Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Cofnod y Trafodion
The Record of Proceedings

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

The Constitutional and Legislative Affairs Committee

30/06/2016

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Huw Irranca-Davies Bywgraffiad|Biography	Llafur (Cadeirydd y Pwyllgor) Labour (Committee Chair)
David Melding Bywgraffiad|Biography	Ceidwadwyr Cymreig Welsh Conservatives

Eraill yn bresennol
Others in attendance

David Hughes	Bargyfreithiwr, 30 Park Place Barrister, 30 Park Place
Emyr Lewis	Partner, Blake Morgan LLP
Yr Athro/Professor Laura McAllister	Prifysgol Lerpwl University of Liverpool
Yr Athro/Professor Rick Rawlings	Coleg Prifysgol Llundain University College London
Dr Diana Stirbu	Prifysgol Fetropolitan Llundain London Metropolitan University

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance

Gwyn Griffiths	Cynghorydd Cyfreithiol Legal Adviser
Naomi Stocks	Ail Glerc Second Clerk

Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Gareth Williams	Clerc Clerk

Dechreuodd y cyfarfod am 11:00.
The meeting began at 11:00.

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau
Introduction, Apologies, Substitutions and Declarations of Interest

[1] **Huw Irranca-Davies**: Good morning. Bore da i chi i gyd. Welcome to this first meeting of the Constitutional and Legislative Affairs Committee, having progressed now from the interim constitutional and legislative affairs committee. Could I, in so doing, and in opening this meeting, give my thanks, as the new Chair of this committee in the fifth session of the Assembly, to those who've contributed to this in previous sessions of the Assembly, but also to my immediate predecessor, David Melding, who's with us here in the committee today, for the work and the leadership that he has done and the very able stewardship that he has performed? I don't do it to embarrass you at all, but it is genuine—

[2] **David Melding**: I don't mind being embarrassed. [*Laughter*.]

[3] **Lord Elis-Thomas**: Can I, as a previous member of the committee for a shorter period, offer my support, warmly, to what you've just said?

[4] Diolch yn fawr iawn am y geiriau caredig ynglŷn â David a'r arweiniad rydym wedi ei gael. Ac rwy'n sicr, Mr Cadeirydd, ar ôl eich hir brofiad chi mewn rhywle arall, y byddwch chi yn ein harwain ni ymhellach.

Thank you very much for those kind words about David and the leadership that he's shown. And I'm certain, Mr Chairman, after your long experience in another place, that you will lead us further.

[5] **Huw Irranca-Davies**: Diolch yn fawr iawn am y geiriau hynny.

Huw Irranca-Davies: Thank you for those kind words.

[6] Thank you very much indeed. We will progress; I have to do some housekeeping first of all in my first role here, stewarding this committee. So, in the event of a fire alarm, Members should leave the room by the marked fire exits and follow instructions from ushers and staff. There is no test forecast for today. Could you make sure that all mobile devices are switched to silent mode? We do have translation facilities here as per normal, so headphones are provided and there is interpretation available on channel 1 and verbatim on channel 0.

11:02

Offerynnau nad ydynt yn Cynnwys Materion i Gyflwyno Adroddiad arnynt o dan Reol Sefydlog 21.2 na 21.3
Instruments that Raise No Reporting Issues under Standing Order 21.2 or 21.3

[7] **Huw Irranca-Davies:** Now, if we can proceed as a committee to item 2 on the agenda, first of all. We have some statutory instruments that are under paper 1 with clear reports provided. It is the Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) (Amendment) Regulations 2016 and the Food Information (Wales) (Amendment) Regulations 2016. Are there any observations or comments on those, or are we happy to note that they have clear reports? Mr Melding.

[8] **David Melding:** I'm content, but I'll take this opportunity to thank everyone who worked with me when I was Chair, particularly the Members and the wonderful secretariat, who are still here, and will serve this committee and you as Chair, and I know will do a fantastic job and are a most marvellous resource. I wish you well. I think I speak for all Members—we were delighted that you decided to take this chair when it was announced that it would be for the Labour Party to nominate. I know, under your stewardship, we will do outstanding work. So, good luck.

