Justice Matters

ESSAYS ON IMPROVING SCOTLAND'S JUSTICE SYSTEM
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The Scottish Conservatives are a party of responsibility. We believe that people must take responsibility for the decisions they make and bear the consequences if they break the law. Freedom cannot exist without responsibility and respect for the rule of law.

But if people are to respect the rule of law, then they deserve a justice system that itself earns their respect, and which upholds that rule properly and fairly.

A functioning system must be properly resourced, and give all people full access to justice. An independent judiciary should be at its heart. It should be robust no matter who is the government of the day.

It must understand the reasons why people drift into lives of crime and tackle them. Those reasons range from unstable living conditions, economic disadvantage, peer pressure, to poor parental supervision. All these are deep rooted problems with no easy solutions.

And a functioning justice system must also recognise that, no matter a person’s circumstances, everyone has the capacity to make individual choices - to choose to commit crime, or to choose not to.

Understanding the social circumstances that draw people into a life of crime must never be to excuse for crime, or to relieve those responsible for crime of the consequences of their actions.

This short pamphlet of essays provides insight from lawyers, academics, politicians and other experts on how we improve that justice system.

Lord McCluskey, the former Solicitor General, writes about the dangers of ending corroboration in Scots law, a cause close to the Conservatives’ heart. His warning that “the rush to legislate does not solve all problems” is one many should heed.

Others write about the need for more mediation, on the need to support children whose parents are caught up in a life of crime, and on how simply encouraging people to say sorry might help heal the damage caused to society by criminal acts.

Margaret Mitchell, the Scottish Conservative justice spokeswoman, meanwhile, writes persuasively about the crisis facing the Crown Office and the Procurator Fiscal Service, and how the advent of a majority SNP Government at Holyrood has prevented the kind of checks and balances that lead to good governance and better decisions taken on law.

Aside from Margaret’s contribution - and as with our book last year on education - all the other contributors come from outwith the Conservative party and they do not speak for the Conservative party. Some, indeed, will no doubt be opposed to Conservative policies and viewpoints.
ensure that the debate on various parts of the justice system is progressed.

Our own views are clear. On law and order, Scottish Conservatives will continue to fight hard for a justice system that, in our view, often seems to provide offenders with more rights than victims.

It says everything about the SNP’s wrong-headed priorities that they have made time to scrap short-term custodial sentences, but refused to find time to finally end the continuing scandal of automatic early release from prison.

We therefore support an end for automatic early release from prison and for honesty in sentencing.

We are calling for community sentences to be rigorously enforced, for them to include a meaningful work element, and for firm penalties – including custodial sentences – to be imposed if they are breached.

And we are calling for further improvements in prison policy, to help close the revolving door of re-offending; teaching offenders the skills and self-disciplines needed to get and hold down a job, to provide for their families and contribute positively to their communities.

These are straightforward, no-nonsense, Conservative policies that reflect the concerns of mainstream Scotland. Our aim is to cut crime and antisocial behaviour, make our communities safer and improve the quality of life of ordinary Scots.

Those are the Scottish Conservative priorities.
**MAKING BETTER USE OF MEDIATION TO RESOLVE DISPUTES AND MANAGE DIFFICULT ISSUES**

*John Sturrock QC, Chief Executive and Senior Mediator, Core Solutions Group*

**What do we mean by mediation?**

Mediation encourages parties who have – or who anticipate having – differences, conflict or a dispute to sit down and talk, with a view to finding a mutually acceptable way forward. It is usually most appropriate when, for a number of reasons, people are unable to negotiate effectively for themselves or have reached some sort of impasse or deadlock. It recognises that direct negotiations can be difficult in many situations. It can also be effective to prevent awkward situations escalating.

A mediator is a skilled independent facilitator who works impartially with all concerned. Discussions take place in a confidential setting, the purpose of which is to help the parties to find a constructive solution that meets their real interests and needs. It enables people to engage in effective negotiations and to seek to understand, narrow and, wherever possible, resolve the differences or dispute between them.

The mediator does not impose a solution - the parties themselves decide the outcome, the terms of any agreement between them and how to take matters forward. Nothing which is said or done is binding on anyone unless and until they agree that it should be, at which point the agreement is usually recorded in writing.

Mediation is sometimes viewed as a “soft” approach. This is to misunderstand it and its purpose. Discussions in mediation ought always to be respectful and dignified. However, they can also be – and often are - rigorous and challenging, as difficult issues are wrestled with and faced up to with the help of the skilled mediator.

**When can mediation be used?**

Mediation can be used at any time, whether or not court or other formal proceedings are in progress. Often, mediation is used in circumstances where litigation is not even in prospect and where no lawyers are involved. Similarly, it is increasingly used in many countries to help parties in a court case to avoid the further cost, time and risk of court proceedings. It can also be used to help people in many settings to finalise contracts, create joint ventures and build better professional, business and personal relationships.

In many countries, mediation is seen primarily as an alternative to court (Alternative Dispute Resolution, or “ADR”). In some jurisdictions this has been very successful. However, this can also place limits on mediation’s scope. It can tend to become legalistic and formal. The beauty of mediation, however, is its infinite flexibility and informality as a means to help people in diverse situations to explore the real underlying issues and look creatively at options for the future, without being limited by legal concepts and indeed by notions of rights and entitlement.

(“ADR” is a term which should be avoided: it is restrictive and ambiguous. It is sometimes taken to refer to mediation, on other occasions to include arbitration, conciliation and a range of other processes. In any event, this expression creates uncertainty by being suggestive of “alternative to” something of prior importance rather than referring to one of a range of equally valid means to help resolve disputes in appropriate ways. As an example, in a number of US states, mediation is simply described as one of a variety of means of dispute resolution. People choose how they want to resolve their dispute without a presumption in favour of any one process.)

**Rights and interests**

In a rights-based world, where people are encouraged to take and support opposing positions, mediation focuses instead on real interests and needs. The classic adversarial and binary approach of courts and what we call positional negotiation (right/wrong, black/white, win/lose) is replaced by the recognition that there are usually several sides to most stories, depending on perspective, experience, assumptions, motivations, hopes, fears,
aspirations and objectives. Modern behavioural psychology, with the extraordinary advances in our understanding of the workings of the brain and neuro-science, supports this more sophisticated approach as a recognition of the non-binary and complex nature of many disputes and indeed of most personal, professional and business relationships.

Where is mediation used?
Mediation is used whenever and wherever negotiation has failed or is in need of assistance. These are just some examples from Scotland:

- **Agriculture and farming** (eg landlord and tenant matters, rights of access, use of land)
- **Banking, insolvency and financial services** (eg disputes between customers and banks over lending or other complaints, debt recovery)
- **Construction and engineering** (from major infrastructure projects like the Edinburgh trams to individual house-building and extension works)
- **Contracts** (all manner of commercial and other dealings)
- **Employment and Workplace** (individual disputes between employee and employer, team and other group dysfunction, conflict between managers, difficult union/management negotiations)
- **Family** (from disputes over access to children to the allocation of property on separation or divorce to family business arrangements)
- **Government, local authorities** (legislative errors, waste management schemes, flood control, planning, environment, provision of services, local community issues)
- **Health services** (allegations of medical negligence, complaints about care, consultant/consultant conflict, management/workforce relations)
- **Higher education** (student complaints, research projects, staff/management matters, funding)
- **Homelessness** (mediation services exist in a number of areas to help prevent homelessness)
- **Housing** (a home owner housing panel resolving disputes between homeowners and factors, application of the NHBC scheme)
- **Insurance** (compensation claims of all sorts, allegations of professional negligence against all manner of professionals)
- **Intellectual Property** (patents, copyright, licensing etc)
- **Landlord and tenant** (disputes over leases, rent, dilapidations)
- **Neighbourhood and Community** (multiple occupancy, nuisance, boundaries, noise, use of open space, conflicting views on use of limited resources)
- **Schools** (the use of peer mediation is a real success in a number of locations in Scotland, Assisted Special Needs Mediation helps resolve concerns and differences parents may have with schools and education authorities over the education of their children)
- **SMEs** (supply chain contracts, shareholder conflict, management tensions)

Others include: the Not for Profit sector, Management and Boardroom, Oil and Gas, Sport, Personal Injury compensation claims.

Benefits of Mediation
Classically, the benefits of mediation are said to be:

Communication: most conflict is the result of inadequate or ineffective communication. “Why didn’t we have this conversation a year ago” is a phrase we hear more than any other. Mediation enables people to have conversations, to address difficult issues and to work through differences of view in a carefully structured way guided by a skilled third party. Crucially, in many situations (neighbours, business partners, contractors, families, in the work place) this can help to restore, enhance and rebuild relationships.

Confidentiality: the ability to discuss privately the
real issues and not to be bound by anything said or done unless and until an agreement is reached.

Control: the parties retain control over the outcome rather than handing it over to lawyers or a judge or other third party adjudicator. Lawyers are often involved in mediation as advisers, advocates and confidantes but one of its defining features is party autonomy.

Closure: for many people, ending a dispute is as important as the outcome. Thus being able to bring a matter to a sensible conclusion without the time, stress, possible publicity, management cost, opportunity cost, reputational risk and loss of morale entailed in long, drawn out conflict is a real advantage. The vast majority of matters dealt with by mediation are resolved quickly and effectively.

Certainty: allied to closure and control is the knowledge of an agreed outcome and avoidance of the risk and uncertainty inherent in handing over dispute resolution to third parties. Being a consensual process, mediation has a remarkably high success and implementation rate.

Creativity: traditional problem-solving tends, because of its adversarial nature, to be binary. Courts are generally limited to money remedies and, on rare occasions to specific remedies such as interdict. There is, understandably, no scope for constructive approaches to dispute resolution. This promotes a culture where money/compensation/claims are the only way in which needs can be addressed. However, research and experience tells us that most people want other and different things: for example, the contracted-for work to be completed, a service to be improved, an apology or acknowledgement of error or mistake to be made (regardless of legal liability), a return to work, recognition of pain suffered, reassurance that steps will be taken to prevent a recurrence, an explanation of what happened/went wrong, a renewed personal or business relationship. All of these can be discussed at mediation.

Cost-saving: while there are different formats for mediation (given its flexibility), broadly, mediation takes a day (or perhaps two) to help parties to reach a conclusion. From first inquiry through to agreement, only a few weeks is generally required. Overall, this should be much less expensive than other procedures, especially court or tribunal. From the perspective of individual cases, this enables resolution without (often hugely) disproportionate expenditure; from the overall perspective of public sector spending, this can bring significant savings in the overall justice budget.

The Courts
Most of these benefits arise, both in individual instances and more generally for society, regardless of steps taken to improve the delivery of court and other formal services. While the court (and arbitration) are important for some cases where a definitive decision by a third party is desirable, in most matters this is not what people want. Indeed, while millions of pounds and people-hours are devoted to the civil justice system, only a very small percentage of cases in the system (5%?) are actually decided by judges. The goal should be to take out of the system as early as possible (or remove altogether) all those cases which consume time, resource and money and yet are ultimately settled by agreement, very often after great expense has been incurred not only by public funds but by litigants, business, funders, insurers and others.

Thus, it would make financial sense to devote more resources to prevention of unnecessary litigation at an early stage in order to reduce the disproportionate expenditure at the expensive stage. Investment in early stage resolution, including encouraging more skilled approaches to negotiation and mediation, could save millions of pounds. In many countries and in many states in the US for example, the civil justice system leads the way in innovative measures to reduce the use of courts. This also frees up courts to handle quickly and effectively those matters which can only be decided by judges (and/or juries).

It is important to emphasise, however, that the benefits of mediation are far wider than merely saving public expenditure and that mediation is not just a way of reducing the cost of courts.
Economic Performance and Productivity

By finding creative ways to address disputes early and effectively (or even to prevent them from occurring or escalating at all), mediation offers a corresponding potential opportunity to enhance business performance, improve productivity, and reduce opportunity and remedial costs. These benefits apply in both the public and private sectors and could have a significant impact on business and overall economic performance and on the level and efficiency of public expenditure.

Research shows that the costs of conflict are high - it has been estimated that it costs UK business over £30bn a year, takes up 20% of leadership time and results in the loss of 370 million working days. The nature of the costs are not only financial, but can include: lost opportunities, distraction from profitable work, poorer service, damaged relationships and reputations, demotivation of staff, increased uncertainty and overall loss of confidence. These costs can have a hugely detrimental impact on business performance and company valuation.

Conflict inevitably represents a significant loss of productivity, which is the main driver of economic development. Even if we accept that conflict is inevitable, the more that can be done to manage it effectively and nip it in the bud, the greater will be the improvement in individual company and other economic results and in the performance of the economy as a whole. Mediation offers such a means.

Mediation in Scotland

it is rather difficult to quantify numerically. It is however still very much a minority pursuit. Family mediation has been established for nearly 30 years. Relationships Scotland supports a network of 22 locally based family mediation services, but family mediation is probably still rather intermittent. A number of initiatives and legislative proposals have brought mediation to some community, housing and other activities. These still tend to be rather sporadic. In Glasgow, Edinburgh and Airdrie Sheriff Court, projects exist supporting mediation in small claims and summary cause cases. These are supported by volunteers and often on a shoestring budget. Despite this, mediations are taking place that are resolving disputes in a very high percentage of cases. Most local authorities have mediation services although the scope and scale of these services is under pressure in the current financial climate. An initiative to introduce mediation in planning has not proceeded despite a pilot scheme in 2010 which demonstrated potential for many savings and gains.

