

Our priorities for the **Scottish Parliament Election 2016** 



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### Foreword



Christine McLintock
President of the
Law Society of Scotland

For over 60 years, the Law Society of Scotland has acted as the professional body for Scottish solicitors and the key guardian of the public interest in relation to the solicitor profession and the wider justice system. Our interaction with over 11,000 members as well as the public gives us a unique perspective, not just on legal matters but on many of the wider issues facing Scotland.

The Scottish independence referendum attracted a record level of political engagement and a quite astonishing turnout at the polls. Following the UK general election in May 2015, and during this year's Scottish parliamentary election, it is vital that the political parties continue to engage the electorate, harnessing the interest and enthusiasm that exists.

Since its inception, the Scottish Parliament has made important changes to the law in relation to: adults with incapacity; land and the abolition of the feudal system of land holding; and the family, such as recognising rights of cohabitees and same-sex marriage. A number of changes have also been made to criminal law and to our courts and tribunal system.

In addition, new powers have been exercised with the creation of the Land and Buildings Transaction Tax and the Scottish Landfill Tax. The further powers expected in the Scotland Act 2016 will affect income tax and other taxes, welfare and benefits and equalities law. There will also be further devolution in significant areas, including the Crown Estate, important tribunals such as the employment tribunal, the British Transport Police, aspects of consumer advocacy and advice, the Gaelic Media Service, the Maritime and Coastguard Agency as well as potential new law in the areas of onshore petroleum exploitation, rail franchising, offshore renewable energy installations and other structural changes.

The next Scottish Parliament will have significant new powers to exercise for the benefit of people in Scotland. This is key to understanding the importance of the election in May 2016. The Law Society is setting out a number of priorities that originate from discussions among our committees, sub-committees, working parties and our ruling Council.

# Introduction to the Law Society

We were established in 1949 to represent the interests of the solicitors' profession in Scotland and the interests of the public with respect to that profession. This gives us an important and prominent role in civic Scotland and to act as one of the pillars of pluralism and independence in society.

As the professional body for over 11,000 solicitors, who collectively engage with millions of people and across a wide spectrum of issues, we are able to access a broad base of experience and expertise.

Our Council and committees are made up not just of legal practitioners, but also academics and other experts from outside the profession.

As the statutory regulator of the legal profession, we work to ensure the highest possible standards. We also have a duty of care to the public to ensure they have an awareness of their rights and how they can access the Scottish justice system. For these reasons, we have a particular interest in good governance and the creation of good law. We respond to public consultations and recommend detailed amendments to political representatives during the legislative process.

We are a strictly non-partisan organisation and engage regularly with the Scottish Parliament's committees and with individual MSPs from across the political spectrum. Our objective is to assist in making good law that is coherent, practical and easy to understand.

### What we are saying

There are five major areas we believe the next Scottish Government should take action on. We are calling for the political parties to consider the following in their manifestos:

- **01** Access to justice
- **O2** Modern legislation for a modern profession
- O3 The legal profession at the heart of a thriving economy
- **04** Access to education
- **05** Law reform and quality of legislation

# Priority 1 Access to justice

### Where we are now

Access to justice gives people in Scotland a voice, often at the most challenging times of their lives, whether unfairly dismissed, unlawfully evicted, resolving custody of their children or defending themselves from criminal charges. It helps to tackle the inequalities that affect many in our society.



The Law Society promotes access to justice through a range of activities, from supporting pro bono initiatives by solicitors, to campaigning for an effective legal aid system, and making recommendations for a better justice system.

Access to justice is under pressure in many ways. A lack of availability of legal aid as well as court and tribunal fees all present difficulties to people who lack sufficient resources to pursue their cases.

Recognising the continuing pressures on public funds, we believe that a number of measures could improve access to justice for people in Scotland.

#### Access to justice:

- Underpins the rule of law, which ensures that everyone in society is able to function and that individuals are able to go about their lawful business
- Helps to build safer and stronger communities where people can enforce their rights and meet their obligations and responsibilities
- Provides people in Scotland with the same fundamental rights as people across the rest of Europe

270,000

legal aid cases each year

### Legal aid

The system of publicly funded legal aid in Scotland is a mainstay of access to justice, providing help in around 270,000 cases each year. Ensuring that all those who require help from a solicitor, whether for civil or criminal matters, can access that support is crucial for a fair society and a properly functioning justice system.

