Law Society of Scotland

Our Priorities

for the 2021 Scottish Parliament Elections

Law Society of Scotland

Foreword

With the 2021 Scottish Parliament elections just weeks away, this set of Priorities lays out some of the key issues on which we will press for progress over the next five years. There are six key strands, but we open with one overarching principle – the importance of the rule of law and human rights.

The rule of law is not just something to be respected, it is something to be actively upheld, protected and valued. It underpins our democracy and society. So I introduce our priorities for the next Parliament by calling on every individual seeking election to commit not only to respect the rule of law, but to protect, value, promote and celebrate it.

It is astonishing to look back just five years to the last Holyrood elections and consider the pace of change. Since May 2016 we have seen three UK Prime Ministers and a vote to leave the EU followed by four years of Brexit negotiations. Then in the last year of the Session, Parliament introduced unprecedented powers to restrict freedoms on an emergency basis to suppress Covid-19 transmission.

Yet while much has changed, much of the work that we called for back in 2016 has still not reached a conclusion. We have actively engaged with extensive reviews, consultations and discussions, but two of the central pillars of our priorities in 2016 return in 2021 with greater urgency: legal services regulation and access to justice. Again, we stress the need to prioritise the modernisation of legal services regulation and the delivery of meaningful change to protect access to justice.

After decades of underinvestment and ever-increasing complexity, our legal aid system remains under threat. The recent uplift in fees is welcome, but only one small step on the way to reforming the system and recognizing and respecting those who work within it. Without the access to justice which legal aid provides, citizens will be deprived of their rights and feel further removed from our laws and our lawmakers. Access to legal advice and representation must be available to us all, not just those with the means to pay.

I go into this election as the first open member of the LGBT+ community to hold the office of President of the Law Society of Scotland. I was elected by my peers to represent our diverse, modern and dynamic solicitor profession and to assure the highest levels of public protection. We should rightly acknowledge how far we have come, but we can make more progress in ensuring the legal profession is as diverse as the society it serves. Like access to justice, access to a law career must be a realistic aspiration for our young people, regardless of their background.

There are many other recommendations in this report which I urge all parties to consider. We have an opportunity to embed improvements in our courts and justice system; revive faith in fatal accident inquiries; boost innovative growth by modernising the laws governing investment; become a true global hub for digital innovation including legaltech; and seek strong collaborative relationships with international partners.

The pandemic and Brexit create immediate challenges which demand immediate focus, but by taking the longer view, we can emerge at the end of the next Session as a more vibrant, inclusive and dynamic nation.

Amanda Millar
President

Law Society of Scotland

The Law Society and our engagement with Parliament

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors, who collectively engage with millions of people across the full spectrum of policy issues. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

In seeking to influence the creation and development of high quality law which serves its intended policy purposes, we draw on the expertise of our network of over 300 volunteer committee members drawn from the legal profession and non-solicitor subject experts. This provides a unique and incredibly valuable resource across all policy areas and we are proud to be more closely involved in policy development and law reform across the full spectrum of policy areas than any other body in Scotland.

We are strictly and proudly non-partisan. We engage extensively with political stakeholders of all parties or none and seek to influence the creation and development of good law that is accessible, intelligible, clear and consistent.

This public interest function is consistent with our regulatory and representative role for Scotland's legal profession, placing us at the heart of civic Scotland and work to achieve the national performance framework goals of encouraging development as a more successful country; providing opportunities for all; increasing wellbeing; creating sustainable and inclusive growth; and reducing inequalities.

Our priorities run across six themes, with an underlying theme of respect for the rule of law and human rights:

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Our Priorities

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Ensuring respect for the rule of law

- Actively promoting the rule of law and human rights
- Further embedding principal UN Conventions on Human Rights into Scots law

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Protecting access to justice

Legal Aid

- Implementing recommendations on simplification and funding
- Focusing on legal aid legislation early in the Session
- Ensuring fees are set at sustainable levels

Digital justice and alternative dispute resolution

- Reviewing the use of technology
- Ensuring access for vulnerable people
- Committing to justice system funding to meet the challenges ahead
- Building greater resilience in administrative justice and advice sectors
- Implementing a principles-based approach to treat people with dignity, respect and fairness
- Reviewing the pandemic's impact on equalities and relationships of power

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Modernising regulation of legal services

- Bringing forward a new Legal Services Bill
- Ensuring active engagement between Consumer Scotland and sectoral regulators
- Introducing a Judicial Factors Bill

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Boosting economic recovery

Removing barriers in the law to innovation and investment

- Introducing a Moveable Transactions Bill
- Introducing a Trust Law Bill

Promoting the Scottish legal profession at home and overseas

- Identifying niches in global markets for expansion
- Showcasing Scottish legal services and legaltech
- Encouraging tech companies to invest in Scotland
- Promoting strong trade and cultural relationships
- Ensuring practice rights for Scottish solicitors in other jurisdictions

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Shaping Scotland's legal and constitutional future

- Engaging broadly on any proposed constitutional changes
- Adapting to ensure the Scottish Parliament's robust scrutiny role is maintained

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Enhancing the diversity of the legal profession

- Providing funding for a solicitor-apprenticeship
- Introducing bursaries for individuals from disadvantaged backgrounds who wish to pursue a career in law
- Introducing funding for legal employers to embed flexible working
- Considering the equalities and flexible working implications of policies which impact legal professionals
- Changing criteria for judicial appointment

