The Law Society 2015 General Election Manifesto

About the Law Society

The Law Society is the representative body for over 159,000 solicitors qualified in England and Wales and practising across 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.

Improving the justice system in England and Wales for society, for the economy and for our global standing.

Foreword

2015 will see the eighth hundredth anniversary of the sealing of Magna Carta, a document that can be seen as the foundation of liberty in the Western world. This document set out and established rights and began the long tradition of adherence to the rule of law, a concept that is vitally important in guaranteeing the rights of citizens and establishing good government.

It will also see a general election within the UK when debate and discussion over the rule of law, justice, the economy, the rights and civil liberties of citizens, and the place of the UK in the world will once again come to the fore.

The Law Society of England and Wales, as the voice of the largest part of the legal sector in the UK, has a unique perspective on many of these issues. A perspective directly informed by the day to day experiences of its members who act as trusted legal advisers to members of the public, companies and other organisations and who play a vital role in upholding justice and the rule of law.

Whichever political party (or parties) form the next government, the country will continue to face serious challenges. While the economy remains fragile during the recovery, there will continue to be voices advocating for a more insular place for the country in the world. Also of concern, is that the effects of the recent cuts to legal aid and the controversial changes to the civil justice system will increasingly be felt. Vigorous debates over the extent of human rights legislation and the functioning of the criminal justice system will continue.

In this context the Law Society calls upon the next government, in the important anniversary year of the sealing of the Magna Carta, to place the principles underpinning the rule of law at centre stage, such as those ensuring a clear and understandable body of law and protecting human rights.
The Society seeks to ensure that the rights of individuals are fully respected and that effective access to justice for all is achieved. It will continue to work towards a legal environment for businesses and consumers that provides legal certainty, clearly outlines rights and duties, and offers effective means of redress. It will support rules that enable the legal profession to perform its duties to clients (whether businesses or individuals) to the best of its ability and in the interests of the broader community.

In this manifesto the Society provides a number of realistic and balanced proposals for reform that would uphold and advance these principles, in the following chapters:

- Making society a fairer place;
- Strengthening the UK’s global standing;
- Boosting the UK economy.

The solicitors’ profession also contributes a huge amount to the national economy as part of the wider professional services industry. The Society is keen that policies adopted by the next Government ensure that the business environment remains highly competitive and allows these vital businesses to survive and thrive.

Our experiences and perspectives combine to give the Law Society powerful insights into these issues. These are presented in this manifesto as our contribution to the public policy debate ahead of the general election in 2015.

Andrew Caplen
President

Executive Summary

To make society fairer, strengthen our global standing and boost our economy, the Law Society calls upon the next government to:

- Ensure every individual has effective access to justice by evaluating recent changes to the legal system and considering reform where those changes have caused harm;
- Protect and enhance the role of English and Welsh law by supporting the legal profession in its work to shape and influence best practice in the rule of law here and around the world; and
- Enable legal services to continue to make their major contribution to the UK economy by ensuring the ongoing competitiveness of the UK legal sector through reviewing regulation, supporting UK law firms’ international growth ambitions and investing in digital infrastructure.
Making society a fairer place

One of the key principles underlying the rule of law is that every individual requires effective access to justice.

This means not only access to competent and independent advice on legal issues, but also effective representation in court. In difficult economic times, when fewer and fewer people can afford to pay for advice, the safety net that the state provides becomes ever more important.

The Law Society makes the following proposals in relation to the criminal and civil justice system.

The Criminal Justice System

Over the last twenty years the criminal justice system has been subject to a frenetic pace of change as policy-makers have implemented a series of changes to substantive law and procedure and also introduced radical funding changes. Rarely does a legislative session pass without the political parties suggesting new changes, often in the aftermath of a particular controversy. The result is a criminal justice system which is overstretched and where fundamental principles intended to safeguard individual freedoms are undermined.

The justice system as a whole is increasingly under pressure for its cost to be reduced to the extent that it places its effectiveness at risk.