In our 2015 strategy paper on legal aid, we stated that the system needs simplification so the public understand it better and it is more effective for practitioners. It needs revision to deal with developing human rights in Scotland. It also needs proper funding, having declined significantly in real terms over the last two decades.

Public funding is an issue for all frontline services, but given the high prevalence of justice problems and the social, emotional and financial cost of leaving these unresolved, investment to halt the ongoing real terms decrease in legal aid funding is crucial.

A cost-benefit analysis demonstrates that legal aid spending results in substantial savings to the public purse and the wider economy. A 2010 Citizens Advice report estimated that for every £1 spent on legal aid in England and Wales, the state saved £2.34 on housing advice, £2.98 on debt advice, £8.80 on benefits advice, and £7.13 on employment advice.

Lack of investment in legal assistance has made it increasingly difficult to maintain a sustainable, high-quality legal aid system across Scotland. A failure to fund the system properly will lead to advice deserts.

- Simplifying the legal aid system to make it more efficient and to generate systems savings, particularly through the use of new technology
- Committing to investment in the legal aid system to ensure its future sustainability
- Reinvesting wider justice system savings into legal assistance expenditure

### Administrative justice

The administrative justice system touches on the everyday lives of many. In a wide range of areas — including social security, immigration and asylum, education and health — people frequently find themselves accessing the administrative justice system, which has undergone many changes in recent years. Often these changes have had significant impacts on some of the most vulnerable people in our society.

We believe there are certain core principles that should underpin people's rights in how they interact with the state. We urge all parties to commit to these principles and, where required, legislate to ensure they are observed:

- The needs of those who use the justice system, including the provision of adequate representation where necessary, must be a central consideration
- All processes and procedures must be independent, open and accountable
- Problems must be resolved guickly and comprehensively
- Coherent and consistent outcomes must be well-reasoned, lawful and timely

We appreciate the pressures on all areas of public spending, but given the far-reaching relevance of the administrative justice system, we believe any policy aimed at achieving cost savings for the Scottish Courts and Tribunals Service should include a full assessment of the impact on access to justice for users.

Similarly, we propose that the legislative process should include a requirement on the promoter of legislation to present an assessment of the impact on users of the administrative justice system.

### We urge parties to give consideration to:

 Ensuring that any policy aimed at achieving cost savings for the Scottish Courts and Tribunals Service should include a full assessment of the impact on access to justice for users of the administrative justice system

### **Employment tribunals**

Employment tribunals, with their character as party-party and private law tribunals, have faced significant access to justice challenges recently. The introduction of employment tribunal fees in 2013 saw an immediate and dramatic reduction in the number of tribunal claims of at least 60%.

Before fees were introduced, around two thirds of claimants' cases were successful at tribunal. Clearly, cases that would be successful are not now being brought. We agree with the commitment from the current Scottish Government to abolish tribunal fees and hope that this obstacle to access to justice can be removed. The introduction of employment tribunal fees has also highlighted the overlap between civil courts and employment tribunals for money-only claims. At a stage that civil courts are set to develop greater judicial specialisation, maintaining and improving the same for employment tribunals will help access to justice. We believe there should be a review of how employment disputes can be most efficiently resolved and of what forum would best facilitate access to justice in these cases — whether that be a specialist employment and equalities court, the first-tier tribunal for Scotland, or other possible options.

- Abolishing fees for employment tribunals
- A review of the overlap between sheriff courts and tribunals in the hearing of employment disputes

### Digitalisation and modernisation

The wider use of new technology — including the improvement and expansion of existing videoconferencing services, use of digital recording and a bold move towards virtual courts — is required to turn our justice system into a modern public service. We would encourage the Government to take forward the Digital Strategy for Justice in Scotland to build on the progress already made. We believe this approach can deliver benefits to access to justice and cost savings to the justice system.

Significant developments in online dispute resolution have taken place in other countries. In England and Wales, for instance, it is already possible to access telephone mediation for small claims, and the facility to conduct this online is being developed. For less complex disputes, we believe that this would be an effective use of technology in Scotland.