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Driving public policy improvement and law reform

Scottish Law Commission Bills

- Increasing incorporation of SLC Bills
- Taking forward work on Trust Law, Moveable Transactions and Cohabitation Law

Post-legislative scrutiny and consolidation

- Increasing post-legislative scrutiny
- Consolidating the law in areas of unnecessary complexity
- Reviewing charity law

Priority areas for law reform

- Reforming the FAI system
- Coordinating and updating legislation across adult incapacity, mental health, and adult support and protection
- Reviewing remote signing and witnessing and digital signatures
- Reviewing and reform succession law
- Updating scrutiny of devolved tax legislation
- Reviewing the LBTT Additional Dwelling Supplement
- Completing work on rural and environmental law
- Consolidating and improving crofting law
- Consolidating, simplifying and modernising compulsory purchase powers

Ensuring respect for the rule of law

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Ensuring respect for the rule of law

At the heart of any fair and just society lies the fundamental principle of respect for the rule of law. It is the basis on which citizens conduct their lives with peace, good order and security. This respect for the rule of law applies to all of us but it is of particular importance that it is upheld by those in positions of power, whether through formal authority or practical influence.

The legal sector is a fundamental pillar of civil society. Lawyers harness their skills, experience and professionalism to protect people's human and other legal rights, ensuring those rights can be enjoyed equally by all of us. In doing so they are upholding the rule of law, a cornerstone of democratic society. Lawyers must be free to carry out this fundamental role without fear of intimidation or restrictions to their independence or impartiality.

Government and Parliamentarians at all levels must unconditionally support and work within the rule of law. To do otherwise would fundamentally undermine Scotland's reputation as a fair and just society, a trustworthy negotiating partner, and a safe place to do business. Over the next Session the Scottish Parliament and Government will face significant challenges as we navigate changing relationships with the rest of the UK and develop in international relations more generally. In tackling these challenges, we must not lose sight of our duty not just to comply with but also to champion the rule of law, fundamental human rights and respect for democracy.

Scotland can be rightly proud of its record on human rights and the clear political will to embed this within the work of the Scottish Parliament and Government. The National Taskforce on Human Rights Leadership will propose a statutory framework for human rights that will import internationally recognised human rights standards and protect the human rights of people in Scotland. We are committed to supporting the work needed to realise this critical goal in the next Parliament.

Human rights can be further embedded in our justice system. Just as there have been moves to embed the UN Convention on the Rights of the Child into law in the current Parliament, the UN Conventions on the Rights of Persons with Disabilities; on Elimination of all Forms of Discrimination Against Women; and on the Elimination of All Forms of Racial Discrimination can be given further effect in domestic law.

We urge all parties to:

- Commit to actively promoting the rule of law and human rights across all activity by Parliament and Government and to challenge any opposition to this fundamental cornerstone of our democracy
- Commit to further embedding UN Conventions on Human Rights into Scots law

Protecting access to justice

Law Society of Scotland

Protecting access to justice

Ensuring that people have access to justice is an essential constitutional and human right. Access to justice gives people in Scotland a voice, often at the most challenging times of their lives. Whether unfairly dismissed, unlawfully evicted, resolving child custody issues, or defending criminal charges, it is imperative that people have access to justice and to the advice they need to argue their case. Access to justice relies on and underpins the rule of law, ensuring everyone in society is able to enforce their rights and ensure others uphold their obligations and responsibilities. Access to justice is fundamental to our democracy and way of life.

The impact of Covid-19 has highlighted the importance of access to justice as many people have had to face uncertainty around health, housing, employment and other issues. Solicitors have worked hard to preserve that right, supporting clients throughout. Our justice system has adapted to meet the challenges that the crisis has posed to date and will be critical to society's continuing response and recovery.

Legal Aid

Legal aid is central to access to justice in Scotland, helping people in over 250,000 cases each year in difficult, life-changing situations. Whether facing criminal prosecution, family separation, discrimination, housing problems, debt or other issues, legal aid is available through a network of over 700 firms in towns and cities across Scotland.

The legal aid system, however, is badly in need of overhaul. It has become overly bureaucratic and complex to navigate - both for individuals seeking support and for the solicitors who provide this essential service. The governing legislation introduced back in 1986 therefore pre-dates both the Scottish Parliament and the introduction of human rights legislation now central to many of these cases.

There is an urgent need to review payment for this work if solicitors are to be able to build business model around continuing provision of legal aid work. Before 2019 and 2021, most fees had remained static for at least a decade and for some types of work they have not increased in absolute terms a generation. This left firms being unable to invest in the future or ill-equipped to meet the financial shock resulting from Covid-19. Notwithstanding the government support announced to assist through the pandemic, a process for periodic review, taking inflation into account, is sorely needed.

