**Written Comments by Jonathan Haydn-Williams to The Commission on Justice in Wales**

**Monday 20 May 2019**

[These are my personal views and are not expressed on behalf of Goodman Derrick LLP, The Association of London Welsh Lawyers or The Law Society Civil Litigation Section or any other organisation[1]]

Summary:

I was once against a separate civil jurisdiction for Wales, but my mind has been changed over recent years by the increasing lack of access to civil justice in England and Wales, largely caused by decisions of government and, in particular, those responsible for the administration of justice. Access to civil justice improved in the 1990s, but has been eroded by treating it as a 'cash cow' to fund criminal justice. The playing field has been tilted against people of ordinary means and small businesses, in favour of big corporates and the very wealthy – not least 'oligarch' types who are given the use of the court process whilst, in many areas, it is effectively denied to most of the ordinary tax payers of England and Wales. Unfortunately, the Westminster government has, to a large extent, reduced civil justice to an option for those who can afford it. I believe that there is a strong sense of justice in Wales, which could flourish in a separate jurisdiction. For instance, simplified civil procedures would make justice more accessible and less costly. With developments such as codified laws, Wales is showing how to improve access to the law. Doing business in Wales can be made simpler than in England, not more complex. Whilst training in Welsh law is needed, mutual recognition of qualifications would enable free flow of lawyers between the English and Welsh jurisdictions[2].

Detailed consideration:

1. Civil Justice as a 'cash cow' to fund Criminal Justice

1.1 I first became aware of this when it was mentioned by Lord Justice Briggs (as he then was) at a speech given at the Law Society about four years ago, in which he informed us that the civil justice system produced an annual surplus of income over expenditure of about £70 million. That, he explained, went into a single justice system 'pot' and thus towards the funding of the deficit in the criminal justice

[1] I am a solicitor with Goodman Derrick LLP, a member of the Association of London Welsh Lawyers and the current Chair of the Law Society's Civil Litigation Section. I am a Fellow of the Chartered Institute of Arbitrators and a Mediator registered with the Civil Mediation Council.

[2] Having listened to comments made at the meeting with Lord Thomas on 20 May 2019, mutual recognition arrangements may not be necessary to begin with, as the Bar and Solicitors profession could remain as currently organised in England and Wales, with reliance on professional duties not to undertake work in respect of which practitioners do not have the requisite knowledge (the Bar Council and the SRA could perhaps highlight that advice on the separate laws of Wales and England should not be undertaken unless practitioners have reasonable knowledge of those laws).

system.

1.2 When the government introduced ‘enhanced’ issue fees for civil claims in 2015 (an Orwellian euphemism par excellence, meaning of course ‘increased’), this resulted in the surplus increasing to some £100 million per year. That increase in fees was in the order of five or six times the existing fees.

1.3 The ‘enhanced’ fee for issuing a claim form was set at 5% of the value of the claim, but capped at £10,000. This means that the 5% fee applies up to a value of £200,000, but that the percentage thereafter drops for every pound over that value. Thus, when two Russian oligarchs choose to use the courts of England and Wales to litigate their dispute and the claimant seeks, say, £100 million in damages, he will pay an issue fee of just 0.01% (£10,000). Yet someone who claims, for example, that they[3] have lost £200,000 in pension funds[4] as a result of negligent advice, would also need to find £10,000 to pay a 5% issue fee. That is palpably discriminatory and unjust.

1.4 On the debate in the Lords on 4 March 2015, prior to the introduction of the ‘enhanced’ fees, cross-bench peer and Queen’s Counsel, Lord Pannick heavily criticised the measure, stating (his full two speeches are set out in the Schedule):

> “For litigants to have to pay such substantial sums in advance of bringing a legal claim will inevitably, in practice, deny access to the court for many traders, small businesses and people suing for personal injuries.” …
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> “On 19 December 2014, the Lord Chief Justice of England and Wales, the noble and learned Lord, Lord Thomas, responded to the consultation on behalf of the senior judiciary—that is, himself; the Master of the Rolls, Lord Dyson; the President of the Queen’s Bench Division; the President of the Family Division; the Chancellor of the High Court; and the deputy head of civil justice. They all know a thing or two about access to justice and litigation. They explained their “deep concerns” about this dramatic increase in court fees. I cannot recall seeing a letter from the senior judiciary expressed in such scathing terms in response to a consultation about a proposed government policy. The noble and learned Lord, Lord Thomas, said that the Government’s impact assessment for these proposals,
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>> “makes some very sweeping and, in our view, unduly complacent assumptions about the likely effect on the volume of court claims issued and access to justice of the proposed fee increases”.
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> The judges added that,
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>> “the research evidence base for these proposals is far too insubstantial for reforms and increases of this level”.” …
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> “My regret—my astonishment—that the Government should bring forward an order of this nature is mitigated only by my optimism that the courts will inevitably add this order to the long list of Mr Grayling’s regulations which have been declared unlawful in the past three

[3] I use the ungrammatical ‘they’ as a non-gender alternative to ‘he/she/it’.

