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Llywodraeth Cymru
Welsh Government

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Welsh Government

Consultation Document

A Separate Legal Jurisdiction for Wales

Date of issue: **27 March 2012**

Action required: Responses by **19 June 2012**



Overview

The purpose of this consultation is to seek views on:

- what is meant by the term “separate legal jurisdiction”;
- whether there are any essential features for the existence of a separate legal Jurisdiction and, if so, what they might be;
- what the consequences of having a separate Welsh legal jurisdiction might be; and
- what the potential advantages and disadvantages of a separate Welsh legal jurisdiction would be.

How to respond

Please respond to this consultation by answering all or any of the questions highlighted in bold throughout the document and listed at the end of the document. You are also welcome to submit a general view or opinion on the question of a separate legal jurisdiction for Wales.

When answering the questions in this consultation paper, please provide reasons for your answers, with particular reference to what you think might be the consequences, advantages and disadvantages of a separate Welsh legal jurisdiction.

Further information and related documents

Large print, Braille and alternate language versions of this document are available on request.

Contact Details

For further information please contact:

The Constitutional Policy Team

Welsh Government

4th Floor

Cathays Park 2

Cardiff

CF10 3NQ

e-mail: constitutionalpolicy@wales.gsi.gov.uk

Data Protection

How the views and information you give us will be used.

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response.

This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone’s name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

Foreword from the First Minister and Counsel General

The constitutional landscape in the United Kingdom has changed significantly since devolution of powers to Wales, Scotland and Northern Ireland happened in 1999.

In Wales, the major changes have happened in clear stages: devolution of executive powers to the National Assembly for Wales in 1999, legal separation of the Welsh Government from the Assembly together with powers to pass Measures in 2007, and powers for the Assembly to pass primary legislation in all devolved areas following the Yes vote in the referendum in 2011.

These changes gave our new democratic institutions – our Welsh Government and Assembly – the powers they needed to develop, implement and scrutinise policy in devolved areas. But there is, inevitably, a wider potential impact – on civil society in Wales, on those lobbying for social or economic change, on members of the public, and, most importantly in the present context,, on the laws and legal system in Wales.

The UK Government has now appointed a Commission on Devolution in Wales, chaired by Paul Silk, a former Clerk to the National Assembly. As part of its work, the Commission will consider the powers of the devolved institutions, in particular issues relating to the boundaries of the devolution settlement in Wales. The Welsh Government will submit written evidence to the Commission in due course. That evidence will in part be informed by the outcome of this consultation.

Currently, all law passed for Wales, whether by the Assembly, Welsh Ministers, Westminster Parliament or UK Government Ministers, becomes part of the law of England and Wales. This is because England and Wales share a single legal jurisdiction; and a single system of courts, judges and legal professions has grown up as a distinctive feature of that jurisdiction.

The devolution of powers to the Welsh Government and Assembly will inevitably mean more distinct Welsh law applying in Wales in future – and the opportunities are now even greater following the Yes vote in last year's referendum. In this context, the time is now right to consider whether or not there should be a separate legal jurisdiction for Wales.

This is a genuine consultation, and the arguments by no means lead to only one possible conclusion. We want all the arguments for and against to be aired and subject to thorough scrutiny, so that the potential benefits and disadvantages are clearly understood. We are clear that separate jurisdictions can exist within a United Kingdom – Scotland and Northern Ireland have their own jurisdictions separate from that of England and Wales. Beyond that, while we have a lot of information about the characteristics of legal jurisdictions, we are open-minded as to whether a move towards a separate jurisdiction for Wales would be the right way forward. .

It is for that reason, therefore, that we are launching this consultation. We are aware that the debate on a possible separate jurisdiction for Wales is already under way in legal circles, and also that the Assembly's Constitutional and Legislative Affairs Committee is already part way through its inquiry into the issue. We welcome the

work that is already being done, and we now want to build upon it through this consultation.

We look forward to receiving your views on the issues raised in the consultation paper. If necessary, we will undertake a further consultation exercise later to explore particular issues arising from the responses in more detail.

A handwritten signature in black ink, appearing to read 'Carwyn Jones', written in a cursive style.

RT HON CARWYN JONES AM
First Minister of Wales

A handwritten signature in black ink, appearing to read 'Theodore Huckle', written in a cursive style.

THEODORE HUCKLE QC
Counsel General

Purpose

The people of Wales voted “yes” in the referendum on the powers of the National Assembly for Wales held in March 2011.