- Introducing online dispute resolution for less complex disputes
- How emerging technologies can make the justice system more accessible and efficient
- Ensuring the legislation governing the justice system is capable of adapting to new technologies

### **Children and young people**

The justice system helps children to determine their fundamental rights, around family, education and a range of other issues. Legal systems are often complex, and it can be challenging for children to secure access to justice.

We believe that more can be done to support children, from access to targeted information and support, to changes in the way legal aid operates for children. Much of the work currently undertaken is piecemeal and we believe that a holistic review of access to justice for children in Scotland would have significant benefits.

### We urge parties to give consideration to:

 A full review of access to justice for young people

# Priority 2 Modern legislation for a modern profession

90%

of people are satisfied with the services of their solicitor

### Where we are now

The legal services market is undergoing dramatic change. Legal services are being delivered in new and innovative ways. There are more cross-border firms, an increasing internationalisation of legal services, changing demands of clients and advances in technology. All are impacting on the Scottish legal profession, businesses and consumers.



However, one thing remains constant — the legal profession and legal services market are critical to Scotland's economy and society and to the maintenance of the rule of law. There is another factor which we want to remain — the trust and confidence there is in the Scottish legal sector. Independent public polling has shown that 90% of the Scottish public are satisfied with the services provided by their solicitor and 82% would recommend their solicitor to others. To ensure this is maintained and built upon, it is important that the solicitor profession has the ability to meet the evolving expectations and demands of clients within a modern flexible framework which can meet the unprecedented, and unforeseen, changes we have seen over recent years and those ahead of us in the future.

Regulation of the legal services market is an essential component which contributes to the rule of law, the proper functioning of the justice system, the economy and society in general. Central to any regulatory framework is consumer protection.

The present legal framework surrounding the Scottish legal profession is, in effect, a patchwork of legislation. The underpinning and central piece of regulatory legislation is now over 30 years old. The legal, economic and social landscapes have significantly evolved since the Solicitors (Scotland) Act 1980 was introduced.

Solicitor numbers have more than doubled, with a third of solicitors now employed in-house. They are also working in a much more diverse legal sector, where larger firms have materialised over recent years to exploit the opportunities of the globalised legal market. Although large commercial and international firms are more prominent, smaller private and general law practices still continue to operate, many serving rural communities. These smaller private practices are key in providing important and much needed legal services to members of the community who may have difficulties in accessing legal services otherwise.

Although many of the provisions of the 1980 Act continue to work well, the law needs to be modernised to support and facilitate the evolution of new business structures and advances in technology. The current legal services market requires a modern, transparent, responsive and adaptable regulatory framework to ensure that, through the Law Society, the Scottish solicitor profession can continue to deliver a competitive world-class service to Scottish, UK and global businesses and consumers.

### Priority 2

### Modern legislation for a modern profession (continued)

1980

Date of current legislative framework for the legal profession

#### We urge parties to give consideration to:

Commit to bringing forward legislation in the next parliament to provide a modern, fit-for-purpose framework for legal services in Scotland that:

- Maintains the advantages of the current system, including the independence of the legal profession, a robust system of co-regulation involving strong professional bodies and an independent complaints handling organisation and discipline tribunal
- Provides a more agile system of consumer protection and addresses the rise of the unregulated legal services market
- Allows flexible regulation that reflects the rise of alternative business models, cross-border firms and internationalisation of the sector
- Enables the Law Society to respond to the changing needs of its members and to open up associate forms of membership to other legal professionals, including paralegals and legal executives

# Priority 3 The legal profession at the heart of a thriving economy

### Where we are now

The legal sector in Scotland now contributes over £1.2 billion to the Scottish economy each year. It is responsible for over 20,000 highly skilled jobs, and the services provided by solicitors are critical to the smooth running of the economy, not least in the property market and helping people to set up their own businesses.



The growing numbers of in-house solicitors also make a critical contribution to the success of the companies and organisations that employ them.

Many of the sectors upon which Scotland depends so heavily — energy, financial services, the life sciences, food and drink — all rely on high-quality, expert legal services to thrive, whether they are provided in-house or through private practice.

Put simply, a successful Scotland needs a successful Scottish legal profession.