[4] Not a huge sum for a non-wealthy person to accumulate over their working life. It would produce an annuity of perhaps £8,000 a year.

years."

1.5 Unfortunately, Lord Pannick's optimism that Mr Grayling's 'civil litigation tax'[5] would be declared unlawful has been shown to have been unjustified in that the measure remains in full force and effect.

2. The inhibiting effect of the Jackson I 'reforms' of 2013

2.1 Before these 'reforms', I could, as a solicitor, bring a claim on behalf of a person, such as in the example in 1.3 above, who had lost £200,000 of pension funds as a result of negligent advice. After them, I could not.

2.2 I had such a case before 2013. The client could not afford to pay my fees. I therefore agreed to act on a 'no win, no fee' basis. But there was the risk of losing (even a case with a 75% chance of success can be lost) and the client did not want to risk losing his house in that event, as he had not got the funds to meet an adverse costs order. I was able to arrange After the Event ('ATE') Insurance to cover adverse costs risk of up to £200,000. The premium was deferred and contingent (not payable if the case were lost). In the event of a win, the premium of about 50% (discounted for a pre-trial settlement) would be recoverable from the defendant as part of recoverable costs. The defendant's insurers could see that we were in a position to issue proceedings and therefore we were able to settle the claim.

2.3 The Jackson I reforms removed the recoverability of ATE premiums and also success fees on 'no win, no fee' agreements. The effect has been, as predicted, to make it in practice not viable for people of ordinary means and small businesses to bring claims of less than about £250,000 against financial advisers, banks, insurers or even lawyers, due to the 'chilling' effect of the risk of an adverse costs order and the fact that to have to pay an ATE premium and a success fee out of compensation or damages under a win or settlement is not financially viable. The 'baby was thrown out with the bathwater'. Reform was needed, but not abolition.

2.4 The Jackson II proposal of fixed recoverable fees would redress the position to some extent, but the progress to introducing them is slow indeed and they can only work if the complexity of the Civil Procedure Rules and related rules, practice directions and Guides were greatly reduced.

3. The over-complexity of the Civil Procedure Rules

3.1 Access to civil justice in modest sized claims will not happen unless or until there is a sea change in the approach to the rules of court. The White Book is still the massive two volume work that it was when I qualified in 1983. The complexity is inimical to access to justice for two reasons:

- It makes the rules impossible for a litigant in person to navigate;

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[5] That is my term, which I consider justified as the issue fee is plainly of a 'revenue' nature in that it may be applied not just to defraying the costs of civil justice or indeed the justice system in general, but may be added to the general public 'purse'.

- It makes it expensive to be represented by a solicitor.

3.2 Lord Justice Briggs (as he then was) was optimistic that the on-line court which he was charged with developing would have a re-written set of rules which would extend to no more than about 30 pages, without repetitious Practice Directions and each division or court having its own Guide. This seems to have been lost in the long grass, but it is an aim that a Welsh jurisdiction could readily achieve, whether on-line or in traditional mode. One only has to look at the slim sets of arbitration rules to see what can be done and work.

4. Access to the substantive law

4.1 In a common law case-law based system of law, it is difficult for non-lawyers to know what the law is on any topic. The identification of the *ratio decidendi* of a case is a skilled task for the trained lawyer.

4.2 The position is not made easier by the approach in the Westminster Parliament to statute law of seeking to cover every conceivable possibility, resulting in often impenetrable statutory provisions, usually not found in one place, but spread over a number of differently named statutes and amending statutes.

4.3 In Wales, the argument in favour of codified statute law seems to have been won in principle and we await to see it operate in practice.

4.4 A separate Welsh jurisdiction can build on this, for example by the judges taking an approving view of appropriate 'Restatements' of English/Welsh law, such as Professor Burrows' 2016 'Restatement of Contract Law'[6] (the Advisory Group for which included Lord Toulson and Longmore, Gross, Lewison and Beatson LJs). The USA has had such Restatements for decades, which are not the law, but receive judicial approbation.

[The above is a slightly amended version of that submitted to Lord Thomas in hard copy]

## SCHEDULE

### LORD PANNICK

"My Lords, last week, the Lord Chancellor and Secretary of State for Justice, Mr Grayling, told the Global Law Summit that he is,

"incredibly proud of our legal heritage".

Today, we are debating an order that he has brought forward which will do incredible damage to the legal heritage because it will impede access to justice. As the Minister mentioned, this order will substantially increase the fees that claimants must pay when they start legal proceedings. If

[6] Regrettably, he entitled it 'A Restatement of the English Law of Contract', when it plainly should have referred to the 'English and Welsh' Law of Contract.

you want to sue for between £10,000 and £200,000, you will need to pay an upfront fee of 5% of your claim. To claim £200,000, you will need to find £10,000. That is a 576% increase on the current fee of £1,515.

The Minister is of course correct to say that Parliament approved Section 180 of the Anti-social Behaviour, Crime and Policing Act 2014, which authorises the Lord Chancellor to prescribe fees above the cost of providing the court service to litigants. That is the power that Mr Grayling is now exercising. But is it a fair, reasonable or proportionate exercise of that power? Plainly not. For litigants to have to pay such substantial sums in advance of bringing a legal claim will inevitably, in practice, deny access to the court for many traders, small businesses and people suing for personal injuries.

