in Scotland, though it is certainly happening (see *The Herald* of 19 January 2016: "More Scots becoming property guardians to save on costs").

### Homelessness

#### ***R. (on the application AR) v. Hammersmith and Fulham LBC* [2018] EWHC 3453 (Admin)**

The claimant sought judicial review of the local authority's refusal to provide him with accommodation and support. He was a Lithuanian national who had come to the UK in 2011. He was twice hospitalised after serious assaults and became homeless. As a result of his injuries he had memory difficulties and shoulder and hand weakness rendering him unable to work. He suffered from pancreatitis and depression, and had attempted suicide. A charity provided him with accommodation over the winter. The local authority had concluded that he was not eligible for assistance under the homelessness legislation as he did not have a right to reside in the UK. An assessment under the Care Act 2014 concluded that he was not eligible for care and support because he did not meet the requirements of the relevant regulations.

The claimant argued, *inter alia*, that the local authority could provide him with assistance under sections 1 and 2 of the Localism Act 2011. This provides local authorities with a

“general power of competence”, such that it has “power to do anything that individuals generally may do... even though they are in nature, extent or otherwise—(a) unlike anything the authority may do...or (b) unlike anything that other public bodies may do”. In essence the point of this provision (which was originally enacted in the Local Government Act 2000) is that the local authority, although a creature of statute, is not limited to actions that are expressly or impliedly authorised by statute. Similar provision is made part 3 of the Local Government in Scotland Act 2003, section 20 of which confers on a local authority in Scotland the power to do anything which it considers is likely to promote or improve the well-being of its area and persons within that area, including the power to incur expenditure; give financial assistance to any person, enter into arrangements or agreements with any person; and provide staff, goods, materials, facilities, services or property to any person.

There has been previous authority to the effect that the local authorities might provide accommodation, or financial assistance to obtain accommodation, under the “general power of competence” (for example: *R. (on the application of) (Ghanaian Citizen) v Enfield LBC* [2002] EWHC 432; and *R. (on the application of GS) v Camden LBC* [2016] EWHC 1762; both decisions of the High Court). However, in *AR*, Judge Markus QC was not persuaded that the Localism Act could be used to assist the claimant. He observed that the homelessness legislation provides that a person is not eligible for assistance if he was a person from abroad who was ineligible. It was common ground that the claimant was not eligible for assistance unless he had a right to reside in the UK under the Immigration (European Economic Area) Regulations 2016. The

defendant had decided that the claimant was ineligible as he had no right to reside, and that decision had not been challenged by way of statutory review. Section 2(2)(a) of the 2011 Act prevented an authority from doing under section 1 “anything” which it was unable to do by virtue of a prohibition expressly imposed by a statutory provision. [In the Scottish legislation, section 22 of the 2003 Act provides that section 20 “does not enable a local authority to do anything which it is, by virtue of a limiting provision, unable to do.”] The “thing” which the claimant asked the authority to do was to secure accommodation for him. The eligibility provisions of the homelessness legislation prevented the local authority from providing that to him. There, the Localism Act could not assist the applicant.

This decision seems in conflict with *GS* in particular, and it may be that the extent of local authority’s power to the provide or fund accommodation under the 2011 Act will have to be the decided by the Court of Appeal.

### **Safi v. Sandwell BC [2018] EWCA Civ 2876**

This case concerned the issue of whether it was reasonable for a person seeking assistance under the homelessness legislation to continue to occupy her current accommodation, under section 175(3) of the Housing Act 1996 (“A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy.”) The equivalent Scottish provision is section 24(2A) of the Housing (Scotland) Act 1987.

The appellant, her husband and their two young children occupied a one-bedroom flat let on a secure tenancy by the local authority. The appellant had moved into the flat as a single person, but had then married and been joined by her husband. Following the birth of her first child in 2015, she

applied to the authority for new accommodation on the basis that the flat was overcrowded, damp and in disrepair. Pursuant to section 175(3) of the Act, she also claimed that she should be treated as homeless because it was no longer reasonable for her to occupy the flat. In December 2015, the local authority rejected her application, finding that the flat was suitable and the appellant was neither homeless nor threatened with homelessness. That decision was upheld by two review panels, whose decisions were communicated to the appellant in February and June 2016 respectively. The June 2016 decision notice noted that the appellant was pregnant with her second child and that the family was on the housing register. It concluded that, given their level of priority, they were likely to be rehoused within a reasonable time if they were more flexible about location, and that it was reasonable for them to continue to occupy the flat in the meantime. The county court upheld that conclusion. On appeal, Mrs Safi submitted that the local authority had not approached the question of reasonableness in correct manner, and in particular, had not asked itself whether it would be reasonable for her to occupy the flat after the birth of her second child.

