



The Law Society

The Law Society manifesto 2010

delivering
justice



The Law Society Council in session

Contents

Foreword 3

Introduction..... 5

Key points

The rule of law and access to justice 7

The defence of the rights of the people..... 9

Good governance and better law-making 11

A strong and independent legal services sector 13

Delivering justice: the Law Society manifesto 2010

The rule of law and access to justice 14

The defence of the rights of the people..... 16

Good governance and better law-making 19

A strong and independent legal services sector 21

Foreword

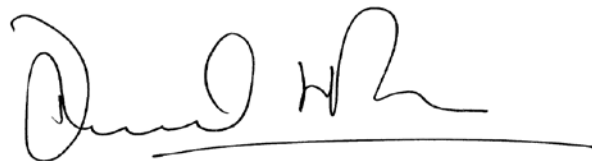
Britain faces immense challenges in 2010. The UK has recently suffered the worst recession since the Second World War. In overcoming the financial crisis, the state has taken on greatly enhanced levels of debt, raising questions as to the future financing of public services. The threat from terrorism continues and both economic and political factors pose threats to the cohesiveness of British society. The power of technology is growing and, with it, the opportunity to create major change, both for good and ill. In confronting these challenges, the rights of the individual in democratic society must not be lost. The rule of law has always been crucial to Britain's prosperity and stability and to the maintenance of a free, peaceful and just society. It is as well to remember that the only guarantee of freedom of the individual is a Government strong enough to protect the people, coupled with a people strong enough to exert their primacy over Government.

It is right to return to this concept to dictate our guiding principles in a time of economic, social and political change. The role of solicitors and of a healthy, independent legal profession in maintaining the rule of law needs to be recognised, supported and maintained. Over time, the profession has been crucial in upholding the rule of law, thereby guaranteeing the rights of citizens which underpin our democracy. The solicitors' profession remains committed to this duty.

Given that a general election must be held by June 2010 it is important that, in the rough and tumble of an election campaign, such principles are not forgotten. The Law Society, as the voice of the largest part of the legal sector, has a unique perspective on the issues affecting justice and the fabric of society. The Society presents this manifesto as its contribution to the public policy debate in the lead up to the general election of 2010.



Robert Heslett
President



Desmond Hudson
Chief Executive



Introduction

The Law Society is the representative body for over 145,000 solicitors qualified in England and Wales and practising around the globe. It lobbies and negotiates with regulators, Government and others on behalf of the solicitors' profession. Through this work, the Society serves its members, the profession and the public by defending the rule of law and promoting access to justice.

Solicitors play a fundamental role in the functioning of society and the country. Every aspect of modern life is governed by the law and solicitors provide their professional expertise to manage legal issues arising from the cases brought to them by clients. In doing so, they support and sustain the rule of law in England and Wales, upon which the stability and structure of society is founded.

Solicitors also make a crucial contribution to the UK economy. In 2009, solicitors directly contributed nearly 2 per cent of GDP. The indirect contribution of their work is far higher, as a consequence of the advice of solicitors to businesses in commercial and other transactions. The investment that solicitors also make in their *pro bono* work, in giving free advice and representation, represents a necessary and proud contribution to civil society by the profession. This is estimated in 2008/09 to have had the equivalent monetary value of nearly £400 million.

However, the profession's ability to remain competitive internationally, to maintain the pre-eminence of English and Welsh law around the world and to fulfil its role as the guarantor of the rule of law is not secure. It relies upon the willingness and ability of Government to govern effectively to fulfil its potential.

The party in Government following the general election will face a hostile and difficult environment. In facing that challenge, it must not forget the basic needs for justice and the rule of law. The Law Society