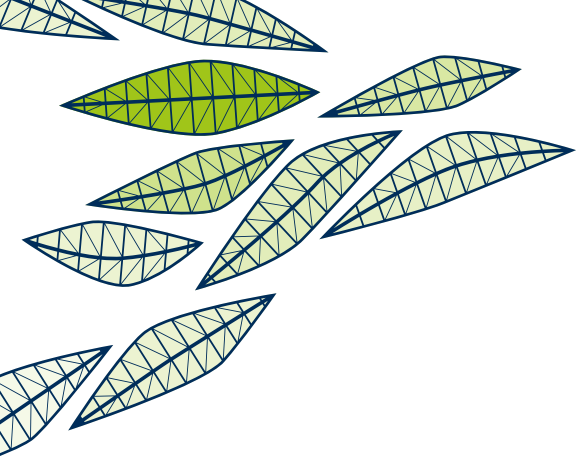
Encouragingly, investing in legal aid saves more than it costs and such investment would therefore result in a clear net benefit. Our research on the social return on investment in legal aid showed that for every £1 spent on family cases there was a saving of £5 to the public. For every £1 spent on housing cases there was a saving of £12.

Because of the complexity of the system and the challenges around funding, there has been a substantial reduction in the number of firms available to offer legal aid work. Over the last decade, the number of firms providing civil legal aid has decreased by 16% and the number of criminal firms has decreased by 25%. Urgent action is needed to simplify the legal aid system and to place its funding on a sustainable footing, taking inflation into account in the setting of realistic fee levels in future.

An independent review of legal aid reported in 2018, although the majority of its recommendations remain to be implemented and would require legislation to do so.

We urge parties to consider:

- Implementing the recommendations of the independent review around simplification and sustainable funding
- Bringing legal aid legislation forward early in the next session
- Ensuring that fees are set at sustainable levels, taking into account the impact of inflation, and kept under regular review



Protecting access to justice

The move towards digital justice and alternative dispute resolution

The impact of Covid-19 has accelerated the use of technology in our justice system, allowing people to bring actions online, or to participate in cases by telephone or video call.

The wider use of technology is overdue, but it is crucial that everyone can participate effectively. Measures that have been introduced out of necessity will need to be reviewed as our recovery progresses to ensure they are inclusive and achieve the same result whether people appear in person or virtually. Assessing virtual custody hearings and trials in particular will be crucial in ensuring that justice is being delivered fairly to all.

In considering the impact of digital justice, we should take the opportunity for a wider review of how people access the justice system and what adjustments could be made to help those who find access more challenging such as people with a disability. It is common for the accused in criminal cases to have mental health issues or other vulnerabilities and different approaches might address these issues while also maintaining strong and safe communities.

In the wake of Covid-19, the backlog of criminal cases has increased significantly with the time it takes for a criminal case to come to trial doubling. It is in the interests of everyone involved in criminal cases - whether the accused, a witness, a victim or a relative supporting any of these - that these cases are concluded as quickly as possible. Everyone benefits from removing uncertainty around trial dates and reducing the number of people on remand awaiting trial. Addressing this backlog will require additional funding to increase court capacity.

There are opportunities to act on lessons learnt during the pandemic to improve procedures in respect of civil cases too. Where appropriate, civil cases could be diverted to mediation or other forms of alternative dispute resolution, avoiding the need for them to be heard in court.

Covid-19 has led to greater state intervention in citizens' lives, with the necessity for restrictive measures to protect health and the provision of financial support through furlough, social security and other measures. Restrictions on travel and social gatherings, requirements for face coverings in public spaces and mandating isolation for those testing positive or displaying symptoms of the disease are unprecedented in modern times. In reviewing and responding to how this relationship has changed there is an opportunity to establish governing principles around how to resolve disputes if something goes wrong.

The current Scottish Parliament has established a more principles-based approach in areas such as devolved social security. Broadening this to ensure public bodies treat people with dignity, respect and fairness across the full spectrum of services they provide and interventions they take can ensure more effective decision-making, appeals processes and governance. There is potential for core principles to effectively underpin any new balance of power between citizens and the state in a way that does not disproportionately impact those most vulnerable or marginalised in our society.

In responding to the crisis, greater resilience will help guard against the impact of future shocks, through decision making, dispute resolution and properly supported advice services.

We urge parties to consider:

- Reviewing the use of technology, particularly hearings by video, to ensure that people are able to participate effectively
- Ensuring that vulnerable people are able to access the justice system and addressing issues around mental health in the criminal justice system, including support for the vulnerable accused
- Providing adequate funding for the justice system to meet the challenges ahead, both to invest in new technology and also to address the case backlogs arising from Covid-19
- Building greater resilience in our administrative justice system and advice sectors
- Implementing a principles-based approach to encourage all public bodies to treat people with dignity, respect and fairness
- Reviewing of the impact of the pandemic on equalities and relationships of power across society

Modernising regulation of legal services

Law Society of Scotland

Modernising regulation of legal services

Scotland benefits from a thriving legal services market. Solicitors support people not only during some of the most difficult times of their lives but also at times of excitement and opportunity, like buying a new home or setting up a new business. The legal profession also accounts for tens of thousands of well-paid, high-quality professional jobs, boosting the economy by around £1.5bn each year.

A successful legal profession is also one where professional standards are high, where consumer trust is maintained and where robust action is taken when things go wrong. It is why there must be a strong and fair system of regulation that allows the legal sector to succeed; protects consumers and the wider public interest; and promotes competition.

However, most of the legislation underpinning the regulatory system for solicitors is now 40 years old. Much of it is out of date and fails to account for today's modern, innovative and diverse legal profession and the increased expectations of Scottish consumers.