As a consequence of that, in May of last year, the provisions of the Government of Wales Act 2006 that enable the Assembly to pass primary legislation (called Assembly Acts) in relation to all devolved subjects were brought into effect.

Amongst other things this means that it is no longer necessary for the consent of the UK Parliament to first be obtained before the Assembly can legislate in relation to those devolved subjects.

The Assembly now has the power to pass Assembly Acts which become law upon Her Majesty giving Royal Assent. Within its powers the Assembly may, by Act, do anything that an Act of the UK Parliament could do.

The UK Parliament is sovereign and retains power to legislate on any matter in Wales. There is, however, a convention that the UK Parliament will not normally legislate in relation to a devolved matter in Wales without the consent of the Assembly¹.

Because England and Wales is a single legal jurisdiction the laws made by the Assembly or by the UK Parliament still form part of the law of England and Wales, even if they are only intended to apply in Wales. The position, in this respect, is different in Scotland and Northern Ireland because each of them is a *separate* legal jurisdiction. Therefore, for example, Acts of the Scottish Parliament only extend to Scotland and do not form part of the law of any other territory within the UK.

Since devolution in 1997, and particularly as a consequence of the referendum in Wales on the Assembly’s law-making powers, there has been much discussion about whether or not Wales should also be a separate legal jurisdiction.

On 7 October 2011 the First Minister for Wales made a written statement to the Assembly setting out the Welsh Government’s intention to launch a public debate on this issue.

The purpose of this consultation is to seek views on:

- what is meant by the term “separate legal jurisdiction”;
- whether there are any essential features for the existence of a separate legal jurisdiction and, if so, what they might be;
- what the consequences of having a separate Welsh legal jurisdiction might be; and

¹ Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee – June 2011.

- what the potential advantages and disadvantages of a separate Welsh legal jurisdiction would be.

When answering the questions in this consultation paper, please provide reasons for your answers, with particular reference to what you think might be the consequences, advantages and disadvantages of a separate Welsh legal jurisdiction.

History

Prior to the conquest of Wales by Edward I of England in 1282-3, Wales and England were separate countries with different laws and legal traditions. In 1284 the Statute of Rhuddlan introduced the English common law system to Wales, although some differences remained in civil law, including the Welsh practice of settling debts by arbitration, and the rules on inheritance whereby a man's land would be divided equally amongst his sons after his death, rather than passing to the eldest.

The legal jurisdictions of England and Wales were merged by the Laws in Wales Acts 1536 and 1542, which created a common legal jurisdiction across Wales that applied English law exclusively. The surviving Welsh laws were abolished. The Acts provided for Welsh representation in Parliament, and established a new system of courts in Wales, known as the Courts of Great Sessions.

The Great Sessions were administratively distinct from the English courts, and dealt with both criminal and civil cases. They sat twice a year in every Welsh county (except Monmouthshire, which was part of the English system). However the Courts of Great Sessions applied English law and proceedings were conducted solely in English (although interpreters were often used). Few of the judges were Welsh, and all the lawyers and judges also practised in England.

Today

The Courts of Great Sessions were abolished by the Law Terms Act 1830, and Wales was incorporated into the English system as the Wales and Chester circuit. Wales became a separate administrative area of Her Majesty's Courts Service (now Her Majesty's Courts and Tribunals Service (HMCTS)) in its own right in 2007, with Chester joining the North West region.

Wales today forms part of the legal jurisdiction of England and Wales, one of the three jurisdictions that make up the UK. Scotland retained a separate jurisdiction under the terms of the treaty that unified it with England and Wales and created the new state of Great Britain. Northern Ireland has also had a separate jurisdiction since its formation as a distinctive division of the UK in 1921.

There has been a trend towards decentralisation in the courts system over recent years to the point where nearly all the courts, up to and including the Court of Appeal, sit in Wales at least some of the time.

Responsibility for the courts, like the majority of administration of justice functions, is not devolved in Wales. However, there are some devolved functions in the field of

the administration of justice. The Assembly has power to create new tribunals², and the Welsh Ministers exercise functions (e.g. to appoint judges and other members) in relation to certain tribunals that sit in Wales³. The Welsh Ministers also have responsibility for the Children and Family Court Advisory and Support Service in Wales (CAFCASS Cymru).

² For example the Welsh Language Tribunal under the Welsh Language (Wales) Measure 2011

³ See the report of the Welsh Committee of the Administrative Justice and Tribunals Council: "Review of Tribunals Operating in Wales"

What is meant by the term “legal jurisdiction”?