Because of this, the Society believes that the time has now come for society to consider the whole basis of the criminal justice system and proposes that a major Commission of Enquiry be established to look at its future scope. The Society therefore calls upon the next government to establish such a Commission of Enquiry into the nature and functioning of the criminal justice system to consider the following issues:

- The value of justice and what society requires from its criminal justice system: if society continues to want the punitive system of criminal justice we have now, what price is it prepared to pay;
- The appropriateness of involving unqualified paralegal assistant prosecutors and police prosecutors instead of regulated, expert solicitors and barristers;
- The extent to which the criminal justice system should continue to be used as the fall-back to deal with social and medical problems instead of properly resourcing other routes for those who need support, not punishment (noting, for example, the work of the recent Bradley review in this area);
- Whether it is preferable that some transgressions are dealt with through civil, rather than criminal sanctions and to consider a raising of the current age of criminal responsibility;
- Whether the Commission on Devolution in Wales (The Silk Commission) recommendations on devolution of powers for policing, youth justice and the probation and prison services should be implemented, in the wider context.
Legal Aid Funding - Criminal Cases

The recent cuts in funding to criminal legal aid have been profound. The government aimed to save £220 million from the Transforming Legal Aid proposals and the expenditure on criminal legal aid in 2013-14 was approximately £900 million, so this reduction represents nearly a quarter of the budget. These cuts threaten the ability of those accused of crime to receive a proper defence. In the light of these cuts, it is essential to preserve a sustainable criminal legal aid system and to mitigate the worst effects of the re-structuring proposals.

To ensure this aim the Law Society calls upon the next government to:

- Carry out careful formal monitoring of the ongoing impact of the recent cuts on society as a whole and take urgent action to address the emerging problems, for example those that are already beginning to emerge in rural areas;
- Rule out any further cuts (including the 8.75 per cent cut to criminal legal aid rates planned for June 2015) until the outcome of the current Leveson Review of criminal procedure and the ongoing fiscal position have been assessed;
- Provide funding to ensure that high quality defence practitioners can continue to serve clients in all parts of England and Wales.

Legal Aid Funding - Civil Cases

The cuts to civil legal aid have also been deep and (taken together with the Jackson changes to the funding of cases) have harmed the ability of the ordinary citizen to take steps to enforce their legal rights.

For example, the MoJ anticipated in its impact assessments in relation to the recent changes that there would be a drop in the number of family legal aided cases of 210,000 from the 2009/10 figures, and of 385,000 in non-family cases. In fact, the number of legal help cases started in 2013/14 was down over 266,000 (from 309,054 to 42,798) in family, and over 504,000 (from 633,828 to 129,703) in civil cases, on those 2009/10 figures. This is a stark decrease in legal help and assistance for members of the public.

The Law Society therefore calls for mitigation of these damaging cuts that affect the most vulnerable members of society and calls upon the next government to:

- Rule out any further cuts to civil legal aid;
- Restore welfare benefits advice funding, particularly for housing benefit. The Society believes that this would reduce possession proceedings and their associated downstream costs;
- Restore early advice in family cases to promote references to mediation which have fallen significantly post passage of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act;
- Further consider the evidence requirements to ensure that victims of domestic violence are not prevented from access to legal advice in family proceedings;
• Abolish the administratively burdensome capital means test for means-tested benefit recipients;

• Repeal the civil residence test which is unreasonably bureaucratic and potentially discriminatory;

• Abolish the judicial review 'at risk' funding changes that will act as a barrier to challenging unreasonable decisions by public bodies.

The Law Society also recommends the development of a comprehensive strategy to ensure sustainable access to justice for all, irrespective of means. As part of this strategy, the Law Society calls upon the next government to:

• Acknowledge the value of family and social welfare law advice in empowering citizens, combating poverty and promoting the rule of law;

• Work with the profession and other stakeholders to develop a coherent civil access to justice strategy to be delivered through a variety of channels in addition to legal aid;

• Develop specific proposals to promote better decision making by public bodies through 'polluter pays' initiatives eg costs for successful applicants in tribunal proceedings involving public bodies such as the Department for Work and Pensions and a levy on the financial services industry to cover high cost fraud cases;

• Provide support for private practice, not for profit and pro bono initiatives to deliver more efficient and affordable services.

The Funding of Non Legally-Aided Civil Cases

Since 2010 a number of changes to the rules governing funding have been made following the Jackson Review under Part 2 of LASPO. While the effects of these changes to access to justice are not yet fully felt, the first signs have been highly discouraging with fewer solicitors willing to take on complex and difficult cases because of the funding risks.

One of the key recommendations of Lord Justice Jackson was that his proposed changes to the funding regime of civil cases should only take place if there were no further cuts to civil legal aid. This advice was not heeded and recent years have seen a diminution of funding for civil cases to the detriment of the victims of negligence (some of which cases are very serious, as with clinical negligence) and other civil wrongs.

In non-personal injury cases the small claims limit has now been raised to £10,000. This means individuals and small businesses will be unable or unwilling to obtain good quality legal advice on claims which for them represent significant sums, as their legal costs cannot be recovered, even if the case is successful. This is a further disincentive for individuals and small and medium sized enterprises to seek justice in such areas. Yet the Government has indicated that it will be reviewing the limit at a later stage with a possibility of it being increased to £15,000.

The drafting of the Damages Based Agreements Regulations currently cause confusion and should be redrafted to increase the uptake.

The next government will therefore need to consider how to rebalance the civil justice system to ensure that both sides - people bringing claims and those they are bringing
claims against - have equal confidence in the system. To ensure this, the Society calls upon the next government to:

- Review the combined effects of the changes to the civil justice system with a view to putting the victims of negligence and other civil wrongs back in a position where they can properly enforce their legal rights. For example, by the extension of qualified one way costs shifting to further areas; or considering whether the success fees in Conditional Fee Agreements ('no win no fee') should once again (in whole or in part) be recoverable from negligent and wrong-doing defendants;

- Cancel any further increase in the small claims limit in non-personal injury cases and actively consider reducing the limit back to £5,000;

- Rule out any increase in the small claims limit in personal injury cases beyond the current £1,000 limit. Given that even relatively small cases may involve serious injury such as broken bones or serious scarring, it is vital that injured people have clear access to appropriate legal advice;

- Amend the Damages Based Agreement Regulations so that they become workable in practice;

- Assess the impact of the introduction of employment tribunal fees on employees' access to justice.

Reforming Insurer Practices

The insurance industry's commitment to the public interest has been questioned repeatedly in recent years, from the PPI scandal, to the Financial Conduct Authority (FCA)'s review of life insurance, to the Competition Commission's investigation into motor insurance. There is a growing body of evidence of insurers similarly undermining public interest within the legal services market.

Insurers continue to engage in behaviours harmful to consumers such as 'third party capture', where insurers attempt to settle claims with injured parties before they take legal advice. A 2009 FSA study found this carried a substantial risk of under-settlement, leaving injured parties with only about a third of what they would have been entitled to with legal advice. Anecdotal evidence suggests that this is becoming more prevalent.

Some insurers have been paying claimants before they have even had medical examinations of their injuries. People are asked to make important decisions about their financial future and healthcare under pressure, and with no legal or medical advice. While this latter practice has been identified by the Ministry of Justice as one that should be banned, the Society believes the Government should go further in protecting consumers.

The Society calls upon the next government to:

- Hold a wide-ranging review of insurer behaviour in the legal services market, to ensure it is not being manipulated at the expense of the consumer and access to justice;

- Force insurers to publish data on third party capture, so that the impact of the practice on victims can be objectively studied - and ban it if it is shown to be harming consumers;

- Clarify the law on legal expenses insurance, and make the FCA do more to stop insurers avoiding their obligations to the consumer.
Strengthening the global standing of the United Kingdom

The Law Society of England and Wales has always taken a strong interest in issues outside national borders, not only to extend and promote the rule of law but also to ensure a free and vibrant market for legal services abroad.

Law firms are also a vital part of the UK economy. They make a major contribution to the economy not only through 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 underpinned by the rule of law. Policy-makers should help the legal sector retain the dynamism and flexibility which have helped to create its unrivalled global reputation for fairness, expertise and independence.