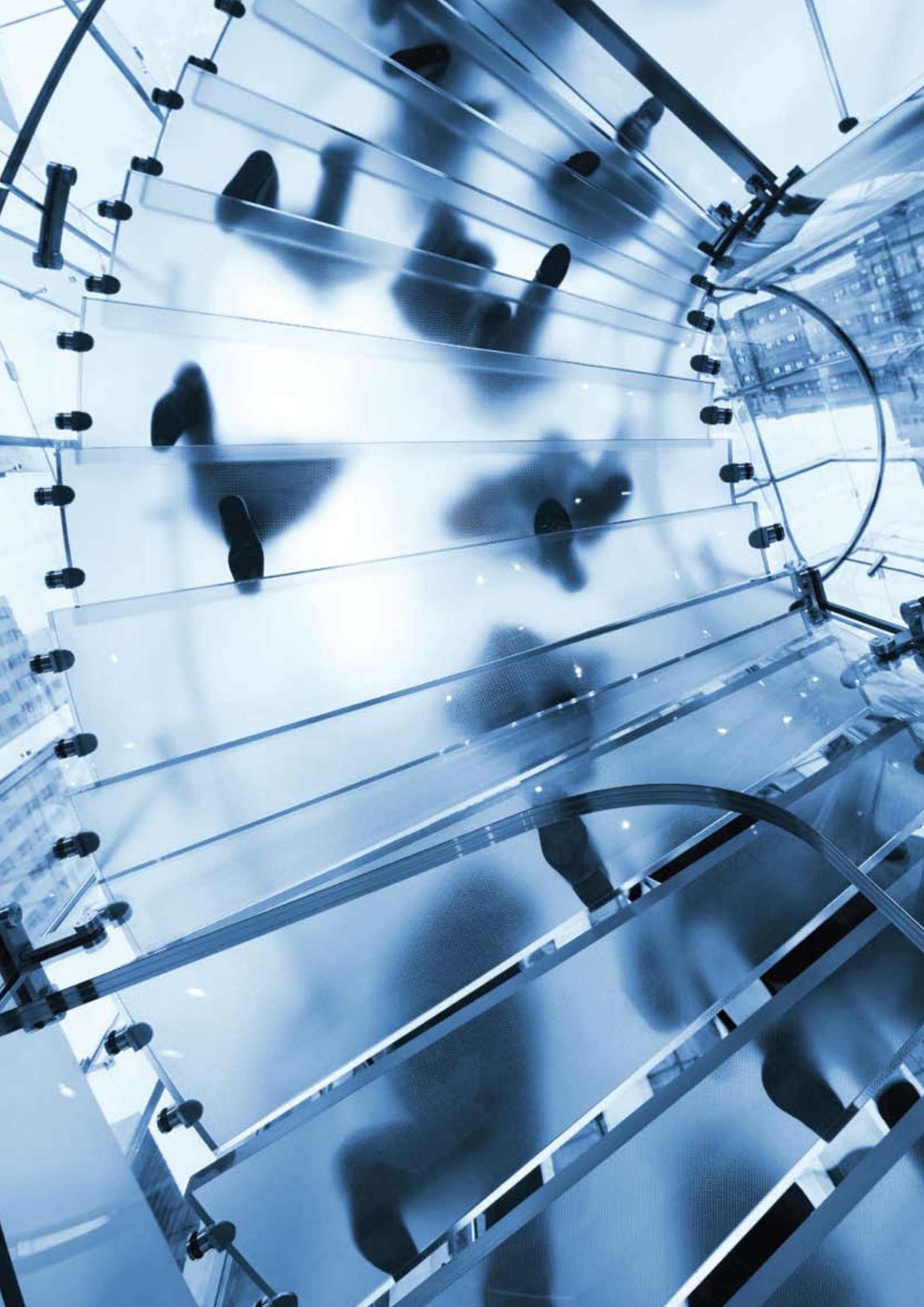
calls on all political parties to publicly support the following four principles in their campaigning, policy development and - if elected - their actions over the next Parliament.

The four principles

- That Government will uphold the rule of law by ensuring meaningful access to justice for all;
- That Government will properly defend the rights of the people;
- That Government will work for good governance and better law-making;
- That Government will support and encourage a strong and independent legal services sector for the benefit of all.

In this manifesto the Society provides a number of proposals for reform that would uphold and advance these principles. It commends them for further debate and discussion.





The rule of law and access to justice

- key points

The rule of law means nothing without effective access to justice for all. All individuals require access to competent and independent advice on the legal issues which affect them. They also need strong representation in court. In a time of economic difficulty, when fewer people have a capacity to pay for advice, the legal safety-net that the state provides becomes even more important.

Legal aid

Legal aid in England and Wales is a front-line service as important as health and education. In recent years, that system has been driven to breaking point by repeated changes in policy and by a failure to anticipate or appreciate the effects on the legal aid budget of decisions elsewhere in the justice system.

The system as it currently exists is not sustainable in the long-term. A report by the National Audit Office in November 2009 revealed that 16 per cent of solicitors' firms providing legal aid criminal defence services make zero per cent profit and 14 per cent of firms make between one and five per cent profit. More worryingly, an NAO survey shows that 28 per cent of firms believe that they are unlikely to be conducting legal aid work in five years' time. Solicitors in private practice provide the most cost-effective way of dispensing legal advice and representation. Constant reorganisation and budget limitation is therefore having the effect of starving out the key suppliers of public legal advice.

The Law Society believes that there is scope for a new approach to legal aid. Partnership between Government and the profession is essential to secure such an approach and to ensure that legal aid provision in England and Wales has a sustainable future for the long-term.

The Law Society calls on all parties to commit to:

- Maintaining legal aid eligibility at current levels;
- Working with the profession on a "new covenant" to enable practitioners to plan with confidence;
- Considering a "polluter pays" policy whereby those authorities or bodies whose failed prosecutions or other actions cause costs to the legal aid fund are required to reimburse those costs;
- Publishing a legal aid impact assessment with every new piece of legislation together with an indication of how costs will be met.

Civil redress

Access to justice means more than legal aid. It also means the right to be able to seek redress. In a just society, a person who has been harmed by the negligence of others should be entitled to seek compensation.

The Law Society calls on all parties to commit to:

- Ensuring that victims can obtain proper redress and have access to the advice and support needed to obtain that redress;
- Maintaining the small claims limit in personal injury cases;
- Encouraging greater take-up of legal expenses insurance through the tax system;
- Ensuring proper regulation of 'third party capture', where insurers attempt to limit damages by going direct to accident victims and encouraging them to under-settle claims.



Warning

**CCTV
in operation**

The defence of the rights of the people

- key points

One of the prime responsibilities of Government is the defence of the rights of the nation's citizens. This means protecting their right to live free of fear and crime. It also means defending their right to freedom, to privacy and to proper justice. There is a fine line between properly defending the public good and improperly violating a person's right to liberty and privacy. The courts and Parliament have a major role in arbitrating this relationship, as does an independent legal profession.

Judiciary and the courts

An independent judiciary is the mainstay of the rule of law. The Judicial Appointments Commission (JAC) has performed excellent work in recent years to establish an independent process of judicial appointment based solely on merit. The conditions to build on this work must be guaranteed.