[9] **Huw Irranca-Davies:** Thank you very much, David, and for those kind words as well for all of the able people who support this committee. Thank you very much.

11:03

Tystiolaeth ym Ymwneud â Bil Cymru
Evidence in Relation to the Wales Bill

[10] **Huw Irranca-Davies**: We will now proceed, then, having dealt with item 2, to the substantive item today, which is item 3, evidence in relation to the Wales Bill. And we begin here with two eminent witnesses in front of us. Could I ask you please to introduce yourselves to the committee? Perhaps we can begin with David Hughes.

[11] **Mr Hughes**: Yes, my name is David Hughes. I'm a barrister practising at 30 Park Place chambers in Cardiff. I have written various pieces in various different publications about Wales and Gibraltar's constitutional affairs.

[12] **Huw Irranca-Davies**: Thank you very much. And then if I could turn to you, Mr Emyr Lewis.

[13] **Mr Lewis**: Bore da. Emyr Lewis yw fy enw i. Rwy'n bartner yng nghwmni cyfreithwyr Blake Morgan yma yng Nghaerdydd. Rwy'n siarad ar ran fy hun, nid ar ran y cwmni. Ac rwyf hefyd wedi ysgrifennu a darlithio llawer ynglŷn a chyfansoddiad Cymru.

Mr Lewis: Good morning. My name is Emyr Lewis. I'm a partner with Blake Morgan solicitors here in Cardiff. I am speaking on my own behalf rather than on the company's behalf. And I have also written and lectured widely on the Welsh constitution.

[14] **Huw Irranca-Davies**: Diolch yn fawr iawn.

Huw Irranca-Davies: Thank you very much.

[15] Could I begin proceedings by opening up with what may seem a broad question, but I think a very important question, and it's whether the Bill that we now see in front of us is an improvement on the Bill that went before, an improvement on the current devolution settlement and, if so, in what ways is it an improvement? Who would like to begin?

[16] **Mr Hughes**: Thanks, Emyr, I'll begin. Let's not be churlish; it is an improvement. It's an improvement to a D-.

[17] **David Melding**: [*Inaudible*.]

[18] **Mr Hughes**: D-.

[19] **David Melding:** I've heard some faint praise in my time, but that really—[*Laughter.*]

[20] **Huw Irranca-Davies:** So, a D-.

[21] **Mr Hughes:** Yes. The problems with it are still grave. There's a wonderful saying by the American writer P.J. O'Rourke. He said:

[22] 'beyond a certain point, complexity is fraud.'

[23] One can argue about whether there's a fraud in this Bill, but it is certainly so complex that, when you pick it up, you can't readily understand it. It's perpetuated one of the main faults from the previous Bill in that it's piecemeal amendment of an already not particularly clear piece of legislation. An American can pick up their constitution, and they seem to talk about nothing else but the Second Amendment over there in political life. You can't imagine the people of Wales having impassioned discussions about Schedule 7B. That's not going to happen. 'What do you think of paragraph 186 of Schedule 7A?' That's not going to happen.

[24] The second problem with it is that—. Sorry. To develop that, my local MP was speaking about the Bill in the Commons and I heard him making the point—. He was talking about the taxation provisions, but he said, 'What we want is accountability.' If there's going to be accountability, people in Wales need to have a good, clear idea of who they vote for or who they vote against on particular things, and this Bill doesn't provide it.

[25] The third point with it is that it's meant to provide a reserved-powers model. It doesn't do that in the proper sense of the term. A reserved-powers model would feature the words, 'The National Assembly for Wales has the power, subject to the provisions of this Act, to make laws for the peace, order and good governance of Wales.' That is a standard form of wording that has been used in overseas territory constitutions; it's one that the Privy Council has said confers a plenary legislative power. And that would mean that your political judgments are sufficient justification for the choices that you make. There would be no question of any court looking at why you have made your decisions. Your political judgment would be sufficient justification.