As noted above, mediation also occurs in a broad range of commercial disputes and in workplace, employment and public sector matters. Many major matters have been resolved in this way in recent years. Generally, this is a matter of choice and dependent on individual (usually legal) advisers and (occasionally) clients suggesting it. To that extent a more flexible and creative approach has been taken to mediation in Scotland which has seen it develop in a less legalistic way than in England, for example.

However, and perhaps rather sadly, the use of mediation in Scotland has not grown as it has in other countries. In England and the Republic of Ireland for example, much greater emphasis is placed on encouraging mediation through the courts. The same is true in countless jurisdictions around the world, in less developed as well as developed nations. In many places, legislation has been introduced to place mediation on a statutory footing. In Scotland, it has been observed that the courts in particular have, generally, been reluctant to recommend or encourage the use of mediation.

Possible rules of court on the use of mediation were drafted in about 2004 but no progress was made pending the review of the civil courts. It is perhaps fair to say that the review was only lukewarm about mediation as a central part of dispute resolution architecture in Scotland. There has been a misconception that encouraging mediation is in some way contrary to the European Convention on Human Rights and the right to a fair trial. As many senior English judges have said, that is not so. If mediation is unsuccessful, parties can still pursue their cases in court. Nobody can be compelled to reach agreement in mediation.
against their will.

The opportunity to place mediation on a sounder footing as part of the radical reforms of civil justice has not yet been taken in Scotland. In England, courts regularly take into account refusal to mediate as a factor in assessing allocation of costs in a litigation. The recent Jackson reforms of the English cost regime, following the Woolf reforms nearly two decades ago, are informed by the need to help parties to resolve cases early and with proportionate cost. The same has not occurred in Scotland. Thus, from a business point of view, Scotland is a less attractive forum for many litigants than other jurisdictions. English-based lawyers and clients frequently express astonishment at what they view as the outdated approach in Scotland.

Professional training in mediation occurs regularly and there are many more trained mediators than have work in mediation. Many of these use their mediation skills in other contexts such as management, HR, consulting and strategic work. They are an untapped resource. Many lawyers are trained in and use mediation skills, often to great effect, in Scotland. Many other lawyers are resistant to its use. Research shows that this is not just about fear of loss of revenue but that many complex psychological reasons are at play, including over-optimism, undue reliance on past experience or intuition, the fallacy of sunk costs, reluctance to change and risk aversion. A recent conference in London revealed that, apparently, the principal impediment to greater use of mediation in many jurisdictions is the reluctance of legal advisers.

Legal professional obligations could be changed to place greater emphasis on the need to advise about mediation. The Law Society of Scotland has shown understanding of this. Scottish lawyers have a great opportunity to change this trend.

It might also be said that in legal and other education, our universities appear to be slower, at undergraduate level (there are some fine masters’ courses), than many others elsewhere to build negotiation and mediation into the curriculum as central features. Arguably, the same can be said of schools. These are life skills which will help us all to cope with conflict and difficult situations in the future.

**Steps to promote greater use of mediation in Scotland**

- A Scotland-wide strategy to encourage greater use of mediation and related skills
- A structured education strategy to introduce mediation to young people, society and business
- Investment by government and others in early stage resolution of disputes and conflict
- Greater encouragement of mediation in courts via rules of court, judicial training, cost sanctions, legal aid provisions, professional obligations and education of professionals
- Re-allocation of civil justice spending to resource facilities to encourage people to find early resolution to disputes, for example a trained Dispute Resolution Officer in each sheriff court.
- Greater utilisation of mediation by government and public sector bodies to address potential and actual disputes and other difficult issues arising in procurement, contracts, provision of services and supply chains
- Emphasis in the Scottish Government Digital Justice Strategy on provision of full information about all the dispute resolution choices and the potential to support online mediation
- Inclusion of mediation in legislation as the primary dispute resolution mechanism for most disputes and other controversial or contentious issues
- Specific collaborative initiatives with stakeholders to include mediation in the health sector, major construction projects, land reform, education, community activity, planning proposals and provision of local services.

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Introduction
The Crown Office and Procurator Fiscal Service (COPFS), is the bulwark of the justice system in Scotland. It follows therefore that if this service is compromised in any way then this has potentially far reaching consequences.

So it is no insignificant matter that this service is today facing huge challenges which are in danger of threatening its ability to function as an efficient independent prosecution service.

In assessing why this should be the case it is important to stress at the outset that prosecutors deserve recognition for the difficult, pressured work they do on a day to day basis.

Changes to the Justice System
During the last decade there have been significant legislative and cultural changes to the Scottish criminal justice system. This has resulted in a shifting of priorities for police, prosecutors and the courts. Perhaps the most notable changes are in terms of the increase in the reporting of both sexual crime and domestic abuse respectively.

The 2009 Sexual Offences (Scotland) Act saw a radical overhaul of sexual offence law. Offences such as a rape were expanded to reflect modern understandings of what constitutes rape.

Specific Structural Changes to the COPFS
This necessitated a shifting of priorities and the introduction of a structure which established specialist units within the COPFS. For example, the National Sexual Crimes Unit for Scotland was established in May 2009 with senior prosecutors specialising in the investigation and prosecution of sexual crimes.

While internal restructuring has reflected these different priorities and Scottish Government initiatives (such as the decision to employ 1,000 additional police officers) there has been absolutely no corresponding increase in the resourcing of the COPFS in order to deal with the additional corresponding work generated by these officers.

Within the legal profession there has always been an appreciation that working for the COPFS is a pressured, demanding and challenging occupation carried out with limited resources. However, it is only recently that the full extent of the burden facing prosecution staff has come light in the context of the Justice Committee’s scrutiny of the Scottish Government’s Draft Budget 2015/16.

Furthermore this hugely concerning information has only been revealed as a result of the evidence provided by the Procurators Fiscal Society (PFS) which is a branch of the FDA trade union. (Originally the Association of First Division Civil Servants, it became known as the First Division Association and adopted the name FDA in 2001.) The Society represents senior managers and professionals within the Crown Office and Procurator Fiscal Service.

Workload
During its evidence to the Scottish Parliament’s Justice Committee the PFS, in a detailed and candid presentation, reported on the increased workload staff are having to cope with and the subsequent effect that this is having on them and on cases.

The Society’s written submission to the Committee pointed out that merely looking at the number of reported cases received does not give an accurate picture of the workload. For example, an additional determining factor has been an increase in the number of serious, complex cases which are more demanding and resource intensive.

The facts speak for themselves. The number of cases received which are to be prosecuted on ‘petition’ i.e. cases which proceed before a jury increased 10.3% between 2012/13 and 2013/14. Subsequently these cases have increased by a further 8% between 2013/14 and 2014/15.

In addition to these startling figures, the number of ‘pre petition cases’ has also increased. These are cases which may possibly be prosecuted on
petition but before a decision regarding prosecution can be made, further investigative work is required by the COPFS to determine the viability of proceeding, including the sufficiency and credibility of evidence.

In the main, these pre-petition cases relate to sexual offences. There were 590 pre-petition cases of this type reported in 2012/3, 747 cases in 2013/4 (a rise of 26.6%) and for the first 6 months of 2014/15 289 cases.

Furthermore, at the Justice Committee evidence session on 18th November 2014, Crown Agent Catherine Dyer stated that since the early 1990s the percentage of sexual offence cases in the High Court has increased from fewer than 25% to approximately 70% today.

**Effect of Police Scotland Priorities**

Another factor to be taken into consideration is that since the advent of Police Scotland in April 2013 there has also been an increased focus on domestic abuse cases within the Scottish justice system.

An average domestic abuse call out for the police takes 6 hours of police time. The creation of a Domestic Abuse Task Force (DATF) was therefore intended to reduce the number of police hours spent on these types of cases as well as helping to raise the profile of domestic abuse cases in Scotland in order to discourage both repeat offenders and any possible lingering public perception that domestic abuse is acceptable.

Here again however, as with sexual offence cases, domestic abuse cases have created increased work for the COPFS due to the complexity of often having multiple complainers whose allegations span several years. This has involved prosecutors having to travel to different geographical locations, in an effort to affect best practice by speaking directly to these complainers.

Not surprisingly then the PFS submission notes that:

“an average straightforward High Court case takes a senior legal member of staff just over one day to carry out all the checks which require to be made to serve an indictment in the case. A DATF case however takes on average 3.5 days to carry out the same process.”

Against this background while the Scottish Government made a commitment to employ 1000 additional police officers it has presided over the COPFS which has been subject to a real terms cut in its staffing budget for 2015/16 and an overall 12% reduction in permanent staffing levels over the last 5 years.

**Experience/Qualifications of Staff**

Worst still rather than seeking to properly resource the service to cope with these additional and challenging demands instead there has been an increase in the number of staff on fixed term contracts. Self-evidently this can only have a detrimental effect in the long-term.

Again the PFS submission explicitly set out why this is the case when it stated:

“The summary courts are staffed by newer, less experienced staff (a high proportion of whom are on fixed term contracts) and their units are under such pressure in terms of staffing, that they have very little or no preparation time within office hours and the preparation cannot always be properly done in the time outside office hour.”

The practice of retaining junior lawyers on fixed term contracts and not re-employing COPFS legal trainees when they have completed their traineeship is likely to have unforeseen consequences in the long run. Meantime in the short term it most certainly affects staff morale. It follows therefore that if Scotland is to ensure it retains and recruits the quality of prosecutor that the Scottish legal system requires, and that the general public deserves, then this situation must be addressed urgently.

**Lack of Resilience Due to Staffing Pressures/Resources**

And the problems facing the Service do not stop there. The Society has also raised a worrying concern about the lack of resilience within the COPFS workforce at this time:

“Our information from members is that they are

2 http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/DB10_FDA_Union.pdf
routinely required to undertake overtime – both in relation to our initial case processing (ICP), sheriff and jury case preparation and high court case preparation. Whilst we would not suggest for a moment that our managers should not be going in to court or undertaking case preparation duties, our information is that they are now doing this routinely to cover for gaps in their staff complement, which places an additional burden on them in terms of finding time to undertake their management responsibilities.”

To some extent, unpaid overtime is an accepted part of the role of being a prosecutor. However, the FDA reports that this practice has become the norm rather than the exception:

“I would also point out that our manager grades are not currently eligible for routine overtime payments and reliance is made upon their goodwill in carrying out unpaid overtime."

Anecdotal evidence further suggests that there is little to no flexibility should members of staff become ill or even desire to take annual leave: “It is further reported to me that some of our solemn legal managers have had to cancel annual leave themselves and of their team simply to ensure work is carried out to meet the statutory time-bar.”

**Inability of Staff to Speak Out**

Not surprising then that when the PFS together with the PCS Union undertook a stress audit last year with all staff in the COPFS, the result revealed “almost 81% of legal staff respondents said that they had serious concerns about preparation time, workload and staffing levels.

An annual staff survey conducted in 2013 found that 16% of the 1,032 staff surveyed (165 employees) claimed to have been bullied or to have suffered harassment at some time in the past year, while 14% (145) said they had been discriminated against in some way.

Only 30% said they could recommend COPFS as a good place to work, 3% fewer than the previous year and 17% below the civil service average. A total of 20% wanted to leave as soon as possible, or within the next year.  

Significantly a staggering 79%, four out of five, said they could not speak out about problems without fear of reprisals.

**Difference in Evidence Between PFS and Crown Agents**

Given the above information the discrepancies between the evidence given by the unions and the evidence given by the Crown Agent, during the most recent evidence session before the Justice Committee, was both marked and concerning.

According to PFS: “Our position is that current performance demands of the organisation are incompatible and unsustainable against the background of the workload that we are dealing with at present, and not at some possible point in the future when it is hoped that reporting of certain types of crime may have fallen.”

Crown Agent Catherine Dyer, on the other hand, when presented with an opportunity by the Justice Committee to affirm whether additional resources would be beneficial, incredibly stated that not only was the COPFS sufficiently resourced but to seek to increase this resource would make her uncomfortable asking for money for work that wasn’t there.

“I would not expect you to think that I should ask for things when I do not have work to carry out with them.”

**‘Churn’ Due to Pressure on Courts**

Meanwhile the greatest and yet often unseen effect of these cumulative pressures on the COPFS is on the amount of ‘churn’ within the court system. This is the term used when cases don’t reach conclusion within a timeframe set by internal targets and are instead continued.

For example, a complaint is served on an accused who is given a date to come to court. The accused pleads not guilty and a date is set for the Intermediate Diet, which is usually two weeks before the trial diet. However, due to lack

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3 http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/DB10a_FDA_Union.pdf
4 http://www.journalonline.co.uk/News/1012145.aspx
5 http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9645#VIA2tqKGG_s
of time or preparation by the Fiscal, come the Intermediate Diet the prosecution aren’t ready and a new trial diet is set for six months in the future.

This is compounded by the fact that trials set for late in the day often get adjourned. It has been reported that some trials are finally being heard 18 months to 2 years from when the complaint was initially served, by which time neither the witnesses nor the accused can remember the details of what occurred.