Back in 2016, we pressed the newly elected Scottish Government to make regulatory reform a key priority. We were delighted when Ministers responded to our call and established an independent review of legal services, which reported in 2018. Nearly three years on, the need for change and the creation of a flexible and modern framework for regulation is greater than ever. Importantly, any change must also protect the independence of the legal profession as a cornerstone of a free and fair society. It must also avoid unnecessary costs, which damage competitiveness and impact legal fees which consumers must pay.

The need for reform is particularly pressing in consumer complaints. The current complaints system established in legislation is too complex, too slow and too expensive to administer. We know it lets down both consumers and solicitors. We have welcomed work with the current Scottish Government and the Scottish Legal Complaints Commission (SLCC) to develop a package of reforms to make the system quicker and more efficient. However, greater change is now urgently needed through primary legislation.

We believe there is an opportunity to transform the SLCC, the gateway for complaints against legal practitioners, into a Scottish Legal Ombudsman Service which could concentrate properly on dealing with consumer complaints thoroughly but swiftly, giving focus to consumer redress and compensation.

This would allow the Law Society to continue its strong track record of addressing issues of professional misconduct and prosecuting for discipline. Similar systems operate in England, Wales and now in Northern Ireland. All this work could be subject to rigorous oversight by the office of the Lord President as the independent head of the legal profession, avoiding any perception of political oversight.

Reform is also needed to allow greater entity regulation of legal firms and more flexibility to suspend solicitors suspected of wrongdoing. Consumers deserve greater protection through restrictions on who can describe themselves as a 'lawyer' and action to address the currently unregulated section of the legal services market. We can make Scotland a more attractive place for legal firms to base themselves by allowing the Law Society to offer a single system of regulation for firms operating across the UK.

There are so many opportunities for improvement which is why we believe a new legal services bill, providing for flexible and permissive regulation of legal services, should be presented early in the next Session of the Scottish Parliament to deliver these and other critical reforms.

Modernising regulation of legal services

Increasing interaction between Consumer Scotland and regulators

The creation of Consumer Scotland was a welcome development, ensuring a valuable Scottish-specific consumer perspective through advice, advocacy and research. In our regulatory capacity, we develop rules, guidance and regulatory approaches to address an ever-evolving legal services market. Consumer Scotland will have a formal duty to provide advice to the Scottish Government and powers to request information from other regulators. With an additional specific duty to provide insight and feedback when approached by sectoral regulators to do so, it would also provide a central point of contact to discuss consumer matters and ensure the consumer perspective is fully and carefully considered.

Enhancing Judicial Factors to better protect consumers of legal services

We have a duty to protect the public, including in the very rare cases where clients' funds are at risk. In serious cases, we can apply to the Court of Session for the appointment of a Judicial Factor to take charge of a solicitor's estate and deal with assets and liabilities, assisting clients to recover sums held on their behalf. The Scottish Law Commission's 2013 report and draft Bill, subject to some minor amendments, would considerably improve this process and enhance public protection. This would also provide an opportunity to correct a serious issue which restricts our ability to protect the interests of clients of an incorporated practice which falls into serious difficulties.

We urge all parties to consider:

- Bringing forward a new Legal Services Bill to modernise regulation of the legal profession as an early priority in the next Session
- Creating a responsibility on the part of Consumer Scotland to actively engage with sector regulators at their request
- Introducing the Scottish Law Commission's draft Judicial Factors (Scotland) Bill within the next Session and incorporating issues around incorporated practices within this process

Boosting

economic recovery

Law Society of Scotland

Boosting economic recovery

The Covid-19 pandemic has had a profound impact on all levels of our society and economy, not least in substantially disrupting the way businesses operate and how individuals work. This has had a particular impact on certain parts of the legal profession. In criminal law, court business has been significantly curtailed, remote jury trials have begun and radical proposals have been put forward to address the backlog of cases. Civil work has had to quickly adjust to the focus on working from home, restrictions on in-person meetings, changes to the operation of the Land Register and in many other ways.

Scotland's legal sector is at the heart of our economy. The advice and services it provides are vital to key sectors such as energy, food and drink, financial and professional services, and tourism. A recovering legal sector will play a vital role in creating a more resilient Scotland.

We will continue to work closely with the Scottish Government and its agencies to recognise the role of legal services in driving economic growth, and to promote its integral role within the export strategy. Measures to support the sector not just survive but thrive will benefit individuals, businesses and society the length and breadth of Scotland.

As we recover from this unprecedented crisis there is an opportunity to rebuild not by looking backwards but forwards to a more nimble and dynamic economy and society, capable of greater resilience and innovation. Our work to stimulate innovation, including in the field of legal tech, within an already modern and dynamic legal sector has the potential to drive sustainable growth across the whole economy.

Removing barriers in the law to innovation and investment

Scotland has a long and proud reputation for research and innovation across numerous sectors including food and drink, financial services, chemical and life sciences and energy. We are well placed to be home to world-leading innovative industries, particularly for IP-rich businesses in growth sectors such as fintech, the gaming industry and innovative energy generation technologies.

Access to external finance is clearly linked to how easy it can be to take security in any given jurisdiction and to how attractive that jurisdiction is to investors. The current legal framework lacks such a mechanism and thereby places Scotland and Scottish businesses at a competitive disadvantage, hampering the ability to use their intellectual property, plant, equipment and stock, shares and balances as collateral to fund their businesses.