[26] And, in a reserved-powers model, you start off with a presumption of competence. In a conferred-powers model, we start off presuming that you

can't legislate unless you can point to the provision that says you can. In a reserved-powers model, it's the other way round—you can legislate unless you can't. But this is where the new Schedule 7B is a problem. It says that, insofar as you are changing the private law, you are not competent to do so. That's the starting point. Then it goes on to say that that doesn't apply if you are legislating for a purpose insofar as it doesn't relate to changing the private law that doesn't relate to a reserved matter. 'Relate' is the same word as we have now—the linking word. At the moment, if something relates to a conferred power, that's a good thing, and 'relate' has been given—. I think in the agricultural wages case, it was given a fairly broad interpretation. Admittedly, we had the asbestos case, which was problematic thereafter, but there we are.

[27] Now, if this goes through, 'relate' is a bad thing. Parliament will have chosen the same word and the courts will be receptive to the argument that it's therefore intended to mean the same thing. So, the same broad meaning, which is good at the moment, because it brings things into competence, will be bad because it'll take them out of competence. And then, you've got a nearly 200-page slalom course to get through before you can say that this is within competence. It is going to be extremely challenging to say with any confidence that the legislation you want to pass is within competence.

[28] **Huw Irranca-Davies**: Thank you very much for those opening remarks.

[29] Mr Emyr Lewis, mae gennym ni D- yma—

Mr Emyr Lewis, we've been given a D- there—

[30] So, there's plenty of scope for resit territory, it seems. What are your thoughts on whether this is an improvement?

[31] **Mr Lewis**: Fel arfer, mae angen amser ychwanegol ar gyfer *resits*, a fy mhryder i yw nad wyf yn siŵr faint o amser sydd i gael ar gyfer *resit* yn yr achos yma. Rwyf am gyfeirio at rywbeth a ddywedodd un o'r tystion rŷch chi'n mynd i glywed yn nes ymlaen ganddo heddiw, sef yr Athro Rick Rawlings. Mae o'n sôn am y model '*leeway and lock*'—dyna'r ymadrodd y mae o wedi'i ddefnyddio

Mr Lewis: Usually, you need extra time for resits, and I'm not sure how much time is available for a resit in this case. I do want to refer to something said by one of the witnesses whom you will hear from later on, namely Professor Rick Rawlings. He mentioned the 'leeway and lock' model—that's the phrase he's used to describe the previous draft Bill: on the one hand, the

i ddisgrifio'r Bil drafft blaenorol: ar y naill law, mae'r Cynulliad Cenedlaethol yn cael y rhyddid—rhyw libart o ryddid—i ddeddfu, ond wedyn mae yna glo sy'n ei rwystro rhag mynd i wahanol fannau.

Assembly is given some leeway to legislate, but then there is a lock that prevents it going in various different directions.

[32] Os caf i sôn am dyst arall a roddodd dystiolaeth i chi'r wythnos diwethaf, yr Athro Thomas Watkin, wel, mae o wedi datgan yn groyw bod maint y rhyddid, maint y gofod sydd gennych i ddeddfu o fewn model pwerau a gadwyd yn ôl, yn hytrach na model pwerau a roddwyd, yn dibynnu, i raddau helaeth, ar beth sydd wedi'i gadw'n ôl. Yr hyn rwy'n credu sydd ar goll, efallai, yn y Bil yma yw'r cysyniad o gyfiawnhau cadw pwerau yn ôl. Mewn model o gyflwyno neu roi pwerau, mae'n rhaid ichi gyfiawnhau pam eich bod yn rhoi'r pŵer i ddeddfu ar amaeth, er enghraifft, i'r Cynulliad Cenedlaethol. Mewn model o gadw pwerau yn ôl, mae angen ichi gyfiawnhau, mewn termau polisi ac mewn termau gwleidyddol, pam eich bod chi'n cadw pwerau yn ôl yn San Steffan. Ac mae rhai pwerau'n amlwg yn rhai sydd angen eu cadw'n ôl mewn gwladwriaeth unedig—materion yn ymwneud â'r cyfansoddiad, yn ymwneud â pherthnasau rhyngwladol, er, efallai, y byddai rhai yn dymuno cael y pwerau hynny'n ôl i Gymru jest ar yr adeg yma.