The Law Society calls on all parties to commit to:

- The continued independence of the JAC in the way in which it conducts its work;
- Limiting the role of the executive in the appointment of judges and the appointment of the members of the JAC.

Human Rights Act

The Human Rights Act has been subject to considerable criticism since its passage in 1998. The Society believes that much of this has been unfair and unjustified and that the principles on which the Act is based should be maintained. Notwithstanding this, there are additional aspects of the common law tradition which are not enshrined as core rights, such as trial by jury. Consideration should be given to securing these rights within UK law.

Volume of legislation

In recent years, the UK criminal justice system has been subject to a constant barrage of new legislation and offences. A more cautious and structured approach to criminal justice is required to prevent the criminal justice system and the police force becoming over-stretched and over-whelmed by a constantly changing criminal code.

This expansion of criminal law in recent years has criminalised an increasing proportion of the population and further disrupted the balance between the power of the state and the freedom of the individual. The Society also maintains serious concerns over information storage and the increasing use of surveillance.

The Law Society calls on all parties to commit to:

- Supporting the principles enshrined in the Human Rights Act;
- The maintenance of the right to trial by jury;
- Reviewing the current focus on 'out of court disposals' - such as fixed penalties, police cautions and conditional cautions - in order to ensure that serious crimes are not addressed in this way;
- Supporting an open coroners system in which all inquests are held in public;
- Calling for a national debate about the proper balance to be struck between surveillance and the privacy of citizens.



Good governance and better law-making

- key points

Clear and accessible legislation is the key to balancing the rights and obligations of citizens in a democratic society. Individuals and businesses need sensible, fair and effective laws which have been properly scrutinised.

Scrutiny

The Law Society welcomes the increase in pre-legislative scrutiny in recent Parliaments. Nonetheless, too much legislation is enacted with serious unintended consequences due to a lack of proper consideration. Legislation must be driven by considered debate, scrutiny and evidence rather than hasty, populist headline-grabbing. Equally, the efficacy of legislation should be assessed post-passage to ensure that it is having the intended effect.

Too much legislation is fragmented and unclear, necessitating clarification of detail through secondary legislation or through 'soft law', such as Government guidance. Neither secondary legislation nor 'soft law' is subject to sufficient scrutiny.

Clarity

Legislation should also be clear and accessible. Greater engagement between the public and the body politic can never be achieved without proposals which are comprehensible and less complex. Openness and transparency means more than being able to physically access the detail of provisions - it also means being able to understand them.

The Law Society calls on all parties to commit to:

- Striving for transparent and accountable laws and law-making;
- Extending pre-legislative review and implementing post-legislative review;

- Either reducing the use of Statutory Instruments or increasing scrutiny of secondary legislation;
- Relying less on the use of 'soft law', such as guidance, to clarify legislation;
- Publishing Government circulars and guidance systematically and comprehensibly;
- Fully implementing Law Commission proposals;
- Introducing a Reform and Repeal Bill which would aim to repeal laws which are outdated, unnecessary or burdensome.

Tax Law

Tax law in the UK is notoriously unclear and complex. For the sake of both individuals and business it is imperative that steps are taken to improve the drafting of current and new tax law, to improve tax administration and to ensure that new legislation is subject to proper scrutiny.

The Law Society calls on all parties to commit to:

- Creating a permanent tax advisory body to recommend reform and simplification of existing law, monitor its application and scrutinise new legislation as it proceeds through the Parliamentary process;
- Changing the tax year to operate on a calendar basis (1 January - 31 December), with a self-assessment deadline of 30 September;
- Applying fixed dates for the Pre-Budget Report and the Budget.



A strong and independent legal services sector

- key points

In a society built on the rule of law, the legal profession plays an essential part in assisting the public to make the best use of the law and to stay true to its terms. Founded on the core values of integrity, honesty and professionalism, the legal profession is also the defender of the rule of law. In doing so, law firms form a central part of the UK economy.

Competitiveness

The legal profession in England and Wales enjoys an unrivalled international reputation. This reputation is based upon the competence and the quality of service provided by its lawyers and a robust system of regulation which helps them to uphold their core values, while remaining both independent and internationally competitive. All of these qualities must be maintained in order to preserve the high standing of English and Welsh law and its value to the UK exchequer.

The burden of regulation is a continuing concern for many law firms. Whilst the right amount of regulation is essential to protect consumers and to maintain trust in the legal profession, the wrong amount can create excessive constraints and disincentives. The current anti-money laundering regime in particular places significant burdens and costs on the profession which appear disproportionate to the benefits it achieves. It is the client who inevitably has to bear the impact of these costs.

New business models

The legal profession, through the Law Society, supports the development of new business models. There is concern that the imminence of the Legal Services Board's target date for the creation of the first Alternative Business Structures means that potentially significant problems may be overlooked. In particular, there needs to be greater consideration

of the implications for access to justice if highly capitalised firms offering a commoditised legal service make it uneconomical for smaller firms to undertake publicly-funded work. There must also be a proper level playing field to ensure that the regulatory regime applying to all firms is fair and provides the right level of protection for clients and for the integrity of the legal system.

Concerns about a level playing field apply also to the unregulated providers of legal services. These providers, often less competent than solicitors and without the protections that regulation provides, can be a danger to the public. Similarly, the growth of referral fees provides a lack of transparency for the public and a real disadvantage in the market place for regulated practitioners.

