



## **INHOUSE LAWYERS' GROUP**

### **GUIDE FOR INHOUSE LAWYERS**



## GUIDE FOR IN-HOUSE LAWYERS

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## **WHAT IS ILG?**

The In-House Lawyers' Group ("ILG") represents the interests of Scottish solicitors employed in public service and commerce. The Group was originally founded in 1973 and was then known as the Public Service and Commerce Group. The name change was agreed in April 1999. It was felt the new name would illustrate unity among in-house lawyers and also the Group's activities would be more readily understood by the legal profession and others.

The objects of the Group are:-

1. To promote the interests and status of solicitors enrolled in Scotland and employed in public service and commerce.
2. To improve and strengthen the links within The Law Society of Scotland between solicitors in private practice and those employed in public service and commerce.
3. To encourage and develop the better training of solicitors in the Group.

Membership is automatically granted to all solicitors who are members of The Law Society of Scotland and who are employed in any capacity in central or local government, industry or commerce, the procurator fiscal service, court administration, public bodies or the like and such other solicitors as the Committee from time to time approve. No subscription is payable by members.

The Group receives its funding from a budget agreed annually with The Law Society of Scotland.

The number of in-house lawyers in Scotland has increased over the years, and currently the Group represents 27% of all enrolled solicitors in Scotland. This number is likely to continue to increase in the coming years.

The Group functions through a Committee which comprises a maximum of 18 members. The President and Vice-President of The Law Society of Scotland are ex officio members of the Committee. The Committee endeavours to ensure that all sectors covered by the Group are represented on it. The Committee appoints a Chairman and Vice Chairman at the first meeting after the Annual General Meeting of the Group, which is held in November of each year. Committee Members serve for a term of 3 years (but are eligible for re-election), with one third retiring by rotation at each AGM.

The Committee is serviced by a member of the Secretariat of The Law Society of Scotland. Members are encouraged to contact the Group Secretary with issues for the Committee to discuss; topics for seminars etc.

A series of seminars are arranged for Members free of charge throughout the year. Details can be found on The Law Society of Scotland's Website (<http://www.lawscot.org.uk>).

The Group comments on proposed legislation etc. which may affect in-house lawyers. A small working party may be set up for this purpose.

The Group plays an active role in the affairs of The Law Society of Scotland. Currently 5 members of the Committee are co-opted onto the Council of The Law Society of Scotland. The Committee is a full reporting committee of the Council, and its minutes are approved and commented upon at Council Meetings. The Group is also represented on a large number of Law Society Committees.

Close links with The Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) are also maintained.

The Current Office Bearers are:-

- |                        |  |
|------------------------|--|
| <b>Chairman</b>        | <b>Mrs Janet Hood*</b><br>BII Scotland                       |
| <b>Vice-Chairman</b>   | <b>Colin Anderson</b><br>The Standard Life Assurance Company |
| <b>Group Secretary</b> | <b>Ms Tricia Sim</b><br>The Law Society Of Scotland          |

The Current Committee Members are:

- |   |  |
|---|--|
| Jane Benson<br>Procurator Fiscal Service        | (representing SYLA)                              |
| John Forsyth<br>HBOS plc                        | Fergus Speight<br>The Pearl Group                |
| Ros McInnes<br>BBC Scotland                     | Lynda Towers<br>The Scottish Parliament          |
| Mrs Annemarie O'Donnell<br>Glasgow City Council | Carolina Viola<br>SVM Asset Management           |
| Cameron Ritchie*<br>Procurator Fiscal Service   | Lynn Welsh<br>Equality & Human Rights Commission |
| Sheekha Saha*<br>Western Isles Council          | Janette Wilson*<br>Church of Scotland            |
| Sara Scott<br>Royal Bank of Scotland            | Alistair Young<br>East Dunbartonshire Council    |

\* denotes Member of Council

## **THE IN-HOUSE LAWYERS' GROUP CONSTITUTION**

### 1. NAME

The name of the Group shall be the In-House Lawyers' Group (the Group) of the Law Society of Scotland (the Society).

### 2. OBJECTS

The objects of the Group shall be :-

- (i) To improve and strengthen the links within the Society between solicitors in private practice - and those employed in public service and commerce.
- (ii) To promote the interests and status of solicitors enrolled in Scotland and employed in public service and commerce.
- (iii) To encourage and develop the better training of solicitors in the Group.

### 3. MEMBERSHIP

Enrolled solicitors in Scotland who are employed in any capacity in central or local government, the procurator fiscal service, court administration, public bodies, administration or commerce or the like and such other solicitors as the Committee from time to time approve shall be Ordinary Members of the Group.

### 4. HONORARY MEMBERS

The Committee shall be entitled to appoint any persons as Honorary Members of the Group for such period in each case as they shall decide.

### 5. EX OFFICIO MEMBERS

The President and Vice-President of the Society shall be ex officio Members of the Group.

### 6. COMMITTEES AND OFFICERS

- (a) The Committee of the Group shall consist of the President and Vice-President of the Society as ex officio members: a number of Members of the Group not exceeding 18 (as elected Members of the Committee). In addition, the Committee shall at their first meeting after the Annual General Meeting each year or as soon as possible thereafter co-opt to the Committee but such co-option to be exercised only if the following categories are not represented by the elective process:-

- One Member from each of the following categories:
  - (i) Procurator Fiscal Service; (ii) Central Government Service; (iii) Local Government (iv) Public Bodies and (v) Commerce and Industry.

- The Committee may in their discretion from time to time co-opt not more than 3 other Members of the Group.
- (b) One-third of those Members of the Group elected to the Committee at the first Annual General Meeting shall retire by rotation at each of the second, third and fourth Annual General Meetings of the Group after this Constitution comes into effect, such one third to be selected by lot.
- (c) After their election or re-election at the second or subsequent Annual General Meetings, elected Members of the Committee shall serve on the Committee for three years, but on retiring, they shall be eligible for re-election.
- (d) The Committee shall from time to time be entitled to co-opt any Ordinary Member of the Group to serve as a member of the Committee to fill any casual vacancy which may occur among elected members. Any such Member shall retire at the Annual General Meeting at which the elected member of the Committee whom he replaced would be due to retire but may offer himself for election.
- (e) The Committee shall from time to time be entitled to co-opt an Ordinary Member of the Group to serve as a member of the Committee to fill any vacancy among the co-opted Members provided that if the vacancy is a casual vacancy such Ordinary member must be co-opted from the same category as the retiring member as specified in paragraph (a) hereof. Any such member shall retire at the next Annual General Meeting.
- (f) The Office Bearers of the Committee shall consist of a Chairman and Vice-Chairman who shall be appointed from the elected Members of the Committee by the Committee at its first meeting and thereafter at its first meeting immediately following the Annual General Meeting in every year. The Secretary and Treasurer of the Group shall be a Member of the Secretariat of the Society appointed by the Committee for such period as they may decide.
- (g) The Committee shall from time to time be entitled to appoint any elected Member of the Committee as Chairman or Vice-Chairman to fill any casual vacancy in these offices which may occur.
- (h) Nominations of Ordinary Members of the Group to fill a vacancy on the Committee must reach the Secretary of the Group not less than twenty-eight days before the date of the relevant Annual General Meeting and each nomination must be signed by a proposer and seconder, and by the nominee all being current Members of the Group.
- (i) If there are more candidates for election to the Committee than the number of vacancies, the resulting competition shall be decided by postal ballot, each candidate disclosing his full name, address and employing authority. The postal ballot shall be carried through by the "first past the

post”method. The result of the ballot shall be announced by the Chairman at the Annual General Meeting and such result shall be final.

- (j) Four Members of the Committee, of whom not less than 3 are elected Members of the Committee, shall constitute a quorum for meetings of the Committee.
- (k) For avoidance of doubt, it is understood that ex officio and co-opted Members shall have full powers as Committee Members.

#### 7. DUTIES OF THE COMMITTEE

The Committee shall be responsible for furthering the objects of the Group, for organising the Group and its activities and for the relations of the Group with the Council of the Society.

#### 8. FINANCE

- (a) The funds of the Group shall be:
  - (i) such sums as may from time to time be made available by the Council of the Society
  - (ii) any other funds provided by the Members of the Group
  - (iii) any other funds received by the Group.
- (b) The financial year of the Group shall run from 1st November to 31<sup>st</sup> October.
- (c) The Secretary and Treasurer shall keep a record of the funds of the Group and shall present the Accounts of the Group to each Annual General Meeting.