The Protection of Human Rights at Home and Abroad

The UK has a long history of recognising the need for legal limits on the exercise of state power, starting with the sealing of the Magna Carta in 1215. This proud history has continued to modern times. The Human Rights Act (HRA) 1998 is a powerful statement of the rights and freedoms of citizens and a bulwark against the exercise of arbitrary public power.

The European Convention on Human Rights (ECHR) has helped to build fairer and more cohesive countries across Europe, including the UK. While the HRA has been subject to considerable unfair and unjustified criticism since its enactment in 1998, the Society considers that the Act is a sound piece of legislation that our courts have interpreted in a common-sense and moderate way. The UK has also always been at the forefront in advocating universal legal values and the rule of law abroad.

The Law Society calls upon the next government to:

- Robustly defend the Human Rights Act 1998 and the values it enshrines;
- Support the work of the European Court of Human Rights (ECtHR) and work constructively to ensure that it can operate effectively and fairly;
- Work with others around the world to ensure that the fundamental rights of all people are respected at a national level and in the global context of the online environment;
- Work to stop the persecution of lawyers and human rights defenders around the world;
- Build the capacity of agencies charged with saving lives by monitoring human rights and maintaining the funding to support this work;
- Maintain the level of development funds available for work to support rule of law and justice;
- Implement the UK Action Plan on Business and Human Rights.
The EU Legal System

UK legal services make up over a quarter of the entire EU legal services market and it is important that the legal profession is at the heart of the discussion. It is also clear that debate about the EU will form a central part of the domestic debate leading up to the next general election. As part of that debate the Law Society proposes that the next Government continues to argue and make forceful representations through the EU institutions that:

- The principles of better law-making in EU processes are consistently upheld. In particular, it emphasises the importance in the EU context of ensuring that the principles of proportionality and subsidiarity are observed;
- Effective access to justice should underpin all EU policies. The efficiency of and access to the EU courts, including the effectiveness of the preliminary reference process as a means of facilitating legal certainty and consistency throughout the EU should continue to be improved;
- Consumer bodies across Europe should be supported in their objective of helping victims of price fixing and anti-competitive behaviour, by encouraging the EU Commission to establish a new EU-wide law, making it easier to tackle this illegal activity;
- Access to justice is important in ensuring that citizens receive fair trials in a criminal context but also in guaranteeing the civil law rights of EU citizens. Establishing effective redress mechanisms and a trusted legal system is an important part of completing, and creating confidence in, the Internal Market.

Extending Collective Redress

Collective redress is where multiple claimants with similar claims sharing common characteristics seek a remedy against the same defendant or multiple defendants. Such redress is not just a potential additional enforcement mechanism but a system that greatly assists in delivering access to justice. The Law Society welcomes its increased use in the context of competition actions, and believes that both the UK government and the European Union should explore the use of collective redress in other areas of law.

The Law Society calls upon the next government to:

- Continue to increase the situations in which collective redress actions may be brought, as recommended by the European Commission;
- Ensure that the UK continues to be the first choice for the provision of legal services in this area - a position which is increasingly challenged by the existence of effective collective redress procedures in other jurisdictions.

Boosting the UK economy

Legal services in the UK have a global reputation for excellence.

This is reflected in a considerable direct contribution to the UK economy and substantial success in global markets. In the Law Society's view the value of legal services should be considered in the wider context of the sector's crucial role in the smooth running of the economy and the attractiveness of the UK as a place to do business. For example:
- Solicitors make a direct economic contribution of 1.5 per cent of the UK’s GDP and strengthen the wider business community
- For every 100 jobs in the legal services sector we support 67 jobs in other areas of the economy
- Every £1 of output of the UK legal services sector underpins £2.39 of output in the UK economy as a whole

In 2012 the sector employed almost 340,000 people, among them 121,000 practising solicitors, exported £4bn of services and contributed a net positive balance of trade of £2.9bn.