Following a pronounced and protracted economic downturn, there is strong evidence to show that the Scottish economy is on the road to recovery. Nevertheless, external challenges in the Eurozone and other international economies, along with the recent significant reductions in the price of oil, demonstrate how the economic recovery cannot be taken for granted.

One of the most welcome developments of recent years has been the growing recognition within government of the importance of our legal sector, not just to civic Scotland but as a significant economic generator in its own right. The number of practising Scottish solicitors is now at an all-time high of over 11,000. The number of unemployed lawyers is still relatively low and trainee numbers have been recovering from the sharp downturn seen at the height of the recession. More firms are now looking to expand internationally and recent initiatives such as establishing the Scottish Arbitration Centre have served to highlight Scotland as an effective location for international dispute resolution.

In the legal sector, the Scottish Government has encouraged a spirit of partnership between professional bodies, business groups and government agencies to support law firms and to promote the Scottish legal jurisdiction throughout the world.

The Scottish Government's economic strategy is critical. It already has important powers to encourage entrepreneurship and innovation and support businesses to grow and create new jobs. This is especially significant for the legal sector given that the vast majority of our legal firms have three partners or fewer, with half of those working as sole practitioner businesses. Although the Scotland Bill is still progressing through both Westminster and Holyrood, the Scottish Government is expected to gain additional powers that will allow it to further support a growing economy.

# Priority 3 The legal profession at the heart of a thriving economy (continued)

£1.2bn+

Legal sector's contribution to the Scottish economy

Removing barriers and unleashing the potential of everyone in our society is good for employers, good for society and good for the economy. Encouragingly, for the first time, a majority of Scotland's solicitors are female following an influx of women to the profession in recent years.

We recognise that the gender pay gap is linked to the continuing inadequacies in work and family provisions which are reflected in lower employment participation rates and higher levels of part-time working among parents of young children. This is an issue highlighted at European Union level in a recent consultation on how these may be improved and we believe further government action is required.

The Law Society is working to address the considerable gender inequalities in the legal profession. The most senior roles in the legal professions, most obviously sheriffs and judges, continue to be disproportionately held by men and QC appointments are also disproportionately male. We published recommendations in late 2015 that we believe, if taken forward by the relevant authorities, will lead to a more diverse judiciary in the future. We encourage all parties to bring forward measures to drive equality across society.

- Continuing to support the international promotion of the Scottish legal sector, its expertise and services and ensure this remains a priority for government and its agencies, including Scottish Development International
- Continuing to ensure promotional agencies are properly equipped to provide practical advice and support to legal firms looking to expand internationally
- Providing as much clarity as possible to businesses and taxpayers on how they would use the new powers devolved through the Scotland Act 2012 and the expected powers arising from the current Scotland Bill
- Measures that will help tackle the gender pay gap across Scottish society, with particular attention to addressing the need for better work and family provisions for all parents with young children

## Priority 4 Access to education

#### Where we are now

There is much to be proud of in Scottish education. Curriculum for Excellence is bold and innovative and the fees regime for Scottish students means, in theory, that our young people can access world-class education with less fear of large debts throughout their careers.



Given the work of the Scottish Government's Commission on Widening Access and the ongoing work of the UK Government's Social Mobility and Child Poverty Commission, we recognise this is the time to focus on widening access to universities and, in turn, to the professions.

We believe that in a fair and just Scotland, all young people must have the opportunity to fulfil their abilities. In a system where the poorest pupils are far less likely to go to university, far less likely to get graduate-level jobs and far less likely to gain professional status, this group's potential will be lost to society in general.

Yet this is the situation we find ourselves in. The Scottish Government's own analysis of Scotland's performance in the 2009 Pisa Tests concluded 'while socio-economic status is as likely as in other countries to affect students, the effect it has is likely to be greater than in other countries'. In short, it is worse to be poor in Scotland than it is to be poor elsewhere.

We know though that pupils from the most advantaged 20% are more likely to attend university, gain more Highers and Advanced Highers, gain higher grades in those qualifications, and gain professional jobs. We know that according to the Scottish Funding Council SIMD20/SIMD40 access to university has 'flatlined' since 2008, although there were improvements in the last year we have

figures for. We know that SIMD20 school participation rate falls considerably between S4 and S6. We know that students from the poorest backgrounds often carry the highest student loan burdens — this harms their ability to undertake postgraduate courses, some of which are mandatory for professions, and harms them on an ongoing basis throughout their careers. How does someone from a poor background save for a mortgage, for instance, if they have a high level of student loan debt?