If I could mention another witness who gave you evidence last week, Professor Thomas Watkin, well, he has stated quite clearly that the space to legislate within the reserved-powers model, rather than a conferred-powers model, is the important thing and that depends, to a great extent, on what is reserved. What I think is missing, perhaps, in this Bill is the concept of justifying reservations. In a conferred-powers model, you have to justify why you are conferring those powers to legislate on agriculture, for example, on the National Assembly. In a reserved-powers model, you have to justify, in policy terms and in political terms, why you are making those reservations in Westminster. And some powers clearly need to be reserved in a unified state—issues related to the constitution, in terms of international relations, although, perhaps, some would like to see those powers conferred on Wales at this particular time.

[33] Ond beth rwy'n credu sydd ddim yn amlwg, yn eglur, yw pam fod y *lock* yma, fel y buasai'r Athro Rick

But what I think is unclear is why this lock, as Professor Rick Rawlings described it, exists in many of these

Rawlings yn ei ddweud, yn bodoli mewn nifer o'r achosion yma. Mae David wedi rhoi enghraifft wych yn y modd y mae'r gyfraith breifat wedi'i chadw yn ôl, ac mae'n ymddangos imi mai un egwyddor, beth bynnag sydd ar waith, yw ein bod ni'n ceisio mapio beth sydd ar hyn o bryd wedi'i gadw'n ôl yn weithredol yn Whitehall. Hynny yw, mae'r gweision sifil yn cadw'r pwerau hynny yn ôl, ac yn ceisio siapio grymoedd deddfu'r Cynulliad o gwmpas patrwm gweinyddol yn Whitehall. Efallai fy mod i'n anghywir, ond mae siâp felly arno fo.

cases. David has given an excellent example in terms of the way in which private law is reserved, and it appears to me that one principle, regardless of what's happening, is that we should endeavour to map what is currently reserved operationally in Whitehall. That is to say that the civil service is reserving those powers and is trying to shape the legislative powers of the Assembly around an administrative pattern in Whitehall. I may be wrong, but that seems to be the case.

[34] **Huw Irranca-Davies**: And, in respect of what you've said, you've anticipated, in some way, my follow-up question, which was to do with whether this places more restrictions, potentially, on the Welsh Government and the National Assembly for Wales. It seems to be implicit in what you're saying that, if we move to a reserved model, then we had better get it right and clear what those reservations are, and the justification and validity of those reservations, because otherwise we'll have to live with the consequences.

[35] **Mr Lewis**: Yn hollol. **Mr Lewis**: Exactly.

[36] **Huw Irranca-Davies**: Yes, okay. Thank you. I think we'll return to this, but if we can move on to another area and, perhaps, Michelle, if you'd like to take us on to the area of the issues of the permanence of the Assembly.

[37] **Michelle Brown**: Sorry, which document are we looking at? Do the witnesses have any comments on the changes to clause 1 from the draft Bill pertaining to the performance of the Assembly? I'm sorry; I'm possibly showing my inexperience. [*Laughter*.]

[38] **Huw Irranca-Davies**: Not to worry at all.

[39] **David Melding**: It's pertaining to the permanence.

[40] **Huw Irranca-Davies**: Yes. It relates to the permanence of the Assembly—whether you have any comments on that.

11:15

[41] **Mr Hughes**: For as long as we have the principle of parliamentary sovereignty, it's something that needs to be understood as symbolic, but it is a symbolic statement of a certain value. I have real difficulties with later provisions in 92, but the statement of the permanence is—let's not think that it's something that Parliament couldn't undo if so minded, but as a statement of intention, yes, I welcome it.

[42] **Huw Irranca-Davies**: And Mr Lewis.

[43] **Mr Lewis**: Rwy'n cytuno, ac eithrio, efallai, ynglŷn â 92—. Wel, wrth gwrs—. A ydym ni'n drafod 92B nawr hefyd—'Recognition of Welsh law'?

Mr Lewis: I would agree, with the exception, perhaps, of 92—. Are we discussing 92B as well—'Recognition of Welsh law'—under this question?

[44] **Huw Irranca-Davies**: Indeed.

[45] **Mr Lewis**: Wel, mi adawaf i David ddweud beth sydd ganddo fe i'w ddweud yn gyntaf, ac wedyn gwnaf ddweud beth sydd gennyf i'w ddweud.

Mr Lewis: Well, I'll let David make his own comments on that first, and then I will make mine.