This is evidenced by the FDA's submission that: “Cases which have been identified as requiring additional preparation are not always getting that additional time afforded to them. The consequence of this is that problems either with evidence, procedure or witness availability are not picked up as quickly as they could or should be and this in turn leads to delays in cases concluding as the trials have to be delayed and new court dates set (‘churn’).”

In May 2014 it was revealed that in Hamilton sheriff court cases were being delayed by nine months from first calling to trial due to the closure of Motherwell JP court. One solicitor spoke out saying “The court deals with too many cases and the fiscal doesn’t have time to speak to defence agents or work out a plea that would avoid the need for a trial further down the line.”

More worrying still this situation is potentially going to be exacerbated by the as yet unreformed sheriff court system when the transfer of civil cases from the Court of Session to sheriff courts under the Courts Reform (Scotland) Act comes into effect.

**Abandoned Cases**

The consequences of above resourcing concerns have also started to emerge in the media. In Dundee Sheriff Court, three cases collapsed in the space of a week in September 2014 due to errors made by the police and prosecution.

Sheriff Alastair Brown criticised the procurator fiscal’s office for failing to secure the evidence needed to back up charges to a benefit fraud case worth £5000. The case had been on-going for two years.

**The Requirement for Corroboration**

Nor is there likely to be any light at the end of the tunnel for the reality of the situation is that the future workload of prosecutors in Scotland is only going to increase in the short term. Should the requirement for corroboration be abolished next year by the Scottish Government, the number of pre petition and petition cases will dramatically increase as more victims come forward in the knowledge that their case has a greater chance of meeting evidential requirements and therefore of being prosecuted.

The now widely acknowledged ‘Saville effect’ has come into play regarding child abuse cases. This together with the increase in other sexual offence cases and the recent 12% increase in reporting of both rape and sexual offences indicates that this is already an upward trajectory (Scottish Government crime statistics November 2014).

**Inspectorate of Prosecution**

All of which presents a pretty dismal picture and one which prompts legitimate questions about how this situation has been allowed to develop. The Lord Advocate is head of the COFPS and responsible for ensuring and maintaining access to justice for every individual court user. Who then provides the necessary independent scrutiny of the operation Prosecution Service.

Step forward the virtually invisible Inspectorate of Prosecution whose remit it is to oversee the work of the COPFS. This Inspectorate was established as a non-statutory body in 2003. Since the Criminal Proceedings etc (Reform) (Scotland) Act 2007 came into effect it has been operating on a statutory basis.

But Her Majesty’s Chief Inspector of Prosecution in Scotland is appointed by the Lord Advocate. At the same time it is tasked with making “recommendations that will result in clear and measurable improvements in the Crown Office and Procurator Fiscal Service (COPFS) service delivery, making COPFS more accountable and enhancing public confidence.”
The principal functions of the IPS are set out as being:

- To inspect or arrange for the inspection of the operation of COPFS
- To report to the Lord Advocate on any matter connected with the operation of COPFS

The Inspectorate has organised its work programme around a series of thematic reports. Whilst this may be useful in identifying areas within the COPFS that could be reformed, it clearly does not, and has not, delivered an adequate holistic assessment of the dire situation facing Fiscals.

In fact there is a deeply concerning absence of any Inspectorate report, statement or submission regarding the resourcing issues facing the COPFS.

**The Way Forward**

“We do not accept the premise that additional funds for COPFS would be wasteful to the public purse, and nor do we accept that there is not work which needs to be carried out.”

“Our view is that the current situation is unacceptable for our members and for the public. Looking at the predicted trajectory for the future it is unsustainable without change. The FDA view is that the service does indeed require the additional resources suggested by the members of the committee.”

This is a warning which must be heeded. The stark truth is that if resources are not forthcoming then eventually political decisions will be required regarding which cases take priority for prosecution and realistic expectations will require to be set for the increased length of time taken from charge to disposal.

In the meantime it is essential that a body tasked with inspecting the operation of the COPFS fulfils its remit. At present the Inspectorate’s work seeks to identify recommendations for improvement by issuing snapshot thematic reports. Quite simply, by failing to adopt a holistic approach, these reports represent nothing more than an attempt to tinker at the edges when the pressures which the COPFS staff are facing, on a day to day basis in Scotland’s courts, indicates a system close to breaking point.

**Review**

In addition to ensuring the COPFS is adequately resourced consideration should be given to the introduction of evening and Saturday courts staffed by experienced prosecutors who have either just retired or taken a career break to for instance, start a family.

A review by a current or former Senator of the College of Justice would therefore be an important first step in ensuring that the Scottish prosecution system is fit for purpose.

**Conclusion**

Following Lord Carloway’s, Lord Gill’s, Sheriff Principal Taylor’s and Lord Bonomy’s reviews it would be not only nonsensical but totally counter-productive to continue overhauling fundamental cornerstones of Scots criminal law, as well as civil justice in Scotland, in an effort to make it more efficient, whilst at the same time ignoring the plight of the COPFS currently creaking at the seams.

What is not in doubt is that, with an unfettered SNP government presiding over a majority in the Parliament and in all the Parliamentary committees and with the advent of a single police force, there is a worrying absence of checks and balances and meaningful scrutiny of key decisions involving the rule of law in Scotland.

Alarmingly it has become the norm for the heads of key organisations when giving evidence to the Scottish parliamentary committees, to ignore rank and file opinion and to instead meekly support the majority government’s policy decisions.

The compromising of Scotland’s independent Prosecution Service is the latest and perhaps the most serious example of this unhealthy state of affairs.

Margaret Mitchell MSP
For centuries, Scots criminal law has had a rule to the effect that, in a criminal trial, corroboration is necessary for proving essential facts. The rule – a basic rule in the Law of Evidence – does not apply to all the facts that the prosecution seeks to prove: it applies only to the essential facts. So, for example, certain sexual activities are criminal if an adult engages in them with a person under the age of 16, but not if the alleged victim is over that age: so the age of the victim is an essential fact. Accordingly, in order to prove that the crime has been committed, the prosecution has to establish her age. The usual method would be to ask the victim her age and corroborate her reply with the evidence of a parent or a birth certificate. Sometimes there are statutory exceptions providing that – unless there is a formal challenge - certain facts alleged by the prosecutor, such as age or capacity, are established without formal proof. There are even crimes or offences in respect of which legislation has abolished the need for corroboration in whole or in part. The requirement for corroboration by evidence, even for essential facts, is thus not invariably set in stone.

The recent dispute about the value and effects of the rule relates largely to sexual assault cases, from domestic abuse to rape. The understandable concern about the effects of the rule in such cases rests on the obvious fact that many such crimes are committed in circumstances when there are no independent eyewitnesses. However, the recent legislation promoted by the Scottish Government went the length of abolishing the need for corroboration in all criminal cases. This was a fundamental and far-reaching change, opposed by the overwhelming weight of expert legal opinion, but supported by official Police bodies, the prosecution services and some women’s organisations that believe that justice is being denied to some victims of sexual crimes.

The number and variety of human situations in which crimes are committed are countless. And the Scottish courts have, over centuries, looked at innumerable real life cases before deciding how the requirement for corroboration bites in the unique circumstances of each case brought to court. The bald requirement of incriminating evidence from an independent source has been pared down to an absolute minimum – as I am sure that Lord Bonomy’s current study will demonstrate. However, the court still looks for some extra piece of evidence that points towards guilt; and it must be found evidence from a source that is independent of the victim. How is “independent” to be understood in this context? The answer depends inevitably on a pragmatic judgment fashioned to the circumstances of the case.

To illustrate how far the courts have gone, I describe briefly a very common type of rape case – one in which the sex is admitted but the issue is consent or no consent. The corroborative evidence is usually found in the evidence of someone who sees the alleged victim soon after the event and describes seeing signs of injury to her person or clothing, or even simply signs of distress. Of course, the distress itself is not “independent”; but if the independent witness observes what he judges to be genuine distress on the part of the victim then the jury can treat that as more consistent with the absence of consent than with consent: it is corroborative.
Think about it: if the alleged victim shows no signs of injury to person or clothing, or of distress, the consent issue becomes a simple issue of his word versus hers. Is that evidence that should be regarded as amounting to proof beyond reasonable doubt? Remember that the accused can face years in prison. For over a century, proof of the use or threat of violence was an essential ingredient in rape cases: the removal of the need to prove such violence made it possible for the issue in dispute to be simply one of consent or no consent. If, however, the fact essential in dispute is whether or not there was sexual penetration the victim’s evidence can normally be corroborated by forensic evidence.

It is easy to multiply examples that show the value of corroboration or the dangers of dispensing with it. But it is important to realize that quite apart from what happens in court - as long as corroboration is going to be necessary in court, the police know that they have to carry out a careful search for evidence, forensic or otherwise, that independently sheds light on the truth. If the prosecution were able to come to court with one witness and say, “That’s enough”, the temptation to the police and prosecutors at the investigation stage is to cut corners, saving expense and trouble, but risk leaving undiscovered vital evidence of the truth. An accused’s legal advisers have no means whatsoever to carry out any meaningful investigation immediately after the alleged assault. The police have all the resources: abolishing corroboration would tempt them to do a less than thorough job. Recent scandals demonstrate how the police have often made a slovenly job of investigating sexual crime.

Lord Bonomy’s remit does not enable him to consider the basic question: “Should corroboration be abolished?”. The former Justice Secretary stated unequivocally that that had been finally decided. But everybody knows that many MSPs had real doubts about abolishing corroboration when the bill was before Parliament; but in the run-up to the Independence Referendum no member of the SNP was allowed to step out of line. So some of them bit their lips and voted for a change they did not support. Even then, it attracted the smallest of majorities. This is no way to effect a fundamental change in a rule that has been considered, revised and modified over many, many years in real life cases by impartial judges trying to hold the balance between the competing risks of injustice. The possibilities of false but superficially plausible evidence being adduced and accepted in court are real. If the impartial, carefully considered judgment of the Judiciary is to be discarded by a political vote on party lines in the feverish run-up to a constitutional referendum, then the proudest traditions of Scots Law are in serious peril.

The criminal law of Scotland as developed over the years since 1707 is unique in many respects, including the definition of some crimes and also the procedural and evidential requirements for the proof of crime. It was rare after the Treaty of Union for Parliament to legislate on these matters. The creation (in 1926/7) of a real right of appeal in High Court jury trials, following the Oscar Slater case, was a rare example. It was well justified; and no judge would suggest that such a reform should not have been introduced. The Judiciary is not infallible: nor are juries; but – as with the Oscar Slater saga – the introduction of fundamental change should be done by consensus and with great respect for principles and processes that have stood the test of time.

Indeed, in any mature democracy based on common law principles, fundamental change in well-established criminal, including due process law, should be based on a carefully discussed consensus. To make such changes by politically whipping legislation through an inexpert legislature against the advice of the Judiciary and the lawyers practising daily in the criminal courts is extremely dangerous.

Scotland’s traditional willingness to leave it to the courts to develop the criminal law by applying the principles to real life cases, and to legislate only when there was a consensus for change, was in stark contrast to what happened in England where the legislature was active in “reforming” the law. Of course, the Westminster parliament always had many lawyer members in both Houses. Legislative intrusion into the administration and definition of criminal law and procedure became very much greater when, following the example of President Nixon in the USA, politicians decided that there was party political mileage in legislating criminal law
reform under the populist banner of Law and Order. Scotland followed suit a little later; and since 1999 the Scottish Parliament has produced a tsunami of legislation that has massively increased the cost and complexity of administering the law. A phrase that I quoted earlier in a related context applies here too: the result of rushed legislative intrusion has been to produce “a field day for crackpots, a headache for judges and a goldmine for lawyers”.

No thinking person believes that the elected legislature should neglect law reform. But there is sometimes a failure to appreciate the difference between the substance of the law and the processes underlying its operation: due process doesn’t create or define crimes; but it includes the law of evidence and the rules governing procedure. The legislature has an obvious and valuable role, after due consultation, in bringing the substantive law up to date, redefining crimes such as rape, varying penalties, decriminalizing activities such as consensual homosexual behaviour in private and regulating public expenditure on courts and legal services. But when it comes to the law governing evidence and procedure, the legislature’s knowledge and understanding of these matters is greatly inferior to that of the Judiciary and the legal profession. It is simply foolish to make fundamental changes in these fields without deep and careful consultation with those who have intimate knowledge of these essential of due process. The aim should be to study the whole picture and seek consensus.

After 1707 the Judiciary in Scotland began to develop practices and traditions that made it the equal of any in the world. Judicial independence here is exemplary. The expertise of Scottish judges is very high and has been fostered and improved markedly in the last 90 years. Training, retraining and critical study have become the norm, especially in the field of criminal law and procedure. Had the legislature not been so hyperactive in recent years I am sure that the Judiciary could have regulated its business in ways that would have reduced the delays that threaten to impair the administration of justice in Scotland.

And the Judiciary has changed. The number of High Court judges has nearly trebled since the War. In the same time, the average age of judges has fallen by well over five years. There were no women judges on the High Court Bench until 1996: there are now nine, out of thirty-four. The numbers and expertise of those lawyers entitled to appear in the High Court has greatly increased: their importance is that they act as powerful watchdogs ensuring that the rule of law prevails.