The Law Society calls on all parties to commit to:

- Maintaining an independent legal profession governed by duties which match the international norms applying to lawyers;
- Accepting the recent House of Lords' recommendations in respect of the anti-money laundering regime;
- Ensuring that the implementation of Alternative Business Structures has a beneficial effect on access to justice and that a level playing field is achieved;
- Supporting a proportionate regulatory regime which will maintain the competitiveness of the legal profession of England and Wales and its global pre-eminence;
- Reviewing the use of referral fees and actively considering their abolition;
- Engaging in a debate about the future of Home Information Packs.

The rule of law and access to justice

“Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with, but injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the existence of free democracy is not imaginary but very real, because democracy’s very life depends upon making the machinery of justice so effective that every citizen shall believe in the benefit of impartiality and fairness.”¹

The words of US Supreme Court Justice Brennan highlight the reasons why access to justice for every citizen is essential. Within our own jurisdiction, the Lord Chief Justice has said:

“The alternative [to people being able to access justice] is mayhem. The alternative is, ‘If nobody else will help me, I will have to find someone to throw bricks through windows’, or worse. You end up with the peace being broken and you end up with crimes being committed, crimes of violence.”²

The rule of law means nothing if individuals cannot obtain effective access to justice. This means that they need competent, independent advice on the issues affecting them and strong representation in court. In a time of economic difficulty this is ever more important. Such advice and representation does not come cheaply, but is essential for the very fabric of society and the welfare of individual citizens. Legal aid in England and Wales is a front-line service as important as health and education.

The cost of advice and representation can be met by individuals in a number of ways: through insurance, or by making arrangements which are contingent on the result or where a funder takes part of any damages. However, there will always be a substantial number of cases where individuals simply cannot pay for their legal representation. This applies particularly in criminal cases or in cases where there is no financial recompense available, such as those concerning judicial review or immigration. A system of state funding to cover these costs is crucial and flows directly from the obligation of Government to uphold the rule of law.

The absence of legal advice and representation, as a consequence of reductions in the legal aid budget, tends actually to increase overall costs by prolonging trials and increasing the need for re-trials and appeals.

It can also create an unacceptable risk of miscarriages of justice because of the lack of adequate funding of representation. The lack of early advice can in addition be more expensive to the state as this may lead to legal and social problems requiring further expenditure at a later date. Cuts to legal aid budgets also impact hardest on the most vulnerable in society at a time when they need protection more than ever.

In celebration of the 60th anniversary of the establishment of legal aid in 2009, the Society, with the Bar Council and other leading international law associations, resolved to adopt formally a number of essential principles in relation to access to justice. The Society re-asserts them in this manifesto.

The Law Society calls on all parties to commit to these principles without equivocation:

- That no one should be unable to enforce or defend a right for want of the resources necessary to obtain legal advice and representation;
- To provide adequate funding to ensure access to justice for all, regardless of means, social or ethnic background, gender or the nature of their cause;
- To encourage the members of all legal professions to continue to undertake fairly remunerated publicly-funded work, as well as *pro bono* work - recognising that the latter can never operate as a substitute for properly funded legal aid by the state;
- To commit to work together with the profession and state agencies in the public interest to explore ways in which access to justice can be improved for the benefit of all, including taxpayers who fund the systems of justice.

The Society recognises the severe strain on public finances. However, it cannot be stressed too strongly that legal aid solicitors already operate on the margins of viability. A report by the National Audit Office in November 2009 revealed that 16 per cent of solicitors’ firms providing legal aid criminal defence services made no profit at all and a further 14 per cent of firms made only between one and five per cent profit. The report, unsurprisingly, casts doubt on whether the supplier base can continue at this level. Solicitors in private practice provide a cost-effective way of providing legal advice and representation and Government must not deprive citizens of access to justice by starving key suppliers. This is the effect of frequent changes of policy, particularly with respect to procurement and the imposition of increasingly onerous and unnecessary bureaucracy so that firms are unable either to plan ahead or to see any viable future in legal aid work. The continued expansion and creation of new criminal offences without the effects

on the legal aid budget being properly considered is also a major factor.

The Society believes that there is scope for a new approach to legal aid. Partnership between Government and the profession is essential to secure such an approach and to ensure that legal aid provision in England and Wales has a long-term, sustainable future.

The Law Society calls on all parties to commit to:

- Maintaining legal aid eligibility at its existing levels;
- Working with the professions on a “new covenant” to enable practitioners to plan with confidence;
- Reducing the bureaucracy and complexity of the existing scheme so that practitioners’ judgement is not second-guessed;
- Considering a “polluter pays” policy whereby those authorities or bodies whose failed prosecutions or other actions cause costs to the legal aid fund are required to reimburse those costs;
- Publishing a legal aid impact assessment with every new piece of legislation together with an indication of how the costs will be met;
- Carefully exploring other potential income streams for the legal aid budget.

However, access to justice goes much further than the reasonable availability of legal aid. It covers the right generally to receive redress for a wrong. But there are worrying signs in current political debate that some are seeking to argue that it is improper for victims to seek such redress.

In a just society, a person harmed by the avoidable negligence of others should be entitled to compensation. English law achieves no more than that: it does not grant unjustified windfalls. Moreover, the rule that costs follow the event provides a strong incentive on litigants not to bring or defend unmeritorious cases. The same applies to agreements that fees will only be paid on success.