Removing this barrier is vital to ensuring our legal system incentivises those based in Scotland or seeking to base themselves here. It is widely agreed that introducing the Scottish Law Commission's (SLC) draft Moveable Transactions Bill would remedy these barriers. This would have a direct impact in meeting the National Performance Framework's aspirations to create a platform for thriving and innovative businesses and encouraging inward investment, incentivising companies to base themselves in Scotland and remain here as they grow, and to create high-quality jobs across the country.

Similarly, the law on Trusts is outdated with the main legislation in this area dating back to 1921. Trusts are important instruments commonly used not just for private arrangements, but also commercially, and commonly for pensions, life policies and other financial products. In its report the SLC found that Scotland was 'losing out' as the existing trusts regime compares very unfavourably with that found in English law.

We urge parties to consider:

- Bringing forward a Moveable Transactions Bill to create a thriving innovative business investment environment as an early priority in the next Session
- Introducing a Trust Law Bill to modernise the law around trusts, allowing for more nimble and creative commercial solutions to funding models and eliminating the current competitive disadvantage in Scots law

Promoting the Scottish legal profession at home and overseas

Boosting economic recovery

Legal services at the heart of a globally competitive Scotland

In Scotland, we pride ourselves on punching above our weight when it comes to making our mark on the rest of the world. Scotland's vibrant legal sector can be at the heart of the Government's ambitions for Scotland's economy to be open, connected, globally competitive and entrepreneurial, while also being inclusive sustainable, and ensuring that Scotland makes a positive contribution internationally.

The Scottish Government's Scotland: A Trading Nation set out plans for making a substantial investment in trade and growing Scotland's exports. The Vision for Trade sets out principles and values for Scotland's future trading relationships. As the UK negotiates new deals with trading partners across the globe, we have a collective responsibility to ensure that Scotland's voice is heard in this process.

The legal profession is ideally placed to support these trade initiatives. We are not only a significant economic generator in our own right but we are critical to the success of Scotland's other key sectors. The Review of Legal Services Regulation included recommendations that the Government should as part of its trade and investment agenda aim to identify niche areas in the global market where we might target our efforts; and work with the sector to bring all the key players together to develop and implement a strategy to maximise our potential for growth and the contribution we can make to the Scottish economy.

In 2018 Scottish Legal International (SLI) was formed, an initiative of a group of Scotland's leading commercial law firms, in partnership with Scottish Development International and the Law Society, to promote the country's legal sector to overseas markets. It aims to highlight the significant international work carried out by Scottish solicitors and encourage expansion by marketing Scottish legal services as an essential component of successful international trade and investment.

Over the course of the next Parliament there is a clear opportunity for promotion of the role of our legal sector in developing trade agreements and leveraging these for the greatest economic and social benefit.

Digital innovation and legaltech

Covid-19 swiftly accelerated the pace at which online working was adopted in Scotland and further afield as the legal sector rapidly moved to an online world, from remote working to online court hearings. Cyber resilience, secure communication and virtual meetings are more important than ever, while getting the basics right is a feature of all modern workplaces and the foundation for digital transformation. Our culture has changed, and we need to support its evolution. Innovation in legaltech is at the heart of our vision.

Even though we are a smaller jurisdiction than England and Wales, we punch well above our weight. As a smaller jurisdiction, Scottish law firms see the value of taking a more collaborative approach to developing areas such as legaltech. We have lent our full support to the development of legaltech in recent years and believe greater backing at Government level can build further momentum.

In 2018 we launched LawscotTech. In Scotland we already have the globally respected FinTech Scotland community, which brings together the financial services sector with technology and academia. LawscotTech follows a similar collaborative model to stimulate the development of a thriving and world-leading legaltech sector in Scotland. Our recently announced partnership with FinTech Scotland and ScotlandIS will help further develop cross-sector collaboration collaboration.

Boosting economic recovery

Working across sectors and national borders can drive the development of Scotland as a globally respected hub for legal services and legal technology innovation, creating competitive advantages for Scotland's legal sector and their clients in markets at home and overseas. We welcome the support of agencies at a UK and Scottish level and the opportunities to promote legal sector and legaltech businesses via international trade promotion efforts. With the support of the next Scottish Parliament and Government we can fully leverage this opportunity to showcase the breadth of talent and opportunity in Scotland, driving growth and creating more high-quality jobs.

We urge parties to consider:

- Work by the Scottish Government and its agencies to identify niches in global markets where Scottish legal services have strong growth potential; and supporting firms looking to expand into these markets
- Creating a strategy in partnership with key players in the legal sector to showcase the cutting-edge and innovative achievements of the Scottish legal profession and to maximise potential for growth in the Scottish legal services and legaltech markets at a Scottish, UK and international level
- Providing full collaboration and promotional support by government and its agencies for initiatives such as LawscotTech to cement Scotland's position as a global hub for legal service innovation
- Promoting the importance of the legal sector to the growth of Scotland's digital economy
- Encouraging technology companies to invest in Scotland by assisting them to develop products
- Promoting collaborative relationships with the EU and global states and blocs
- Ensuring practice rights for Scottish solicitors in other jurisdictions are maintained and the interests of the legal profession and broader Scottish economy are front and centre in trade negotiations

Shaping Scotland's

legal and constitutional future

Law Society of Scotland

Shaping Scotland's legal and constitutional future

Scottish Independence and the UK/Scottish Constitutional Settlement

The question of Scottish independence continues to be a live issue in Scottish politics. As a proudly and strictly non-partisan organisation we take no position on whether Scotland should be an independent country; on whether a referendum on Scottish independence should be held; or on whether any such referendum should be within the lifetime of the next Scottish Parliament. With some of the major parties expected to stand on a platform of independence however, those who seek to influence the public and our lawmakers should be able to engage in any such debate from an informed position.