The Judicial Appointments Board for Scotland, whose main purpose is to guard the independence and quality of the Scottish Judiciary is bound by statute to pursue a policy which they have summarised in these words: “The Board takes seriously its duty to encourage diversity among those who are eligible to apply for judicial office, while ensuring that merit remains the principle for recommending applicants for appointment.” So far, the diversity is less clear than the merit: but that is inevitable: for it usually takes twenty or thirty years to demonstrate the necessary merit and to reach the bench of the High Court of Justiciary. And although the appointments Board encourages all applicants - regardless of gender, age, social or ethnic background, marital status and sexual orientation - to apply for judicial office there has been no flood of meritorious, qualified applicants from minority backgrounds. In the meantime, while recognising that no system is perfect, I believe that those with any real knowledge of what happens in our courts have confidence that our current Judiciary maintains a sound tradition of independence and expertise.

As far as the content of Scots Law is concerned, there is a great deal of change taking place. The most newsworthy is the effect of the Human Rights Act. The most far-reaching is the legislative enthusiasm of the Scottish Parliament. I am one of those who think that the highest courts, including the Strasbourg Court and even the Supreme Court have been too ready – in matters of human rights - to rule on matters of detail rather than to restrict
themselves to matters of true and universal principle. Part of the theory of Human Rights jurisprudence is that the national courts must have what is described as a “margin of appreciation”. That concept is intended to acknowledge that very different jurisdictions, with wholly different legal traditions, should be allowed to develop and retain their own solutions to problems arising from the application of civilized principles to the infinite variety of human problems: the concept of “fairness” in Turkish pre-trial procedure is not necessarily the same as in Scotland. However, the courts in the UK, including the Supreme Court, are still wrestling with the application and effects of the European Convention on Human Rights; and there are signs that the margin of appreciation is being applied more generously than has been so in the past.

As for the Scottish Parliament, no doubt as it matures (it is still a teenager) it will gradually discover that the rush to legislate does not solve all problems: dangerous dogs do not cease to be dangerous because you pass a statute about them. The other lesson that the Scottish Parliament has to learn is that the Scottish Committees for pre-legislative scrutiny are not as effective as was hoped when the system was created. The lack of expertise among MSPs is well known. The Committees reflect that shortcoming. And even when the scrutiny by some individual members is searching and well informed, the rule of the Government whips in this unicameral parliament too often ensures that the Government can ignore well-founded criticisms. I would not advocate the creation of a second chamber modeled on the House of Lords, which has deep expertise and exercises true independence; but we need to find some way of improving the ability and resources of MSPs to enable them to challenge draft legislation more effectively. That is a job for parliamentarians. But it is time to start thinking deeply about this, particularly as, contrary to the expectations of those who designed the structures of the Scottish Parliament, it seems that we are likely to continue to have its single chamber dominated not by a coalition but by a single party.

It would be a grave mistake to underestimate the importance of mature laws that enjoy the full consent of the citizens and an open legal system that allows access to legal remedies at the hands of impartial judges. The quality of our body of law rests upon a tried history of applying principles, and creating a corpus of precedents that together direct our courts to dispense justice on a consistent and fair basis. The system depends crucially on the independence and the competence not only of judges and their support staff but also of prosecutors and court lawyers.

Of course, in any human system - ours included - there will inevitably be failings, mistakes, and even scandals. But if one begins to make a comparison with other systems of which we know something, from Pakistan to Mexico, Russia, Italy or even the USA, one can see the real merit of the administration of criminal justice in this country. The importance of consistent principle and of judicial independence can be seen clearly against the forensic background to the recent riots in America. The legal system there is a twisted version of that envisaged by Jefferson and the founding fathers in the 1776 Declaration of Independence and the 1791 Constitution - “All men are created equal….”. Elected or politically appointed predominantly white judges, prosecutors and police discriminate on a brazen scale against blacks and “Latinos”: for decades after December 1941, even the Supreme Court turned a blind eye to the wholly unjust treatment of the descendents of Japanese immigrants. The application of high-minded constitutional principle is too often mediated through a racial and political lens to produce a result that owes everything to prejudice and little to Justice.

Our enthusiastic legislators would do well to pause with humility before politicising the administration of justice and rushing in to legislate changes predicated on the belief that every human tragedy can be righted by enactments forbidding conduct that some find reprehensible. Consider the 1919 US Amendment introducing prohibition, which led to a massive increase in illegal trading in alcohol and the permanent growth of a pervasive mafia and widespread corruption: that gives a warning that, in law-making, the road to hell is paved with good intentions. Arguably, the most important law for legislators to keep in mind is “the Law of Unintended Consequences”.

Lord McCluskey
Introduction

Professor Jack Halliday at the University of Glasgow used to say “Governments may come and Governments may go but Law Reform goes on regardless”. We should heed his words – they contain a truth and also a warning. Professor Halliday himself had a very credible record of contributing to Law Reform in Scotland. His significant Report on Conveyancing Legislation and Practice (CMND3118) published in December 1966 began a process of reform which eventually led to the abolition of feudal tenure in 2000.¹

Law Reform has always been a pre-occupation of Government in Scotland. In the middle ages various Commissions were established to “Mend the Law that needs mendment”. In the Parliament at Perth in March 1425 it was enacted that “six wise men from the Three Estates see and examyn the bukis of law of this realme... and mend the lawis that nedis mendment”².

This first Law Commission had its work cut out. The two ancient bukis referred to Regiam Majestatem and Quoniam Attachiamenta contained most of the corpus of Scots law at the time. Many of the proceedings of the early Scottish Parliament were taken up by enacting and re-enacting laws covering significant social and economic problems - ultimately with limited effect.

There were many vehicles for considering law reform over the years. Sometimes Parliamentary Commissions, often Royal Commissions (usually in response to some perceived critical need) were established but systematic law reform was elusive. The Law Revision Committee was set up in 1934 but ceased operation in 1939. After the war the need for reform was clear. Significant statutory changes took place under the Labour Government of Clement Attlee (1945 – 51). But a method was needed to deal with “ordinary law reform”. The Law Reform Committee was therefore established in 1954 “to bring to the attention of the Lord Advocate aspects of the law of Scotland which seemed to the Committee to require consideration; to consider these or other aspects of the Law in Scotland which may be remitted to the Committee by the Lord Advocate; and to report whether any changes in the law are desirable”. The first Report of the Law Reform Committee for Scotland was published in 1957 and related to occupiers’ liability and obligations of a lessee toward third parties invited by a lessee.³

Systematic law reform only properly got underway in the 1960s. Gerald Gardiner, who was to become Lord Chancellor in the Labour Government of 1964 – 1970 was the moving force behind the creation of the Law Commissions for England and Wales and Scotland.

The Law Commission and the Scottish Law Commission were established by the Law Commissions Act 1965 with a broad range of functions which included “to take and keep under review all the law which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law”⁴

The Scottish Parliament

One of many major changes which occurred with the Scotland Act 1998 coming into effect was the approach to Law Reform. Prior to the Scotland Act 1998, many Scots lawyers complained that the process of law reform was haphazard and patchy. It was difficult for the UK Parliament to assign adequate legislative time to more than one Scotland specific Bill per session – although, there were of course occasions when more than one bill was possible but that was a matter of the coincidence of parliamentary time and political will.

Furthermore, the more deep-seated complaint was that legislation was often enacted by

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¹ Abolition of Feudal Tenure (Scotland) Act 2000
² The Statute Law Revision Act 1425 (APSII, 10 c10)
³ First Report of the Law Reform Committee for Scotland (CMND88) February 1957
Westminster with a UK application in mind which did not give adequate consideration to how the legislation affected the law of Scotland.

The law of Scotland may have been subject to only relatively narrow self-contained amendments during the nearly 300 years of the absence of a Scottish Parliament, but since 1999 the Parliament has certainly developed the law in many areas where it was felt that reform was needed.

The Parliament has been a model of public engagement both formally and informally. The activities of the Public Petitions Committee, in engaging with members of the public who wish to draw attention to issues where the Parliament has competence, is very significant. Engagement on diverse issues which otherwise would not feature in government policy terms has led to significant scrutiny of government and, in some instances, to changes in practice or the law.

Subject to the limits set out in Section 29 of the Scotland Act 1998, the Scottish Parliament has a very wide jurisdiction for legislation. It includes agriculture, forestry and fishing, education, environment, health, housing, law and home affairs, local government, natural and built heritage and planning law, police and fire services, social work, sport and the arts, statistics and public records, some tax raising powers e.g. land and building transaction tax and the Scottish rate of income tax, tourism and economic development and transport. Since 1999 the Parliament has enacted 223 Acts of the Scottish Parliament and the broad range of legislation covers issues of such importance as reform of the criminal law, reform of the system of land tenure and agricultural holdings, legislation regarding adults with incapacity, planning law and licensing law and many other areas besides.

The Scottish Parliament is responsible for legislating on most aspects of the law which affect individuals. Every topic not reserved to the UK under the Scotland Act 1998 is devolved. Law reform is clearly embedded within this wide range of competences. Since the Parliament opened in 1999 many reports from the Scottish Law Commission have been enacted. Some of these have been of considerable significance such as the Adults with Incapacity (Scotland) Act 2000, The Abolition of Feudal Tenure (Scotland) Act 2000, The Debt Arrangement and Attachment (Scotland) Act 2004, The Charities and Trustees Investments (Scotland) Act 2005, The Family Law (Scotland) Act 2006, The Bankruptcy and Diligence etc. (Scotland) Act 2007, The Sexual Offences (Scotland) Act 2009, The Land Registration (Scotland) Act 2012 and other legislation besides.

However it is also true that many reports from the Commission have not been implemented. Chairmen of the Commission have in the recent past voiced their concern about the rate of implementation.

However changes to Scottish Parliamentary procedure and the creation of a committee - the Law Reform and Delegated Powers Committee show the Parliament’s resolve to provide routes to law reform which are efficient and effective. The first bill to be dealt with in the new arrangements is the Legal Writings (Counterparts and delivery) (Scotland) bill which will allow documents to be signed in counterpart and also provide for delivery of traditional documents by electronic means.

The United Kingdom Parliament

The significant reservations in the Scotland Act 1998 mean that the UK Parliament is still responsible for legislating in areas such as the Constitution, Foreign Affairs, Defence, the Civil Service, Financial and Economic matters, some aspects of Home Affairs such as data protection, elections, firearms (except air weapons), immigration and nationality, national security, betting and gaming, access to information, Trade and Industry, Energy, Transport, Regulation of some professions, Employment, aspects of Health and Medicines, Media and Culture and a miscellaneous group of powers concerning judicial remuneration, equal opportunities, control of weapons, ordinance survey time and outer space\(^5\).

\(^5\) The Scotland Act 1998, Schedule 5
Over the past 15 years most UK statutes have extended to Scotland, for example in 1999, the first year of operation off the Scottish Parliament 26 out of 35 acts of the UK Parliament had some provision which applied to Scotland, in 2005 21 out of 24 acts had some provision affecting Scotland and in 2011 the proportion was 20 out of 25 acts. Some recent legislation such as statute law revision measures has also involved the Scottish Law Commission operating in concert with its English counterpart. In 2013 a Scottish Law Commission bill was promoted as the Partnerships (Prosecution) (Scotland) Act 2013 which used the special Law Commission bill procedure in the House of Lords. This was the first Scotland only legislation enacted by the UK Parliament since the creation of the Scottish Parliament.

The impact of the Smith Commission proposals to devolve some tax and welfare legislative powers to Scotland may impact on these ratios in the future.

The important observation is that the UK Parliament has never stopped legislating for Scotland. However, few non-government bodies have been active in Westminster on law reform issues which affect Scotland since the creation of the Scottish Parliament. This is a missed opportunity for civic engagement and for reform of the Law of Scotland.

The European Institutions

The European institutions are responsible for a large proportion of the law which applies in the United Kingdom and accordingly Scotland. Significant areas of law which affect economics, commerce and business emanate from the EU e.g. banking law, company law, intellectual property, competition law and agricultural law. The estimates of how much law comes from the EU vary widely from 6% to 84%. However the most rational basis for assessing the level of law affecting the UK is based on a study carried out in 2010 for the House of Commons which indicate that between 6.8% of primary legislation and 14.1% of secondary legislation made in the UK has an EU origin.

The most significant issue for Scotland in dealing with proposals for EU law is that of capacity to influence. There are also specific issues linked to the scrutiny of EU legislation which falls within the Parliament’s competence. The EU is clearly a significant source of legislation and policy in areas such as environmental law, agriculture and fisheries and in the area of justice and home affairs. Such legislation is typically, although not invariably, implemented by way of subordinate legislation. Given the procedural and time limits applying in this area, and the restricted opportunity for scrutiny and potential for amendment of legislative texts, issues of transparency and parliamentary scrutiny arise and could be improved upon. These concerns can be mitigated by the effectiveness of pre- adoption consideration of proposals, but there is a potential lack of consistency resulting from the different working methods of Parliamentary committees.

The Treaty of Lisbon (207/C306/01) has a number of provisions on the future EU regime for dealing with family law, criminal law, succession law and criminal and civil procedural law which have additional significance in Scotland.