In this context the Society notes the recent work of Lord Justice Jackson in his review of costs. It is essential that the proposals are enacted in such a way that does not adversely affect access to justice. It will be particularly important that Government carries out a rigorous evidence-based analysis of the potential effect of the proposals on business, the wider economy and on access to justice. Implementation without proper consultation by Government could also have adverse consequences. For example, the Society has been deeply concerned at the manner in which the present Government has sought to address the regulation of damages-based agreements. Further proposals to restrict or negate the recoverability of success fees in conditional fee arrangements and limit

the percentage fee in damages-based agreements may also make many lower value claims unviable, thus further reducing a citizen’s access to justice.

There are issues, too, in the way in which insurance can help or hinder such access or the just settlement of claims. Legal expenses insurance provides an important way of financing cases. However, the Society is concerned that many insurers deprive clients of their choice of lawyer. In addition, some insurers seek to deal directly with victims rather than through a solicitor. This gives rise to an obvious conflict of interest.

In other areas of civil litigation there are also risks that what may seem like uncontroversial reforms may have serious consequences. For example, the fact that the small claims track is limited to claims under £1,000 in personal injury is crucial to thousands of victims of personal injury seeking redress. Damages for injury in the UK are relatively low which means that a claim worth between £1,000 and £2,500 can involve serious injuries such as broken bones or bad scarring. Indeed, claims worth less than £2,500 make up about 80 per cent of claims in road traffic cases.

But even relatively small cases may involve complex questions of liability and causation and a substantial amount of legal work is needed, regardless of whether the claim is worth £2,000 or £10,000. Professional advice and help is needed which, because in the small claims court legal costs cannot be recovered, there is a disincentive to take legal advice. If the costs of this could not be recovered then many people would be unable to pursue these remedies or would be at a significant disadvantage against the other side. It is vital that the current limit on personal injury cases in the small claims court is not increased, especially where the only beneficiaries of such a change will mainly be the shareholders of insurance companies.

The Law Society calls on all parties to commit to:

- Ensuring that victims can obtain proper redress and have access to the advice and support needed to obtain that redress;
- Considering tax incentives to encourage individuals to take out legal expenses insurance;
- Examining the role of insurers in the market to ensure that their practices are in the public interest;
- Ensuring proper regulation of ‘third party capture’ where insurers attempt to limit damages by going direct to accident victims and encouraging them to under-settle claims;
- Maintaining the current limit on personal injury cases in the small claims court;
- Considering more active use of information technology in the litigation process to increase efficiencies and lower the costs of the court process.

The defence of the rights of the people

One of the prime responsibilities of Government is the protection of the rights of the nation's citizens as well as others subject to its jurisdiction. This means protecting their right to live free of fear and crime. But it also means respecting their right to freedom, to privacy and to proper justice. Parliament and the courts, supported by an independent legal profession, have a major role in monitoring and arbitrating the relationship between citizen and Government.

An independent judiciary is the mainstay of the rule of law. The United Kingdom can be justly proud of the quality, integrity and independence of its judges, who are respected across the globe. The Law Society applauds and supports the work of the Judicial Appointments Commission (JAC), which has carried out significant work to establish a demonstrably independent process of appointment based on merit. There is still considerable work to be undertaken to improve diversity within the judiciary and to persuade solicitors from all walks of life of the benefits of a judicial career. However, the Society is confident that the JAC can build on its work provided that it retains the independence that it has thus far enjoyed.

The Law Society calls on all parties to commit to:

- Continuing the independence of the JAC in the way in which it conducts its work;
- Limiting the role of the executive in the appointment of judges and the appointment of the members of the JAC;
- Abolishing the power to appoint *ad hoc* Deputy High Court judges which can provide a selection advantage to those individuals who receive such appointments;
- Removing barriers to appointment that might adversely affect solicitors and candidates from currently under-represented groups.

The Human Rights Act has been subject to considerable criticism since its passage in 1998. The Society believes that much of this has been unfair and unjustified and that the principles on which the Act is based should be maintained.

The Law Society has noted recent proposals from a number of quarters for a UK Bill of Rights. The Society would be interested in engaging in any debate about whether particular aspects of the common law tradition, such as trial by jury, should be incorporated in such a document. However, this should not be taken as an opportunity to dilute the Human Rights Act or to reduce the basic protections that it provides. Moreover, these protections are part of the UK's obligations under international law. We live in an increasingly inter-connected world where the UK must co-operate and compete with other nations and regimes. The UK should set an example by leading in

Europe on procedural and civil rights issues as well as living up to its commitments in international human rights treaties and urging the same in others.

The Law Society calls on all parties to commit to:

- Supporting the principles enshrined in the Human Rights Act;
- Promoting civil and procedural rights in Europe;
- Promoting compliance by both the UK and other countries with human rights treaty obligations;
- Promoting a robust procedural rights regime to guarantee access to legal advice and representation in criminal cases across Europe - particularly regarding procedures relating to the European Arrest Warrant.

In recent years, the UK criminal justice system has been subject to a constant barrage of new legislation and offences. A more cautious and structured approach to extending and reforming criminal law is required to prevent the criminal justice system being overwhelmed and police forces becoming overstretched by a constantly changing criminal code.

This expansion of criminal law in recent years has criminalised an increasing proportion of the population and further disrupted the balance between the power of the state and the freedom of the individual. New procedures and initiatives may have had similar effects.