Jurisdiction is a term that can mean different things in different contexts. The term can be used to describe authority, particularly legal authority, over an area, subject-matter or person. In the context of courts, for example, it can be used to describe the types of cases that a court has power to decide or whether the court has power to hear appeals (appellate jurisdiction).

In this consultation paper, however, the term ‘legal jurisdiction’ is used to refer to the concept of a national legal jurisdiction in the sense that, currently, Scotland and Northern Ireland are legal jurisdictions separate from each other and separate from the legal jurisdiction of England and Wales.

In this paper we seek views on what a legal jurisdiction (in this sense) means, whether there are essential features that must exist before a separate legal jurisdiction can be recognised and what the consequences of having such a jurisdiction might be.

Key features of a Separate Legal Jurisdiction

It may be helpful to consider whether a separate legal jurisdiction tends to exhibit certain key features.

Where attempts have been made to outline the essential features of a separate legal jurisdiction, three key components are commonly cited⁴:

- a. a defined territory; with
- b. a distinct body of law; and
- c. a separate legal system - such things as a legislature, courts, judiciary and legal professions.

Applying those key features to Wales

a. A defined territory

There are two principal definitions of “Wales” which suggests that there is already a reasonably ascertainable defined territory for Wales.

These definitions can be found in Schedule 1 to the Interpretation Act 1978 (which is based, principally, on the land area of Wales) and section 158 of the Government of Wales Act 2006 (which also includes the territorial waters around the Welsh coast).

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

⁴ For example Sir Roderick Evans and Professor Iwan Davies in their evidence to the Richard Commission; Professor Keith Patchett, ‘Welsh Law’, IWA Agenda article Winter 2007-8; the Report of the All Wales Convention paragraph 3.9.15; Jones and Williams, ‘Wales as a Jurisdiction’, Public Law Journal 2004

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?

b. A distinct body of law

“Distinct” in this context can mean two things.

Firstly, a body of law may be distinct because it is different in substance.

Secondly, a body of law may be distinct because of the territory over which it applies, irrespective of whether the law is different in substance.

There is already a body of legislation applying in Wales that is different from England – e.g. the Rights of Children and Young Persons (Wales) Measure 2011 or the Welsh Language Act 1993 – and it is highly likely that this divergence will continue to increase.

This divergent legislation derives from a number of sources – e.g. the Assembly, the UK Parliament, Welsh Ministers and UK Government Ministers.

There are currently three legal jurisdictions within the UK; Scotland and Northern Ireland are two, and England and Wales is the third. These are the three territories to which legislation can extend. Legislation passed by Parliament can extend to just one or to all three territories, or any combination of them. An Act of Parliament may be for the whole UK, or for England and Wales only, or for England and Wales plus Northern Ireland but excluding Scotland, and so on.

The Scottish Parliament and Northern Ireland Assembly can legislate only for their own particular territory. The National Assembly for Wales is different. Wales and England currently form a single territory for this purpose, so its legislation becomes part of the law of the England and Wales jurisdiction, even if it only applies in Wales.

This difference between the extent and the application of legislation can be a difficult concept to understand. A way to explain this is that the legislation becomes part of the body of law of England and Wales even if it only has effect in Wales.

The following example may help.

The National Assembly for Wales passes an Act of the Assembly dealing with repairing the footpaths on Mount Snowdon. Clearly, the Act will only have a practical effect within Wales, and this can be referred to as its application.

However, like all Welsh devolved legislation the Act will become part of the body of law of England and Wales, and it will extend to the whole jurisdiction. As a result, if a walker from Norwich was injured whilst using one of Snowdon's footpaths and wanted to bring a claim against the authority responsible for maintaining them, he or she could use a local solicitor to bring the claim in Norwich county court and rely on the Assembly Act as it forms part of the laws of England and Wales and will, therefore, be recognised as such by the courts of England and Wales. The Assembly Act would not have any practical application in Norwich, but it would extend there because of the shared England and Wales jurisdiction.

By contrast, if he or she had an accident in similar circumstances whilst walking up Ben Nevis, and wanted to bring a claim under an Act of the Scottish Parliament, he or she may be required to do so in a court in Scotland. This is because Scotland is a separate legal jurisdiction and Scottish law under an Act of the Scottish Parliament would apply, whilst the defendant would be a Scottish public body, so an English court may not be the appropriate forum.⁵

The fact that there is currently no such thing as 'the law of Wales' (or, of course, 'the law of England'), only the law of England and Wales, means neither Wales nor England can be described as a jurisdiction in its own right. As a result, a court in England could hear a case brought under Assembly legislation, just as a court in Wales could hear a case brought under an Act of Parliament that applied only in England.