Allowing the appeal, the Court of Appeal observed that although the June decision notice referred to the appellant’s pregnancy, it did not address the question of whether the birth of a second child would make it unreasonable to expect the family to continue to live in the flat. Essentially, the local authority relied on the appellant being able to find suitable accommodation through the usual operation of the housing list, given her priority status. Instead, it should have asked itself whether, taking account of the family’s circumstances and the impending birth of their second child, it was reasonable (looking to the foreseeable future as well as the present) for them to continue to live in the flat. If the answer was no, it should have asked how long it was reasonable to expect the family to stay there in the short term, and whether they would be able to obtain suitable accommodation within that time through the operation of the housing list. The decision notice did not indicate that the local authority had asked itself those questions.

### **Abbreviations**

#### *Case reports*

HLR	Housing Law Reports
Hous LR	Greens Housing Law Reports

#### *Neutral citation*

EWCA	Court of Appeal (England & Wales)
EWHC	High Court of Justice (England & Wales)
UKSC	United Kingdom Supreme Court

#### *Level of court (inserted after the case citation where not otherwise apparent)*

KB	decision of the King’s Bench Division of the High Court of Justice, England & Wales
QB	decision of the Queen’s Bench Division of the High Court of Justice, England & Wales
Ch	decision of the Chancery Division of the High Court of Justice, England & Wales

\* Adrian Stalker is an advocate with Westwater Advocates. He is a legal member of the Housing and Property Chamber of the First-tier Tribunal for Scotland, an expert in housing law he also practices in other fields of civil litigation. He is author of *Evictions in Scotland*, published by Avizandum (2007), and *Housing and Equality Law in Scotland*, published by Shelter Scotland (2018).

# Child Law Update

Lexy Plumtree\* continues our regular update of developments, last at 2019 SCOLAG 56.

This Update covers a range of legislative and policy information on a wide range of childcare and legal matters, listed under individual headings. Reference to publication is, unless otherwise stated, to publications or consultations on the Scottish Government site, <[www.gov.scot](http://www.gov.scot)>. Scottish Government consultations are listed as open and closed and are available at <<https://consult.gov.scot>>. There is also a general information website for "Access to public services in Scotland" at <[www.mygov.scot](http://www.mygov.scot)>. Acts, regulations, etc are available on the Legislation UK website <[www.legislation.gov.uk](http://www.legislation.gov.uk)>.

## Scottish Child Abuse Inquiry and related matters

Phase 4 is planned to start on 4 June 2019, with evidence relating to the investigations into residential childcare establishments run by male religious orders.

The Inquiry has published findings in relation to residential institutions run by the Sisters of Nazareth, its second case study. Lady Smith, Chair of the Scottish Child Abuse Inquiry, said: "The Nazareth Houses in Scotland were, for many children, places of fear, hostility and confusion, places where children were physically abused and emotionally degraded with impunity... Children in need of kind, warm, loving care and comfort did not find it. Children were deprived of compassion, dignity, care and comfort."

The findings are published on the Inquiry's web site <[www.childabuseinquiry.scot](http://www.childabuseinquiry.scot)>. The site has a range of materials, including research reports, literature reviews and transcripts of evidence.

The Child Migrant's Payment Scheme is a UK Government scheme and there is information about it on the Inquiry's News page, dated 5 April.

The Scottish Government's Advance Payment Scheme opened on 25 April 2019, and the Deputy First Minister made a statement to Parliament. Those eligible to apply to the scheme are people who were abused as a child in care in Scotland before December 2004 and either have a terminal illness or are aged 70 or over. There is an Advance Payment Group who can be contacted. In addition to links on the Inquiry website, detailed information and the application form are available at <[www.gov.scot/publications/financial-redress-for-survivors-of-child-abuse-in-care-advance-payment-scheme](http://www.gov.scot/publications/financial-redress-for-survivors-of-child-abuse-in-care-advance-payment-scheme)>.