[46] **Mr Hughes**: Well, 92B, I think, is also a symbolic provision, but it's one that, speaking as a lawyer, I find slightly insulting. It's there—. For a start, it's a statement the accuracy of which I would dispute. 'Welsh law' can't just mean the law made by you. Welsh law must mean law made by Westminster for Wales, must mean the common law as it applies in Wales, and, until any changes happen, must mean European law as it applies in Wales. That's the inaccuracy. The inaccuracy bothers me but doesn't offend my professional pride.

[47] **Dafydd Elis-Thomas**: Or even Welsh medieval law.

[48] **Mr Hughes**: I would have included that under common law, but, yes, if you're distinguishing it—yes, absolutely.

[49] Where it offends my professional pride is that it is there, it looks like it, on the assumption that we would be either too lazy or too stupid to read on and realise that there is no recognition of Welsh law as a body of law that is something different from the law in England, even if they mirror each other to a large extent. This is not saying that Welsh law is distinct from English law in the way that the law of New South Wales is distinct from the law of Queensland. It's not doing that. That's the only reason that I can think of it being there.

[50] **Mr Lewis:** Rwy'n cytuno â hynny. Mae hwn yn mynd â ni nôl at y cysyniad mai un gyfraith sydd, sef cyfraith Cymru a Lloegr, mai un diriogaeth gyfreithiol sydd yn bodoli, sef Cymru a Lloegr. Dyma'r rheswm pam—. Mynnu mai hynny yw'r ffaith, yn wyneb y ffaith bod y gyfraith yn wahanol ac yn mynd yn fwy ac yn fwy gwahanol o fewn y ddwy diriogaeth, yw'r rheswm pam ein bod ni wedi cael cymaint o Ddeddfau Cymru er mai dim ond un—wel, mae dwy, ond mae Deddf wreiddiol yr Alban yn dal i sefyll bron fel oedd hi. Mae ceisio cynnal yr wrtheb yna wedi bod yn rheswm dros gymhlethdod drafftio yn Neddfau Cymru am yn agos i 20 mlynedd nawr, ac mae arnaf ofn bod y gymhlethdod—nifer o'r enghreifftiau o gymhlethdod a welwn ni yn y Mesur yma—yn deillio o'r methiant i fynd i'r afael â'r cysyniad a jest dweud, 'Ymlaciwch. Mae yna gyfraith Cymru. Mae yna gyfraith Lloegr. Nid yw hynny'n golygu diwedd y byd.' Ond rwy'n ofni bod yna rai pobl yn meddwl bod hynny yn golygu diwedd y byd.

Mr Lewis: Yes, I would agree with those comments. This takes us back to the concept that there is but one law, the law of England and Wales, and there is only one legal jurisdiction in England and Wales territory. This is why—. Insisting that that is the fact in the face of the fact that the law is different and is increasingly divergent within the two territories is why we have seen so many pieces of Welsh legislation whilst the original Scotland Act remains in place almost intact. But trying to maintain that contradiction has led to great complexity in terms of drafting Acts for Wales, and I'm afraid that much of the confusion that we see in this Bill arises from that problem in actually getting to grips with that concept and saying, 'Relax. There is Welsh law and there is English law. That is not the end of the world.' But I think that some people think that that will lead to the end of the world.

[51] **Michelle Brown:** Do you see any problems with conflicts between

English law and Welsh law if Welsh law comprises a distinct body of law, and we have a separate jurisdiction? Because we have a lot of cross-border relations with England, and if you look at the commercial world, you have businesses in England working in Wales and vice versa, contracting across the border. Do you see any problems with things like conflicts of laws and other jurisdictional tensions?

[52] **Mr Lewis**: Yn bersonol, na. I ddechrau gyda masnach, rwy'n gwneud llawer o waith ym maes cyfraith fasnachol ac, wrth gwrs, mae pobl yn dewis pa Ddeddf, pa gyfraith y maen nhw eisiau cytundebu oddi tani. Rydym yn gwybod, er enghraifft, fod nifer fawr o fusnesau mwyaf y Deyrnas Gyfunol yn yr Alban yn gwneud busnes ar draws y Deyrnas Gyfunol ac yn aml yn defnyddio cyfraith Cymru a Lloegr er mwyn cytundebu.