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

2.1 When is a body of law distinct enough in this regard?

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

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

c. *A separate legal system*

Wales already has a devolved legislature and government.

There is a unified court system, judiciary and legal profession throughout England and Wales. Responsibility for the courts, the judiciary and most administration of justice functions is not devolved in Wales and remains with the Ministry of Justice.

⁵ See the section 'Enforcement of the law of one jurisdiction in the courts of another jurisdiction', pages 9-10

Experience shows that where there is a separate legal jurisdiction there may also be a separate courts system which deals with cases of all kinds and this may be so even if some areas of the law that those courts deal with are not within the competence of that jurisdiction's government and legislature.

In Canada, for example, the criminal courts are run by the provincial authorities, but the creation of criminal offences and defences is reserved to the federal government. Similarly, consumer protection is generally speaking a reserved matter throughout the whole UK, but is dealt with by the separate court systems of England and Wales, Scotland, and Northern Ireland. The same employment law is also applied across the UK, even though the separate tribunals systems in England and Wales, Scotland and Northern Ireland may have different procedural rules.

Within the UK, all three of the UK's jurisdictions have their own courts up to their individual courts of appeal. However, the Supreme Court, the final UK appeal court in most matters⁶, operates across all three jurisdictions, deciding cases in accordance with the laws applicable in that jurisdiction. As the final appeal court, the Supreme Court sets precedents which must be followed by lower courts within that jurisdiction. While it is usual for courts to operate in just one jurisdiction, the Supreme Court demonstrates that it is possible for a court to be cross-jurisdictional.

Therefore, it may be possible that a unified court system of England and Wales could still operate even if England and Wales were to become separate jurisdictions. Likewise it may be possible for the existing unified court system to be retained at different levels, e.g. to include the High Court, Court of Appeal, and Supreme Court as currently constituted; or alternatively Court of Appeal and Supreme Court; or simply the Supreme Court. Thus in the last two examples, Wales would have to have its own separate High Court or equivalent, or High Court plus Court of Appeal.

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?

- 3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?
- 3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?
- 3.3 If there were a separate Welsh courts system, which courts would be affected?
- 3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?
- 3.5 Should Wales continue to share some courts with England, and if so, which ones?
- 3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?

⁶ Scottish criminal cases do not go to the Supreme Court, unless they raise a human rights or other devolution issue.

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?

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

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?

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?

There appears to be no single method or process for the creation or emergence of a separate legal jurisdiction.

A separate legal jurisdiction cannot, however, be created unilaterally by the devolved institutions in Wales and such a jurisdiction could not exist until it is recognised by institutions such as Parliament and the courts, for example in a UK Parliament Act that recognises Wales as a separate legal jurisdiction in its extent provisions, in the same way as it does now does for Scotland and Northern Ireland.

There is an argument that all that would be required in order for a separate legal jurisdiction to exist in Wales is to recognise Wales, for legislative purposes, as a separate and distinct unit of the UK. In such a case the UK Parliament, if it intended to make law for Wales, would provide that the law extends to Wales (just as is done now in respect of Scotland and Northern Ireland). The power of the Assembly to legislate by Assembly Act may also need to be modified (see question 19 below) so that its legislation extends only to Wales.

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?

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

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

Is the current single legal jurisdiction of England and Wales sustainable within the existing devolution settlement?

History suggests that the conditions for recognition of a separate legal jurisdiction depend on the particular circumstances of the territory concerned. Sometimes the conditions are practical and in other cases there are political or other conditions.

Practical conditions include, for example, when a region has acquired a degree of autonomy and its laws and/or legal institutions gradually diverge from that of the parent jurisdiction.

If this divergence becomes sufficiently great, it may become impractical for lawyers and judges trained only in the law of the parent jurisdiction to deal with the law of the autonomous or semi-autonomous region without additional training. Canada and other former colonies provide examples of this process. The gradual devolution to Canada of executive and legislative powers caused its law to develop differently to the point where full legal separation became a practical necessity.

In the absence of practical necessity the existence of political or other conditions may support the recognition of a separate legal jurisdiction. Northern Ireland is perhaps the best example; its legal system, intended to have jurisdiction over its territory, came into being when Northern Ireland itself was recognised as a distinct region of the UK and the whole arrangement was designed to prevent further civil unrest in Ireland. At this time, Northern Ireland did not have a distinctive body of law of its own, and indeed its law remains very similar to that of England and Wales.