Of the UK’s three legal jurisdictions, England and Wales dominates – accounting for 91.3 per cent of the UK total and, in the major centres of Birmingham and Manchester, legal services account for more than £1 billion in local GVA. London is the biggest global legal centre, home to over 100,000 legal sector employees and the relationship between London’s world-leading financial sector and its legal sector is critical to the success of the UK economy.

The legal sector also boosts business confidence and makes it easier to do business in the UK. The legal services sector, and the legal system it upholds, contribute to companies having confidence in the rule of law and the ability of laws and regulations to create a level playing field for businesses.

However, if the legal services sector is to remain world-leading, it is vital that the UK continues to improve the business environment and support law firms’ growth ambitions at home and abroad. To this end the Law Society of England and Wales has recommendations for the next government across the following areas.

**Infrastructure**

The UK should aspire to a modern infrastructure, which accommodates growth and provides access to emerging markets around the world. The Law Society calls upon the next Government to:

- Commit to an overhaul of existing IT in the Courts and allocating sufficient funding to improve IT systems to improve domestic litigation procedures and maintain the courts of England and Wales as the jurisdiction of choice for international dispute resolution;
- Take steps to ensure UK-based firms are able to access developing markets.

**Regulation**

In order to maintain its contribution to the nation’s GDP, it will be essential for the legal profession itself to remain strong and independent. It should not suffer from any perceived lack of independence or from regulatory requirements which get the balance between public protection and business competition wrong. The Law Society calls upon the next government to:

- Maintain the constitutional independence of the legal profession from Government;
- Provide mechanisms to ensure that regulators are properly accountable for their actions through adherence to the Code for Regulators;
• Encourage the availability in the consumer interest of a strong, diverse legal profession with high professional standards.

Taxation

Discouraging tax avoidance has been high on the government's agenda in recent years. The Law Society supports this aim but believes that the government has demonstrated a tendency to allow the rule of law in taxation to be eroded in the interests of combating avoidance. This tendency must be curbed. Retrospective application of legislation complex approaches to regulation, moves to criminalise certain business decisions and restrictions on access to justice pose risks to the UK’s reputation and should also be avoided.

While the Society accepts that there are cases where, given the risk to the Exchequer, the government needs to take steps to combat avoidance, these cases should be kept to an absolute minimum because they give rise to potential unfairness.

We are also concerned by government approaches that appear to endorse legal uncertainty as a useful tool for achieving their objectives. Uncertainty or subjectivity in tax law should be avoided, and laws should not be deliberately designed to be vague and not amenable to legal analysis. A lack of legal certainty undermines the legitimacy of our tax system and should not be tolerated, let alone encouraged.

In light of these concerns, the Law Society calls upon the next government to:

• Adopt a new Tax Law Charter, setting out the rule of law principles to which all tax legislation should adhere;

• As a matter of course, publish detailed reasoning as to how the relevant minister has certified that the Finance Bill or any other fiscal measure is compatible with the European Convention on Human Rights.

Immigration

To remain globally competitive, the UK needs to allow law firms and other businesses to retain top talent and plan their human resources requirements over the long term. The Law Society calls upon the next government to:

• Re-assess the cooling-off period, which by preventing most sponsored workers from returning to work in the UK for 12 months, reduces business flexibility. The cooling-off period should be relaxed for migrants who have specialist and much needed skills.

Intellectual Property

The next Government must ensure that Britain maintains its current reputation as a centre for intellectual property expertise. The Taylor Wessing Global IP Index 2013 found the UK was the best place to obtain, exploit and enforce IP. The current Government succeeded in negotiating for London to host one section of the newly established Unified Patent Court, in the Central Division of the European Court.

Additionally, the Law Society has campaigned for change in the area of groundless
threats in IP law for nearly eight years, arguing that the current provisions are inconsistent between the various intellectual property rights and that current rules are extremely complicated and contain a myriad of traps for those who do not specialise in IP law. The Law Society applauds the Law Commission’s recent report on this topic, *Patents, Trade Marks and Design Rights: Groundless Threats*. For our members who work in this area - and indeed any business that wishes fairly to assert its IP rights - these reforms would mean a clearer and improved framework.

The Law Society calls upon the next government to:

- Enact the Law Commission's proposals on groundless threats.