#### 9. ANNUAL GENERAL MEETING

- (a) The Annual General Meeting shall be held annually on a date and at a time and place to be determined by the Committee who shall give at least six weeks notice thereof by such means as the Committee shall decide.
- (b) The business of the Annual General Meeting shall consist of -
  - (i) the reception of the Chairman’s Report on the previous year’s activities of the Group;
  - (ii) the consideration and approval of the Accounts of the Group;
  - (iii) the report by the Chairman of the election of Members to the Committee;
  - (iv) any other business of which notice may have been given or which may be permitted to be raised without notice;

(v) any matter relating to the business of the Group specified in a requisition made by not less than 10 Members of the Group and received by the Secretary not less than 28 days before the meeting provided that the Chairman may allow any matter to be raised at the Annual General Meeting without such previous written notice as aforesaid.

(c) The Chairman of the Committee shall act as Chairman of the Annual General Meeting, failing whom the Vice-Chairman whom failing any Member of the Committee elected to the Chair by the Ordinary Members of the Group present at the Annual General Meeting. Subject to the provisions of this Constitution all decisions shall be taken by a majority vote of the Ordinary Members present at the meeting and in the event of equality the Chairman shall have a second or casting vote.

#### 10. SPECIAL GENERAL MEETING

(a) Special General Meetings of the Group shall be convened by the Secretary on the instructions of the Committee or on a requisition signed by not less than ten ordinary Members of the Group. The requisition must state the objects of the meeting. It must be deposited with the Secretary and may consist of several documents in like form each signed by one or more requisitionists.

(b) A Special General Meeting required by requisition shall be held within 28 days of receipt of the requisition and shall, subject to the provisions of this Article, be held on such date, time and place as the committee may appoint.

(c) Fourteen days' notice of a Special General Meeting shall be given to Ordinary Members of the Group by such means as the Committee shall decide.

#### 11. CONDUCT OF MEETINGS

The standing orders made by the Council of the Law Society of Scotland shall mutatis mutandis apply to the conduct of business at General and Committee Meetings of the Group.

#### 12. AMENDMENT OF CONSTITUTION

The Group may at any General Meeting by a majority vote of the Ordinary Members present at the meeting amend this Constitution provided that notice of a motion to this effect of such amendment has been given to the Ordinary Members of the Group in the same manner as provided for in Article 9(a).

#### 13. WINDING UP

The Group may at any General Meeting decide by a majority vote of the Ordinary Members present at the meeting that the Group shall be wound up provided that notice of a motion to this effect has been given to the Ordinary Members of the Group in the same manner as provided for in Article 9(a). In

this event the assets of the Group shall be transferred to the Society for such purpose as they may think fit.

## **COMMITTEE MEMBERSHIP**

The ILG Committee is rather different from other Law Society committees in that it has its own constitution. Members of the committee are elected by the Group members at the AGM in November. Nomination forms can be obtained from the Group Secretary and a copy is attached here. The Committee can also co-opt members during the year, either to replace someone retiring or to fill a perceived gap in representation. Co-opted members must stand for election at the following AGM. Details are in the In-house Lawyers' Constitution which you can find in this Guide.

The office bearers are appointed by the elected committee members at their first meeting following the AGM.

The committee usually meets monthly at Drumsheugh Gardens, on the last Thursday of the month. The meetings usually last for about 2 hours. Between meetings, Committee members deal with many straightforward matters by email.

**IN-HOUSE LAWYERS' GROUP  
NOMINATION TO THE COMMITTEE**

We \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Insert name and  
address

and \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Insert name and  
address

being members of the In-House Lawyers' Group do hereby nominate

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Name and address  
Of Candidate

for election as a member of the In-House Lawyers' Group Committee at the next ensuing election.

\_\_\_\_\_  
\_\_\_\_\_

Signature of  
Proposer

Signature of  
Secunder

I, the nominee for election, consent to be nominated and if elected accept office as a member of the Committee of the In-House Lawyers' Group.

\_\_\_\_\_  
\_\_\_\_\_

Signature of  
Nominee

Date

## **ILG PROGRAMME OF EVENTS**

### **Seminars**

ILG holds around 25 seminars each year, on a wide range of topics. These are usually in the evening although there are occasionally full- or half-day events. There is no fee for attendance by members at evening seminars. A registration fee will be charged for full-day events – these are budgeted for individually.

Lawyers qualified in other jurisdictions working inhouse in Scotland are treated as members for the purposes of attending seminars.

Trainees, paralegals and law students are welcome to attend ILG events on the same basis as members. The Committee has also extended this offer to other professionals in your organisation who might have an interest in attending specific seminars, eg. an HR manager might be interested in attending an employment law seminar, finance staff in banking law etc. Places may be limited at some events and are allocated to members in the first instance.

### **AGM and Symposium**

The AGM is held in November each year in a central location and is combined with a Symposium. This format has proved popular with members, as in addition to providing continuing education there is also the opportunity to get together with friends and colleagues and to discuss issues with Committee members. A Dinner is held in the evening.

### **Joint Conference with the Faculty of Advocates – The 21<sup>st</sup> Century Bar**

This conference is usually held at the beginning of December each year and is a full day conference held in the Mackenzie Building in Edinburgh, the education centre for the Faculty of Advocates. This joint venture has proved very popular and we are delighted that the Dean of Faculty continues to give us his enthusiastic support.

## **WEBSITE**

The In-House Lawyers Group has its own section on The Law Society of Scotland's website, [www.lawscot.org.uk](http://www.lawscot.org.uk). This section provides information on the Group, news items and general information for members and an events page which gives details of the seminar programme. On-line enrolment is available.

The web pages are updated at least once each month with news of Committee activities, forthcoming events and other information which the Committee feels would be of interest to members.

Suggestions or comments from members on the content and layout are always welcome and members are encouraged to submit material which would be of interest to others in the Group. It is hoped that, with input from members, the website can become a forum for exchange of information.

## **WHAT'S IN A NAME – THE ILG POLICY**

If you have a practising certificate then your title can be (but need not be) "solicitor" or relevant derivative. If you are legally qualified, but do not have a practising certificate, then you cannot have solicitor, or derivative, in your title. In effect, in many organisations where there are lawyers without practising certificates, they will take a generic business title. So, for example, if they are in the legal department, the title may be "manager, group legal services" or in a business area, "senior adviser, corporate banking". Anyone who wishes to use a specifically legal title like solicitor should have a practising certificate. We look upon the title as going with the right to practise - so, if you want the title, get the certificate.

Having a practising certificate should be seen as evidence of meeting certain basic criteria in the eyes of the Society, which entitle you to hold yourself out as "solicitor".

## THE IN-HOUSE LAWYER

The need for an in-house legal service is dictated by the need for businesses to have legal experts of top quality available within their corporate structure at all times.

### **The specifics of the practice of the in-house lawyer**

Intrinsic characteristics

Tasks entrusted to the in-house lawyer

Recruitment

Continuing legal education

Representation of the profession

### **Intrinsic characteristics**

The first characteristic of the in-house lawyer is the absence of a client base. As an in-house lawyer you have many personal contacts, both within your own organisation and in others but they are not your clients because you do not defend their private interests, but rather those of your organisation, nor are you remunerated by them. The in-house lawyer gives legal advice exclusively to his/her company and not to third parties.

The second feature is that you exercise your role under a contract of employment. It also means that your activity is governed by employment law and, as the case may be, by the terms of any collective bargaining agreement applicable to your organisation or industry sector.

Exceptionally, the relationship between the in-house lawyer and the organisation may take the form of a medium or long-term contract for services. In either case, the in-house lawyer has full intellectual independence, no more affected by the status of an employee than a doctor employed by a hospital, a pharmacist working under an employment contract or even an employed lawyer in private practice.

The practice of a profession as an employee is perfectly compatible with intellectual and technical independence as has been confirmed by decisions of the supreme courts of several member states of the European Union (incl. the United Kingdom). It would accordingly be incorrect to infer that the economic dependence of the employee would alter the intellectual independence of the in-house lawyer. On the contrary, that very independence, as chief executives well know, serves the interest of the organisation and the public interest, by integrating into business practices respect for the law and professional ethics, of which the chief executive is advised from the moment he/she hires the in-house lawyer.

