STEP Response to the Welsh Government consultation on Wales becoming a separate legal jurisdiction

The Society of Trust and Estate Practitioners (STEP) is the worldwide body for practitioners in the fields of trusts and estates, executorship, administration and related issues. STEP members help families secure their financial future and protect the interests of vulnerable relatives. STEP aims to promote the highest professional standards through education and training leading to widely recognised and respected professional qualifications. STEP internationally has over 17,500 members, with more than 6,500 members in the UK. Over 4,500 students worldwide are currently studying for STEP qualifications and in the UK STEP supports an extensive regional network providing training and professional development.

STEP Wales welcomes the opportunity to comment on the Welsh Government consultation on Wales becoming a separate legal jurisdiction and our responses to the direct questions asked in the consultation are as follows.

1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?

Yes.

1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – “Wales” as defined in the Interpretation Act 1978 or as defined in the Government of Wales Act 2006?

The 2006 Act gives a broader definition, which would be more sensible.

However, it may also be necessary to consider the basis on which a person would be regarded as domiciled in Wales (however, that is defined). Would Wales wish to retain the existing discriminatory connections through the father for legitimate children or through the mother for illegitimate children or consider a fresh approach as adopted in Scotland under the Family Law (Scotland) Act 2006? Would any form of choice or election for United Kingdom citizens to choose the part of the UK with which they regard themselves as being most closely connected, be possible or desirable? STEP is fully in favour of party autonomy and would argue that choice of domicile and/or choice of law are to be encouraged wherever possible.

2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

Theoretically not, but in reality, there is little point to a separate legal jurisdiction unless it does have its own distinct body of law.
2.1 When is a body of law distinct enough in this regard?

There is no absolute answer. The operation of a separate legal jurisdiction is likely to involve additional expense. At what point does the extent of the differences between English law and Welsh law, justify this additional expense? One answer would be, when the cultural differences are such as to justify it.

The website of the Supreme Court of the United Kingdom in relation to its emblem refers to “four heraldic elements, equally represented in the design, reflecting the jurisdictions within the United Kingdom

- England: a symmetrical five-petalled wild rose,
- Wales: the green leaves of a leek,
- Scotland: a purple thistle and
- Northern Ireland: a light blue five-petalled flax flower”

The designers clearly considered Wales to be a separate jurisdiction already, of even weight with Scotland and Northern Ireland as well as England. The extent to which the Welsh leek should be separate or entwined with the English rose would be a matter for evolution. Perhaps it is time for the leek to be growing some side shoots.

2.2 Does it matter whether the law in question is statute law or common law?

No, but it is difficult to envisage significant differences developing between English and Welsh common law until statute law begins to impose such differences.

2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?

No. The division of powers between the national United Kingdom federal government and the local state Welsh or English governments is a matter for political agreement.

3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

Not inevitable, but it would be logical for the administration of justice to be dealt with at Welsh state level rather than UK federal level.

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

A separate Welsh legal jurisdiction could be compatible with a unified England and Wales court system in the same way that the Supreme Court is a unified UK court; however, some division of the court system would be sensible.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

A separate Welsh legal jurisdiction could be compatible with a unified England and Wales judiciary in the same way that the Supreme Court is a unified UK court; however, some division of the judiciary would be sensible.
3.3 If there were a separate Welsh courts system, which courts would be affected?

As private client practitioners, our focus is upon property and tax issues. Our presumption would be that the High Court would be affected and inevitably therefore the county courts.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?
We would envisage that a separate High Court would become necessary in due course, but that the Court of Appeal could remain unified for much longer.

3.5 Should Wales continue to share some courts with England, and if so, which ones?

As private client practitioners, our knowledge of the criminal court system is limited. However, we would presume that differences between English and Welsh criminal law would be likely to remain marginal and that the criminal courts system could remain unified.

3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?

We do not feel that we can comment sensibly as to changes that might be needed.

4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?

We do not see that it would be necessary for the Welsh Assembly to have general legislative competence over the criminal law.

4.1 Are there any other subjects of legislative competence that should be devolved in such a case?

Succession law and other personal law issues are often seen as part of the culture of a nation state. Such subjects might well be seen as being worthy of devolution.

5. How might a unified England and Wales court system work if:

5.1 There were a separate Welsh legal jurisdiction and the Assembly’s legislative competence:
   a. remained, as now, with the ability to expand incrementally, or
   b. extended over all matters except for those expressly reserved to the UK Parliament?

   In either event, this would be feasible, in that the unified court system would have to apply the correct law and be competent to administer both English and Welsh laws. However, it might become increasingly difficult for courts further away from Wales, in Newcastle upon Tyne for example, to deal effectively with Welsh law issues.

5.2 The current unified legal jurisdiction of England and Wales continued and the Assembly’s legislative competence:
   a. remained, as now, with the ability to expand incrementally, or
   b. extended over all matters except for those expressly reserved to the UK Parliament?

   In either event, this would be feasible, in that the unified court system would have to apply the correct law and be competent to administer both English and Welsh laws. However, it might become increasingly difficult for courts further away from Wales, in Newcastle upon Tyne for example, to deal effectively with Welsh law issues.
6. When reference is made to a ‘legal jurisdiction’ in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

The power to create and amend law in relation to a defined area and to persons connected to that area. Scottish law is a foreign law in England & Wales and subject to questions of private international law.
If Wales and England are to be separate jurisdictions, then private international law rules will need to apply between the English and Welsh jurisdictions.