Mr Lewis: Personally, I don't. To start with commercial issues, I do a great deal of work in commercial law and, of course, people choose under which law they want to work, and we know that there are a number of the largest businesses in the UK who are working in Scotland and work across the UK and very often use the laws of England and Wales when contracting and so on, and undertaking commercial law.

[53] Rwy'n credu, wrth gwrs, fod yna gwestiynau yn mynd i fod_ynglŷn â sut yr ydych yn gweithredu'n drawsffiniol mewn pob math o gyd-destunau, ond mae yna atebion i'r rhan fwyaf o'r cwestiynau hynny eisoes oddi mewn i'r Deyrnas Gyfunol, rhwng Cymru a Lloegr, neu Lloegr a Chymru, a'r Alban a rhwng Lloegr a Chymru a Gogledd Iwerddon. Wrth gwrs, yng Ngogledd Iwerddon, mae gennych chi ffin ryngwladol, lle mae gwahanol gyfreithiau'n weithredol. Felly, oes, mae yna gwestiynau i'w holi, ond mae yna atebion ymarferol i'r cwestiynau yma. Yn fy marn i, byddai'n reitiach i dreulio'r amser a'r egni sydd yn mynd mewn i geisio siapio setliad mor gymhleth mewn i

Of course, there are going to be questions as to how you work on a cross-border basis in all sorts of contexts, but there are solutions or answers to most of those questions already within the UK, between England and Wales and Scotland and between England and Wales and Northern Ireland. Of course, in Northern Ireland, you have an international border, where different laws are operational. Therefore, yes, there are questions to be asked, but there are practical solutions and answers to those questions. In my view, it would be a better to spend the time and energy that's going into trying to shape such a complex settlement on trying to resolve those problems and to find a pattern that

geisio datrys y cwestiynau hynny a chael patrwm sydd yn gwneud synnwyr ymarferol yn y cyd-destun hwnnw.

makes practical sense in that context.

[54] **Mr Hughes:** I'd agree with what Emyr says. Perhaps I can suggest that we approach it this way: that if the settled will of the National Assembly as the representatives of the people of Wales is that we're going to move to a reserved-powers model, the necessary consequence, if we're going to do that in a workable way, is that you do need two jurisdictions. If you're going to do that, there are issues, as Emyr has said, that we have to face that are not without precedent. Lots of major cities in the United States, for example, are very near state borders—lots of inter-state commerce there. So we can address those and there are precedents around the world that we can use to help us address those. There is also the advantage of clarity. For example, family law is not my area of practice, but, as I understand it, there are different financial provisions where children in the care of one local authority are placed in another local authority—the funding obligations extend longer when one moves from one side of the border to the other than if the movement is vice versa.

[55] If everybody in Wales and in England knows that Welsh law and English law are distinct things, even if they look very much alike, people will know that they have to check and the silly little things that happen now—people using the wrong forms because they don't have a Welsh-language version, people turning up to court and citing English rather than Welsh statutory guidance—those are much less likely to happen. So, there are problems with this, but there are also advantages that can be recognised.

[56] **Huw Irranca-Davies:** Before we move on to Lord Dafydd Elis-Thomas on a slightly different area, perhaps I could ask you: you seem to be suggesting that this is overly complex and that it's a problem of its own making in the way that this has been drafted and conceived within this Bill and that there's a much simpler way to do it.

[57] **Mr Hughes:** Yes.

[58] **Huw Irranca-Davies:** How would you then express that simplicity in statutory terms? What would we be looking at as a clause?

[59] **Mr Hughes:** I think you start off with the wording that I was using

earlier: that, subject to the provisions of this Act, the National Assembly for Wales has the power to make laws for the peace, order and good governance of Wales. That's the starting point. Then, you think, 'What reservations are necessary if we are to continue as a United Kingdom?' We could argue about those, but the starting point would probably be to look at Scotland and Northern Ireland, and, if something is not reserved in Scotland and in Northern Ireland, or in either one of those, then there is no logical or principled case for saying that it needs to be reserved in Wales.