The third characteristic is that the function is one of legal expert: the in-house lawyer acts a priori: you represent your company/industry during the consultation process for proposed new legislation and regulation; you are in effect the first to apply new legislation. In the absence of any learned analysis or commentary, you must immediately implement, in the day to day business, new rules and regulations published that day in the official journals. In-house lawyers decide which cases to run with on the basis that companies are increasingly adopting a tactical approach to litigation: seeking settlement on certain cases, regardless of the strength of the case, and running with other litigation for 'test' purposes. These are the key parts of the in-house role.

The fourth characteristic is that an in-house lawyer is also an executive, perhaps even an in-house director, a fully integrated member of a multi-disciplinary team in direct relationship with the board. You are familiar with the culture and values of your organisation.

The final principal feature is that of mobility. Whether it be from one subsidiary to another or from one

speciality to another or even, in the larger organisations, from one country to another, the in-house lawyer is accustomed to moving from one organisation to another. Needless to say, you are also ready to move from one branch of the legal profession to another.

### **Tasks entrusted to the in-house lawyer**

The tasks entrusted to the in-house lawyer, which are determined by the variety of situations with which your organisation is confronted, can be summarised as follows:

The detection, prevention and minimisation of legal risks affecting the organisation, its officers and its property in the conduct of its business;

The identification of legal means available to the organisation to achieve its objectives at reasonable cost and minimum legal risk;

The optimisation of legal rights and obligations undertaken by the organisation vis-à-vis third parties, whether in the public or private sector, while ensuring that those rights and obligations are coherent and consistent, not only in themselves, but also with the organisation's objectives, and with its ethical code which he/she has helped to form.

Their enforcement by all appropriate means including litigation;

The administration of the requirements of the law, to which the organisation is subject as a legal entity (such as general meetings and board meetings);

The conduct of contractual negotiations and the drafting of agreements;

The responsibility for litigation and settlement thereof in front of courts, tribunals or arbitrators, in conjunction with advocates or barristers where required;

The issue of legal opinions, not only in relation to contracts but also on any aspect of the organisation's activities, often in a situation of crisis, or in key moments of decision making.

Informing and advising management and staff of legal developments, actual and anticipated, affecting their activities;

Active and constructive involvement in the drafting of new rules and regulations;

Undertaking the interface of the organisation with the external legal environment

## **CONFLICT OF INTEREST**

### Purpose of Guidance Note

A number of Members have raised the issue of conflict of interest in the provision of legal advice. This note is intended to identify some of the issues for subsequent consideration and discussion. Feedback from Members is requested along with details of any experiences they have had to deal with. It is thereafter the intention to re-issue a second version of this guidance note.

### Notary Public

Nothing in this guidance note prejudices the ability of an In-House Lawyer to notarise documents as doing so does not *per se* create a solicitor/client relationship.

### The Facts

- In-House Lawyers act for one client, their employer.
- In-House Lawyers are generally exempted from contributing to the Guarantee Fund and are indemnified by their employer. See comment below.
- The Solicitors (Scotland) Practice Rules 1986 prohibit a solicitor from acting for two or more parties whose interests conflict (Rule 3). Further provisions are set in Rules 4 and 5.
- Conflict of interest is not defined and the onus is therefore on the solicitor to make his/her judgement based on the circumstances of each case.
- The Scottish Solicitors' Discipline Tribunal, has expressed concern over the profession's continuing failure to recognise conflict of interest and to follow the Practice Rules.

### How to spot a conflict

Members should ask themselves:

- Am I being asked to give advice to someone other than my employer?
- Am I being asked to give advice on a subject matter outwith the remit of my employer?
- Do I have a personal interest in the matter I am being asked to give advice on?
- Where two parties are involved in the same matter would my advice to the parties be different?

If the answer to any of the above is yes then the In-House Lawyer should carefully consider his/her position and consult the Practice Rules and Law Society Guidelines.

On occasion the In-House Lawyer may be put under pressure to act in a certain way that may lead to a conflict of interest. In such circumstances he/she should refer the matter

to his/her superior. Reference can also be made to any of the Committee Members of the In-House Lawyers Group and/or Bruce Ritchie, Director of the Professional Practice department of the Law Society, tel. 0131 476 8124 or email [bruceritchie@lawscot.org.uk](mailto:bruceritchie@lawscot.org.uk).

**It cannot be overemphasised that all solicitors should walk away from proceedings in the event of a conflict AND where a conflict is reasonably foreseeable in the circumstances.**

### Illustrations

#### Local Government

Individual Councillors are not the solicitor's employer and care should be exercised where a Councillor asks for advice about non authority business.

Where an authority sets up a company/trust or agrees to be a member of a company/trust, external solicitors should be appointed to advise the company/trust.

Where a joint venture is set up with another public body (eg health, water, transport), each body must continue to receive separate legal advice, ie a local authority solicitor cannot advise Health Boards/Scottish Water/Transport Authorities on their statutory functions and vice versa.

#### Banking/Conveyancing

Members are directed to the Law Society's Guidelines which are on the website. They give clear guidance on conflict of interest relating to commercial securities, loans and conveyancing.

### **Declaring an Interest at meetings for In House Lawyers**

In House Lawyers should be aware that their actions can be scrutinised by the Law Society of Scotland, their employers, the profession at large, the Scottish Executive, the Ombudsman, the general public and the press.

- It is therefore imperative that they act in such a fashion as to be beyond reproach by any of these parties. One of the most complex issues which needs to be considered is the issue of when to Declare an Interest in meetings where they may be representing or advising their employers or be seen or believed to be so representative or where they are acting in another personal capacity.
- If an In House Lawyer is acting in another capacity outside of the work place he/she should so declare before taking part in any meeting or event where confusion may arise and the advice given below should still be considered prior to taking part in that meeting or event. (Please note: the advice given below can be applied to any other meeting or event in which an In House Lawyer may take part)

It is vital that decisions at any meeting are taken in a manner which is not only impartial but seen to be impartial by any party who may have an interest - whether peripheral or not. Therefore best advice is that if you have an interest in proceedings you should declare an interest and leave the room unless that interest is so minor as not to be able to be perceived as being able to have influenced your decision in which case you may care to apply one of the other alternative actions detailed below.

There are 3 main areas where an Interest requires to be declared.

**Personal** – where the matter before the meeting is one which affects you, your family or your friends or business partners or colleagues.

**Financial/ Business** – where you have a direct or indirect financial or other business interest in the matter under discussion by way of being a partner – salaried or otherwise, employee, shareholder, owner or any other business or financial interest otherwise not here mentioned or where you act, have acted or are expecting to act professionally whether or not for a fee, for the person, business or organisation under discussion.

**Organisation** – where you are a member of a professional or trade organisation, club or other body, whether formally constituted or not, that is under discussion

**Actions** – If you fall into one or more of the above categories you should consider taking one of the following actions:-

For Meetings pertinent to your work at which you may be required to give advice to your employer

1. Declare an interest and request another solicitor gives advice on the particular matter - *e.g. where you are the applicant or affected neighbour in a disputed planning application or similar situation*
2. Declare an interest and give advice to your employers - *e.g. where you have a peripheral interest in a matter such as where a remote family member may be a member of a club*

For meetings in which you may take part in a non employment situation.

1. Declare an Interest - leave the room – take no part in discussion - do not vote – *this is the most proper action to take in most cases where conflict of interest occurs.*
2. Declare an Interest - remain in the room - take no part in discussion - do not vote – *where your interest is minor but could be perceived to influence your decision*
3. Declare an Interest – remain in the room – give information pertinent to the matter under discussion – do not vote - *only where the information you have to bring to the discussion is so vital that the other persons involved in the meeting could not come to a proper decision without that information being disclosed*

4. Declare an Interest – remain in room – take part in discussion – vote - *where your interest is so minor that no person could possibly perceive that it has influenced your decision*

It is a matter for each In House Lawyer to decide which of these Actions are most appropriate. However you are advised to discuss matters with your superiors in advance of the meeting at which you believe a potential conflict may arise whether or not you believe you require advice or assistance in this matter.

Reference can also be made to any of the Committee Members of the In-House Lawyers Group and/or Bruce Ritchie, Director of the Professional Practice department of the Law Society, tel. 0131 476 8124 or email [bruceritchie@lawscot.org.uk](mailto:bruceritchie@lawscot.org.uk).

**It cannot be overemphasised that all solicitors should exclude themselves from proceedings in the event of a conflict AND where a conflict is reasonably foreseeable in the circumstances.**

## **LEGAL PRIVILEGE**

The doctrine of legal privilege is a keystone of our legal system. This has been confirmed by the House of Lords in the recent Three Rivers case which arose out of the collapse of BCCI.