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?

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?

Enforcement of the law of one jurisdiction in the courts of another jurisdiction

Where a court is faced with a case that involves ‘foreign’ law, there are bodies of rules used by the courts to determine which jurisdiction’s law should be used to decide the case. These rules are referred to as “conflict of laws” or “private international law” and apply unless legislation makes express provision for resolving the issue. The rules apply as between different countries, and between different legal jurisdictions within the same country, including the three existing legal jurisdictions of the UK. If the applicable law is found to be that of another jurisdiction, the court may decline to hear the case if it could be dealt with more conveniently in the other jurisdiction. In some circumstances, the court might decide to deal with the case itself, but decide it using the other jurisdiction’s law. If the law of another jurisdiction is to be used, an expert on the relevant law must give evidence about its content. The court will always use its own procedures and its own remedies.

For example, if a court in Wales were presented with a dispute between a local company, and a company based in another legal jurisdiction, such as Scotland, it would first have to decide whether it had jurisdiction to hear the case at all, and if it did, whose law should apply. If it found that the matter should be governed by Scottish law, it would then have to decide whether to decline to hear the case, on the basis that it ought to be dealt with in Scotland, or to deal with it but apply Scottish law⁷.

Enforcement of judgments across the existing UK jurisdictions

To enable a judgment of a Scottish or Northern Irish court to be enforced in England and Wales, the court in Scotland or Northern Ireland issues a certificate certifying the details of the judgment⁸. The certificate then has to be registered within six months in the High Court in London before a warrant of execution can be issued. Once the ‘foreign’ judgment has been registered the High Court can issue a warrant of execution and normal enforcement procedures, such as the use of bailiffs, can begin. A similar process applies for registering and enforcing judgments of the courts of England and Wales in Scotland, again based on registration of a certificate from the court that made the judgment. The procedure is essentially administrative and there is no need to start a new claim in the jurisdiction where enforcement is sought.

At present, the judgments and orders made by courts sitting in Wales can be enforced in England, even if made under devolved legislation, without any additional formalities, because the jurisdiction and legal system are the same.

Criminal proceedings across the existing UK jurisdictions

A significant proportion of criminal law is different between the jurisdictions of England and Wales, on the one hand, and Scotland on the other, but there is a statutory framework for the enforcement of warrants and the arrest of suspects across the jurisdictions. A warrant issued in England and Wales (or Northern Ireland)

⁷ See section 16 of and Schedule 4 to the Civil Jurisdiction and Judgments Act 1982

⁸ Section 18 of and Schedules 6 and 7 to the Civil Jurisdiction and Judgments Act 1982

can be executed in Scotland either by a Scottish police officer, or by an officer from the issuing jurisdiction. Similarly a Scottish warrant can be executed in England and Wales by either a Scottish or a local officer⁹. Officers from England and Wales also have the power to arrest suspects in Scotland without a warrant for crimes committed in England and Wales (and vice versa for Scottish officers) if it appears to them the arrest would have been lawful if the suspect were still in their home jurisdiction¹⁰.

Therefore, although the law on arresting suspects is not identical across the jurisdictions, the legality of a cross-border arrest can be easily and predictably determined by reference to statute.

When answering the following questions (11 to 15 (inclusive)) it would be helpful if you could provide your answers firstly on the basis of a unified England and Wales court system and 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?
12. Would such statute law be judicially noticed in those other jurisdictions?
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?
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?
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?

⁹ Criminal Justice and Public Order Act 1994, s.136

¹⁰ Criminal Justice and Public Order Act 1994, s.137

Impact of possible separate legal jurisdiction on powers of the Assembly

Devolution works differently in Wales and Scotland. The Scottish Parliament has general legislative competence, which means it can pass laws in relation to any subject, provided the subject is not specifically reserved to the UK Parliament. The Assembly has defined legislative competence, which means it can pass laws only in relation to subjects that have been specifically devolved to it.

At the time of the passage of the Government of Wales Act 2006, it was suggested that the defined powers model was the most appropriate form of devolution for Wales, because the shared England and Wales legal jurisdiction made a wider ranging settlement like Scotland's unworkable. It is sometimes said that because of this a separate Welsh jurisdiction would be a necessary part of any new, wider devolution settlement.