At present the policy of free tuition seems to disproportionately benefit those from the most advantaged backgrounds. Lucy Hunter Blackburn of the University of Edinburgh notes that 'For young people in full-time higher education in Scotland, the net effect of policy decisions over the decade to 2015-16 will be a resource transfer from low-income to high-income households'. If the policy of free tuition is to mean anything at all surely it has to benefit those from all backgrounds and not just those from the wealthiest homes?

At present, there are loans available to those undertaking the Diploma in Professional Legal Practice and other such professional courses. The creation of a fund that gave money in grants — not loans — to the poorest students (based on need) to qualify as professionals could be hugely powerful in changing the socio-economic background of those entering all professions.

### Priority 4 Access to education (continued)

We have established the Legal Education Trust to provide both financial support and professional mentoring. We hope that this will help young lawyers who have the grades, the drive and the will – but not the money – to make it through university. We believe this Trust will do a great deal of good but we recognise it cannot do everything. We believe that parties should consider creating bursaries for the poorest students undertaking postgraduate professional education, based on need.

There are many potential policies that may assist closing the attainment gap — amongst many other things Scotland could learn from the London Challenge, initiatives like Teach First could be trialled, a national structure for facilitating articulation from college to university could be created, universities could move towards a consistent use of contextualised admissions and summer schools could be used more creatively.

It is important that the legal profession reflects the society it represents and that talented young people from all walks of life can become lawyers. These aspirations are impossible to achieve whilst the attainment gap between the richest and the poorest children continues to exist: blighting lives and blighting the economy.

- Measures that reduce the attainment gap in school education
- How access to university can be made fairer
- Using the full extent of the powers devolved in the Scotland Act relating to equal opportunities
- A review of postgraduate funding

# Priority 5 Law reform and quality of legislation

### Where we are now

The importance of law reform should not be underestimated — put simply, good policies need good law to make them work. Our Law Reform Committee and its many sub-committees work hard on behalf of the profession and the public to promote improvements in the law and legal system in Scotland. The practitioners, academics and other experts who sit on our committees and working groups make a vital contribution to the law-making process.

A large body of legislation has been passed since the creation of the Scottish Parliament in 1999 but the workload of the Parliament has allowed little time for systematic post-legislative scrutiny. We believe the time is right for an evaluation of the quality and effectiveness of the laws passed since devolution.

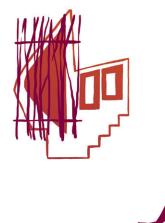
Modernising our laws should not be limited to bringing forward ever more new legislation – the simpler and more streamlined our laws are the more effective they can be and the less room there is for costly unintended consequences. We believe some of the areas of law that have received the most attention in recent years would benefit from codification or consolidation, to make them simpler and more effective. These include land law, family law, and criminal law and procedure.

All new Bills must also be as clear and operable for practitioners as possible. While we appreciate the pressures on Parliamentary time, we believe Bills with broad scope are counterproductive and should be avoided where possible. For example, the recent Land Reform Bill included a significant section on agricultural holdings. With further agricultural holdings legislation likely to be combined with crofting proposals, and so much detail being introduced by way of statutory instruments, the areas of property, agriculture and crofting law are becoming more and more fragmented and will need consolidation.

We enjoyed positive engagement with the Scottish Government and Revenue Scotland on the land and buildings transaction tax. We look forward to this spirit of openness and collaboration continuing as further powers are devolved. The Law Society is ready to assist the development of law that is equitable, coherent, practical and clear. This is especially important in tax law but also in welfare law and the law relating to tribunals, the Crown Estate and consumer advocacy.







# Priority 5 Law reform and quality of legislation (continued)

With the devolution of further powers however, there is a risk that regular law reform proposals may be sidelined and not given the priority they deserve. The Scottish Law Commission also has an important role in revising and promoting codification of the law. We welcomed the expanded brief of the Scottish Parliament's Delegated Powers and Law Reform Committee to consider Scottish Law Commission Bills in the current parliamentary term. It is important that the Parliament increases the pace of implementing Scottish Law Commission Bills.