## Ongoing Programmes and Reviews

### Child Protection Improvement Programme

This was launched in 2016 and its initial Report was published in March 2017. The CPIP Blog provides updates, the most recent of which were published on 13 and 20 December 2018. *Protecting Scotland's Children and Young People – National Policy* and *Protecting Scotland's Children: Child Abuse Prevention Activity* were published on 29 March 2018. Minutes from the October 2018 and January 2019 meetings of the National Child Protection Leadership Group were both published on 7 May 2019. For further information, go to <[www.gov.scot/policies/child-protection/child-protection-improvement-programme](http://www.gov.scot/policies/child-protection/child-protection-improvement-programme)>.

### Independent Care Review

This was launched by Scottish Government in February 2017. The Journey stage is due to be completed in December 2019. In the fourth and last stage – the Destination – the Care

Review will make final recommendations, aiming to conclude in spring 2020. For further up-to-date information, see the Review's website at <[www.carereview.scot](http://www.carereview.scot)>.

## General - Consultations

### UN Convention on the Rights of the Child

On 28 April, the First Minister announced plans to incorporate the UNCRC into Scots law by 2021. This was welcomed by Bruce Adamson, Children and Young People's Commissioner for Scotland (see <<http://bit.ly/cypcs-un>>). *Children's Rights: Consultation on incorporating the UNCRC into our domestic law in Scotland* was published on 22 May and is open until 14 August.

### Children's services planning

*Children's services planning: provision of statutory guidance – consultation* opened on 25 March and is open until 17 June. The relevant provisions are in This was published on 15 April and takes account of the implementation of the Cremation (Scotland) Regulations 2019, SSI 2019/36, which came into force on 4 April.

### Supporting disabled children, young people and their families: guidance.

This is general guidance intended to provide clear, accessible information for families about national policies, entitlements, rights and the different options for support available. It is intended to help improve the experiences of disabled children, young people, and their families. It was published on 24 April, along with *Supporting Disabled Children, Young People and their Families consultation - Consultation Analysis*, following the consultation in June 2018.

### Early learning & childcare

*Funding follows the child and the national standard for early learning and childcare providers: guidance for setting sustainable rates from August 2020* was published on 29 April and contains guidance to enable local authorities to set a sustainable rate for paying funded providers in the private and third sectors. There are two other related documents, about business sustainability and transition options

## General - Reports

### 2017-18 Children's Social Work Statistics for Scotland

Published on 26 March. These give the latest data on looked after children and young people, and those on the child protection register and in secure care.

### Care Inspectorate Report

*The joint strategic inspection of services for children and young people: Review of findings joint inspection services for children and young people 2012-17* was prepared by the Care Inspectorate and is "a comprehensive review of the effectiveness of the delivery of services by community planning partnerships (CPPs) in Scotland to meet the needs of children and young people, including those identified as most vulnerable". It is based on evidence gathered by the Inspectorate and other bodies between 2012 and 2017 and was published on 22 January 2019. It is available at <[www.careinspectorate.com/index.php/publications-statistics/28-inspection-reports-local-authority/inspection-reports-joint-inspections-of-children-s-services](http://www.careinspectorate.com/index.php/publications-statistics/28-inspection-reports-local-authority/inspection-reports-joint-inspections-of-children-s-services)>.

## Equalities Outcomes and Mainstreaming Report

This SCRA report covers the two years from April 2017 and looks at what SCRA “have been doing to mainstream equality, diversity and inclusion across SCRA and all of our services”. It was published on 28 March and is available at <[www.scra.gov.uk/2019/03/equalities-outcomes-and-mainstreaming-report](http://www.scra.gov.uk/2019/03/equalities-outcomes-and-mainstreaming-report)>.

## Healthy relationships and consent: key messages for young people

This is designed for professionals to help them support young people in their understanding of healthy relationships and consent. It was published on 17 May.

## Named Person

*Correspondence between Professor Ian Welsh OBE, Chair of the Getting it Right for Every Child (GIRFEC) Practice Development Panel, and Clare Adamson MSP, Convener* deals with the Panel’s work, looking at implementation of the Named Person provisions in the Children and Young People (Scotland) Act 2014 and was published on 1 March. For further information on the Panel, see <[www.gov.scot/groups/girfec-practice-development-panel](http://www.gov.scot/groups/girfec-practice-development-panel)>.

## Self-directed Support Implementation Study 2018

Reports 1 to 4 were published on 11 April 2019. These are: 1, a change map and narrative; 2, a literature review and other data; 3, findings from case studies; and 4, a summary of the research in the other reports.