These involve important areas of devolved competence. In addition, and importantly, these are also areas where Scots substantive and procedural law are often different from the rest of the UK, and Scottish institutions – such as the Crown Office and Procurator Fiscal Service, the courts, the prisons and the legal profession – form separate and distinctly regulated bodies. In a UK context these factors make the Scottish position potentially more complex and add a particular dimension not only to implementation of legislation but also pre-legislative policy considerations and negotiations.

The system of opt-ins under the EU Treaties has already created specific issues for devolved administrations, for example the recent decision by the UK Government to choose to opt-out of the criminal law and procedure aspects of pre-Lisbon Treaty EU law including the European Arrest Warrant has caused significant problems. As the views regarding opt-in/opt-out may be

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6 How much legislation comes from Europe? House of Commons Research Paper 10/62
different between the various UK jurisdictions and where inter-governmental negotiations are led by the UK, there must be mechanisms so that the views of the Scottish Government and the Scottish Parliament can be taken into account.

The Society enhanced and formal role of national parliaments in scrutinising policy under the Lisbon Treaty is to be welcomed but it is essential that where a proposal consulted on by the EU is in an area of devolved competence under the Scotland Act 1998 or any of the other devolution arrangements within the UK, the Scottish Parliament and Scottish Government (and the other devolved bodies) must be included in the consultation process in order that a comprehensive and meaningful UK response can be submitted to the EU. The short time scales in the Lisbon Treaty mean that meaningful consultation of any body other than the UK Parliament is very difficult in practical terms but systems could be established to streamline the process as much as possible. There should also be a mechanism for dealing with issues where the United Kingdom Parliament and the Scottish Parliament take different views, for example on criminal law policy. Having a mechanism to deal with the political tension in these circumstances should be considered.

**Impact of the Smith Commission**

The Heads of Agreement, agreed by the participant political parties in the Smith Commission will, subject to Parliamentary approval, provide the Scottish Parliament with the following further devolved powers:

Powers over benefits including attendance, carers and disability living allowances, personal independence payment, industrial injuries disablement allowance and severe disablement allowance.

The Scottish Parliament would also be given powers to create new benefits in devolved areas and to provide support for unemployed people through employment programmes.

In addition, powers relating to the management and operation of all reserved tribunals with a couple of exemptions would be devolved.

Furthermore, the Smith Commission recommended that speed limits, road traffic sign powers and the function of the British Transport Police in Scotland should be devolved, powers to determine how supplier obligations in relation to energy efficiency and fuel poverty are designed and implemented should be devolved and the licensing of on-shore oil and gas extraction should be devolved.

Finally, the Scottish Government should be given powers to request a market study investigation for competition issues arising in Scotland and consumer advocacy/advice should be devolved.

Pillar 3 of the Smith Commission’s proposals include the devolution of income tax, rates and thresholds and also air passenger duty and aggregate’s levy.

With such a significant range of new powers affecting the lives of tens of thousands of people in Scotland, there may be political judgements of the value of pursuing reform in the area of welfare law or tax law as opposed to reforming some area of private law such as family law, contract law or property law. The advent of new powers for the Scottish Parliament should not of itself derail the process of law reform which the Parliament has embarked upon since its inception. Society is constantly changing and the legal needs of modern society require constant maintenance of the legal system and laws which underpin much of the legal interaction and activity in Scotland.

The possibility that attention of Parliamentarians will focus on the exercise of new powers to the detriment of humdrum but nonetheless necessary law reform must be guarded against and systems and structures ought to be put in place to ensure that priority status for law reform projects is acknowledged and exercised as the Parliament embarks on the next stage of the evolution of its powers.

There are a couple of structural issues which could be put in place to ensure that law reform

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7 The Report of the Scottish Commission (November 2014)
maintains this profile.

**Ministerial responsibility for law reform**

Government could signal how important law reform is in its list of priorities by assigning a Cabinet Secretary to undertake responsibility for ensuring that law reform is developed and promoted.

Currently, Ministerial remits do not appear to allocate this topic to a Cabinet Secretary or Minister.

If a Minister is appointed with this responsibility, that would be one way of ensuring that the profile of law reform projects is not superseded by the exercise of new powers of old powers in a new way.

**Scottish Government commitment to law reform**

Each year the First Minister brings forward a Programme for Government including proposals for Bills which the Government intends to introduce into Parliament in the following Parliamentary session.

It would be a clear signal of any Government’s commitment to law reform were each Programme for Government to contain a commitment to bring forward at least two law reform bills per annum. Not only would this emphasise the Government’s responsibility for law reform but it would also ensure that the Scottish Law Commission and other law reform agencies could proceed with projects and plans in the sure knowledge that they would be implemented.

**CONSPECTUS**

Many people mis-attribute to Bismarck the saying that “Laws are like sausages – it is best not to see them being made”.

Even if the Iron Chancellor never said this, the sentiment is one which we should reject. Law reform is too important to be left to politicians or lawyers, it affects everyone and needs open transparent development in the democratic context. The participative nature of the Scottish Parliament should allow for full engagement in law making.

The enthusiasm for political debate seen in the recent referendum campaign shows that when the issue is important, the electorate engage. We must find new ways to ensure that the need for sound law reform is recognised by as many of those affected by it as possible.

The views expressed in this article are the author’s own and do not represent the views of the Law Society of Scotland.

**Michael P Clancy OBE**

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8 [www.scotland.gov.uk/about/people/ministers](http://www.scotland.gov.uk/about/people/ministers)

9 Bismarck did not say this, the earliest quote is “Laws, like sausages cease to inspire respect in proportion as we know how they are made” which comes from the University Chronicle, University of Michigan 27.3.1869
When Helen (not her real name) was remanded into custody, a Criminal Justice Social Work (CJSW) report was written – standard procedure for a first-time offender. However, whilst the report mentioned that Helen was the sole carer of three young children, no questions were asked about care arrangements or the impact that her inevitable prison sentence would have on them or about the wider family members who became their guardians. Rather, the report merely stated that “it is assumed that the remaining family [would] take on the care of the children.” Helen received a life sentence, and three children faced life without a mother with no assessment of their needs and no support package in place.

Over recent years, a range of initiatives and research has focused on children affected by imprisonment. In Scotland, 27,000 children each year experience a parent’s imprisonment – about twice as many as experience a parent’s divorce in that time (see Loucks 2012). Scotland’s Commissioner for Children and Young People wrote a thematic review on this called Not Seen, Not Heard, Not Guilty (Marshall 2008). One of the main recommendations from this report was for Child Impact Assessments to be conducted at the point of sentence. This recommendation flagged up a theme that has remained prominent, namely that adult, offender-focused systems tend to overlook their impact on children.

In September 2011, the UN Committee on the Rights of the Child hosted a Day of General Discussion that focused for the first time on children with imprisoned parents. The Quaker United Nations Office compiled a detailed report on the event (Robertson 2012), which included the following recommendations:

- Child Impact Assessments should be conducted whenever considering placing or releasing parents from custody.
- Non-custodial sentences should also be assessed for their impact on children.

When a sentence causes parents to be separated from children for whom they are caring, they should be given sufficient time to make arrangements for those children.

In April 2012, the Commission on Women Offenders, chaired by The Right Hon Dame Elish Angiolini DBE QC, published its report. In the Commission’s view, Child Impact Assessments were not necessary as a distinct recommendation because that assessment is included in the CJSW report. However, CJSW reports are not required in the majority of cases, nor do they always provide detailed information regarding family circumstances or the impact on dependants, as was the case for Helen.¹

An assessment highlighting the needs of Helen’s children, and the family members left caring for them, would have made an enormous difference to everyone and to their subsequent access to support; the children’s teachers have testified to that. They knew about the crime from newspaper reports, but not once did any of those papers comment on the impact of what had happened on Helen’s children. They didn’t mention the trauma the children had experienced; the shame they felt; the bullying they received; the mental health problems that two of them subsequently developed. They didn’t tell of the pressure and strain on the family members now caring for three extra children. Because no one asked the family how this might impact them, because there was no conversation about support available, the family struggled on, isolated. And because the school did not understand the impact of imprisonment on children, they struggled on, too – no one really talking about the main issue; no support package that met the actual needs of the children.

It is important to note that a Child Impact Assessment would not have made a difference to the sentence in Helen’s case; she would have received a lengthy custodial sentence anyway. Child Impact Assessments are not about reducing or avoiding sentences; rather, they are

¹ Indeed, the High Court granted an appeal in the case of Stuart Gorrie v PF Haddington (2014) – the borderline custody case of a single father – on grounds including the fact that the CJSW report had mentioned no further detail beyond stating that custody “might have implications” for the man’s teenage son.
about focusing on the circumstances of those who will be affected by the sentence - the innocent victims who are punished alongside their family member. They are about asking, ‘How can we minimise negative impact here?’

Imprisonment is a traumatic experience for families, and its impact is often significant and enduring, particularly on the children of prisoners. Regressive behaviour is a common reaction from children, often showing up through deterioration in behaviour and performance in school. This type of behaviour is very similar to children who have suffered a bereavement. ‘Grief reactions’ such as anger and acting out, self-medication, isolation, and so on parallel the two experiences. An important difference between loss through death and loss through imprisonment is that the former engenders sympathy and social support, whereas imprisonment fosters hostility and stigma. Doka (1998) calls this ‘disenfranchised grief’, referring to a grief that is not socially supported.

Multiple care arrangements are common when any parent goes to prison but are a particular problem when a mother goes to prison. Children are likely to move a number of times during a family member’s imprisonment and may be separated from siblings, friends, schools and so on. Higher risk of problems with physical and mental health are also evident in the literature, with children of prisoners developing serious mental ill health at up to three times the rate of other young people (Philbrick 1997; Jones and Wainaina-Wozna 2013).

In addition, children often do not learn about a family member’s imprisonment from their own family. Carers report knowing what to say to children when a family member goes to prison as one of the most stressful aspects for them. Parents and carers will often try to hide the imprisonment from children, saying ‘Mummy’s in hospital’ or ‘Daddy’s working away’, but children often realise the truth for themselves, for example from other children at school or, as they get older, from reading the signs at the prison. The difficulty is that children often find out before they’ve had an opportunity to talk about it with their parents or to ask questions. They in turn become afraid to discuss it and ‘play along’ with the family’s attempts to hide it from them.

As Scotland’s only national charity that works solely to support the families of people involved in the criminal justice system, Families Outside seeks to ensure that families affected by imprisonment and the people who work with them are informed and supported; that policy and practice reflects the needs of families affected by imprisonment; and that children and families receive information and support at the earliest possible stage in a way they understand. When we ask young people what that means for them, they reply, “I want someone to ask how I am doing”; “I want to be listened to”; “I want to be involved in decisions that are made about me”; “I want to be connected and included” – a succinct summary of the purpose of a Child Impact Assessment.

The UN Convention on the Rights of the Child - to which the UK is a signatory - speaks very clearly of the need to take the best interest of the child into account for any decision that affects them:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Article 3.1

This does not mean that offenders with children should have a ‘get out of jail free’ card; rather, prison should punish the guilty, not the innocent. As in Helen’s case, some offences are so serious that prison is the only option. The children should not however have to pay for their parents’ actions, when they have done nothing wrong. The implications of imprisonment for children and families last much longer than the period of imprisonment. If we fail to mitigate these, we risk perpetuating intergenerational cycles of offending through the consequent breakdown in family relationships, disruption of schooling, loss of income and housing, social isolation, and unsupported trauma.

Despite the fact that the Angiolini Commission
chose not to recommend the implementation of Child Impact Assessments, Scotland has made some progress in considering the impact of imprisonment on children. There’s the case of a Sheriff allowing a woman to return home to make arrangements for the care of her children before serving her sentence in HMP Cornton Vale (Currie 2011), and others (unreported in the press) who have done the same. Another passed a community payback order rather than a custodial sentence because the person concerned was the sole carer of three children (BBC News, 7 March 2014). Indeed, Families Outside has received a number of letters from the judiciary in support of Child Impact Assessments. While welcome, these examples have not established a legal precedent and remain very much exceptions to the norm.

Legal decisions to recognise the impact of a parent’s imprisonment on children have been more prevalent abroad, such as in the landmark S v M case in the South African Constitutional Courts in 2007. In this case, Justice Albie Sachs rules that judges must take into account the impact on dependent children in their sentencing decisions, noting that children “cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them....” In Scotland, the courts are just beginning to acknowledge such considerations (see for example PF for Slovakia v Denise Srponova 2013 and Stuart Gorrie v PF Haddington 2014), but this is far from standard practice.

The fact is, we have been talking in Scotland for long enough about Child Impact Assessments; now is the time for action. Perhaps if there had been a Child Impact Assessment for Helen’s children, support could have been put in place for the family members who were left caring for them; perhaps they would have felt more confident in sharing information with the school; perhaps teachers at their school would have had a greater understanding of how to reach out to families affected by imprisonment; perhaps we could have prevented two of her three children developing significant mental health issues.

The bottom line is that we need to recognise that offending is about far more than the offender. We need to take the wider view and focus not solely on the sentence in relation to the offence but on those affected by the sentence. We need to start asking about the impact of imprisonment on children.

Nancy Loucks

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Introduction
Scotland has an illegal drugs problem that is virtually unequalled anywhere in the world - a problem which began in the early nineteen eighties and which has spiralled steadily upwards thereafter. In its “Annual Drug Report” the European Monitoring Centre for Drugs and Drug Addiction identifies the UK as having a heroin problem greater than in any of the 31 countries studied (EMCDDA 2013). If the UK represents the European epicentre of the global heroin problem then Scotland represents the epicentre of the epicentre with a prevalence rate for problematic drug use of around 1.1% of the population twice that of England. It was, however, not always thus.

In 1960 a UK Government committee was convened to consider whether Scotland was experiencing a similar heroin problem to that which had been identified in London. The committee concluded that:

In Scotland there was not a problem of drug misuse comparable to that reported in London and the Home Counties. A few persons addicted to narcotic drugs were known to the Home Office through the inspection of pharmacy records. There were rumours and occasional factual reports of drug taking at parties, cafes or dance halls by young people…..But Scotland has no Soho and no place comparable to Piccadilly Circus as a focal point of the drug world…Traditionally the mood-altering drug of the Scots is alcohol and the tradition of alcohol misuse may however have protected young people in Scotland from following the cultural trend of those in England. (Scottish Home Department 1960)

Along with the dismal statistics on the increasing number of problem drug users in Scotland there has been equally dismal news on the extent of drug related harm. For example, there were a total of 382 drug related deaths in Scotland in 2002 with that figure increasing to 526 by 2013. In 2002, 25.6% of the drug related deaths in Scotland were linked to methadone whilst by 2013 that percentage had increased to 42.0% (Nat Statistics for Scotland 2014). In England, over the same period, the number of deaths linked to drugs misuse increased by only 17.2% (from 1669 in 2002 to 1957 in 2013) with only 14.3% of those deaths linked to methadone (ONS 2013). Whilst those figures do not in themselves portray a failure of drug policy nor do they stand as an illustration of success in tackling the problem of serious drugs misuse within Scotland.

Scotland Gets a New Drug Strategy
In 2008 the Scottish Government published a new drug strategy – “The Road to Recovery: A New Approach to Tackling Scotland’s Drug Problem” which represented a major break with previous drug strategies in the focus upon recovery. The Scottish Government provided a clear definition of what it meant by that term:

What do we mean by recovery? We mean a process through which an individual is enabled to move on from their problem drug use, towards a drug-free life as an active and contributing member of society. Furthermore, it incorporates the principle that recovery is most effective when service users’ needs and aspirations are placed at the centre of their care and treatment. In short an aspirational, person-centred process. (Scottish Government 2008:23)

Whilst the Road to Recovery strategy has enjoyed cross party political support since its launch in 2008 there is a need now to consider why it has not had a more marked impact on reducing the extent of drugs misuse within Scotland. There are and to an extent remain many areas of practice which have fallen short of the aspirations contained within the Scottish strategy and which collectively may explain that failure.

Scotland’s Reliance on Methadone.
In Scotland methadone has remained as the principal treatment for heroin addiction. The evidence base showing that methadone can be an effective tool in the treatment of opiate
addiction is both substantial and long standing. That does not mean, however, that Scotland’s own methadone programme is beyond reproach. Indeed there are very real grounds for concern at precisely the way in which methadone is being used in Scotland. First, there is a worrying lack of information on the number of people being prescribed the drug and the number of individuals who have been helped to become drug free on the basis of the drug. Research in England has shown that there is a three-fold increased risk of death on beginning to use methadone and a nine-fold increased risk of death on ceasing methadone. (Cornish et al 2010). On the basis of those statistics one might have thought that at any country with a wide ranging methadone programme would ensure that accurate information was available on the numbers of drug users being prescribed the drug and the numbers who were leaving the programme. In Scotland, however, since well before the current “Road to Recovery” drug strategy there has been a serious lack of information on the numbers of drug users prescribed methadone or the numbers leaving the programme drug free.

The failure to obtain accurate information on the number of drug users in Scotland being prescribed methadone is all the more alarming when one notes that approaching half of all drug related deaths in Scotland are now linked to methadone compared to a figure of 14% for England. The worrying increase in the proportion of drug related deaths in Scotland over the last ten years should have resulted in a determined commitment to obtain accurate information on the numbers of drug users in Scotland being prescribed the drug. The concerns over Scotland’s methadone programme however go well beyond the question of how many drug users are being prescribed the drug.

In 2007, the Scottish Government instituted a review of its methadone programme in the wake of concerted criticism that too many drug users were being parked on methadone with too few being helped to become drug free (BBC 2005, McKeganey 2006). The findings of that review identified systemic failure in many aspects of Scotland’s methadone programme: Many services are unable to demonstrate that they are delivering comprehensive care within national guidance and to acceptable standards and that they are delivering on going benefits to all who are in receipt of methadone replacement prescribing. Few services make any attempt to assess outcomes (SACDM Project Methadone Group 2007:4)

Information on current performance of Scottish services is sparse. Services struggle to supply meaningful information on process or outcomes of methadone treatment in Scotland and national data systems are currently unable to give a clear understanding of treatment processes or effectiveness. When surveyed, few ADAT area services are able to supply useful information on treatment process and standards. Many struggle to retrieve information collected clinically. Few services routinely report on outcomes. (SACDM Project Methadone Group 2007:4)

A further review of drug and alcohol services carried out by Audit Scotland in 2009 was no less damning its own assessment. According to Audit Scotland the drugs problem in Scotland costs the country around £2.6 billion a year with public bodies spending around £100m a year spent on tackling the problem. Despite the allocation of substantial sums of public money Audit Scotland was unflinching in its criticism of the failure to maintain any kind of system for monitoring expenditure and service effectiveness in tackling Scotland’s drugs problem:

Spending decisions are not always based on evidence of what works or on a full assessment of local need. The majority of drug and alcohol services do not have clear aims and there is very little information on whether they are achieving specific outcomes or measures of success (Audit Scotland: 22)

There is no direction from the Scottish Government on what money for drug treatment and care services should deliver. Although the Scottish Executive
developed National Quality Standards for Substance Misuse Services in 2006 there is no national monitoring of whether they have been implemented (Audit Scotland 2009:22)

Given the lack of consistent high quality performance management data and that new outcome measures are proposed as optional, comprehensive and comparable outcome information will not be available across Scotland in the near future. This contrasts with the development in England over recent years of a system for national performance management and accountability, which combine service data with unit costs. (Audit Scotland, 2009:26)

A further review of Scotland’s methadone programme in 2013 (Scottish Drug Strategy Delivery Commission) showed that there had been little progress since the 2007 review:

The review found considerable variation in local delivery of even the core elements of recovery orientated systems of care. Many areas stated their plans were at very early stages of development. There was little evidence presented by some Alcohol and Drug Partnerships regarding a real impetus towards recovery...There are real concerns around the lack of progress we found in many ADP areas regarding the delivery of recovery orientated systems of care and quality assurance for services. The Scottish Government funds ADP’s to facilitate local improvement. Despite this, in many areas, basic information seemed to be impossible to access. Clear strategic plans and objective reports of improvement were rare in the responses received by the review. Elements of recovery orientated services were often absent. There was not a strong sense of accountability. (Scottish Government 2013:2)

The reports from these successive enquiries make uncomfortable reading not simply because of the individual failures they identify but because of the persistence of the problems even after they have been identified. It is a situation that persists to the present day. Most recently the Scottish Government has invested heavily in developing a national naloxone programme; providing drug users and their families with syringes pre-loaded with the drug naloxone in order that families and other drug users might administer the drug when they find themselves in a situation where a drug user they are with is overdosing. Whilst this scheme has been trumpeted as an illustration of the Scottish governments willingness to innovate in how it is seeking to reduce the extent of drug related deaths in Scotland there has been no equivalent commitment from the government to subject the naloxone provision programme to rigorous independent evaluation. Such evaluative study, it seems, is regarded as an unnecessary additional expense. And yet in the absence of such research we will never know whether the naloxone programme has been cost effective, whether it should continue to be supported, extended, or reduced. We will, in other words, remain in the dark about the success or failure in how we are seeking to tackle one of the most tragic aspects of Scotland’s drugs problem – the rising tide of drug related deaths.

Drugs Enforcement in Scotland

The shortcomings in how Scotland is tackling its drugs problem are not confined solely to the area of drug treatment and support services. The realm of drugs enforcement is also one where there appears to be little commitment to rigorous independent evaluation even despite the signs that over recent years enforcement agencies have been removing fewer not more harmful drugs from the streets in Scotland.

In 2004/05 Scottish Police forces seized 179.3kg of heroin. By 2012/13 that figure had reduced by more than half 80.4kg. That reduction in the quantity of heroin seized is remarkable because over the same period there has been a notable increase in the prevalence of problem drug use in Scotland. In the face of the growing number of problematic drug users within Scotland it is unlikely that the reduction in the quantity of heroin seized by enforcement agencies is a reflection of the reduced availability of the drugs on the streets.

It may be that over the last ten or so years the
ability of those importing heroin has become more sophisticated, allowing them to import sufficient quantities of the drug to meet local need without experiencing an increase in heroin seizures. Equally, it may be that there has been a diminution in the quality of the intelligence enforcement agencies have been able to gather on the organised criminal networks responsible for much of the importation of heroin into Scotland. It is notable in this respect that whilst there was a major heroin seizure involving the Scottish Crime and Drug Enforcement Agency in 2007 (BBC 2007) there has been no equivalent seizure in the following seven years. It may be that enforcement agencies within Scotland have been increasingly successful in working with enforcement agencies in other countries in interdicting heroin bound for Scotland. Such an explanation would mean that Scotland would have witnessed a sustained heroin drought. There is very little evidence of such a drought occurring. Finally, it may be that enforcement agencies have shifted priority away from heroin seizure to the seizure of other illegal drugs. Although there has been no open discussion of such a shift in enforcement priorities the data on drugs seizures provided by the Scottish government do show an increase in the quantity of cocaine being seized by Scottish enforcement and border control agencies and it may be that such a shift in priorities has occurred.

**The Lack of Transparency**

Within England the Advisory Council on the Misuse of Drugs provides independent and authoritative advice to ministers. The ACMD regularly holds its meetings open to the public. As a result there is a welcome transparency in the drugs policy and practice process in England. Within Scotland, by contrast, none of the key drugs policy committees nor the Alcohol and Drug Partnerships that spread across the country hold their discussions and deliberations in public. As a result there is a lack of transparency at how Scotland is indeed tackling its drugs problem.

**The Challenge of Balancing Central Government Control with Local Area Responsibility**

Within Scotland the network of local Drug and Alcohol and Drug Partnerships, funded by the Scottish government and charged with the responsibility of delivering national drug strategy and meeting local need, enjoy considerable autonomy. The principle of devolved responsibility however has meant that the Scottish Government has been slow in intervening in local areas even where there are clear signs of a failure to meet local need or to deliver national priorities. Whilst many commentators would agree that the current system of governance is preferable to an arrangement whereby local services are directly controlled by central government nevertheless there clearly needs to be intervention where local partnerships are not developing practices and processes for delivering recovery oriented practice in publicly funded services.

There has, however, been a failure at the central level to benchmark progress towards realising the goals of the Road to Recovery drug strategy. With no clear guidance as to how far local areas should be progressing along the “road to recovery” it is hardly surprising that reviews of Scotland’s drug treatment system should have identified such uneven progress in implementing the goals of the 2008 drug strategy.

**Conclusions**

The failures in the ways in which illegal drug use is being tackled in Scotland are long standing and well identified. Understanding the nature of a problem is not however, the same as successfully addressing the problem. It is not a lack of knowledge (although there are significant gaps in knowledge) that has truly hampered efforts at tackling Scotland’s drugs problem. Rather there appears to have been successive shortcomings in the capacity to combine drug policy at the strategic level with a clear mechanism for implementation at the “street level”.

There is a need in Scotland for greater accountability where deficiencies are evident in the ways in which publicly funded bodies are seeking to implement national policy. There is a need for a much greater commitment to evaluating the implementation of policy, to identifying the effectiveness of interventions (in
treatment enforcement and prevention), to ensuring that good practice is disseminated and poor practice curtailed. Finally, there is a need for a commitment at both the national level and the local level not simply to reduce the harms flowing from Scotland’s drugs problem but to reduce the scale of that problem. Scotland needs to move from its position at the very top of the league table of Europe’s drugs problem. Identifying the nature of the problem has been done (more than once); it is now time for substantial remedial action.

**Dedication**

I should like to dedicate this essay to Margo MacDonald MSP, one of Scotland’s finest politicians. Fearless, and principled, and much missed.

*Neil McKeeganey*

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CURRENT CHALLENGES IN SCOTTISH FAMILY LAW
Kenneth McK. Norrie, Professor of Law, University of Strathclyde

Introduction
In 1988 the UK Parliament, with conscious malignity and etymological illiteracy, prohibited local authorities from promoting “homosexuality as a pretended family relationship” (subsequently providing the model for more recent legislation to the same effect in Mr Putin’s Russia). One of the first things the Scottish Parliament did after its (re)establishment was to repeal the so-called “section 28”. To their shame, Scottish Conservative MSPs voted unanimously to retain the prohibition, while not a single other MSP did so. Fourteen years later the Scottish Parliament passed the Marriage and Civil Partnership (Scotland) Act 2014, a far starker rejection of the distaste for same-sex families embodied in section 28. Within the overall majority of 105 to 18, Scottish Conservative MSPs voted 8 against and 6 in favour of the 2014 Act, revealing a party still predominantly resistant to an expanded conception of the family, though less overwhelmingly so than in 2000. The change in voting patterns between 2000 and 2014 reflects but is not wholly explained by the general weakening of social conservatism in Scottish society. There has in addition been a shift in the understanding of what family law is actually for.

Family law traditionally was the state’s means of encouraging particular forms of family relationship (most obviously, through the legal preferences and protections afforded by the institution of marriage) and of discouraging other forms (by refusing legal recognition to unmarried couples, by disadvantaging the “illegitimate” child, and by dismissing same-sex relationships as “pretended”). Today, however, legislatures across the (western) world have lost their appetite for using family law in this directory fashion, and instead have adopted a more regulatory approach which seeks to give space to individuals to construct their family lives in a way that they choose as most suitable for them: a model, in other words, of social liberalism in the tradition of John Stuart Mills. But this new approach creates new challenges, which can be seen in both the main aspects of family law: regulation of adult domestic relationships, and of the parent-child relationship.

Adult Relationships
By the Family Law (Scotland) Act 2006, the Scottish Parliament achieved for Scotland what no other part of the United Kingdom has yet been able to achieve: substantial formal recognition of cohabiting couples, carrying practical (financial) consequences for the individuals concerned. Previously, the mutuality of rights and obligations inherent in marriage were limited to marital couples, and unmarried couples were left to utilise, as best they could, such legal mechanisms as contract, will, and unjustified enrichment to protect the interests that family law protected through marriage. But the increasing number of cohabitants clearly showed that the assumption underpinning this, that couples could be encouraged to marry by withholding marital benefits from those who did not, was flawed, and the major effect of the non-recognition of cohabitation was to make more vulnerable the economically weaker of the two (typically women) – as well as, paradoxically, giving an incentive to the economically dominant (typically men) to avoid marriage with its range of financial consequences.

But the 2006 Act does not make the financial claims of the cohabitant equivalent to those of the spouse (as similar legislation in, for example, Australia and New Zealand does). Instead, there are provisions to ensure that what a court awards on death or separation will be less than what might be sought at the end of a marriage/civil partnership. The Act is designed to respond to the reality that domestic relationships can create financial imbalances

1Local Government Act 1988, s.28.
2Ethical Standards in Public Life etc (Scotland) Act 2000, s.34.
3Though two SNP MSPs (Dr and Mr Ewing) abstained.
4In England in the second reading debate on the Marriage (Same-Sex Couples) Bill 2013 Conservative MPs voted 136 against and 127 voted in favour.
irrespective of how they are legally structured, but at the same time to retain an institutional preference for marriage/civil partnership. The main flaw in this approach is that the 2006 legislation gives no clear picture of what it is trying to achieve for cohabitants. Courts are given little guidance on how to value the claims, and in the absence of any clear indication of the very purpose of the claims courts have struggled to exercise the discretion the Act gives them with any consistency. It took the Supreme Court to tell us that, looking at the background papers that accompanied the Family Law (Scotland) Bill in 2005, together with the debates at Holyrood on that Bill, the underlying principle (at least in a claim on separation) is one of “fairness”. This is useful, so far as it goes, but fairness, like beauty, lies in the eye of the beholder and the end result is that determination of the aim of the law has passed from the legislature to the judiciary. This might, perhaps, be an inevitable consequence of family law’s change in overall purpose from directory to regulatory, but it does mean that parties have nothing to lose by raising speculative actions. Such encouragement is never good legal policy.

The policy objectives behind the Marriage and Civil Partnership (Scotland) Act 2014 were far clearer but its passing signifies, even more than the 2006 Act, the Scottish Parliament’s acceptance that family law’s role is no longer to encourage certain forms of family over others but rather to reflect and regulate family life as it is in fact led. It is as well to remind ourselves how recently the law in Scotland acted to diminish and destroy same-sex families for religious/ideological reasons. As noticed above, “section 28”, with its dismissive message of contempt, remained in force until 2000, as did differential ages of lawful sexual activity; the Scottish courts were, as late as 1995, removing children from their mothers who entered lesbian relationships; anti-discrimination legislation did not cover discrimination on the ground of sexual orientation until 2003, before which it was lawful to refuse to employ or promote, or to pay less, gay and lesbian people; it remained lawful to refuse to provide goods and services to gay and lesbian people until 2007; joint adoption by same-sex couples was not permitted until 2009; and it took Strasbourg until 2011 to accept that same-sex couples had a right to respect for their family life under article 8 of the European Convention on Human Rights.

The Marriage and Civil Partnership (Scotland) Act 2014 is the culmination of these statutory developments if, paradoxically, one of the least significant in terms of strict legal effect (given the substantive effects of the original Civil Partnership Act 2004). Underpinning the Parliamentary debates on the Bill were very different conceptions not only of the meaning of marriage, but also and more profoundly of the very role of the law in regulating family life. Was marriage an institution of such venerable age, or of such divine creation, that it was simply not in the realm of the law to change its essential nature? Is the role of the law to create an environment in which all families have the greatest opportunity to thrive, irrespective of how they are structured, or to give effect to the state’s decisions as to which forms are most likely to lead to the greatest good of society itself? And if the latter, what forms of evidence might law- and policy-makers legitimately use to determine which type of family structure is socially most beneficial?

In the event, the practicalities of accommodating same-sex couples within marriage were remarkably straight-forward, for most of the work in removing the rules that had traditionally ensured the legal dominance of the male spouse and legal subservience of the female spouse had been done long ago. The real focus of dispute as the Bill was being debated was how to provide space in the public domain for those who cannot or will not reconcile their own consciences to the law as it now stands.

The Marriage and Civil Partnership (Scotland) Act 2014 offers some accommodation to religious opponents of same-sex marriage and civil partnership, to the extent of ensuring that neither religious bodies nor individual members thereof are required to be involved in the legal creation of such relationships. But the Act certainly does not exempt religious believers from having to accept, and act upon the fact,
that couples are married: religious believers remain subject to the general law. So it is no infringement of the right to freedom of thought, conscience and religion for the state to refuse to employ (or to continue to employ) as a district registrar an individual who does not want to be involved in registering same-sex marriages or civil partnerships. Bed and breakfast owners who refuse to allow same-sex couples a double room are still guilty of unlawful discrimination. A local authority may still refuse to register as foster carers religious believers who put their own faith above the authority’s non-discrimination policies. Though there were calls for a much broader “conscience clause”, the Scottish Parliament was very wise to resist these calls, for they amounted to no more than a claim for general exemption for religious people from the legal obligation not to discriminate.

Allowing an exemption from taking part in the (legal) creation of the relationship may well have been a necessary compromise in order to neutralise opposition. However, the challenge for the future is not to ensure that this compromise works, but rather to ensure that it becomes less and less necessary. Law- and policy-makers need to encourage all sections of the community to recognise the essential benignity of same-sex relationships – and indeed of unmarried relationships. Though it is not for any Parliament to tell citizens what they can and cannot believe, legislatures can (and should) adopt policies that allow all families, irrespective of their structure, to thrive; they can (and should) create a social environment in which the harmful effects of some religious beliefs are minimised. Ensuring that teachers are aware of the insidious effects of homophobic bullying can do a lot. Not permitting teachers or other leaders to endorse any second class status for those of any minority, whether sexual, racial or religious, can do more. Challenging bigotry and assumptions of heterosexual superiority wherever they are found – in the classroom, the football terraces or even the pulpit – can help to build a society in which families are valued and nurtured for the functions they perform as opposed to the norms that they adhere to. That is a legitimate role for the Scottish Parliament, and a clear challenge for them.

The Parent-Child Relationship
For most of our history the centre of gravity within the family, and the focus of family law, was the marital relationship between a husband and a wife: everything flowed from that relationship, not only the responsibilities and rights between the married couple themselves but also the legal connection they had with their children. The status of the child was traced to the marriage of the child’s parents and the so-called “illegitimate” child suffered serious social and legal detriments. Marriage, indeed, served as a mechanism both for establishing the legal relationship between children and their fathers and for conferring on the father a role in the child’s upbringing. Marriage was the mechanism by which men were tied not only to their wives but also to their children.

Today, however, the centre of gravity in family life has shifted to the parent-child relationship, and the predominant concern of the law needs to be to regulate that relationship in a way that gives all children the best chance to thrive. Of all the theories of child development, the one thing that we can be most sure of is that children tend to thrive in an environment of stability and security. Families today are clearly much more complex and fluid than in the past, with reconstituted families, step-parenthood, single-parenthood, kinship care of children, and same-sex parenthood all becoming more common. Given this, the major challenge for the future is to ensure that children are able to be brought up in stability and security while recognising, and accommodating, the reality that family life today takes a variety of different forms. Again, therefore, regulating the function of families in creating the right environment for children is a much more important role for the law than directing the form any individual family ought to take.

That environment depends, of course, on how parents see their role. Too often, parents perceive the parent-child relationship in terms of “rights”, reflecting the fact that the governing legislation, the Children (Scotland) Act 1995, continues to use the language of parental rights.
Yet juridically speaking there are no “rights” here: in disputes between parents, or between parents and others, the court does not make its decision by weighing conflicting “rights” but by identifying the child’s welfare. This continued emphasis on rights has almost certainly contributed to the failure of the two main policy objectives of the 1995 Act: to reconceptualise the parent-child relationship as one of parental responsibility, and to encourage joint parenting after parental separation. The social perception of the parent-child relationship, and of how disputes on parental separation should be resolved, remains much as it was before 1995. Men, in particular, have resisted seeing parenthood as one of responsibility and while they have fully embraced the concept of shared parenting after separation they have all too often done so within the context of attempts to vindicate their own rights to continued involvement in their children’s lives. Women, in particular, have been resistant to the notion of joint decision-making after parental separation and all too often assume that sole residence gives them the right to be sole decision-maker.

The legislature in England, recognising the importance of language, has recently tackled this problem and moved away from a legal process that “grants” residence to one parent and contact to the other in favour of “child arrangement orders”5. Additional effort is made to encourage shared parenting and the English legislation creates a presumption (strongly opposed, in some quarters) that continued involvement in a child’s life by the non-resident parent will further the child’s welfare. Scotland would do well to watch closely how these changes to English law work in practice, but the lesson from the 1995 Act is that legal change alone does not change parental expectation, or parental demand: what is needed is public education to effect a change in mindset of what being a parent is actually about – shared responsibility, not individual right.

One part of this is for the law to be far more robust in dealing with the recalcitrant parent who simply refuses to allow their ex-partner any role in their child’s upbringing. How to enforce contact orders is an old debate that continues to be bedevilled by gender-politics. Mostly the argument is between resident mothers and non-resident fathers and organisations such as Fathers 4 Justice, though they tendentiously structure their arguments in terms of children’s rights (to have and to know a father), exacerbate very unhelpfully a gender split emphasised by their very name. Yet the law does seem virtually powerless to enforce orders that it makes over children if the resident parent (the main carer, usually the mother) refuses to obey it. It happens (at least in Scotland) only in the most extreme and egregious of circumstances that a mother is imprisoned for contempt of court by defying contact orders. Courts need to be more willing to use this remedy, and need to be open to the development of other responses that would make it far less palatable for resident parents to defy court orders. Some countries revoke driving licenses, or reduce state benefits before the extreme of imprisonment. In return, non-resident parents must be encouraged to accept that the child’s need for stability and security will sometimes require that they step back and recognise that continued disputes about what is in the child’s welfare are, in themselves, likely to act against that very interest. Being a parent requires the parent to sacrifice their own interests.

Another part of this is for parents – and “small government” politicians – to accept that the state has a supervisory role to play. At the extreme, the state has the power (and duty) to impose compulsory measures of child protection when the upbringing process has been seriously compromised: few would challenge the state’s role in such circumstances. The Children and Young People (Scotland) Act 2014, however, goes much further and seeks to provide support for families at an earlier stage, when it is still possible to effect sufficient change within the family to render later compulsion unnecessary. The “named person” provisions, which attracted much ideological opposition, are a central feature in the sharing of information amongst agencies to ensure that the problems in particular children’s lives are not overlooked (as has happened, with tragic consequences, too often in the past). It is misleading and unhelpful to castigate these provisions as the “nanny

5 Children and Families Act 2014.
state” imposing “state guardians”. Guardians are decision-makers, while named persons are information facilitators with no power to overrule parental decisions. We must never forget the unpalatable fact that most children who are injured by adults are injured within their own families: any measure designed to allow early identification of potential problems within families must, therefore, be a good thing, though these measures will work only if the resources are there to provide the necessary support.

The provision of such resources – which will of course be directed to some of the least popular sections of the community (families living with low educational achievement, unemployment, addiction, violence and criminality) – lies ultimately in the hands of politicians. Since every child is valuable, no matter who their parents are, the major challenge for Scottish family law is for politicians to see past the unpopolarities and increase the supports available to vulnerable families as a whole. By these means, all children can be nurtured by the society of which they are members, and society as a whole will benefit.