The privilege we are considering can be divided into two categories:

1. legal advice privilege, and
2. litigation privilege.

### Legal Advice Privilege

Legal advice privilege protects from disclosure confidential communications (written or oral) between a client and a lawyer, provided the lawyer is acting in his professional capacity and the communication is for the purpose of the giving or receiving of legal advice. The House of Lords' decision in the Three Rivers Case has confirmed that presentational advice given to clients by their lawyers on how they should proceed in the relevant legal context is also covered by legal advice privilege. The Court of Appeal's earlier decision in Three Rivers had placed this favourable position for privilege in jeopardy.

In order for privilege to apply Lord Scott stressed that there must be a relevant legal context. This is broadly defined and is dependant on the facts and circumstances of each case. In certain transactions a lawyer may give commercial advice but provided this relates to the lawyers' professional role as legal adviser it may still be covered by legal privilege. However, Lord Scott identifies the situation where a solicitor may become the clients' "man of business..responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters.. in which case the advice may lack a relevant legal context." The test to be applied is "whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law."

No threat of litigation is needed for legal advice privilege to apply. The advice can be provided in relation to any area of law and could cover an inquiry which does not amount to an adversarial process. This latter point is evident from the House of Lords' decision in the Three Rivers Case.

Legal advice privilege does not protect communications between the client or his lawyer and a third party, eg a witness or expert.

In the UK, the privilege extends to in-house lawyers and unqualified staff of external lawyers such as trainees. However, this is not the position under European Law, where privilege only covers advice provided by external lawyers who are qualified to practice in a member state of the European Economic Area. Hence advice received from external or internal counsel from a third country jurisdiction such as the US will not attract legal

advice privilege. Nor will advice received from in-house lawyers qualified to practise in the EEA, although this position is currently being re-considered by the European Court of Justice in the case of Akzo Nobel, with judgment expected later this year.

The issue of who constitutes the client for privilege to apply is by no means clear. In the Court of Appeal's decision in the Three Rivers Case the client was narrowly defined as the individual or body within the in-house organisation that instructed the lawyer or received the advice. If followed by the Scottish courts, this would mean that advice given cannot be circulated outside of this 'client' lawyer relationship without the risk of privilege being lost. Previously, it was thought that the client was the entire legal entity whom a solicitor was advising. The House of Lords' decision only clarified the issue of whether 'presentational' advice provided in relation to the Bank of England's response to the Bingham inquiry could be covered by legal privilege. Their Lordships declined to rule on the definition of the client as the point did not form a direct part of the appeal. Although, the Scottish courts are not bound to follow the Court of Appeal's decision on the definition of the client, it is perhaps better to ensure that consideration is given at the outset to who should be included in any group for the purposes of seeking legal advice together with the proposed means of distributing any privileged information beyond the client.

### **Litigation Privilege**

This category of legal privilege is generally subject to the same principles as legal advice privilege and the same issues as those detailed above apply. However, litigation privilege is wider than legal advice privilege in that it covers not only communications between lawyers and their client but also communications by the client or lawyer with a third party e.g. witnesses for the dominant purpose of conducting litigation.

Litigation is taken to refer to an adversarial and not an investigative or inquisitorial process and the litigation must be in process or contemplated. In the Three Rivers case the House of Lords indicated that the scope of litigation privilege was ripe for review in view of the changing face of dispute resolution.

### **Regulatory Investigations/Disclosure in Dawn Raids**

Regulatory authorities (such as the OFT) who have the power to raid premises or otherwise request disclosure will have a right to inspect the original documents where available. This will include handwritten notes on them. Parts of a document covered by legal privilege may be separated from parts which are required to be disclosed.

In such circumstances, emails are of course as discloseable as they would be if in paper form. Documents are to be disclosed if held by a party or under their control.

The marking of a document as 'legally privileged' helps a claim for privilege but is not conclusive and a document may be privileged with no such mark. Similarly the marking of correspondence as 'Without prejudice' may help prevent admissions genuinely made in regard to the possible settlement of legal proceedings from being founded upon in court by the recipient, but such a statement is not conclusive.

The law on loss of privilege is complex. The assumption seems to be that once a document is outside of the client and especially once a third party has the document, privilege will have been lost unless one can argue that the document should never have been disclosed in the first place. For example, it may be possible to argue that such advice is covered by litigation privilege or was obtained illegally.

**Warning**

This note is a summary of a complex area of law. It is not exhaustive and therefore specific legal advice should be sought on a case by case basis.

**LEGAL PRIVILEGE – AKZO NOBEL APPEAL**

The situation with regard to the status of privilege for in-house lawyers' communications with their clients has become less clear following the recent decision in **Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd (Joined cases T-125/03 and T-253/03)**. The case raised a number of fundamental issues in relation to privilege and appears to have taken a narrow view in suggesting that legal privilege should extend only to communications of an "independent" nature involving external lawyers.

Having regard to the specific facts of the case, the Court of First Instance ("CFI") held that legal professional privilege did not extend to communications between company personnel and in-house lawyers in the context of cartel investigations by the European Commission. It went on to classify what documents are likely to attract privilege and clarified the procedure in the event of a dispute about their status. The background to the case is as follows:

**Facts:** During a raid by the European Commission of the parties' UK premises, a dispute arose about whether three categories of documents were legally privileged. These were:

1. Memos from a General Manager to a superior containing information gathered in the course of internal discussions with employees, for the purpose of discussing the Group's compliance programme with external counsel. One contained handwritten notes from the manager's brief discussion with an external lawyer.
2. Handwritten preliminary notes drafted by the same General Manager during discussions with lower-level employees and used for the purpose of preparing a typewritten memo at point 1.

3. Two e-mails between the General Manager and the in-house lawyer (Dutch lawyer, member of Dutch bar).

Documents in 1 were placed in a sealed envelope (after having been read by the Commission) as the Commission was unsure about whether they were privileged. Documents 2 and 3 were considered by the Commission not to be privileged and so were copied and added to the Commission's file i.e. freely read and any claim for privilege was rejected at that stage.

### **The Issues In Question**

Three issues relating to the scope of legal professional privilege arose from the dispute:

1. whether the denial of privilege to written communications between a company and its employed in-house lawyers (established by the ECJ in *AM&S v Commission* (Case 155/79)) should be changed given the change in status of in-house lawyers since 1979;
2. whether a wholly internal document prepared for the purposes ultimately of communicating with an external lawyer as part of a compliance programme may be privileged even if there is no express reference to seeking legal advice;
3. whether Commission officials are entitled to cast even a cursory glance over documents which a company claims are protected by privilege (unless a company has consented)?

### **Judgment of the CFI**

Privilege applies only to the extent that the lawyer is independent i.e. not bound by a relationship of employment. The e-mails between General Manager and in-house lawyer were not privileged.

Documents (including preparatory documents) compiled exclusively for the purposes of seeking legal advice from external counsel, in exercise of the rights of the defence, may attract privilege. However, it was not shown that the documents in question were drawn

up exclusively for those purposes. It should be unambiguously clear from the content of the documents or the context in which they were prepared and found, that they were prepared with the sole aim of seeking legal advice. General documents prepared under a competition law compliance programme were not necessarily for that exclusive purpose, particularly since the documents were not addressed to a lawyer and made no mention of seeking legal advice.

However, it was not all bad news. The CFI held that the Commission was wrong to force Akzo to give the Commission even a cursory view of the documents. An investigated undertaking is entitled to refuse even a quick overview of a document it claims is privileged, if such a cursory view could reveal its content, provided it gives the Commission officials appropriate reasons for its view. The CFI also criticised the Commission for having put contested documents in its investigation file, in spite of Akzo's claim of privilege. Contested documents should be sealed in an envelope and the undertaking should have the opportunity to have their status determined by the CFI.

Akzo has appealed to the European Court of Justice on all the main points.

## **Conclusion**

The case has considerable implications for in-house lawyers able to claim legal professional privilege in certain communications with their clients under English and Scots law (as well as the law of certain but not all other EU Member States). The Law Society of England & Wales, together with industry bodies, are seeking leave to intervene in the Akzo appeal. Further information on the outcome of the case will be incorporated within the ILG Guide when it becomes available.

## **COUNCILLORS AND FREEDOM OF INFORMATION**

### **Introduction**

COSLA has asked the Scottish Information Commissioner (SIC) to provide them with some guidance on how freedom of information will affect councillors. In this note, freedom of information is taken to mean the rights to access information under both the Freedom of Information (Scotland) Act 2002 (the Act) and the (draft) Environmental Information (Scotland) Regulations (the EIRs).