## Progressing Children’s Rights in Scotland – An Action Plan 2018-21

This was consulted on between 2 July and 26 September and updated feedback on progress was published on 16 April 2019, available at <<https://consult.gov.scot/children-and-families/childrens-rights>>

## SCRA’s Corporate Parenting Plan 2019-20

This was published on 18 April and available at <[www.scra.gov.uk/2019/04/corporate-parenting-plan-2019-20](http://www.scra.gov.uk/2019/04/corporate-parenting-plan-2019-20)>.

## Education

### Education - Guidance

#### *Devolved School Management: draft guidelines*

These are for local authorities, about Devolved School Management Schemes, how they fund schools and the accountability and responsibility for financial decisions. They were published on 5 April.

#### **Guidance on the presumption to provide education in a mainstream setting**

This was published on 26 March.

#### *LGBT inclusive education: guidance to education authorities*

Published on 10 May, this takes the form of a joint letter issued on 8 May from the Scottish Government and COSLA. On 8 November 2018, Scottish Ministers accepted in full the 33 recommendations of the LGBTI Inclusive Education Working Group. These cover the professional learning of teachers, practice and guidance, school inspections and anti-bullying and full implementation is planned by March 2021.

#### **Pupil Equity Funding: National Operational Guidance, 2019**

Guidance to help schools plan how they will most effectively spend their Pupil Equity Funding (PEF) allocation, published on 22 February.

## Education - Reports

### Additional Support

*Additional support for learning: experiences of pupils and those that support them* – these are findings from qualitative research and were published on 26 March.

*Details of the implementation of additional support for learning in 2017-2018*, published on 26 March.

*Strategy for the learning provision for children and young people with complex additional support needs 2017-2026: full consultation analysis and a summary analysis*, published on 9 April. This consultation ran from 5 June to 28 August 2017

### Bills

Further information about individual Bills and Committees is available on the Scottish Parliament’s website at <[www.parliament.scot](http://www.parliament.scot)> under Parliamentary Business/Bills or Committees, and follow the links.

### Age of Criminal Responsibility (Scotland) Bill

This Government Bill was introduced on 13 March 2018. The Bill **passed Stage 3 on 7 May and awaits Royal Assent**. Among many other provisions, it raises the age of criminal responsibility from 8 to 12, s.1; and it also contains provisions about disclosures. Section 78 requires a future review of the Bill’s provisions and specifically the age of criminal responsibility, within three years of implementation of s.1. Further information is available on the Current Bills page (and on the Previous Bills page after Royal Assent); and on the Equalities and Human Rights Committee’s page. There is also information on the Scottish Government website at: <[www.gov.scot/policies/youth-justice/raising-age-criminal-responsibility](http://www.gov.scot/policies/youth-justice/raising-age-criminal-responsibility)>.

### Children (Equal Protection from Assault) (Scotland) Bill

This Member’s Bill was introduced by John Finnie on 6 September 2018. It is designed to abolish the defence of reasonable chastisement of children. There was a substantial consultation on the proposed Bill in 2017 and information on this is available at <[www.parliament.scot/parliamentarybusiness/Bills/104602.aspx](http://www.parliament.scot/parliamentarybusiness/Bills/104602.aspx)>. The Equalities and Human Rights Committee is the Lead Committee and it issued a call for written views, to be received by 25 January 2019. Over 400 submissions have been made and are accessible on the Committee’s page for the Bill, at <[www.parliament.scot/parliamentarybusiness/CurrentCommittees/110066.aspx](http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/110066.aspx)>.

On the same page, there is a SPICe summary of the submissions. The Committee also took oral evidence, from 28 February to 28 March. The Stage 1 debate is set down for 28 May. Further information is available on the Current Bills page and on the Committee’s page. A blog on the implications of the Bill was published on the CELCIS website on 31 October, <<https://www.celcis.org>>.

### Children and Young People (Information Sharing) (Scotland) Bill

This Bill was introduced on 19 June 2017 and is intended to amend the named person provisions in the 2014 Act, in relation to information sharing provisions, following on the Supreme Court decision in 2016. It remains at Stage 1. For further information, go to <[www.parliament.scot/parliamentarybusiness/Bills/105191.aspx](http://www.parliament.scot/parliamentarybusiness/Bills/105191.aspx)>.