Such laws and initiatives include:

- Limiting the costs recovered by acquitted defendants to the equivalent legal aid rates;
- Proposals on means testing for legal aid funding in the crown court, which could see defendants having to contribute to their legal costs despite having a very low income, potentially threatening their access to justice;
- The maintenance of a DNA database (created with no meaningful consultation) that tends to treat as criminals non-convicted defendants and arrested, but not charged, individuals whose DNA may be retained;
- The growth in the use of control orders in terrorism cases;
- The increasing use of out-of-court disposals such as cautions and fixed penalty notices which are issued without any court oversight. This is damaging from two perspectives: cautions fail to deal appropriately with those who may have committed serious offences, while fixed penalties criminalise those whose offences may be minor, or who may have a good defence but find it easier or more convenient to plead guilty;



- Virtual courts, where defendants may not have face to face access to a defence lawyer and so have difficulty in giving confidential instructions or taking advice;
- Provisions in the Coroners and Justice Act 2009 which allow for secret inquests, if the coroner so rules;
- Provisions requiring the defence to provide advance notice to the prosecution of witnesses that it intends to call, tipping the scales of justice in favour of the prosecution before a trial has even begun.

The Society also has serious concerns over the increasing use of surveillance and information storage both through the increasing use of CCTV and Government databases, with the risk of disproportionate intrusions into privacy caused by the use of advancing technology.

The Society believes that no-one can object to sensible measures to prevent and detect serious crime but there is always a balance to be struck between fighting crime and doing so in such a way that protects rights - including the right not to be spied upon in an undetectable and intrusive fashion.

An often-quoted argument is that people who have done nothing wrong have nothing to fear from secret surveillance and other infringements upon their privacy. However, everyone accepts that there are limits; no-one would suggest that an acceptable way to reduce levels of domestic crime would be to install cameras in private homes, however great a deterrent that might be.

The right of people to privacy (and freedom from monitoring by public authorities) is founded on a prior right to personal autonomy and rooted in human dignity. People are right to expect a degree of privacy even though the harsh outcome may sometimes be that more crimes will be committed - or remain undetected - than otherwise would be the case. Because of this the Society calls for a national debate about the proper balance to be struck. As one example, society needs to consider whether recent proposals from some police forces to develop plans for military style spy drones to monitor and carry out surveillance on British citizens is, in fact, proportionate.

The over-use of surveillance and sophisticated technology also potentially causes an imbalance of power between the state and the citizenry which could undermine the rule of law. That is why such initiatives must be properly debated and carefully considered before they are introduced. Greater consideration should also be given to whether large databases held by the Government and public bodies are necessary, especially where ongoing security of the data may be at issue. The Society believes that the principle of proportionality must govern the use and storage of such data.

Proportionality also needs to be the key to debating recent Government proposals concerning the balance between privacy in the court system and the principle that justice should be seen to be done. For example, in relation to media reporting of family court proceedings, it will be important to deliver a transparent and accountable family justice system without sacrificing the privacy of families especially where children are concerned.



The Law Society calls on all parties to commit to:

- Maintaining the right to trial by jury;
- Repealing the provisions limiting the costs of acquitted defendants to those they would have obtained on legal aid. These provisions mean that if a person is acquitted, they are only entitled to recoup costs equivalent to legal aid levels, regardless of the actual level of costs incurred in their defence, penalising an individual for having been wrongly accused. This is unjust, undemocratic and illiberal and could lead to financial ruin for those with limited financial resources who do not qualify for legal aid;
- Supporting the pivotal role of the defence solicitor in protecting the rights of the defendant and ensuring that the criminal justice process actually works on the ground;
- Ensuring that CPS policy to delegate some advocacy work in the magistrates' court to non-qualified lawyers does not dilute standards;
- Consulting with and taking into account the views of the legal profession prior to legislative or policy changes. Practitioners are uniquely placed to comment on and shape an effective and fair criminal justice system;
- Withdrawing the extension of confiscation measures under the Proceeds of Crime Act 2002 to include more minor criminal activity and to limit enforcement, to police and customs officials;
- Reviewing the current focus on 'out of court disposals' - such as fixed penalties, police cautions and conditional cautions - in order to ensure that serious crimes are not addressed in this way. Proper advice and protection should also be offered to those people receiving such penalties;
- Supporting an open coroners system in which all inquests are held in public;
- Creating an effective role for public legal education in schools;
- Reconsidering the current proposals in the Children, Schools and Families Bill relating to the proposed framework to enable the media to report the substance of family proceedings;
- Calling for a national debate about the proper balance to be struck between surveillance technology and the provision of large Government databases with a citizen's reasonable expectation of privacy.

Good governance and better law-making

Clear and accessible legislation is the key to balancing the rights and obligations of citizens in a democratic society. Individuals and businesses need sensible, fair and effective laws which have been properly scrutinised. This is true whether in the case of laws or rules made or enforced by national Government, the National Assembly for Wales, public bodies or local authorities in England and Wales.

Law reform should not be driven by tabloid headline grabbing but on the basis of considered debate, scrutiny and evidence. Too much legislation is followed by serious unintended consequences due to a lack of adequate consideration. An example is the vetting and barring scheme catching all those dealing with children that was hastily introduced in 2009 and has already been the subject of an independent review before all its aspects have come into force.