There are two main issues which need to be considered when discussing the relationship between freedom of information and councillors. The first issue is whether councillors are covered by the legislation. The second is to what extent local authorities hold information on behalf of councillors.

### **Are councillors covered by the legislation?**

Schedule 1 of the Act sets out the bodies which are public authorities under the Act. Part 3 of Schedule 1 covers "local government". The following bodies are specifically mentioned in Part 3: assessors, councils, joint boards, licensing boards and the Strathclyde Passenger Transport Authority.

The problem comes, however, in deciding whether a councillor is acting as part of one of these bodies (for ease of reference I will refer to "councils" in the rest of the document). There does not appear to be any set rules on when a councillor is and is not acting on behalf of a council.

However, it is helpful to look at guidance which has been issued to councillors in respect of other legislation. For example, guidance issued by the UK Information Commissioner (UKIC), who is responsible for regulating the Data Protection Act 1998, recognises that a councillor can act as a member of a council (e.g. as a member of a housing committee who has access to tenancy files); on their own behalf (e.g. dealing with complaints made by local residents) and on behalf of a political party (e.g. as an office holder or official candidate). The guidance appears to suggest that that only when the councillor is acting as a member of the council are they part of the council.<sup>1</sup>

The SIC agrees with this line and is of the opinion that information held by a councillor in relation to his/her party political or constituency activities will not be accessible under the Act or the EIRs. Any other information held by a councillor is likely to be covered by the Act and the EIRs. This includes recorded information about formal council meetings (including minutes, agendas and reports) and informal meetings which the councillor has with council staff or with external bodies on council business. It will also include information which the councillor holds as, e.g., the leader of the council.

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<sup>1</sup> The guidance relates to the notifications requirements of councillors and can be viewed at <http://ico.cms.amaze.co.uk/DocumentUploads/general%20advice%20for%20the%20elected%20members%20of%20local%20authorities.pdf>. SIC has discussed the relationship of freedom of information and councillors has with the UKIC, but his office do not yet have a policy on the relationship.

It may also include information which a councillor holds as a result of his/her membership of an external body, although this is likely to depend on the terms of his/her appointment to the body.

It is of course possible that information will not have to be disclosed because it falls into one of the exemptions contained in the Act or the EIRs.<sup>2</sup>

Requests for information relating to a councillor's work as member of a council could be made either to the council or to the councillor. As the 20 working day period for responding to requests begins when the council or the councillor receives this information, it is important that councils provide assistance and training to councillors on how to deal with information requests, both in terms of the legislation and in terms of councils' internal practices. It is important that training extends to the EIRs, given that verbal requests are valid under the EIRs.

### **What about information held by a council which belongs to a councillor?**

The Act allows an information request to be made for any information which is held by a council. However, there is a definition of "held" in the Act, which means that if a council holds information on behalf of another person, then that information is not considered to be held by the council and does not have to be released in line with an information request.

The EIRs are very different. If information is in the possession of a council and has been produced or received by that council or is held by another person on behalf of the council, then the information is considered to be "held" and should be released under the EIRs. Unlike the Act, the EIRs do not exempt information which a council holds on behalf of another person.

Many councils are likely to hold information on behalf of a councillor. For example, a council may allow a councillor to use its IT system for writing and storing correspondence with and on behalf of constituents. Some councils provide councillors with administrative support, including for political meetings. What happens if requests are made for information held by the council in these circumstances?

As mentioned above, councillors do not need to respond to requests for information made to them where the information request relates to their party political or constituency activities. The SIC is satisfied that where a request is made to a council for

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<sup>2</sup> Although the publication of committee agendas, reports etc is covered by the Local Government (Access to Information) Act 1985 (the 1985 Act), any refusal to disclose information must still be considered in line with the exemptions contained in the Act or the EIRs. Both the Act and the EIRs exempt information if other legislation prohibits the disclosure of that information (s26(a) of the Act and reg.10(5)(d) of the EIRs). The 1985 Act only prohibits the disclosure of information in very limited circumstances, ie (1) where the information has been given to the council by a government department and that department has expressly forbidden the disclosure of the information and (2) information the disclosure of which is prohibited by statute or by the order of a court. If the information falls into either of these groups, it does not have to be disclosed in response to a request under the Act or the EIRs, because of the specific exemptions in the Act and the EIRs for information whose disclosure is prohibited by other legislation. However, there are other circumstances (see Sch 7A of the 1985 Act) in which councils are *permitted* to withhold information from the public. The fact that councils are given a discretion here means that the disclosure of the information is not *prohibited* by other legislation and the exemption in s26(a) of the Act and reg.10(5)(d) of the EIRs cannot be relied on. However, even if these exemptions cannot be used, it is possible that councils will be able to rely on one of the other exemptions in the Act or in the EIRs.

this type of information under the Act, then the council only holds the information because it is holding it on behalf of the councillor. As a result, neither the councillor nor the council needs to disclose the information under the Act.

However, the EIRs are different from the Act. They do not exempt information which is held on behalf of another person. Instead, information which is in a council's possession and has been produced or received by that council is considered to be held by the council and should be released under the EIRs. This means that environmental information which a council holds on behalf of a councillor would have to be disclosed. However, there may be other exceptions under the EIRs which allow the information to be withheld, e.g. because it is personal data (reg.11).<sup>3</sup>

### **Status of guidance**

This has been prepared by the SIC at the request of COSLA. It contains the Commissioner's current view. This view may change over time as cases are referred to the Commissioner for decision and most requests will have to be considered on a case by case basis. It is not legal advice and should not be considered as such.

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<sup>3</sup> This issue was raised with the Scottish Executive Environment Group on 16 November 2004. They have been asked to consider aligning the EIRs with the Act.

## **PROFESSIONAL INDEMNITY INSURANCE FOR IN-HOUSE LAWYERS**

To clarify the uncertainty that has surrounded the requirement for in-house lawyers to have professional indemnity insurance (PII) either through their employers or themselves, the following guidelines have been drawn up.

The principal points which all in-house lawyers should bear in mind in relation to professional indemnity insurance are as follows:-

**1. The Master Policy for Professional Indemnity Insurance** - The Society maintains a single Professional Indemnity Insurance Scheme for all solicitors in private practice, known as the Master Policy. This scheme is not available to in-house lawyers unless such lawyers have established themselves as a private practice unit.

**2. Professional Indemnity Insurance for In-House Lawyers** - Where a solicitor is employed as an in-house lawyer it will be the employing organisation, be that a public authority or body, government agency or company, which will put in place professional indemnity insurance arrangements for their in-house lawyers. It is therefore very important for an in-house lawyer to ensure that their employers' professional indemnity insurance arrangements do provide cover for legal advice provided by an in-house lawyer in his/her capacity as an employed solicitor.

The Law Society of Scotland cannot stipulate the arrangements which employers of in-house lawyers should have with respect to their solicitors' professional indemnity insurance arrangements.

**3. Work conducted by In-House Lawyers outwith their employed position** - Sometimes an in-house lawyer can be asked to act for another person (who is not their employer) and such a situation could arise where an in-house lawyer accepts instructions from a member of the public.

For example, an in-house lawyer may work for a family-owned private company operating in the manufacturing sector but the solicitor may be asked to provide legal advice in many aspects of the private affairs of the family who own the business. The in-house lawyer's professional indemnity insurance arranged through his/her employer will not cover such actings and therefore the solicitor will require to provide their own insurance arrangements for these specific actings.

There is no prohibition on an in-house lawyer from acting outwith their scope of employment, but in doing so an in-house lawyer will have to establish himself/herself as a private practice unit for which cover under the Master Policy will be required. Furthermore,

such actings will also necessitate the in-house lawyer making a contribution to the Society's compensation scheme, known as the Guarantee Fund.

A key question which should always be asked when considering whether separate and independent professional indemnity insurance is required for an in-house lawyer is *who is the client for whom the in-house lawyer is acting*. If the client is an in-house department or subsidiary company within a group company structure, actings for such "clients" should be covered by the professional indemnity insurance arrangements put in place by the in-house lawyer's employer. However, where the client is, for example, a member of the in-house lawyer's immediate family for whom the solicitor is conducting a domestic conveyancing transaction, Master Policy cover will be required.