### Human Tissue (Authorisation) (Scotland) Bill

This Government Bill was introduced on 8 June 2018 and deals with the authorisation of removal and the use of body parts of dead persons. Some of the provisions will affect children

and their rights. The Lead Committee is Health and Sport and its Stage 1 Report was published on 1 February, supporting the Bill's general principles. The Bill passed Stage 1 on 26 February and Stage 2 on 7 May. Further information, including submissions, is available on the Current Bills page and at <[www.parliament.scot/parliamentarybusiness/CurrentCommittees/108998.aspx](http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/108998.aspx)>.

#### Management of Offenders (Scotland) Bill

This Government Bill was introduced on 22 February 2018 and the Lead Committee is the Justice Committee. The Bill covers three areas, including changes to the provisions about disclosure of convictions, Part 2 and Schedule 2. The Stage 1 report was published on 31 January, recommending that the Bill's general principles be approved. The Bill completed Stage 1 on 7 February and Stage 2 on 30 April. For further information, including the submissions to the Justice Committee, go to Current Bills and <[www.parliament.scot/parliamentarybusiness/CurrentCommittees/justice-committee.aspx](http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/justice-committee.aspx)>.

#### Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill

This Government Bill was introduced on 12 June 2018 and the Lead Committee is Justice. It sets out a range of measures in criminal cases, for taking evidence from children and other vulnerable witnesses, allowing commissioners to take evidence, and other matters. The Stage 1 Report was published on 24 January and recommended approval of the Bill's general principles. Stage 1 was completed on 7 February, Stage 2 on 12 March and Stage 3 on 9 May. Royal Assent is awaited. For further information including submissions, go to Current Bills (and Previous Bills after Royal Assent) and the Justice Committee's page.

#### Legislation

##### Act of Sederunt (Rules of the Court of Session 1994 and Child Care and Maintenance Rules 1997 Amendment) (Parental Orders) 2019

SSI 2019/147, in force on 24 May

This amends the relevant Court of Session and sheriff court rules about applications for parental orders under the Human Fertilisation and Embryology Act 2008, following the enactment of s.54A of the by the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, S.I. 2018/1413. Section 54A extends to single applicants the right to apply for parental orders, previously available only to couples. Paragraph 2(2) to (6) inserts into Chapter 97 of the RCS references to the relevant provisions of s.54A. Paragraph 2(7) makes consequential amendments to Forms 97.3, 97.10 and 97.12. Paragraph 3 makes similar amendments to the CCMR.

##### Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Views of the Child) 2019

SSI 123/2019, coming into force on 24 June.

This amends and supplements existing court rules about intimation to children and seeking their views in family actions when orders are sought under s.11 of the Children (Scotland) Act 1995.

##### Continuing Care (Scotland) Amendment Order 2019

SSI 2019/91

This was laid in draft on 25 January, passed on 12 March and came into force on 1 April. Section 67 of the Children and Young People (Scotland) Act 2014 introduced the Continuing Care system by inserting s.26A into the Children (Scotland) Act

1995. When initially implemented on 1 April 2015, it only applied to care leavers who were aged sixteen were eligible. The age of eligibility has been extended every year and the 2019 Order raises it to 21.

##### Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019

SSI 2019/104

These were laid as draft regulations on 25 January and have been prepared in exercise of the powers conferred by paras 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018. The purpose is to address failures of retained EU law to operate effectively and other deficiencies in retained EU law (in particular to address reciprocal arrangements which no longer exist and are no longer appropriate) arising from the withdrawal of the UK from the European Union. They come into force on exit day.

#### Recent Cases

These are available on <[www.scotcourts.gov.uk/search-judgments](http://www.scotcourts.gov.uk/search-judgments)>. POA is a permanence order with authority for adoption and SAC is the Sheriff Appeal Court.

##### *H&H v. H&M*, [2019] SAC (Civ) 7, 27<sup>th</sup> February 2019.

This was an appeal against an adoption order by the child's birth parents. The adoptive parents were the child's maternal grandparents. The appeal was refused.

##### *Glasgow City Council, Petitioners v. N&F*, [2019] CSOH 25, 14<sup>th</sup> March 2019

This judgement was given jointly in two applications for permanence orders for brothers, aged 11 and 9½. The court granted the orders for both boys, with ancillary provisions, and revoked the compulsory supervision orders.