Further problems that have arisen out of legislation in recent years include:

- Unclear wording, problems of structure caused by multiple amendments, 'gold-plating' in the transposition of EU measures or simply lack of adequate detail;
- Difficulty in finding out which provisions are in force;
- Over many decades, 'knee-jerk' legislative reactions to current events by Parliament which have led to hastily made and flawed laws;
- Inappropriate use of secondary legislation (as identified by the Supreme Court in relation to orders freezing the assets of certain terrorist organisations);
- Over-complexity in legislation, particularly tax, immigration and planning legal frameworks, coupled with an increasing tendency towards retrospective effect;
- A lack of accountability for delegated powers whose scope is extended without debate or public scrutiny long after the original enabling Act was passed.

A related issue is the continued maintenance of laws on the statute book that have become redundant or unnecessary. All too often in the post-war period, Governments have tried to solve complex societal issues by legislation where exhortation or other non-statutory action would have been more appropriate. Ministers sometimes have a worrying tendency to see legislation as an end in itself where often it is the method of implementation and the resources given to new policies following statutory change that is more important. Because of this, the Society urges all parties to commit to the introduction of a Reform



and Repeal Bill which would aim to repeal laws which are outdated, unnecessary or burdensome. Further consideration should also be given to the establishment of a Parliamentary Select Committee on Repeals, to consider and advise about such issues, on an ongoing basis.

The Law Society calls on all parties to commit to:

- An extension to pre-legislative review. Before re-legislating on a topic, the scope and effectiveness of existing legislation should be reviewed. If new provisions are needed, these should be carefully dovetailed with the old. Sections which have been overtaken or never implemented should be repealed. Consolidation should always be considered if there are multiple and/or outdated Acts on a current topic.
- Transparent and accountable laws. Earlier involvement by Parliament and its committees in Government Bills would allow systematic consideration both of primary legislation and of the nature and content of the respective regulations. Impact assessments should be more open to scrutiny and external challenge.
- Balancing primary and secondary legislation. Statutory Instruments (SIs) often contain vital details about the working of a measure yet receive a lower level of scrutiny than primary legislation. Either Bills should contain more detail or new procedures should allow draft SIs to be debated and amended. In the meantime, significant secondary legislation should be subject to meaningful consultation before being formally laid.
- Less reliance on 'soft law'. In too many areas the Government relies upon 'soft law', such as guidance, to clarify legislation instead of making the law clear in the first place. This applies particularly to tax law where too often the taxpayer is taxed by legislation and then untaxed by guidance. Government departments tend increasingly to rely on their own interpretation of the law as definitive rather than accepting that it is for the courts to determine any ambiguities.
- Taking advantage of technology. Government circulars and guidance should be published more systematically and understandably online and on paper and should show dates of implementation and clearly distinguish legislative requirements from interpretation. Recent developments in relation to participative democracy through the use of the internet could also be examined such as 'Wiki-Bills' where people can use technology to collaborate on the design of legislation.

- Implementing Law Commission Bills. The "fast track" procedure for consideration of proposals by the Law Commission is welcome, but there needs to be a real commitment to implement most Law Commission proposals in full, rather than to cherry-pick or delay. The amendments to the Commission's proposals to reform the law on homicide are a particular example of Government choosing political expediency over sensible reform.
- Introducing a Reform and Repeal Bill which would aim to repeal laws which are outdated, unnecessary or burdensome and considering the establishment of a Parliamentary Select Committee on Repeals.

Taxation is one area where the relevant UK law is unclear and complex. In this field the Society makes the following specific recommendations which are designed to improve the drafting of current and new tax law, to improve tax administration and to ensure that new legislation is given proper scrutiny.

The Law Society calls on all parties to commit to:

- The creation of a permanent tax advisory body comprising MPs, representatives of HMRC, representatives of professional bodies and representatives from business and commerce and academics. This body should be charged with: recommending reform and simplification of existing law; monitoring the practical application of legislation and proposing amending legislation; and reviewing new legislation as it progresses through the parliamentary process. There should be automatic reference of each Finance Bill to the tax advisory body, whose recommendations would be debated by Parliament;
- Changing the tax year of assessment to a calendar basis (1 January to 31 December) with taxpayers filing their self-assessment returns by 30 September following the year of assessment. This proposal, which has been implemented in the Republic of Ireland, would put the collection of income tax on a more rational and simplified basis consistent with other tax jurisdictions. It would also avoid the confusion caused to taxpayers by "late" Budgets and reduce the disruption caused by general elections;
- Fixed dates for the Pre-Budget Report and Budget. Whilst a number of factors influence the date of the Budget, it is clear that party political factors are also an (undesirable) feature. A fixed timetable would provide greater certainty and stability in the system.

A strong and independent legal services sector

The legal profession in England and Wales is proud of its core values of integrity, confidentiality and professionalism. As the representative body of solicitors, the Law Society is committed to maintaining and continually improving the standard of service offered by its members.

Law firms are also a vital part of the UK economy. The benefit to business and to the public generally of a thriving and trusted legal services sector is immeasurable. Law firms make a major contribution to UK GDP not only through their UK-based activity but through the role they play in helping to attract wider foreign investment and in generating significant export earnings. They need support from Government to maintain and expand their ability to trade internationally through improved market access and the maintenance of a rules based system. Policy-makers should recognise the need to promote these benefits to international parties resolving disputes in England and Wales. They should also help the sector to retain the dynamism and flexibility which has helped to create its unrivalled global reputation for fairness, expertise and independence.