## **Guidance Note for In House Solicitors**

The decision in the case of *Merrett v Babb* (see synopsis below) justifies a review by all employed, or formerly employed, professionals of

- their exposure to claims arising out of errors or omissions on their part, and
- the contractual and insurance arrangements which may be in place to protect them in respect of such exposure.

This guidance note is intended to highlight some of the principal issues to be considered by In-House Lawyers or former In-House Lawyers.

### **1. Do In-House Lawyers require to be covered by Professional Indemnity Insurance?**

Many In-House Lawyers will already be covered by Professional Indemnity Insurance arranged by their employers to cover either (a) the activities of the in-house legal team alone or (b) a range of activities which give rise to professional liability exposures (e.g. if the organisation is a bank, building society or insurance company) including the in-house legal team.

Insurers generally provide Professional Indemnity Insurance only in respect of claims at the instance of third parties. Professional Indemnity Insurance is really not available for losses which the employers themselves might incur as a consequence of errors or omissions on the part of their in-house lawyers/legal team. An 'in-house loss', in the absence of a third party claim, is treated as a trading loss for which, effectively, insurance cover is not available.

Note: Insurers may treat as an 'in-house loss' (and therefore not insured/insurable) claims at the instance of certain associated organisations even though they are separate legal entities eg. subsidiary companies.

### **2. How can claims by third parties arise out of errors or omissions on the part of In- House Lawyers?**

- Where the organisation has provided advice to customers or clients which is "negligent" and causes a loss. Any claim would be likely to be pursued against the organisation, even though the "back office" advice emanated from the in-house legal function.

- Where the organisation has provided advice to customers or clients which is “negligent” and causes a loss. Any claim would be likely to be pursued against the organisation although could be pursued (also) against the individual(s) in the legal department (however it is unlikely that the “back office” legal function would be ‘visible’ to the client).
- Where the legal department itself has been involved in external communications with customers/clients, there is an identification of a distinct legal function within the organisation and a claim could be directed against a named individual and/or the organisation.
- As above, except that the legal department’s advice is relied on by third parties who are not customers/clients.

### **3. Why do In-House Lawyers need to be concerned personally about Professional Indemnity Insurance?**

On the face of it, it is a matter for In-House Lawyers’ employers to consider –

- whether the organisation could be subject to claims arising out of the activities of their In-House Lawyer/in-house legal team, and
- where such an exposure is identified, whether to “self-insure” or to arrange insurance cover

However the In-House Lawyer or in-house legal team may have an exposure to personal liability at the instance of third parties or at the instance of their own employers which justifies the In-House Lawyer/team in considering contractual/insurance arrangements to protect themselves.

### **4. In-House Lawyers’ exposure to personal liability to third parties**

How can personal liability to third parties arise?

#### **4.1 Personal liability of employees to third parties**

In an article in Scots Law Times 1998 p275, Gordon Junor, Advocate states:-

“The employing and employed solicitor alike will – or should be – aware that, in law, they may be jointly and severally liable for any negligence on the part of the employed solicitor acting in the course of his or her employment .... It is well settled, at least in general terms, that an employer (vicariously) and employee (directly) can be held jointly and severally liable for negligence on the part of the employee in the course of his employment with the employers – on the simple view that all persons must be held responsible for their own actings.”

The decision in *Merrett v Babb* (see synopsis below) appears to be entirely consistent with Mr Junor’s statement of the law in Scotland.

#### **4.2 Personal liability to employers' associated organisations**

Third parties could of course include entities which, although associated with the In-House Lawyers' employers, are in fact separate legal entities e.g. wholly owned subsidiary companies; companies in which the employers have shareholdings; joint ventures; partnerships. That means, for instance, that a joint venture partner could pursue a claim against an individual within a partner organisation's in-house legal team for advice provided by the individual on which the claimant partner relied and which proved to be negligent.

**Note:**

No comment is made here concerning the likelihood of claims actually being pursued in any of the circumstances described in this section. That will depend on a number of circumstances, not least the status/solvency of the employer organisation. In most cases, third parties will clearly choose to pursue claims against the employer organisation alone.

#### **5. Personal liability of In-House Lawyers to their 'employers'**

In-House Lawyers could incur personal liability to their 'employers' in the following situations –

##### **5.1 In-House Lawyers who are 'self-employed' rather than 'employed'**

If, although considered to be "In-House", the lawyer's services are in fact provided to the employers on a self-employed basis, the 'employers' are third parties vis-à-vis the "In-House" Lawyer and would be entitled to pursue a claim against the Lawyer for losses resulting from the Lawyer's errors and omissions unless they have waived their rights by the terms of their contract with the Lawyer.

##### **5.2 Liability of In-House Lawyers to employers for dishonesty**

It would seem to be inappropriate for employers to contractually waive their rights of recovery or to indemnify employees in respect of claims arising out of the employee's dishonesty. Nor will insurers indemnify employees for claims against them arising out of their dishonesty.

#### **6. Issues to be considered by In-House Lawyers**

##### **6.1 Do I require to have cover under the Master Policy ?**

Although apparently not 'solicitors in private practice', some 'in-house' lawyers may in fact be required by the terms of the Solicitors (Scotland) Professional Indemnity Practice Rules 1995 to maintain cover under the Master Policy.

That involves consideration of the nature of the individual's activities and in the event of doubt, reference should be made to Douglas Mill, Secretary and Chief Executive of the Law Society of Scotland or to David Cullen, Director, Financial Services at the Society.

## **6.2 If Master Policy cover is not required, do I nevertheless require to have the protection of Professional Indemnity Insurance ?**

For the reasons stated above, if there is a risk of claims arising which could give rise to personal liability, this justifies the In-House Lawyer considering the position in relation to:-

### **6.2.1 The employers' Professional Indemnity Insurance cover**

The issues which In-House Lawyers may wish to consider will include –

- scope of cover – does the policy cover extend to all the activities which might give rise to claims? Are personal representatives of deceased parties entitled to the benefit of the cover?
- extent of cover – is the limit of indemnity sufficient for the worst case scenario taking into account (a) the possibility that the cover may be on an aggregate basis (i.e. a number of claims in the course of the period of insurance may use up the indemnity) rather than 'any one claim' basis, and (b) the fact that most Professional Indemnity Insurance policies contain a provision to the effect that a series of claims arising from a single negligent act may use up the indemnity?
- who is able to invoke the cover? Are the terms of the employer's Professional Indemnity Insurance cover such that the individual in-House Lawyer, faced with a claim against him or her personally, is able to access the cover without requiring the employers to take steps before the employee receives the benefit of the insurance in the event of a claim made against the employee personally. (Remember (a) that the contract is between the employer and the insurance company and (b) in a situation like *Merrett v Babb*, the decision as to insurance cover (i.e. not to arrange continuing cover) was a decision of a third party (the Receiver).
- evidence of insurance – is the individual entitled to see some evidence that satisfactory cover is in place? Does that entitlement continue after the cessation of the individual's employment?

### **6.2.2 Personal Professional Indemnity Insurance for the individual**

In-House Lawyers or former In-House Lawyers may be justified in considering whether to arrange personal Professional Indemnity Insurance for their own protection.

It is appropriate to stress that personal Professional Indemnity Insurance for the protection of an individual employee or former employee is not widely available and should not be assumed to be readily available.

Leaving aside the matter of availability of cover, it is clearly more satisfactory and cost effective\* if the employers arrange the cover in the organisation's name for the protection of the entire in-house legal team including, where appropriate, former legal personnel. However:-

- if the In-House Lawyer's employers decline to put cover in place at all or if the cover is considered by the In-House Lawyer insufficient for his or her proper protection, the individual could consider arranging cover or supplementary cover in his or her own name
- in a situation similar to *Merrett v Babb* where a former employer has become insolvent with it may be appropriate for In-House Lawyers to consider arranging cover on a "run-off" basis no provision being made for continuing Professional Indemnity Insurance – giving rise to the possibility of otherwise uninsured personal liability of former employees.

**\*Note:-**

Premiums may not necessarily be proportionately less where cover is arranged for the personal protection of individual employees than where the cover is arranged in the employers' name for the protection of the organisation and its employees as a whole. In some cases, insurers may take the view that their exposure is not materially different.

### **6.2.3 Indemnification by employers**

In-House Lawyers may wish to consider the extent to which –

- their employers waive by contract any rights they might have as a matter of law to recover from them losses resulting from their employees' negligence. Query: is it an implied term?
- they are entitled by contract to be indemnified by their employers in respect of any claim by a third party. Again, is it an implied term?
- these contractual protections continue after the termination of their employment

Of course, this is an entirely commercial matter for negotiation between employee and employer. These considerations may be equally applicable to any employee (whatever their profession) who gives advice to third parties as part of their role.