##### *XY, Appellant*, [2019] CSIH 19, 27<sup>th</sup> March 2019.

This was an appeal in a children's hearing case by an older sibling, XY, of children who are subject to compulsory supervision orders and are in foster care. XY was refused 'relevant person' status by a hearing in August 2017. He appealed to the sheriff, who overturned the refusal. One of the Children appealed to the Sheriff Appeal Court, which restored the original refusal. In June 2018, XY was again refused 'relevant person' status, at a pre-hearing panel. He appealed to the sheriff, who refused the appeal. XY then appealed to the Inner House. The appeal was refused. As a postscript, the judgement indicated that the court had heard a brief oral submission from the children's safeguarder, about her concerns in relation to the effects on the children of extensive legal proceedings and other matters. The court shared all her concerns.

##### *F&F, Petitioners*, [2019] CSOH 27, 23<sup>rd</sup> April 2019.

This was an adoption application for the child W, aged 5. Both birth parents opposed the petition but after proof, the court dispensed with their consent and granted the adoption order.

##### *AB & CD v. LM*, [2019] SAC (Civ) 19, 25<sup>th</sup> April 2019.

This was one of three appeals heard together, against adoption orders relating to siblings. The birth mother had opposed the adoptions. She then appealed on the basis that the sheriff erred in not granting orders for indirect contact. The appeals were refused. There are some comments about post-adoption contact, direct and indirect.

\*Lexy Plumtree is an experienced legal consultant, who writes and teaches in child law and adoption.

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### SPLG Annual Conference

17<sup>th</sup> June, Edinburgh  
At this 11<sup>th</sup> Annual Conference, the Scottish Public Law Group will hear a keynote speech from a senior member of the judiciary and other insightful and topical contributions from a range of speakers. See <[www.splg.co.uk](http://www.splg.co.uk)>.  
Contact enquiries@splg.co.uk.  
0141 354 1274 or seminars@lsa.org.uk.

### Power of Attorney Masterclass

27<sup>th</sup> June, Glasgow  
This LSA morning seminar (2 hrs CPD) will give delegates a detailed operational knowledge of power of attorney. Delegates will also have the opportunity to talk with expert Sandra McDonald about their case specific issues and challenges.  
Contact Susan Bell on 0141 354 1274 or seminars@lsa.org.uk.

### Domestic Abuse

3<sup>rd</sup> July, Glasgow  
This LSA seminar (3 hrs CPD) will consider the Domestic Abuse (Scotland) Act 2018 and the changes to the law. It will look at challenges in the interpretation and implementation of the Act and its impact.  
Contact Susan Bell on 0141 354 1274 or seminars@lsa.org.uk.

### Ruth Adler Lecture 2019

8<sup>th</sup> July, Edinburgh  
The Ruth Adler Memorial Lecture 2019, "We Need to Talk About an Injustice" will be delivered by Bryan Stevenson, Founder and executive director of the Equal Justice Initiative, and a clinical professor at New York University School of Law, 2019 recipient of the Honorary Degree of Doctor of Laws, University of Edinburgh.  
The event is free, but registration is required: <<http://bit.ly/Adler-19>>.

### Legal Research

10<sup>th</sup> July, Aberdeen  
This year, the theme of the Legal Research Society Annual Conference is "Rethinking the Law".  
Contact the Legal Research Society: lrs@abdn.ac.uk

### Sheriff Court Practice (II)

19<sup>th</sup> July, Glasgow  
This LSA full day advocacy masterclass

will look at developing the full range of court skills required for an effective Sheriff Court practice. The morning session will focus on making advocacy submissions before courts, tribunals and even in presentations. There will be time set aside for participants to try their skills under the supervision of the instructor. In the afternoon the emphasis will turn to structuring submissions.  
Contact Susan Bell on 0141 354 1274 or seminars@lsa.org.uk.

### Power of Attorney Masterclass

24<sup>th</sup> July, Edinburgh  
This LSA morning seminar (2 hrs CPD) will give delegates a detailed operational knowledge of power of attorney. Delegates will also have the opportunity to talk with expert Sandra McDonald about their case specific issues and challenges.  
Contact Susan Bell on 0141 354 1274 or seminars@lsa.org.uk.

### Charity Trustees' Duties

8<sup>th</sup> August, Glasgow  
This LSA morning seminar (3 hrs CPD) will focus on the legal duties and responsibilities placed upon trustees in Scotland under the Charities and Trustee Investment (Scotland) Act 2005; where and how failures in trustee duties can occur; and the investigation and enforcement powers of OSCR.  
Contact Susan Bell on 0141 354 1274 or seminars@lsa.org.uk.