There are three major reasons for the success of the legal sector in England and Wales: the strength of the common law, the competence and quality of service provided by its lawyers and a regulatory system which maintains their independence and facilitates their adherence to core professional values. It is essential that these should be preserved, both for confidence in the profession and for the continued application of the rule of law. Both the Legal Services Board and the Solicitors Regulation Authority have a significant duty in this regard.

Law firms as well as individual solicitors face new challenges and opportunities in the post-Legal Services Act landscape. These take place against a background of major technological developments in the business world and the changing demands of consumers.

In the face of this change, there are a number of conventions which must be protected. For example, legal professional privilege - the inherent right of clients to receive confidential advice from their lawyers - must be maintained.

Any incoming Government must also ensure that the use of common law in international contracts is not undermined by the European development of a common civil code.

It is also of fundamental constitutional importance that the regulation of lawyers and legal services should continue to be independent of Government. This is one of the recognised international cornerstones of the rule of law. As the Hon. Justice Michael Kirby of the High Court of Australia has said:

*“If the people are to have faith that legal decisions are based upon their legal and factual merits rather than political interests or popular clamour, judicial independence is essential. If all people are entitled to equal protection under law, without exception, lawyers must be able to represent unpopular clients fearlessly and to advocate on behalf of unpopular causes, so as to uphold legal rights. To ensure the supremacy of the law over the arbitrary exercise of power a strong and independent legal profession is therefore essential”.*³

Because of this the Society urges all political parties to accept the broad outline of the regulatory arrangements established by the Legal Services Act 2007 that ensures that regulation is independent of Government.

The burden of regulation is an increasing concern. Regulation is clearly important for the benefit of consumers, citizens and for the profession. However, it can also provide significant burdens and disincentives for legal businesses. The present anti-money laundering regime places demands on the profession and costs (inevitably passed on to clients) which appear disproportionate to the benefits that they achieve. In another context the additional bureaucracy caused by the introduction of Home Information Packs (HIPs) has not assisted the home buying process in any substantial way and has simply created extra expense.

The Society supports the legislative provisions which permit the development of new business models (‘Alternative Business Structures’). It is concerned, however, that the speed with which this work is progressing may ignore significant difficulties. Firstly, there is a real likelihood that the effect of large firms offering commoditised legal services will be that existing firms find it uneconomic to undertake less remunerative publicly funded work, particularly in fields such as immigration, housing and mental health. Secondly, there must be a proper level playing field to ensure that the regulatory regime applying to all firms is fair and provides the right level of protection for clients and for the integrity of the legal system.

Concerns about a level playing field apply also to the unregulated providers of legal services. These providers, generally less competent than solicitors and without the protections that regulation provides, are often a danger to the public. This is particularly the case in the provision of will-writing and probate advice, where unregulated providers provide a much

lower level of service and standards and the dangers of poor advice are manifest. Similarly, the growth of referral fees provides a lack of transparency for the public and a real disadvantage in the market-place for regulated practitioners.

Finally, one of the strengths of the profession lies in the diversity of its membership. The Society strongly supports measures to increase diversity and to open up further access to membership of the profession. However, without proper funding arrangements it is hard to see how the profession is going to ensure the diversity that Government is urging it to provide.

The recent Milburn report into access to the professions has much to commend it. The Society remains prepared to consider opportunities to raise funds from within the profession specifically to support social mobility initiatives. However, any such move would have to form part of a partnership with Government through the provision of a matched level of funding. This could deliver significant practical assistance and make the most open branch of the legal profession even more inclusive. The Society also believes that the standards of relevant university courses should be rigorous and effectively monitored, as well as properly funded, so that there are always high quality applicants seeking to join the profession.



The Society calls on all parties to commit to:

- Maintaining an independent legal profession governed by duties which match the international norms applying to lawyers;
- Maintaining legal professional privilege as an inherent right of clients to receive confidential advice from their lawyers;
- Accepting the recent House of Lords' recommendations in respect of the anti-money laundering regime;
- Ensuring that the implementation of Alternative Business Structures has a beneficial effect on access to justice and that a level playing field is achieved;
- Encouraging the Legal Services Board to establish a proper level playing field in the regulation of legal services and thereby enhancing consumer protection, for example, by the extension of reserved activities under the Legal Services Act in the field of will-writing and probate;
- Supporting a proportionate regulatory regime which will maintain the competitiveness of the legal profession of England and Wales and its pre-eminence in the world;
- Reviewing the use of referral fees and actively considering their abolition;
- Engaging in a debate about the future of Home Information Packs;
- Considering a matched funding scheme to support proposals from the Milburn report into access to the professions;
- Supporting policies which encourage small business start-ups and reduce burdens on small business, thus supporting the majority of firms in the legal sector and encouraging innovation and efficiency in the provision of services;
- Committing support to the international provision of legal services by UK firms, particularly in the corporate and financial sector, in which the solicitor's profession is a world leader and makes a huge contribution to the UK economy.

Quote Source:

1 Brennan, *The Community's Responsibility for Legal Aid*, Legal Aid Brief Case Vol. 15 (December 1956) at 75, cited by Lord Clarke, Mary Ward Legal Advice Centre Annual Lecture, 15th July 2009. (page 14)

2 Interview with *Law in Action*, BBC Radio 4, 27th October 2009. (page 14)

3 Justice Kirby's address to the Law Council of Australia, 20 March 2005. (page 21)





The Law Society

113 Chancery Lane
London
WC2A 1PL