COMMISSION FOR JUSTICE IN WALES

PAPER ON SEPARATION OF THE LEGAL PROFESSIONS

1. At the last meeting of the members of the Commission with members of the judiciary resident at the Cardiff Civil and Family Justice Centre, one of the issues discussed was the separation of the legal professions as between England and Wales. We undertook to make enquiries as to whether papers on the subject have been presented to legal associations in Wales and/or to submit our own short paper to the Commission.

2. Enquiries have revealed no such papers and accordingly this paper is submitted on the subject, with apologies for the delay. This paper represents the personal views of the names appended below, and not necessarily those of colleagues.

3. We are aware that the Commission has received evidence from the professions on the subject and we do not feel it is appropriate for us to submit a very detailed or contentious paper. Rather we set out some of our experiences which may help to inform proposals in this regard.

4. By now it is or should be widely known amongst the professions in England as well as in Wales that there is a growing divergence of the laws applicable in the two countries. This has been the subject of articles in professional journals circulating in both countries and of talks to professional bodies both sides of the border.

5. The text of primary and secondary legislation emerging from the National Assembly for Wales is now readily available online. There is still little commentary available on such texts either online or in hard copy, although the last couple of years has seen the publication of several textbooks on Welsh law, for example those published by the University of Wales Press on topics concerning Administrative Law, Planning Law and legislating in Wales.

6. On one view those practitioners who are based in England but who undertake work in the Welsh courts should be able to access those texts and deal with it as a matter of statutory interpretation. Yet in our experience far too often this is not done.

7. We need only refer to two recent examples which occurred last month to illustrate this point. These are not on any view isolated incidents.

8. Case 1 involved a dwelling in a severely exposed part of Wales into which the defendant had installed cavity wall insulation. This, as was found, allowed water penetration to cross the cavity and to damage plaster. All legal professionals and

experts in the litigation were based in England. Each party referred to and relied upon statutory guidance issued by HM Government in London under the Building Regulation Act 1984, which on its face applied to England. This was despite the fact that the relevant functions in respect of properties in Wales had been transferred to the Welsh Ministers as long ago as 2009. When this was pointed out by the court on the first day of the hearing, it was greeted with some incredulity by the professionals who said that they had assumed the guidance applied in Wales too. The court requested copies of any relevant guidance to be produced on the second day of the trial, which it was, when the guidance issued by the Welsh Ministers applicable to properties in Wales was handed up by counsel, who said that a "salutary lesson" had been learnt by those practicing in England but undertaking cases in Wales.

9. Case 2 involved a family case, where England based practitioners had no awareness of the Social Service and Wellbeing Act 2014 or its relevance to the case until it was pointed out by the court. Not only was it relevant, but it provided a remedy in the case which was not otherwise available.

10. The divergence is particularly marked at the moment in the fields of planning, housing and social care. This includes not only new laws applicable to Wales only but also laws applicable to England only. The Housing (Wales) Act 2014 and the Renting Homes (Wales) Act 2016 being the most radical changes though the 2016 Act is still not in force save for powers to create sub-legislation. Delay in implementation may in part be due to a need to ensure HMCTS have in place necessary online procedures. It should be noted that legislation now exists which applies only to properties located in England. Prime examples are: sections 33 to 40 of the Deregulation Act 2015, imposing restrictions in relation to the ability to serve effective section 21 notices, which do not apply to assured shorthold tenancies in Wales; and The Assured Tenancy Notices and Prescribed information (England) Regulations 2015 (S.I. 2015 No. 1646) which do not apply in Wales (the only hint to that being in the title of the regulations – there is nothing in the S.I. otherwise referring to Wales).

11. It is to be hoped that, as divergence increases, so too will awareness amongst professionals based both sides of the border of such divergence and the need to prepare cases accordingly. On present showing, that is likely to take many more years. The examples set out above occurred in the 20th anniversary year of devolution.

12. It is clearly very important that judges hearing cases in Wales should be assisted by being referred to the laws applicable in Wales. It is recognised that the Law Society

in Wales and the Welsh and Chester Circuit is each playing its part to raise awareness in Wales.

13. The question remains whether it can be left to mere hope that awareness will be raised for practitioners based in England.

14. The separation of the professions between England and Wales would be the surest way of achieving this. However, there is real and justified concern that any such separation will lead to even more practitioners, whether English or Welsh, choosing to practice only in England. There is already a demonstrated lack of practitioners in Wales to meet the demand for judicial review services, for example (see Research carried out by Dr Sarah Nason et al).

15. If the Commission makes that recommendation, there should be no undue obstacles put in the way of practitioners wishing to practice both sides of the border and so to join the professional body for each country. For example, the present procedure for practitioners based in England and Wales who wish to practice in Northern Ireland involves a fairly straightforward application. For those practicing in non- devolved fields this could be way of an administrative application. For those practicing in devolved fields this could be by way of requiring an applicant for membership to satisfy the professional body that they have an appropriate awareness of the relevant laws applicable in each country in that field. This need not be too onerous, and need not, for example involve examinations. At present candidates for judicial office in Wales are required to demonstrate such an awareness by answering a few basic questions. A similar procedure could be adopted on the application for membership of professional bodies in Wales. For those applicants who have graduated/qualified from Welsh Law Schools there could be a presumption that the requirement is met.

16. If that is not to be the recommendation, consideration should be given to making an awareness of the law applicable in Wales a component of membership of professional bodies. Moreover, the professional disciplinary bodies are at present based in London, and consideration should be given to mandatory Welsh representation on such bodies.

HHJ Jarman QC: Chancery Judge for Wales; Business and Property Courts
Administrative (including Planning) Court

HHJ Harrison: Designated Civil Judge for Wales

HHJ Edwards: Family Judge, Welsh Language Liaison Judge

DJ James Welsh Language Liaison Judge, Wales Training Judge

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