However, others have argued that it would have been possible to create a form of devolution similar to the Scottish system that was compatible with the shared England and Wales legal jurisdiction. Certain areas of law would have had to be reserved to maintain consistency across the jurisdiction where necessary.

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?

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

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

Under section 108(5) of the Government of Wales Act 2006, the Assembly can in certain circumstances make provisions in Assembly Acts that apply in England as well as in Wales. Such provision can be made, for example, if it is needed to make the provisions of an Assembly Act effective or to allow the Assembly Act to be enforced.

Example

If the Assembly passed an Act aimed at preventing children from playing truant from Welsh schools, it could confer a power on local authority education officers to take truant children and return them to school. However, the Act would clearly be less effective if children in border areas could evade the officers by going into England. Therefore, the Assembly could also use section 108(5) to confer the same powers on the education officers of English local authorities. This would be permitted because its aim would be to make an Assembly Act applying to Wales effective and to ensure that it could be enforced.

This is possible at present because England and Wales form a single legal jurisdiction and Assembly Acts are part of the law of that jurisdiction, so laws made in Wales can be recognised by courts in both Wales and England. By contrast, the Scottish Parliament's legislation can only take effect in Scotland, because it is a separate legal jurisdiction.

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?

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?

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?

Impact of possible separate legal jurisdiction on the legal professions

The requirements imposed on legal professionals who want to practise in a different jurisdiction vary, depending on how much the law of the jurisdiction in which they wish to practise differs from that of their home jurisdiction.

The law of Scotland is different from that of the rest of the UK in a number of important respects, and Scotland has very different legal procedural rules in many instances, so Scottish lawyers who want to practise in England and Wales or Northern Ireland are required to undertake additional training, as are English and Welsh or Northern Irish lawyers before they can practise in Scotland.

The law and legal practises of Northern Ireland are not so substantially distinct from that of England and Wales, so lawyers moving between those jurisdictions generally do not have to retrain at all.

The question therefore arises whether, and to what extent, a separate legal jurisdiction would require separate legal professions.

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.

Impact of possible separate Welsh legal jurisdiction on the common law

England and Wales is a common law jurisdiction. In common law jurisdictions, the law comes both from legislation, made by legislatures and governments, and from decisions of the courts. Decisions of the highest courts have to be followed by judges in lower courts when dealing with cases where the facts are similar – i.e. the higher courts set legal precedents for the lower courts to follow.

The decisions of courts of other legal jurisdictions (including Scotland and Northern Ireland) are not binding in England and Wales. However in some cases they may be taken into account and may be persuasive in the sense that a court in one jurisdiction may adopt the legal reasoning of the court from the other jurisdiction.

The common law will continue to develop as it has always done.

However, devolved powers are statutory in nature and an Assembly Act may replace a common law rule with a statutory rule, provided that it is within the Assembly's competence.

There is an argument that a separate legal jurisdiction in Wales (whether or not this is coupled with a separate court system) would not directly affect the development of the common law. Wales would remain a common law jurisdiction with the UK Supreme Court as the final court of appeal, as in the case of those Commonwealth countries, such as Jamaica at present, which still look to the Judicial Committee of the Privy Council in this way.

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?

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

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)?

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

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

24.2 How difficult would that be?

Operation of and other possible impacts of a separate Welsh legal jurisdiction

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?
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?
27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?
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?

Complete List of Consultation Questions

1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?
 - 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?
2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?
 - 2.1 When is a body of law distinct enough in this regard?
 - 2.2 Does it matter whether the law in question is statute law or common law?
 - 2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?
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?
 - 3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?
 - 3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?
 - 3.3 If there were a separate Welsh courts system, which courts would be affected?

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

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

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

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?

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

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?

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?

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?

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

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

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?

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?
11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?
12. Would such statute law be judicially noticed in those other jurisdictions?
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?
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?
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?
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?
17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?
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?

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power?¹¹

- a. upon the basis that any provision made in relation to England would extend to and from part of the law of England?
- b. Otherwise, and if so how?

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?

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.

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?

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

23. Would your answer be different if the Assembly had legislative competence generally over:

- a. criminal law;
- b. civil law; or
- c. any other area of law?

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

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

24.2 How difficult would that be?

¹¹ If such a power was retained it would be on the basis that any provision made in relation to England would extend to and form part of the law of England.

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

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?

27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

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?

29. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed please tell us about them.

**Consultation
Response Form**

Your name:

Organisation (if applicable):

email / telephone number:

Your address:

Responses to consultations may be made public – on the internet or in a report. If you would prefer your response to be kept confidential, please tick here: