

OPENING OF THE LEGAL YEAR

“Welcome everyone to the opening of the legal year. I thank you all for coming.

Although today marks the ceremonial opening of the legal year, the reality is that we run all courts throughout the year. It remains a tradition worth retaining, but we can, and will, change it from time to time. Just as last year’s ceremony was the first to be live streamed, we will this year again attempt to improve upon the traditional format.

I was reminded recently of an article which Professor McBryde had written for the Scots Law Times on my becoming Lord Justice Clerk ten years ago. He was reflecting on the Lord Justice Clerk’s involvement in controlling an outbreak of distemper amongst cattle in the late 18th century. He added wittily and I quote:

“Lord Carloway must be grateful that he is unlikely to be called upon to manage the next outbreak of foot and mouth”.

I suspect that this is something called irony.

There are some obvious themes to cover this year. Sometimes it seems as if everything that might be said about the COVID months must have been said already. The reality is that the justice system in Scotland, in common with jurisdictions across the globe, has been forced to adjust, adapt, learn, respond and innovate on almost a weekly basis.

This has altered our perception of the court simply as a building. It is not just a physical space. It is a public service. Virtual courts and online services must be viewed as core components of the justice system. They should sit alongside and complement in-person hearings.

The principal adverse effect of lockdown on the courts was to stop criminal trials, especially jury sittings, because of the real and immediate dangers to health. The cinema model has worked well. I extend my thanks to all those who participated in the creation of this world class innovation which has told us a great deal about how we could modify our practices and procedures to accommodate modern thinking.

There may be perceived disadvantages in the remote trial but there are advantages too, especially in the manner in which juries engage with the pressures of the courtroom. Research may throw light upon what, if any, difference the model makes. That will have to be looked at carefully. It is likely that the cinema model will be with us for some time to come. It may become, in a modified form, a permanent feature for some cases.

Whether that is so or not, a priority is clearing the backlog in criminal trials. I am acutely conscious of the extended time-periods between indictment or complaint and trial. These affect not only those in custody and those waiting for trial on bail but all the alleged victims and other witnesses in the pending processes. The problem can only be dealt with by resolving cases at the earliest opportunity and by increasing the number of courtrooms available to conduct trials. Physical space, while occasionally challenging, is not the major problem. It is making sure that there are enough people to carry out the work. This, as can be seen from current events, is not a problem unique to the legal sector.

The Scottish Courts and Tribunals Service began recruiting more staff some time ago with a view to having court clerks and others in place for the recovery programme. Provided that Government support remains available, this will continue in the hope that during the coming year we may be able to increase even further, the number of trial courts operating throughout the country.

I have asked the Judicial Appointments Board to recommend for appointment an extra 15 fee paid sheriffs and 15 fee paid summary sheriffs to augment the existing cohort, which, in a different era, had dwindled to 24. It may be that, if the numbers of indictments continue to increase, as we are being told they will, we may need to ask the Government to sanction the appointment of more permanent, full or part time, sheriffs and summary sheriffs.

All of this will have an impact on the professions, who will be asked both to prosecute and to defend in an increasing number of trials. The levels of business which will be generated may be encouraging on one front, but each factor in the equation, including of course the provision of adequate legal aid, requires to be adequately funded to make the recovery programme work. There is the added problem of the cross over between the various occupations, whether sheriff, prosecutor or defender, in that each may be attracting applications from each others' cohort.

I am optimistic that, with the programmes which we are currently modelling and the considerable assistance of the professions, over the next few years we will return to the time periods which were prevalent before lockdown.

Civil practice has brought different changes as we have progressed down the electronic route. The WebEx experience has been a fascinating and largely beneficial one in that it has forced us to realise what can and cannot be done with virtual systems. The bottom line is that we can do almost everything in this manner. The question is whether that is beneficial to the system and those who use it, whether as litigants or lawyers.

Two myths are worth dispelling at the outset. The first is that SCTS is trying to convert the justice system into an online process with a view to saving money. It is true that we are trying to make Simple Procedure more efficient and cost effective for those raising actions, but using WebEx instead of an in-person hearing has few, if any, cost saving benefits to SCTS although it may well produce significant savings for the professions and their client bases. The purpose of the use of online systems, apart from dealing with the physical restrictions imposed by Covid, is to increase the efficiency of the system, to improve the quality of justice. To extend access to justice and to reduce the time taken by others, including the legal profession and witnesses.

The second, which has been a recurrent theme is this: with the relaxation of the lockdown rules we have seen the reopening of nightclubs, large scale events and football stadiums. Why aren't the courts doing the same? The answer is not in the availability of physical space. The problem is not, and never has been, an inability to conduct a case in person in a particular courtroom. Even with one metre social distancing, this court has a safe capacity of 37 people. If there is a need for there to be an in-person hearing, that can (and has been) accommodated.

The problem is having 12 courtrooms all occupied at the same time, with the footfall that that creates in the building; not in the individual courtroom but the communal areas. That is where the danger lurks and that is what we have been keen to guard against. An outbreak of COVID in Parliament House would be a significant problem to deal with, as it would in any of the other court or tribunal buildings. The recent spike in transmission levels demonstrates that we remain in a fragile position. As the public health position changes, we will change but it would be foolish to over-ride health risks in favour of our own preferences.

The Scottish Civil Justice Council's new consultation paper is now available, with a response date of 18 October. There are draft rules to prompt discussion annex to the paper. I am quite happy to take responsibility for the way in which the rules are framed as long as it is understood that they do not represent my own views on how the system should operate in the future. They are what is said on the tin; proposals for consultation. If anyone has an alternative formulation, please let us have that. I am unaware that anyone from outwith SCTS has proposed an alternative as distinct from expressing disaffection with the existing draft.

They are not part of a Machiavellian conspiracy to close the Parliament House for business. Quite the contrary, this building, and its satellites, will remain the centre of a modern legal system for generations to come. I expect it to return to normal operations albeit in a phased and sensible manner and with virtual hearings a significant retained element.

Once the SCJC has, in a balanced and measured way, ingathered the responses, we will reach a decision on the direction of travel. Hopefully, we will be able to take the vast majority of the members of the profession with us on that journey which, I am certain, will lead to a much more efficient and, partly because of that, a much fairer system for us all – and by that I mean all court users. I wish to stress, however, that this can only be achieved if we manage to work together in

a constructive manner to reach a consensus with which we are all reasonably happy. This is not a time for aggressive behaviour but patience and careful thought.

I would like to extend particular thanks to the Lord Justice Clerk, to the administrative judges and to the sheriffs principal for their help throughout the year in working through the COVID crisis. I congratulate the SCTS chief executive, Eric McQueen and all the staff of SCTS, especially the digital team, in providing solutions to the many problems that electronic processes continue to throw up on a daily basis, and to the Principal Clerk, Pamela McFarlane, for doing the same with such good humour. Finally, and by no means least, I extend my gratitude to the Faculty of Advocates and the Law Society of Scotland, together with the other important and ancient legal institutions represented here today, for their valuable assistance and yes, even the criticism too, where it has been constructive.

As I have said before, this is not the time for a defence of tradition. The cry of 'it's aye been' cannot prevail. Equally, as we seek to take advantage of the new technology, three key principles must be preserved: access to justice, fairness and transparency.

Over the last year we have travelled great distances and sometimes at a high speed. We have seized the momentum and responded to the challenges. The reward of having a new vibrant, progressive, digitally enabled courts and tribunals service is now within our grasp. This is an opportunity to be bold. I therefore look forward to working with you all in this spirit.

There has been much dialogue over the past year around the changes implemented and those to come. The Dean of the Faculty and the President of the Law Society have, quite rightly, not been slow to express their views. Their contribution to the discourse is appreciated. It is with that in mind that I have invited them both to say a few words, of their own choosing, today.

It is now my pleasure to welcome those who have gained the rank and dignity of Her Majesty's Counsel.

Mr MacSporran, you have distinguished yourself in complex medical negligence claims, and in the course of your career have taken up important appointments as Standing Junior to the Scottish Government and the Department for Environment, Food and Rural Affairs.

Mr Hayhow, you bring your vast experience from a career as both a solicitor and an advocate. Your specialisation in family law, particularly financial provision on divorce, will be of considerable benefit in that area.

Mr Moir, prior to calling you gained considerable experience as a solicitor. You have distinguished yourself in your practice in criminal law including proceeds of crime.

Ms Bain, you are skilled in the areas of family and criminal law. You gained valuable experience as a senior advocate depute for the Crown before returning to defence work. You will be a major asset to the senior criminal bar.

Mr Hawkes, you bring to the senior bar your experience as a commercial litigator. You have been a standing junior to the Scottish Government and have appeared in many extradition cases on behalf of the Lord Advocate.

Mr Middleton, you have a successful reparation practice, acting for pursuers and defenders in a broad range of employment and road accident cases, disease and workplace stress claims. You share your valuable knowledge with new advocates as an instructor on the Faculty's foundation course.

Mr McNaughtan, while your particular expertise lies in reparation cases, you have also worked for the DPP in Fiji, and will return to the criminal law with your new appointment as advocate depute. You have contributed a great deal in teaching advocacy skills in the Faculty's foundation course.

Mr Hamilton, you have a breadth of experience across a range of civil areas including media law, high value personal injury actions and clinical negligence. In addition, you have served as

advocate depute and have made a valuable contribution in your role as a convener of the Mental Health Tribunal.

Ms Smith, you have a successful practice in reparation and public law. You have been counsel to the Investigatory Powers Tribunal, and have been Standing Junior Counsel to the Advocate General, You have contributed a great deal to the work of the Equality and Human Rights Commission Panel and as Deputy Chair of JUSTICE Scotland.

Ms Malcolm, you have achieved this distinction of having a varied and successful practice focused on family law and child related issues. Your publication on cohabitation is of great value to the legal profession. You too will be a major asset to the family courts.

Ms van der Westhuizen you are skilled in the areas of commercial, planning, environmental and public law. You have practised in South Africa as well as calling to the bar of England and Wales in 2008. You have gained experience as standing junior to the Scottish Government.

Mr Kearney, during the course of your lengthy career, you have gained valuable experience in a range of criminal law matters, especially in your worthwhile service as advocate depute following a long career in the procurator fiscal service.

The rank and dignity of Queen's Counsel is hard earned and well deserved for each of you. These brief summaries of your careers do not do you justice. I offer you all my sincere congratulations and best wishes for this next chapter in your legal careers.

I am conscious that there will be those who will be disappointed this year. I repeat what I said last year that, although by no means determinative one way or the other, I attach particular importance to service as an advocate depute (especially during the current crisis), when determining suitability, and also, both in the civil and criminal contexts, to regular appearances in the appellate courts.

Before the Court adjourns, it is important to commemorate the legal careers of those senators who are leaving the First Division this year.

Lord Menzies is a graduate of the Universities of Oxford and Edinburgh. He passed advocate in 1978 and was appointed Queen's Counsel in 1991. He enjoyed a highly successful career in civil work at the bar, notably in planning and related fields. He was chairman of the Scottish Planning, Local Government and Environmental Bar Group. He became a temporary sheriff in 1996, before becoming an advocate depute and then Home (now principal) Advocate Depute in 1998. He became a judge in 2001 and was elevated to the Inner House in February 2012. As judge, Lord Menzies was able to apply his skills both in civil and criminal work to great effect. He has sat in many of the major cases over the last decade and has applied his vast knowledge and experience, not to mention his practical and common sense, to these litigations.

Lady Smith is a graduate of the University of Edinburgh. She passed advocate in 1980 and took silk in 1993. Lady Smith had a very busy practice at the bar, notably her work in clinical negligence and family cases. She was chair of the Advocates' Medical Negligence and Family Law Groups. She served as a temporary sheriff in the late 1990s. She carried out very important work as chair of the Scottish Partnership on Domestic Abuse. She served as an Advocate Depute. She was appointed as a judge in 2001 and to the Inner House in 2012. She has undertaken a wide range of duties, not least as her time presiding in the Employment Appeal Tribunal. Her work as President of the Scottish Tribunals has been invaluable. Her retirement from the bench is not, however, a departure from her ongoing work as Chair of the Scottish Child Abuse inquiry, in which role she will continue.

I would like to express my gratitude for the diligence and assistance provided by Lord Menzies and Lady Smith over the years. The knowledge and expertise which they brought to the courts and tribunals has been considerable. Their absence from this bench will be tangible. That can be noted in the minutes of proceedings. I am in no doubt that they will continue to carry out important work, away from the bench. On behalf of the College of Justice, I wish them both the very best in their future endeavours, both professional and personal. The court will now adjourn."