Kenneth McK. Norrie
All societies teach their children to apologise for wrong-doing. We do this because societies function better when people acknowledge and agree on what is a wrong, and because acknowledging the wrong, saying sorry and being re-accepted is a powerful way of preventing feuds and anger from overtaking normal social processes. We also all have legal systems, and I would argue that the importance of a legal system is, fundamentally, that society as a whole agrees on the laws and, as a whole, upholds them. We call this the rule of law.

Both these things – apologies and law – are important to society. Normally we think of apologies as part of the moral system and not part of the legal system; but at the same time, the moral and legal world need to connect with each other. A legal system which is entirely separate from morality is generally not regarded as adequate. The point of a legal system is to assist people’s lives, and apologies are an important part of normal life that should not be prevented from occurring. In this essay I argue that when law makes people afraid to apologise this is a bad thing, and that we can and should create laws which do not make people afraid to apologise.

For a long time it has been common for lawyers to advise clients not to apologise. This is partly because of the fear that an apology will be regarded automatically as an admission of guilt or liability. The consequences of guilt or liability may be prison or having to pay a large sum of money, neither of which is a small matter. This would not matter if all apologies were definitive of legal guilt or liability or if people did not quite often apologise for things which are not legally wrong. For example, a parent who allows their teenager to attend a party at which the teenager is badly hurt is very likely to blame themselves and may well apologise to the teenager. But there is no legal wrong attached to the parent’s behaviour here. It is well known now that confessions are not always accurate, and that it is not safe to accept a confession in the absence of other evidence. Similarly a surgeon who has operated on a patient where the patient died because the anaesthetist made a mistake may want to apologise to the patient’s family because the surgeon feels responsible, but there is no legal wrong on the part of the surgeon. So the complex psychology of the people concerned may lead to what might be called ‘excessive’ apologising.

Of course, there are times when an apology or confession is made correctly for a wrong which is real and illegal. I am not arguing that an apology or confession will never be a sign that there has been a wrong. Rather, I am arguing that the law as it stands at present may have an excessively chilling effect on people’s ordinary patterns of apologising and that we need to address this.

Another reason why lawyers might not want their clients to apologise is because many insurance contracts contain a clause which makes the insurance void if the client makes an admission. Although courts in many jurisdictions have said that an apology is not necessarily an admission, this is a major concern. Clients who tell their insurer that they have apologised after a car accident may find that the insurer then says they will not pay because that has made the contract void. Often the client is not able to challenge this statement, and since they often do not have a lawyer who might challenge it, the matter ends there to the great benefit of insurance companies. Similarly, medical practitioners are often advised not to apologise to a patient who has suffered some kind of unexpected harm from treatment, because of the concern that this would be a legal admission and make their insurance void.

Advice to people not to apologise can create a ‘chilling’ effect. Where this has happened, people may become paralysed, torn between their ingrained habit of apologising for a wrong of any level of blameworthiness, and the fear that there may be a disproportionate response to the apology because it is seen as an admission of legal wrongdoing.

All this is important to consider when there is concern about levels of litigation and a ‘blaming society’. Although the evidence that there is a
massive rise in litigation or blaming in Britain has been discounted \(^1\), this does not mean that it is not still worth considering ways of reducing litigation and managing what happens when things go wrong in a way which is less destructive than going to court with all that that entails.

This is the impetus for apology-protecting legislation where it exists. To ameliorate the problem, many countries in the last twenty years or so have passed legislation designed to protect apologies from being treated as admissions or from being admitted as evidence into court. Many jurisdictions in the United States, all the Canadian provinces and all the Australian states and territories have done so and New Zealand and Hong Kong are currently considering it. Such legislation also exists in England and Wales in the form of section 2 of the Compensation Act 2006. Parliaments have mainly done this because of a belief that apologies should not be stultified by the law, and in the hope that this will reduce litigation.

It is important to note that this legislation is aimed at removing disincentives to apologise and not to alter matters such as the use of apologies in offers to make amends in defamation or legislation making evidence of what parties said to each other in settlement or mediation processes inadmissible. Such legislation is not what is referred to as apology legislation.

Despite the fact that the aim of the various pieces of legislation is the same, it differs markedly across the jurisdictions. The differences lie in the definition of apology, the field where the legislation operates, and the specific provisions included, such as preventing the apology from being admissible into court, preventing it from voiding an insurance contract, preventing it from being considered as an admission, and preventing an apology from making time run for the purposes of limitation of actions.

The following table gives some examples of apology legislation and shows the differences amongst them. I have chosen a selection of jurisdictions to show the range. This is by no means all the apology legislation, but it is representative of the forms in which it comes. ‘NEP’ means there is no equivalent provision in the legislation.\(^2\)


\(^2\) The legislation shown in the table is: AUSTRALIA: Civil Liability Act 2002 (NSW) ss 68-70; Civil Liability Act 1936 (SA) s 75; CANADA: Apology Act 2006 (British Columbia); ENGLAND AND WALES: Compensation Act 2006 (Eng & Wales) s 2: USA: Arizona Code 12-561 (Arizona); Rev Stat § 626-1 (2007) (Hawaii); Civ Prac and Rem Code Ann §18.061 (1999) (Texas); California Evidence Code §1160; Government Code §11440.45 (California); General Statute Ch 899, Tit 52, §184d (Connecticut); Stat Tit 7 Ch 90 §4026 (2001) (Florida).

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Apology defined to include fault</th>
<th>Scope of matter</th>
<th>Apology deemed not to be admission</th>
<th>Apology not admissible as admission of liability</th>
<th>Apology not to be taken into account/not relevant in determination of fault or liability</th>
<th>Apology does not make time run</th>
<th>Apology does not void insurance contract</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUSTRALIA</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>NSW (2002)</td>
<td>Yes</td>
<td>Most civil liability except motor accidents and employment</td>
<td>yes</td>
<td>Yes</td>
<td>NEP</td>
<td>NEP</td>
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<tr>
<td>SA (2002)</td>
<td>No</td>
<td>torts</td>
<td>NEP</td>
<td>yes</td>
<td>yes</td>
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<tr>
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<td></td>
<td></td>
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<tr>
<td>British Columbia (2006)</td>
<td>Yes</td>
<td>Any matter</td>
<td>Yes</td>
<td>yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>ENGLAND AND WALES (2006)</td>
<td>Not defined</td>
<td>Negligence or breach of statutory duty</td>
<td>Yes (not of itself an admission)</td>
<td>NEP</td>
<td>Yes (not of itself an admission)</td>
<td>NEP</td>
<td>NEP</td>
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<tr>
<td>UNITED STATES OF AMERICA</td>
<td></td>
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<td></td>
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<tr>
<td>Arizona (2005)</td>
<td>Yes</td>
<td>Unanticipated outcome in healthcare</td>
<td>NEP</td>
<td>Yes</td>
<td>NEP</td>
<td>NEP</td>
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<tr>
<td>Hawaii (2007)</td>
<td>No</td>
<td>Any matter</td>
<td>NEP</td>
<td>Yes</td>
<td>NEP</td>
<td>NEP</td>
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<tr>
<td>Texas (1999)</td>
<td>No</td>
<td>accidents</td>
<td>NEP</td>
<td>Yes</td>
<td>NEP</td>
<td>NEP</td>
<td>NEP</td>
</tr>
<tr>
<td>California (2000)</td>
<td>No</td>
<td>Accidents (not willful action)</td>
<td>NEP</td>
<td>Yes</td>
<td>NEP</td>
<td>NEP</td>
<td>NEP</td>
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<tr>
<td>Connecticut (2005)</td>
<td>Yes</td>
<td>Unanticipated outcome in healthcare</td>
<td>NEP</td>
<td>Yes</td>
<td>NEP</td>
<td>NEP</td>
<td>NEP</td>
</tr>
<tr>
<td>Florida (2001)</td>
<td>No</td>
<td>Accidents</td>
<td>NEP</td>
<td>Yes</td>
<td>NEP</td>
<td>NEP</td>
<td>NEP</td>
</tr>
</tbody>
</table>
The definition of apology in legislation differs. Particularly in jurisdictions where the legislation is covering a wide field it often does not include an admission of fault. In England and Wales it is not defined at all. Where the legislation is focused on medical negligence alone (mostly in the United States) there are more provisions which include admission of fault in the definition of apology (‘full apologies’); but it is clear that often the legislation only protects apologies which do not include an acknowledgement of fault (‘partial apologies’).

The difference between full and partial apologies matters. There is strong evidence from both sociology and psychology that most people do not regard an apology which is merely an expression of regret, a ‘partial’ apology, (for example, ‘I’m sorry your leg has come off’) as a ‘real’ apology. Where harm has been done, they almost invariably seek an acknowledgement of fault and responsibility as well, what is termed a ‘full’ apology (for example, ‘I am so sorry, we cut your leg off by mistake’). Psychological research has shown us a great deal about the role of apologies. There is evidence that where a wrong has occurred to V the victim, and person A who did the wrong apologises, the blood pressure of V is likely to go down in response. This is an indicator of a drop in anger. The evidence also shows us that where A does not acknowledge that she has done wrong, this response is reduced – indeed V’s anger may rise where V thinks that A has been at fault. Apologies can equalise the status of the victim compared with the wrongdoer- so that they can enhance the status of the wrongdoer, or operate to show the victim that their community thinks that they are in the right and the wrongdoer is in the wrong. We know people desire apologies when things go wrong and may be angry if the apology is not forthcoming and there are now several studies which have shown that people are less likely to sue after an apology. Professor Jennifer Robbenolt, of the University of Illinois, has carried out extensive research showing that partial apologies may make the situation worse than it was before, emphasising the importance of full apologies, particularly where harm is severe.

Where apology legislation defines apology as not including an admission of fault there is reason to believe it is not necessary. Such legislation does not change the law, because a mere expression of regret can never be an admission, although it may encourage apologies through publicising and educating about them. But where legislation defines apology to include an admission of fault how does it work? A case from Alberta, Canada, where the apology legislation defines apology to include acknowledgement of fault, is illustrative. In Robinson v Cragg (2011) 41 Alta LR (5th) 214, the court considered a negligence case involving a letter which included an apology and an acknowledgement of fault. The court held that the parts of the letter containing the apology, including the acknowledgement of fault, should be removed from the letter, all the rest of the letter being admissible to the court. The court then had to determine the negligence in the absence of the acknowledgement of fault and the expression of sympathy, but could use the other facts (including admissions of fact) mentioned in the letter which were not combined with apology. This seems the correct way to use the legislation. There is still evidence which is pertinent to the issue, but the combined admission of fault and apology was excluded as ‘unfairly prejudicial’. Of course, there will continue to be questions about how closely connected the apology and the acknowledgement of fault have to be to be excluded. But courts commonly have to make difficult decisions like these.

There are concerns that protecting apologies may lead to defendants using apologies in an insincere and strategic way to manipulate plaintiffs to accept less compensation than they would otherwise have done. There is also concern that the use of insincere apologies will undermine apologies as a social good or that the legislation is ineffective.

There is strong evidence in the medical field that when a system of apologising and acknowledging fault exists within a hospital context that the cost of litigation goes down. This does not mean rates of complaint go down. It means that some matters are resolved by...
apology and/or a small settlement and that settlement rates for larger matters go up, which reduces the cost of litigation because the matter does not actually go to trial. Does this mean that the injured are not fully compensated? The evidence suggests that it does not. It does reduce legal costs considerably, as being in court is the most expensive part of legal costs, so plaintiffs, while receiving lower sums may in fact be better off because the legal costs are less. Similarly, defendants are better off because costs are less. In the United States where each side pays its own costs this is significant. In Australia and Scotland, where the party who loses usually pays the costs of both parties, this still reduces costs for both.

Apology-protecting legislation is not a magic wand which can be waved to end litigation. Nor should it be. I began this essay by noting the importance of apologising for maintaining relationships in communities and society in general. As people are complex, it is a complex issue, but since the first apology-protecting legislation was enacted in Massachusetts USA in 1986 we have learned a great deal about how apologies work and how to make apology protecting laws more or less effective. For example, in Australia the legislation is embedded in civil liability legislation. Although the evidence is anecdotal, there is reason to believe that this has hidden the apology legislation from public view, and there is little knowledge or understanding of it amongst the public and indeed the legal profession. So if the aim is to protect apologies in the medical context, then it may be best to put such legislation in medical legislation such as the NHS Redress legislation or an equivalent. This is more likely to be seen by doctors and their lawyers than if it is hidden in civil liability legislation. In British Columbia, the apology legislation is stand-alone legislation which applies to all civil liability. This seems likely to be preferable at least in terms of meeting the goals of public education and understanding that apologies are protected.

Clear understanding by everyone of the scope of the legislation and what it applies to is vital if it is to be effective. But more than this, we now have the psychological research showing us how humans respond to certain kinds of apologies in particular situations, and this information is also useful in showing us how the content of apology-protecting legislation might differ in order to be more or less effective in different contexts. It is important to draw on this research in order to determine the best ways to achieve the goals which these laws seek to achieve, namely the use of the law to enhance rather than to damage the normal processes of human interaction and resolution of conflict. This is indeed a goal worth reaching for.

Prue Vines