Should an independence referendum be called or proposed, we urge both sides of the debate to set out with the greatest possible clarity the expected impact of a vote either way or any proposals for future constitutional reform. This must by necessity involve the greatest possible engagement with citizens, business and civic society at all levels. Voters should be enabled to make the most informed decisions possible and to plan in advance for the impact of either result.

Current and future UK Governments and any future Scottish Government should carefully consider the implications of withholding consent for a referendum or holding a referendum without bilateral consent. Respect for the rule of law, legal processes and the values of our democracy, at both a Scottish and UK level, should be central to these decisions.

The UK's withdrawal from the European Union will lead to an unprecedented repatriation of powers. We commend the UK and Scottish Governments and the other devolved administrations for the work which they have accomplished in creating a significant number of Common Frameworks. Common Frameworks are a good way of managing legislative and policy diversity within the areas of intersection between devolved and EU law. The UK Internal Market Bill proved controversial during its passage through Parliament and may continue to be so now it has received Royal Assent. Again, respect for the rule of law and fostering positive relationships between the UK Government and the devolved nations must be borne in mind by all in positions of authority.

We urge parties to consider:

- Engaging broadly with society at all levels to produce clear, detailed and relevant factual information on any proposed constitutional changes, particularly where these are subject to a referendum
- Adapting the policies and procedures of the Scottish Parliament to ensure its robust scrutiny role is maintained and enhanced during a period of changing volume, variety and subject matter of legislation

Enhancing the

diversity of the legal profession

Law Society of Scotland

Enhancing the diversity of the legal profession

Diversity across the legal profession

Scottish solicitors assist clients across the full spectrum of society every day. It is important that the legal profession reflects the society it represents and that talented young people from all walks of life see a future career in the law as attainable and desirable.

Much has been done by the Law Society and our partners in recent years to improve social mobility and routes to the profession. Our Street Law programme runs highly interactive and engaging courses, largely in schools in more disadvantaged areas. By examining practical law, legal policy and the constitution and tackling not only what the law is but what it should be, it encourages pupils to better understand the law and consider it as a future career path. The The Lawscot Foundation provides financial and mentoring support for pupils who have the talent and drive to become lawyers, but lack the finances and personal connections. Other initiatives such as the formation of a Racial Inclusion Group, support for the Glass Network of LGBT+ members of the profession and profession and promotion of positive mental health in the profession also work to identify and break down barriers.

We have worked closely with Skills Development Scotland, a university provider and the profession to develop a graduate apprenticeship route to qualification to offer a truly work-based route to qualification as an alternative to the standard route of Scots law degree, diploma and traineeship. By broadening the talent pool, this has the potential to both benefit the profession and society by diversifying the legal profession and making a positive contribution to social mobility. Support and funding is needed for this programme to establish such an apprenticeship route.

Covid-19 can revolutionise our approach to flexible working. We know that more flexible and family-friendly working can build a more diverse professions, help tackle the gender pay gap and make sectors more agile and appealing to a wider range of candidates. In recent years we have worked to embed a culture of flexible working across the legal profession. We have engaged extensively with firms, new entrants and solicitors at all career levels to promote the benefits of flexible working and give managers the tools to make it work for employers and employees.

We welcome the Scottish Government's aim to drive flexible, family-friendly policies in the legal and other professional service sectors, but to leverage the advances that have been made as a result of Covid-19 funding for firms exploring new ways of working could deliver a real step-change. Careful consideration should also be given to any policy proposals, such as weekend opening of courts, which would present further barriers to a more flexible future.

We urge parties to consider:

- Including full funding for a solicitor-apprenticeship within any expansion of Graduate Apprenticeships
- Providing bursaries for individuals from disadvantaged backgrounds who wish to pursue a career in law
- Providing funding for legal employers to embed flexible working
- The equalities and flexible working implications of policies which impact legal professionals

Enhancing the diversity of the legal profession

Broadening the talent pool in the judiciary

The current requirements for appointments to the judiciary disproportionately disadvantage solicitors and in particular female solicitors. Legislation currently prevents experienced tribunal judges from being considered for appointment as Senators of the Court of Session, the supreme civil court of Scotland. The profile of tribunal judges, with a significantly higher proportion of women and of solicitors, is more diverse than that of court-based judiciary.

Compounding the issue, experienced tribunal or first tier judges in Scotland are eligible to apply for similar roles in England and Wales, creating a real risk of talented individuals transferring their skills to other jurisdictions. Consideration should also be given to whether legal academics should be eligible to apply for judicial appointment. Simple legislative changes would help the Judicial Appointments Board for Scotland meet its statutory duty to encourage diversity in the range of individuals eligible for judicial office.

We urge parties to consider:

- Changing the legislation setting the criteria for judicial appointment to reflect the broader range of experience that might be gained elsewhere, broadening the pool of potential applicants
- Revisiting the criteria for judicial appointment to focus more on competencies than on specific and inflexible career experience requirements, including a new 'reflection of society' criteria where the ability of a candidate to contribute to a diverse judiciary is taken into account

Driving public policy and law reform

Law Society of Scotland

Driving public policy and law reform

Our public policy and law reform teams and their network of volunteer committee members, drawn from the legal profession and other experts in their fields, are invaluable partners for our lawmakers in the Scottish Parliament. The law is no more static than the society it governs and continual review and reform is required to ensure our laws work as intended.

Scottish Law Commission Bills

The Scottish Law Commission (SLC) makes recommendations on how the law can be simplified, modernised and improved, addressing existing deficiencies and responding to developments. It is an invaluable resource and a body we engage with and support strongly. Work in recent Sessions to accelerate the incorporation of SLC Bills is welcome, but a large volume remain unimplemented, including several with the potential to have a wide-ranging positive impact across our society and economy.

The Delegated Powers and Law Reform Committee's 2020 report ecommended improvements that could increase the rate of implementation of SLC Bills in coming sessions. The Commission on Parliamentary Reform recommended a formal mechanism for the Government to alert Parliament to new SLC reports, set out initial plans to consider findings and introduce any legislation. We support both recommendations, but where the definition of an SLC Bill forms a barrier to bringing forward legislation we would also urge the Scottish Parliament to devote time through other means to carry out long overdue work to modernise and consolidate our existing laws.

We urge parties to consider:

- Increasing the rate of incorporation of SLC Bills and setting out early in the next Session plans and timescales for the implementation of specific reports
- Taking forward as a priority work on Trust Law, Moveable Transactions and Cohabitation Law

Post-legislative scrutiny and consolidation

One clear principal of the rule of law is that that laws must be accessible, intelligible, clear and consistent.

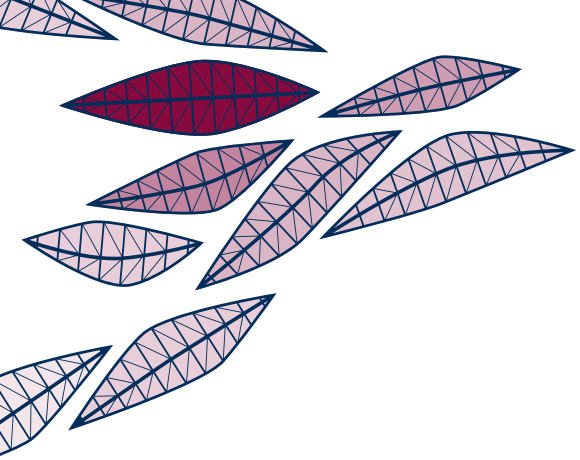
Due to the volume and complexity of legislation passed by the Scottish Parliament since 1999, several incidences of unintended consequences have come to light. This Session has seen a particularly large volume of regulations relating to Brexit and the passage of emergency powers in response to Covid-19. We welcome the increased remit of the Public Audit and Post-Legislative Scrutiny Committee to consider the impact and issues arising from the passage of specific legislation in the previous Session, but this process needs to be stepped up as the Parliament and its legislative output continues to mature.

There are several areas where consolidation would make the law clearer and more operable. Relatively uncontroversial projects to consolidate existing legislation into laws which are clearer and more accessible can significantly assist businesses and individuals navigate the legal environment they operate within, promoting growth and greater compliance with the law.

In other areas, legislation enacted in earlier Sessions needs to be reviewed to bring it in line with developments and ensure it continues to meet the original policy goals. A good example of this is charity law, where we have identified over 20 areas of the Charities and Trustee Investment (Scotland) Act 2005 where reform could be beneficial to charities, donors, trustees and confidence in the sector as a whole.

We urge parties to consider:

- Making a collective effort across Parliament to increase the rate of post-legislative scrutiny and place this on the agenda across all subject areas
- Undertaking projects to consolidate the law in areas of unnecessary complexity, including in crofting law, environmental law, agricultural law and the law of succession
- Reviewing charity law, last subject to significant legislation in 2005



Fatal Accident Inquiries

The current legislation governing Fatal Accident Inquiries (FAIs) was passed in 2016, but has not led to the major improvements required to rebuild public trust in the system. FAIs are carried out to examine sudden deaths, one of the most traumatic experiences imaginable for people close to the deceased. The responsibility for these investigations lies with the Crown Office and Procurator Fiscal Service (COPFS) in accordance with the requirements of Article 2 of the European Convention on Human Rights which states that "everyone's right to life shall be protected by law".

These investigations must be robust and cannot be rushed, and it can currently take several years between an incident taking place and any decision by COPFS to hold an FAI. That also affects those where the holding of an FAI is mandatory such as a death in police custody or prison. The publication of an FAI determination comes much later, even in relatively straightforward cases. That method of publication effectively allows for only minimal public scrutiny, with only the last 50 determinations published in date order by the Scottish Courts and Tribunals Service. There is no systematic search mechanism unless the name of the deceased is known.

FAIs should be held without long delays and the death investigation process in Scotland needs to be transparent, effective and robust. There has been recent significant and repeated publicity and criticism made of the continual delays in holding FAIs. This system and scrutiny process must be improved, otherwise public confidence in the system will continue to erode and the opportunity to learn lessons from such deaths reduced or substantially impeded by delay.

Other policies and procedures surrounding investigation into the circumstances of a death would also benefit from a comprehensive review, as current practices can cause unnecessary distress for those connected with the deceased. As well as the FAI system, the post-mortem process, overhaul of role of COPFS in deaths, and the wider legislative frameworks relating to the law on homicide and culpable homicide should be subject to review. We would encourage consideration of the SLC's recommendations on culpable homicide once published as a matter of priority to help with clarity in these important areas of law.