### Sheriff Court Practice (III)

16<sup>th</sup> August, Glasgow  
This LSA day advocacy masterclass (5 hrs CPD) will look at developing the full range of court skills required for an effective Sheriff Court practice in questioning witnesses. The morning session will focus on examination in chief, cross examination and re-examination of factual witnesses. In the afternoon the emphasis will turn to structuring questioning of expert or skilled witnesses.  
Contact Susan Bell on 0141 354 1274 or seminars@lsa.org.uk.

### ADR in Family Law

20<sup>th</sup> August, Glasgow  
This LSA morning seminar (3 hrs CPD)

will cover three of the alternative dispute resolution methods used in family law: collaboration; arbitration; and mediation.  
Contact Susan Bell on 0141 354 1274 or seminars@lsa.org.uk.

### Data Protection Compliance

22<sup>nd</sup> August, Glasgow  
This Law Society of Scotland half-day course will consider what is actually meant by 'accountability' and will include a detailed consideration of what should form an 'accountability portfolio' and the activities necessary to demonstrate compliance.  
Contact 0131 476 8201 or email - cpd@lawscot.org.uk.

### Appeals to the Upper Tribunal

27<sup>th</sup> August, Glasgow  
This CPAG Scotland experienced level course is essential for anyone who wants to challenge decisions of the First-tier Tribunal (Social Entitlement Chamber) effectively. The main aim of the course is to give you an understanding of what is an error of law and practice in finding errors of law in the First-tier Tribunal statement of reasons.  
Contact 0141 552 3303 or email pchalmers@cpagscotland.org.uk.

### Power of Attorney Masterclass

30<sup>th</sup> August, Dundee  
This LSA morning seminar (2 hrs CPD) will give delegates a detailed operational knowledge of power of attorney. Delegates will also have the opportunity to talk with expert Sandra McDonald about their case specific issues and challenges.  
Contact Susan Bell on 0141 354 1274 or seminars@lsa.org.uk.

### Immigration Appels

4<sup>th</sup> September, Glasgow  
This LSA morning seminar (3hrs CPD) presented by Joe Bryce, Advocate, offers *A Practical Guide to preparing for a case in the Upper Tribunal (Immigration and Asylum Chamber)*. It will cover common case law and common mistakes/pitfalls in identifying an error in law in a First tier Tribunal Determination and how best to prepare for a case in the Upper Tribunal.  
Contact Susan Bell on 0141 354 1274 or seminars@lsa.org.uk.

### Scottish Social Security

10<sup>th</sup> September, Glasgow  
This CPAG Scotland course focuses on the first Scottish benefits - carer's allowance supplement, best start grant, and funeral expense assistance. Aimed at advisers with a working knowledge of the benefits system, it explains how the new system is different from the familiar DWP approach.  
Contact 0141 552 3303 or email pchalmers@cpagscotland.org.uk.

### SCCJR Annual Conference

3<sup>rd</sup> October, Stirling  
The Scottish Centre for Crime and Justice Research's annual conference and lecture will be held at the University of Stirling. The key speaker will be Professor Edward Kleemans from Vrije Universiteit Amsterdam with a presentation (provisionally) on *Criminal Careers and Transitions in Organised Crime and Cybercrime*. See <[www.sccjr.ac.uk](http://www.sccjr.ac.uk)>.  
Contact Scottish Centre for Crime and Justice Research, School of Social and Political Sciences, University of Glasgow, Ivy Lodge, 63 Gibson Street, Glasgow, G12 8LR; or email - enquires@sccjr.ac.uk.

### Law Society of Scotland Annual Conference

25<sup>th</sup> October, Edinburgh  
You can find the most up-to-date information, and make a booking at - <[www.lawscot.org.uk/annualconference](http://www.lawscot.org.uk/annualconference)>.

### SASO Annual Conference

1<sup>st</sup> & 2<sup>nd</sup> November, Glasgow  
The 50<sup>th</sup> annual conference of the Scottish Association for the Study of Offending will be chaired by Lord Carloway, Lord Justice General. This year's theme is *Reducing Violence: Radical Ideas*. For further details see <[www.sastudyoffending.org.uk](http://www.sastudyoffending.org.uk)>.  
Contact SASO Administrator, PO Box 7225, Pitlochry, PH16 9AH; 01796 473556; or email - info@sastudyoffending.org.uk.

Please send details by email  
to: [diary@scolag.org](mailto:diary@scolag.org)

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