6.1 In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?

No.
Jurisdiction in relation to the Inheritance (Provision for Family and Dependants) Act 1975 currently depends upon the domicile of the deceased.
Legal jurisdiction for personal law issues depend upon a connecting factor with that individual that in England & Wales has been that of domicile. Other jurisdictions use nationality or habitual residence as the connecting factor.
Many international conventions such as the 2000 Hague International Protection of Adults Convention referred to in Sch. 3 to the Mental Capacity Act 2005, do use the connecting factor of habitual residence, instead of domicile.
If Wales is to be separate from England, then rules for determining domicile and rules for establishing habitual residence as between Wales and England would be extremely helpful.

Currently foreign law is regarded generally as a matter of fact that requires to be proved by one of the parties.
Matters of law are within the knowledge of the court.

In other jurisdictions, matters of foreign law are regarded as matters of law and the court often has resources to make its own enquiries and findings as to a particular matter of foreign law.

7. Are there any other essential features of a separate legal jurisdiction?

Some Constitutional mechanism for controlling disputes between the federal government and legislation and a state legislation or between state legislations is also a requirement.
Whether the UK Supreme Court has sufficiently clear constitutional powers to rule in relation to matters between the UK and Wales or between Wales and England or Scotland is uncertain.

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

Some of us believe not, but these are political matters.
To what extent is the United Kingdom necessary if its constituent parts remain as Member States of the European Union? One view is that it is only necessary in relation to those matters over which the EU has no competency. Foreign policy for the time being and taxation other than taxation within the competency of the EU. Notwithstanding, divergence in Scotland on some taxation matters, it is likely that some areas of taxation may remain uniform – inheritance tax, for example.

If so, this issue is also a matter of concern for England in addition to Wales.
9. If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following?
   a. The administration of the courts and/or tribunals systems
   b. The judiciary (including the magistracy)
   c. The legal professions (including their regulation)
   d. Education and training in law
   e. Accessibility of legislation

10. If you consider that the current legal jurisdiction is sustainable then are there any other short-term or long-term changes that should be made?

   When answering the following questions (11 to 15 (inclusive)) it would be helpful if you could provide your answers **(a)** firstly on the basis of a unified England and Wales court system and **(b)** secondly on the basis of a separate Welsh court system.

11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?
   
   a. Yes.
   
   b. Yes but as a foreign law, which would currently require to be pleaded by one of the parties.

12. Would such statute law be judicially noticed in those other jurisdictions?
   
   a. Yes.
   
   b. Yes but as a foreign law, which would currently require to be pleaded by one of the parties.

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?
   
   a. Yes.
   
   b. Yes but as a foreign law. Whether it was recognised or enforceable, would depend upon the circumstances. Currently EU Regulations do not apply between constituent parts of the United Kingdom whilst Hague and other conventions generally do. Thus enforcement and recognition under Brussels I or II would not currently apply between England and Wales, in the same way that they do not apply between Scotland and England & Wales.

14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?

   These matters are outside our expertise.

15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or “conflict of laws”) between Wales and the rest of the UK?

   We have referred to private international law issues throughout our answers to these questions. We would suggest that it is time for EU Regulations to apply between the constituent parts of the United Kingdom. The UK government might perceive this as a loss
of sovereignty, but there would then be clarity, whilst at the moment there is much confusion and uncertainty.

16. In the event that Wales moved towards a ‘reserved powers’ form of devolution, like Scotland’s, do you think a separate Welsh legal jurisdiction would be:
   a. essential;
   b. desirable;
   c. undesirable; or
   d. irrelevant?

Desirable.

17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

No.

18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly’s power that enables it in certain circumstances to make laws applying in England?

Yes.

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power:
   a. upon the basis that any provision made in relation to England would extend to and form part of the law of England?
   b. otherwise, and if so how?

Yes.

19.2 If you think that there would be such difficulties:
   a. what are they?
   b. would those difficulties be any different to the current situation where the Assembly already has the power to make provision applicable in England?

If power is devolved, then it is devolved to a Welsh Assembly in relation to matters pertaining to Wales and should also be devolved to an English Parliament in relation to matters pertaining to England (Even if for the time being it is called the UK Parliament). It is not appropriate for either to legislate in relation to the other.

What is required is clear private international law as to the jurisdiction, applicable law and recognition and enforcement of each other’s laws.

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?
20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?
   a. education and training;
   b. qualification;
   c. regulation.
In due course, specialist training, qualification and regulation in Welsh law would be inevitable. Whether the profession would be of sufficient size to warrant complete separation is unclear. It is likely that Welsh specialists would be a subset of the legal profession of England and Wales.

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

**English common law and Welsh common law would inevitable begin to diverge.**

22. Would your answer be different if there was a separate court system in Wales?

*No.*

23. Would your answer be different if the Assembly had legislative competence generally over all (or most of) the:
   a. criminal law;
   b. civil law; or
   c. any other area of law that you do not consider falls within (a) or (b)?

*No.*

24. Could there be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

Yes, but this would be an unhelpful distinction. If, for example, succession law were to be an area of competence for the Assembly, then judges will need to interpret any legislation made by the Assembly for Wales. Welsh common law will therefore need to develop separately from English common law, whether or not this is a matter for Welsh courts and the UK Supreme Court or for a continuing court system of England & Wales.

24.1 Why would that be desirable, and how would it work in practice?

**It would not be desirable.**

24.2 How difficult would that be?

It would create unnecessary and unhelpful distinctions.

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

The requirement for a separate English legal jurisdiction implies the need for a separate English parliament or assembly separate from that of the United Kingdom Parliament.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

Websites are a very useful means of disseminating such information. We look forward to the first text book on Welsh private international law.
27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

It is presumed that there are numbers of UK citizens and domiciliaries resident in Argentina. Consideration as to matters of domicile in Wales should apply to those persons as well as to matters between England and Wales.

28. Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly’s legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?

No