These points are particularly relevant to those whose services are engaged on a self-employed basis and the parties ought to be clear about the position in their terms of engagement.

#### **6.2.4 Disclaimers**

Wherever there is a risk of unintended liability to a third party, consideration should be given to ensuring that that liability is expressly excluded.

**Note:**

The insurance/contractual protections described in this section are not necessarily mutually exclusive and may be appropriate in combination.

### **6.3 Private/work activities (“homers”)**

The foregoing comments refer to claims that might arise out of the activities of In-House Lawyers in the course of their employment.

The position in relation to any private work undertaken by In-House Lawyers is different. It is most unlikely to be covered by any Professional Indemnity Insurance arrangements made by the In-House Lawyer’s employers.

In those circumstances, the In-House Lawyer requires to establish whether undertaking such work requires him or her to arrange cover under the Master Policy (possibly as a ‘Part Time Practice’) with any additional Top-Up cover required and, possibly, to contribute to the Guarantee Fund.

If the Practice Rules do not require the In-House Lawyer to arrange Master Policy cover, it is for the In-House Lawyer to decide whether or not to arrange an individual Professional Indemnity Insurance policy, to carry on without insurance or avoid undertaking the work and the associated risk.

Whatever decision is taken, it has to be borne in mind that Professional Indemnity Insurance cannot be arranged for a single transaction and is on a ‘claims made’ basis. This means that cover requires to be maintained (normally that means renewing cover for a premium on an annual basis) for as long as there remains any risk of a claim. In the case of many types of legal work, claims are capable of arising many years after the work was undertaken and the (alleged) error or omission occurred.

## **Summary**

In-House Lawyers are encouraged to consider –

- whether Master Policy cover may be required for their activities
- whether their employers have Professional Indemnity Insurance in satisfactory terms for their employers' and their own personal protection
- whether there is continuing Professional Indemnity Insurance on a 'Run-Off' basis in cases where former employers are no longer trading/are now insolvent
- whether their contractual arrangements provide satisfactory protection in respect of potential personal liability

## **Synopsis of decision in Merrett v Babb**

### **Court of Appeal rules - employees are personally liable for professional advice**

In the case of Merrett v Babb, the Court of Appeal has ruled that employees are vulnerable to claims brought directly against them for advice given on behalf of their employers. This is being hailed as a landmark test case.

The appeal concerns a situation in which, following the insolvency of his former employer, Mr John Babb, a member of the RICS found himself personally liable for a mortgage valuation that he had carried out over seven years earlier.

While the case relates to a surveyor and the appeal was supported by the Royal Institution of Chartered Surveyors, the Court of Appeal's ruling will impact upon all sectors and professions where employees give specialist advice to clients on behalf of their employers.

Professional employees would appear to be particularly vulnerable if their employers:

- have ceased trading and have no run-off cover
- are under-insured and cannot meet the claim in full
- are unable to pay the Self-Insured Amount (excess) due under the policy
- are unable to obtain indemnity from their professional indemnity insurers as a result of a dispute over cover.

The Court of Appeal expressed the view that prudent employees – whether professional, or otherwise - would wish to ensure that their employers' insurance covered them personally and that such employees may need to take steps to obtain personal insurance if that cover did not continue after their employment ended. As a matter of practicality, it is unlikely that a former employee would be able to secure that sort of cover at present.

Few, if any, employees receive remuneration that is commensurate with the risk of incurring personal liability. Indeed, that is an exposure which few employees are likely to have contemplated. If the majority decision of the Court of Appeal stands, it will leave all employees who provide specialist advice – whether professional or otherwise - exposed to personal liability.

Mr Babb, with the support of the RICS, petitioning the House of Lords for leave to appeal but the House of Lords refused to allow a further appeal.

## **ANTI - MONEY LAUNDERING EXAMPLE NOTE FOR LOCAL AUTHORITIES**

All of you will be aware that The Proceeds of Crime Act 2002 and its attendant regulations have been in force for some time now.

It was initially thought that only members of the profession in private practice and financial services would require to consider its implications – however we believe that lawyers practising in Local Authorities should also take note of its terms and advise their Councils' constituent departments to take care not to inadvertently further criminal activities by failing to consider their dealings with the public.

If local authority staff have reason to consider that certain financial transactions may be suspect they are advised to contact NCIS – National Criminal Investigation Service at [www.ncis.co.uk](http://www.ncis.co.uk) or the police to advise them of your suspicions. They will then deal with the problem or give you advice as to how to deal with the problem. It is best not to try to deal with matters lest you tip off the person whom you suspect of criminal activities. Tipping off can lead to problems for the officer or Council concerned.

The following list is by no means exhaustive but is intended to indicate where care should be taken.

### Housing

Offers to pay up front in cash or cheque for council house purchases

Offers to pay off substantial arrears of rent or council tax in large amounts whether cash or cheque

### District Court

Offers to pay off substantial fines in large sum cash or cheque

### Social Work

Dealing with clients claiming state benefits when it is known they are working in the black economy

### PPP/PFI

Note requirement to check partners' backgrounds thoroughly

### Licensing

Note where rent for premises far exceeds amount expected to be paid for similar premises in area

### Finance

Offers to pay of substantial rates arrears in cash or cheque

More detailed information on the regulations for inhouse lawyers will be available within your organisation and for those in private practice on the Law Society of Scotland website.

### **A NON DOMINO DISPOSITIONS AND THE INHOUSE LAWYER**

A question has been raised as to the competency and advisability of an in-house lawyer granting an *a non domino* Disposition in favour of his or her employer. It is understood that the practice of doing so is quite common in some Local Authorities where it has been seen as an extension of the former custom of Council solicitors executing Notices of Title in relation to Council property.

It is suggested however that it would better practice that the solicitor involved in the drafting of such Dispositions should not also act as granter.

Firstly, there is a risk that it might subsequently be argued that the Disposition falls foul of the criteria necessary to create a valid foundation writ for the purposes of prescription as set out in the case of The Board of Management of Aberdeen College v. Youngson and another, [2005 1 S.C. 335] i.e. that the subjects must be conveyed A to B and not A to A. This difficulty might arise particularly where the solicitor could be said to be executing the deed as an authorised officer on behalf of the Council rather than in an individual capacity. The underlying conveyancing theory requires there to be transfer or delivery by the donor to the donee. Even if signing in a personal capacity, as an employee of the Council, it might still be argued that the employee is acting under the Council's instructions and should be regarded as being the Council for this purpose.

Secondly, the transfer must be made in good faith. The Keeper will now require appropriate enquiries to be carried out with a view to ensuring that no competing title is understood to exist. In theory however, there must always be a competing title even if that lies with the Crown or indeed the Queen's and Lord's Treasurer's Remembrancer. Whilst actual knowledge of a competing title and non disclosure of relevant information to the Keeper would very likely constitute misconduct on the part of the solicitor, in some circumstances, the issue of whether there is a competing title may be a matter of judgement. In such difficult circumstances, there could well be advantage to the granter being distinct from the solicitor.

Finally, it must be doubtful as to whether it is the "duty" of an employee in terms of their contract of employment to be required to execute dispositions in such circumstances. In terms of good governance, actions of this nature lie more happily with elected members/office bearers rather than with employees.

For general guidance in relation to *a non domino* Dispositions, see also the article on the Registers of Scotland web-site at:

<http://www.ros.gov.uk/foi/legal/text/ch36.htm>

## **LEGAL DEFENCE UNION**

The purpose of the Legal Defence Union is to assist and represent solicitors in dealing with professional problems and complaints, and has over 17 years experience in doing so. As an in-house lawyer, it is less likely that you will face these problems as often as a private practitioner. The LDU have therefore tried to find a way to make membership of the LDU of more value to you and have negotiated a new policy with their insurers which will be exclusive to public service lawyers. This policy offers all the existing benefits of their general policy, but in addition, **offers protection in respect of any employment disputes** which is more likely to be attractive to you as employees. The wording of the cover is extremely straight forward and very wide, as you can see below. Each claim is covered for up to £50,000 of legal advice and representation. The LDU can offer you the services of specialist employment lawyers in terms of this cover.