The Government have suggested that court fees will be a small fraction of the legal expenses which a claimant will incur, but many claimants will not have to pay their legal expenses at the outset of proceedings. They will not have such a substantial sum of money available at the outset of the case, or they may be able to pay these court fees only by doing without competent legal representation. The deterrent effect on litigation will, I think, make it most unlikely that the increased charges will produce the anticipated £120 million which the Government hope to produce by this order.

The order will have further damaging consequences. Unscrupulous debtors will be far less likely to pay up if they suspect that their creditor cannot afford the court fees.

The Minister mentioned the consultation and the strong views in response. On 19 December 2014, the Lord Chief Justice of England and Wales, the noble and learned Lord, Lord Thomas, responded to the consultation on behalf of the senior judiciary—that is, himself; the Master of the Rolls, Lord Dyson; the President of the Queen's Bench Division; the President of the Family Division; the Chancellor of the High Court; and the deputy head of civil justice. They all know a thing or two about access to justice and litigation. They explained their "deep concerns" about this dramatic increase in court fees. I cannot recall seeing a letter from the senior judiciary expressed in such scathing terms in response to a consultation about a proposed government policy. The noble and learned Lord, Lord Thomas, said that the Government's impact assessment for these proposals,

"makes some very sweeping and, in our view, unduly complacent assumptions about the likely effect on the volume of court claims issued and access to justice of the proposed fee increases".

The judges added that,

"the research evidence base for these proposals is far too insubstantial for reforms and increases of this level".

The letter said that,

"there are fears that the increase in fees could trigger commercial work moving elsewhere".

On behalf of the Law Society, the Bar Council and other legal bodies, the solicitors Kingsley Napley have sent the Lord Chancellor a letter before claim threatening judicial review proceedings, and rightly so. Section 180 does not alter the Lord Chancellor's legal duty under Section 92 of the Courts Act 2003 to,

"have regard to the principle that access to the courts must not be denied".

The courts will interpret the powers conferred by Section 180 as not intended to authorise regulations which impose an unreasonable or disproportionate barrier to access to the courts.

In his 19th-century *Lives of the Lord Chancellors*, John Campbell said that too many holders of this office are remembered only because they,

“perverted the law, violated the constitution and oppressed the innocent”.

Mr Grayling’s period of office has been notable only for his attempts to restrict judicial review and human rights; his failure to protect the judiciary against criticism from his colleagues; and the reduction in legal aid to a bare minimum provision. Yesterday, Mr Grayling lost yet another judicial review claim, this one overturning the regulations which authorise legal aid for judicial review cases only after permission has been granted to bring the proceedings. Now for his finale before the general election Mr Grayling is undermining basic access to justice in the courts, by seeking to make money from small businesses which simply want to enforce their contractual rights and from victims of personal injury seeking to obtain compensation from the wrongdoers. That is not a legal heritage of which anyone could be proud.

If you wrap yourself in Magna Carta, as Mr Grayling sought to do last week at the Global Law Summit, you are inevitably and rightly going to invite scorn and ridicule if you then throw cold water over an important part of our legal heritage. I beg to move.”

LATER:

“I am very grateful to all noble Lords who have spoken—and spoken passionately—in this debate. The Minister said that the order contains sensible and proportionate provisions. As your Lordships have heard tonight, these proposals are going to do inevitable and substantial damage to access to justice. It is simply perverse for the Government to dispute that many small businesses and many personal injury claimants are going to be unable to pay an up-front £10,000 fee as the price of access to the courts.

The noble Lord’s and the Government’s argument comes to this. Funds are needed to pay for the court system, but there is no point in having a civil court system if ordinary people are to be charged an entry fee which they cannot afford to bring basic claims for breach of contract and personal injuries. The Minister described litigation—I wrote this down, because it was a very striking phrase—as an “optional activity”, like a skiing holiday or a visit to a three-starred Michelin restaurant. As the Minister well knows from his experience as a very successful barrister, for many people—those suing for debts or to recover compensation for personal injury—litigation is often a necessity to keep your business alive or to maintain any quality of life. The Minister is absolutely right that there are already many impediments to access to justice. That is surely no justification—no excuse—for the state to erect further high barriers.

The fee remission provisions to which the Minister, perhaps somewhat desperately, referred are not going to assist other than in exceptional cases. Nor is it any answer that court fees can be recovered from the other side if the claim succeeds. Claimants need to find the fee up front.

The Minister referred to my earlier Motions of Regret with a reference to Frank Sinatra. To change the music somewhat, “Je ne regrette rien”. Happily, the courts have done more than regret. In a series of cases they have quashed Mr Grayling’s regulations which we have regretted in this House. My regret—my astonishment—that the Government should bring forward an order of this nature is mitigated only by my optimism that the courts will inevitably add this order to the long list of Mr Grayling’s regulations which have been declared unlawful in the past three years.”