We urge parties to consider:

- Reforming the FAI system to reduce delays and increase transparency and effectiveness
- Review procedures surrounding post-mortems, homicide and culpable homicide

Incapacity, mental health and adult support and protection

The Scottish Parliament established Scotland as a world leader in adult incapacity, mental health, and adult support and protection law and practice with its legislation of 2000, 2003 and 2007. Excellent work is currently being undertaken on reviewing and updating these areas of law in light of human rights and other developments, including emerging needs highlighted by the pandemic such as reform of deprivation of liberty situations. We are in danger of falling behind other jurisdictions in an area in which Scotland has recently led the way.

We urge parties to:

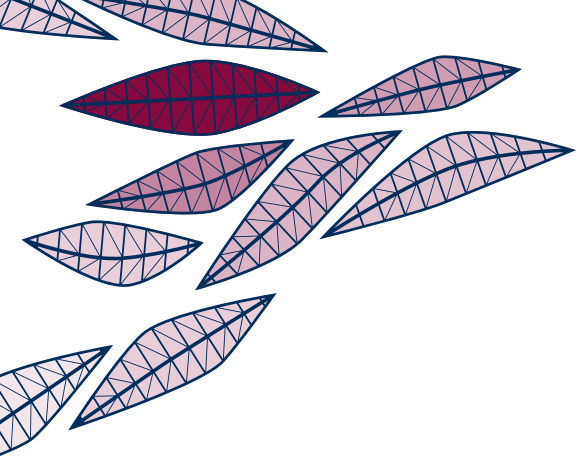
- Commit to the delivery and implementation of coordinated and updated legislation across adult incapacity, mental health, and adult support and protection law and practice in the next Session

Electronic and remote signing of documents

Covid-19 accelerated moves towards acceptance of digital signatures. A move from 'wet' signatures to digital has clear advantages for legal practitioners and consumers and can be at least as secure and binding. Emergency coronavirus legislation included provisions allowing for the remote execution of notarial documents. There is a strong case that this should become the norm in a post-pandemic, increasingly digital professional world to meet the changing needs of society.

We urge parties to consider:

- Reviewing any legislative requirements for a relevant person to be physically present when another person signs a document, takes and oath or makes an affirmation or declaration
- Reviewing any legislative requirement for 'wet' signatures with a presumption for the acceptance of secure digital signatures



Driving public policy and law reform

Succession and the law of cohabitation

The law of succession is one of our most fundamental bodies of law. It has been subject to consultation and revision but significant issues remain, particularly in cases of intestacy where no will has been properly prepared. It is important that succession law is consolidated and a new approach taken to bring forward reforms in this area in line with our recent consultation response.

There has been a significant growth in the number of cohabitating couples and families in recent years. The Family Law (Scotland) Act 2006 contains provisions concerning cohabitants, but these raise significant issues. Time limits on claims for financial provision where cohabitation ends otherwise than by death; and for claims by the survivor against the estate of the deceased partner where a will has not been created are problematic and practitioners report numerous cases where these issues arise.

We urge parties to consider:

- Reviewing and reforming succession law, including a fairer reflection of the status of cohabitants

Taxation

The previous Sessions have seen the first devolution of distinct Scottish taxes, fundamentally changing public finances in Scotland. Tax laws are complex and often require regular amendment to adapt to new policy direction and correct unintended consequences. Full parliamentary scrutiny is of vital importance when amending existing tax laws or creating new legislation, but the Scottish Parliament's legislative processes were not designed with tax powers in mind.

We urge parties to consider:

- Taking forward work to explore the value of alternative legislative processes for amending devolved tax legislation to allow a more strategic and efficient approach to the development of tax legislation
- Conducting a post-implementation review of the Land and Buildings Transaction Tax Additional Dwelling Supplement to increase clarity and address unintended consequences and perceived unfairness

Environmental and rural law

In relation to environmental law, significant workstreams began during this session but have not reached a conclusion. Early progress in the new Parliament to progress work carried out on the circular economy; grouse and deer management; and SEPA's integrated authorisation framework would lead to considerable improvements in Scotland's management of resources in line with the National Performance Outcomes on environmental justice and supporting sustainable rural economies.

The law on agricultural and environmental matters is complex. It has developed in a piecemeal fashion and would benefit from consolidation. In particular, crofting law is unnecessarily complex and improvements would better support the rights and sustainability of crofting communities as our rural economies recover from the impact of Covid-19.

We urge parties to consider:

- Complete work begun in this Session on the circular economy, grouse and deer management
- Consolidating existing crofting law and making improvements relating to croft succession, the status of owner-occupier crofters, statutory conditions of tenure and the definition of 'crofting community

Compulsory purchase

Compulsory purchase of land and property in the public interest is a valuable tool for local authorities and other public sector bodies, for example to allow infrastructure development. As an area of law with significant impact on those whose property may be subject to purchase by the state, it is vital that legislation is as clear, up-to-date and transparent as possible. This is an area of law where there is a clear need to modernise and reform legislation, following the Scottish Law Commission's work in this area.

We urge parties to consider:

- Introducing legislation to consolidate, simplify and modernise compulsory purchase powers

Law Society of Scotland

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