### **Wording re employment dispute cover.**

*"The pursuit of any legal proceedings against the insured's employer arising from the Insured's contract of employment.*

*The insurer will not pay legal expenses where the insured was subject to a written or verbal warning within the six months immediately preceding the commencement of the first period of insurance and where a claim is notified to us within six months of the commencement of the first period of insurance"*

The cost of the general cover for all employed solicitors including private practitioners is currently £65 +VAT. The membership year runs from 1<sup>st</sup> May and a pro rata reduction is given to those joining throughout the year. For 2005 there will be no additional charge for the new cover i.e. **the full cover including the new employment cover remains at £65 +VAT.**

An application form is attached. A direct debit mandate is available if that method of payment is preferred.

## THE LEGAL DEFENCE UNION - MEMBERSHIP APPLICATION FORM

1. I wish to apply to be registered as a Member of The Legal Defence Union Ltd

Member Name: \_\_\_\_\_ Member No: \_\_\_\_\_

Postal Address: \_\_\_\_\_

Telephone \_\_\_\_\_

Fax \_\_\_\_\_

Legal Post \_\_\_\_\_

Email \_\_\_\_\_

Preferred Method of Contact: Postal \ DX \ Legal Post \ Email

Name & address of employer \_\_\_\_\_

Position held \_\_\_\_\_

2. I wish to apply as an Employed Member not engaged in private practice

Yes/No \_\_\_\_\_

3. Are you, after enquiry, aware of any circumstances that

a) may give rise to a claim being made under the Legal Defence Union Legal Expenses Scheme?

Yes/ No \_\_\_\_\_

b) would have given rise to a claim under the Scheme had cover been in place at the time of the incident (including incidents that occurred whilst working for another employer?)

Yes/ No \_\_\_\_\_

If the answer to a) or b) is "Yes", please give details below

Please continue on separate sheet if required. Please tick if separate sheet attached.

4. Method of Payment

By cheque made payable to "Legal Defence Union Ltd" (please attach)

By Direct Debit of four monthly instalments (please request mandate)

5. Declaration for Insurance Purposes

I declare that the above statements made by me are to the best of my knowledge and belief true and complete and I agree that this proposal will form part of the contract between the Insurer and myself.

Signature \_\_\_\_\_ Date \_\_\_\_\_

Please return the completed form with your remittance/Mandate to:-

The Legal Defence Union Ltd c/o Marsh Ltd, Orchard Brae House, 30 Queensferry Road, Edinburgh EH4 2HS

DX 539940 Edinburgh 19, LP1 Edinburgh 15

## **PROFESSIONAL ORGANISATIONS**

### **The Aberdeen Oil & Gas Group**

The Aberdeen Oil Lawyers' Group is an informal group of in house oil and gas industry lawyers from oil companies and oil service companies located in Aberdeen. A few law firm lawyers are allowed to attend but in strictly limited numbers. It meets 2 or 3 times a year to discuss topical issues and network. J Crow of Talisman is Chairman, Penelope Warne of Cameron McKenna is Secretary

### **Education Officers Working Group**

The Group acts as a forum for local authority solicitors with experience of, or a developing interest in, legal issues relating to education law. Typically the agenda covers the practice and procedure in relation to hardy perennials such as placing requests and exclusions, responses to consultations, consideration of proposed legislation, court judgements and trends in legal education issues. Members of the Group have recently been assisting CoSLA in connection with the Education (Additional Support for Learning) (Scotland) Act 2004 and the development of a comprehensive Code of Practice in connection with special educational needs. The Group encourages contributions from amongst its own participants and from external speakers, including of late, Robert Brown MSP, Convener of the Scottish Parliament Education Committee and Janys Scott author of 'Education Law in Scotland'. The Group meets at least twice a year and further information can be obtained from Cameron Munro (0141 840 3346) in Renfrewshire Council's Legal Services Division.

### **Fund Managers Legal Forum**

The Fund Managers Legal Forum is an informal group of in-house lawyers employed by asset managers or investment advisers in Scotland. Meetings will take place in Edinburgh approximately quarterly. Any topic relevant to the asset management or investment advice industry can be considered at the forum and attendees are able to share experiences or swap knowledge in confidence. Further information can be obtained from Gordon Taylor of Baillie Gifford & Co on 0131 275 3038 or Adrian Smith of Edinburgh Partners Ltd at [asmith@edpam.com](mailto:asmith@edpam.com).

### **The Procurator Fiscal Service**

The Crown Office and Procurator Fiscal Service is the sole prosecuting authority in Scotland and also investigates sudden deaths and complaints against the police which are of a criminal nature.

An independent Inspectorate was established in 2003 to monitor the performance of the COPFS and provide a measure of public accountability.

### **Scottish Children's Reporter Administration**

All Children's Reporters are employed by the Scottish Children's Reporter Administration, a N.G.P.B., the Headquarters of which are in Ochil House, Springkerse Business Park in Stirling. Although there is no prescribed discipline or professional qualification for Reporters a significant number nationally are solicitors. Some choose to

maintain their practising certificates, others remain on the Roll of the Law Society of Scotland.

The Reporter receives reports of almost all offences alleged to have been committed by children under the age of 16 years and in addition referrals in almost equal number of children who may require statutory action taken on their behalf to secure their welfare and development.

Reporters assess the cases of children referred both to ascertain sufficiency of evidence and a need to act giving paramountcy to the best interests of the child referred. Reporters instruct the preparation of reports and despatch all documents for the consideration of children's panels, attend these to record the decisions and reasons and to give appropriate advice and assistance to all present. Where grounds for referral of a child are disputed the reporter presents the case before the Sheriff and where a decision of a hearing is appealed appears in the role of respondent.

**The Scottish Media Lawyers Society** is an informal group dealing with practical issues of media law. Consisting of both in-house lawyers and private practitioners in the field, it encourages advances in access to court and freedom of expression. ILG member Alistair Bonnington, BBC Scotland, is Secretary to the Society

#### **Scottish Police Lawyers Group**

Chair: Ian McPherson, Strathclyde Police

The Scottish Police Lawyers' Forum comprises the in-house lawyers working for Strathclyde, Tayside and Northern Police Forces, together with the 'Lead Authority' Solicitors who represent the interests of Lothian & Borders, Grampian, Fife, Central and Dumfries & Galloway Police Forces. The Forum, which is peripatetic, meets around three times a year to discuss areas of mutual interest.

Additionally, Ian McPherson, Duncan Campbell, Catherine Duffy, Rhona Stannage (all Strathclyde), Isobel McGarrol (Tayside) and Norman Phillips (Northern) are all members of the Association of Police Lawyers, a body representing the interests of in-house lawyers of Police Forces throughout the United Kingdom. The Association has a formal Annual Conference together with up to two further Conferences in the course of the year to discuss areas of mutual interest. It discharges work through four Sub-Committees looking at Criminal Justice and Policing; Employment; Commercial; Freedom of Information, Data Protection and Disclosure.

#### **Social Work Legal Officers Group (SWLOG)**

This group is the umbrella for the following sub-groups:

##### **Sub-group: Community Care Group**

Chair: Ken Graham, Renfrewshire Council.

The community care group has been in existence since local government reorganisation in 1996. It meets three times per year and its main purpose is to provide a forum for local authority lawyers for discussion and sharing of experiences on community care related legal matters. Current issues include applications under the Adults with Incapacity Act, Supporting People grants and changes to the rules on determining ordinary residence. Membership of the group is open to all local authorities.

Sub-group: **Child Care Group**

Chair: Brendan Kearney, Dumfries & Galloway Council

The Child Law Group comprises Solicitors from Local Authorities who work extensively in this area of law. The Group meets between 3 and 4 times a year in different venues throughout Scotland and discusses topical matters and matters of mutual interest, such as new developments in the law, recent Court judgements, practice matters, responses to consultation documents, etc It also acts as a network for Solicitors to share ideas and problems with colleagues from different Local Authorities. We also invite Speakers from other professions/disciplines to speak to us on matters of common interest. Some have included a Sheriff, an Adoption expert and a representative from the UK Passport Agency. The next meeting is scheduled for January and will probably be held in Edinburgh. If anyone is interested in finding out more about the Group or coming to a meeting, information can be obtained from me or from colleagues in the relevant Local Authority Legal Department.

**The Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)**

exists to promote best administrative and legal practice within Scottish local authorities and to promote and develop the professional knowledge and talents of its members. The Society holds meetings on a regular basis throughout the year and organises training events relevant to the work of its members. The Secretary is Diane Campbell, East Dunbartonshire Council.