Our priorities for the UK general election urged the political parties to protect human rights, retain Convention rights, and remain within the jurisdiction of the European Court of Human Rights. We echo these points in the context of the forthcoming Scottish election.

- Committing to the implementation of at least two Scottish Law Commission Bills in each session
- Evaluating the quality and effectiveness of Scottish statutes and subordinate legislation passed since 1999
- Conducting a wide-ranging review of the areas of law that are appropriate for consolidation and amendment, with a programme brought forward in the next Parliament

- Introducing clear, operable Bills wherever possible and avoiding the use of broad scope Bills
- Making sure that the legislation brought forward in the next Parliament is consistent with, and compatible with, the European Convention on Human Rights

# Priority 5 Law reform and quality of legislation (continued)

There are some specific measures we would like to see taken forward as a matter of priority:

#### Adults with incapacity law

We welcome the forthcoming consultation on the review of the Adults with Incapacity (Scotland) Act 2000. The Act was world-leading when passed but urgently requires to be updated to ensure compliance with ECHR in terms of deprivations of liberty as addressed in the as yet unimplemented Report on Adults with Incapacity by the Scottish Law Commission and with the UN Convention on the Rights of Persons with Disabilities, which is the subject of a current research project supported by the Law Society. In other aspects, it is no longer being implemented consistently and as intended.

Amending and strengthening the Act in these respects would ensure Scotland has a modern, proportionate and flexible legal framework to promote and safeguard the rights, welfare and interests of people with dementia, learning disabilities and other intellectual disabilities.

#### Charity law

The legislation establishing the Office of the Scottish Charity Regulator (OSCR) was passed in 2005. When drafting legislation of this kind, it is impossible to predict exactly what the role of a new organisation will be, as it will have to adapt to fit the requirements of the sector in which it operates. OSCR has worked well in the past ten years but there have been significant changes to the sector in that time, which has presented challenges.

There have been numerous calls for a review from within the sector, including from OSCR itself, the Scottish Council for Voluntary Organisations and the Scottish Parliament's Public Petitions Committee. We believe the time is right for charities law to be reviewed, including the application of the charity test and the ability of certain groups to earn charitable status.

# Priority 5 Law reform and quality of legislation (continued)

#### Family law

Ten years on since the passage of the Family Law (Scotland) Act 2006, there has been limited take-up of the legislation as it relates to cohabitants. This is despite positive policy intentions recognising the value of financial contributions and the economic sacrifices that often arise from cohabitants' home-making and childcare activities. A review of this legislation – in particular, the difficulties in practice of interpretation, proof and quantification of economic advantage and disadvantage and the width of the court's discretion – would be welcomed to ensure the original policy intentions are observed in our courts.

#### Succession law

The law of succession in Scotland is one of our most fundamental bodies of law, potentially affecting the lives of every citizen. The opportunity to amend it does not arise often and we have a collective responsibility to ensure that it is done efficiently, effectively and with the objective of serving the people of Scotland well for generations to come.

As well as the Bill that is currently going through Parliament, the Scottish Government has recently consulted on several other aspects of the Scottish Law Commission's 2009 Report on Succession, presumably with the intention of bringing forward another piece of legislation. We believe it is vital that succession law is updated as swiftly and thoroughly as possible. There may be some benefits to considering different aspects of the review separately but it must be coordinated. Again, we think that a consolidating Act would provide necessary clarity in this area.

- Updating and strengthening the Adults with Incapacity (Scotland) Act 2000 to ensure compliance with international human rights requirements and consistent, proper operation of the Act's provisions
- Reviewing the Charities and Trustee Investment (Scotland) Act 2005 and the charities test
- Reviewing the Family Law (Scotland) Act 2006, in particular in relation to cohabitants
- Consolidating the law of succession in Scotland in the coming parliamentary term

### The Law Society of Scotland

Legal post: LP1 - EDINBURGH 1 Telephone: +44 (0) 131 226 7411 Textphone: +44 (0) 131 476 8359 Email: lawscot@lawscot.org.uk

www.lawscot.org.uk