[60] That could mean that I recognise the transfer of a lot of areas that the Welsh Assembly or the Welsh Government may feel, 'We want to defer the responsibility for this'. Northern Ireland has an interesting way of dealing with that and it's a way that the Society of Conservative Lawyers has actually proposed in evidence to a Lords committee, which is that, in Northern Ireland, you've got excepted powers, which are the equivalent of reserved here, and then you've got reserved ones that, in principle, are transferred, but the decision about when that's implemented comes later. In Wales, if we moved that model and instead of those reserved—in the Northern Ireland sense—powers being subject to Westminster deciding, they were subject to Wales deciding, then you've got a good, lasting model that will stand the test of time.

[61] **David Melding:** This is what the First Minister suggested, in essence, wasn't it?

[62] **Mr Hughes:** Yes.

[63] **Huw Irranca-Davies:** Very good. Thank you. Lord Dafydd Elis-Thomas.

[64] **Yr Arglwydd Elis-Thomas:** Diolch yn fawr, Gadeirydd. Roedd gen i gyfrifoldeb mewn Cynulliadau blaenorol am ddatganiadau ynglŷn â chymhwysedd deddfwriaethol unrhyw Fil neu unrhyw Fesur a oedd yn dod ger ein bron ni. Ac felly rwyf wedi cymryd diddordeb yn yr holl gwestiwn oherwydd fy nghonsyrn i y byddem ni mewn sefyllfa o gyfyngu ar ein pwerau deddfwriaethol. Roeddwn i'n gwrando gyda **Lord Elis-Thomas:** Thank you very much, Chair. I had responsibility in previous Assemblies for statements relating to the legislative competence of any Bill or Measure that came before us. And therefore I have taken an interest in this question because of my concern that we would be in a situation of restricting our legislative powers. I was listening with great interest, in particular, to what David Hughes had to say earlier, namely

diddordeb mawr, yn enwedig, ar beth oedd gyda David Hughes i'w ddweud gynnau, sef bod y Bil yma, fel mae o'n sefyll, yn gam yn ôl, os rhywbeth, oherwydd bod yna wahaniaeth bellach rhwng gosod grymoedd ag eithriadau a chadw grymoedd ag eithriadau. A dyma gwestiwn cyffredinol hoffwn i ei ofyn i'r ddau ohonoch chi: i ba raddau y mae'r Bil yma yn mynd yn groes i'r penderfyniad democrataidd a gymerwyd gan etholwyr Cymru yn y refferendwm diwethaf ar ddatganoli yn yr ystyr ei fod o, o bosibl, yn cyfyngu ar yr egwyddor a atebwyd yn gadarnhaol yn y refferendwm yna?

that this Bill, as it stands, is a retrograde step, because there is a difference in conferring powers with exceptions and retaining powers with exceptions. The question that I'm going to ask both of you is: to what extent does this Bill go against the democratic decision that was taken by the Welsh electorate in the last referendum on devolution, in the sense that it possibly restricts the principle that was answered positively in that referendum?

[65] **Mr Lewis:** Wel, mi bleidleisiodd pobl Cymru o blaid setliad penodol a oedd yn cyflwyno pwerau deddfu am y tro cyntaf, fel yr ydych chi'n gwybod yn iawn, yn sgil patrwm nad oedd wedi gweithio cyn hynny. A'r refferendwm a greodd y pwerau deddfu sydd yn bodoli ar hyn o bryd. Mae yna fwy o bwerau wedi'u trosglwyddo, ond y refferendwm a greodd hynny. Ac mae yna le i ddadlau bod y ffordd y mae grym yn cael ei gymryd yn ôl fan hyn yn cymryd grymoedd yn ôl sydd ar hyn o bryd gan y Cynulliad Cenedlaethol. Nid yw rhywun yn pryderu ryw lawer, yn arbennig felly yn sgil achos amaethyddiaeth. Nid ydyn nhw'n pryderu ryw lawer ynglŷn â materion y mae rhywun yn derbyn eu bod nhw'n faterion a ddylai fod wedi eu cadw'n ôl ond, drwy amryfusedd, ddaru ddim cael eu cadw yn ôl—

Mr Lewis: Well, the people of Wales voted in favour of a particular settlement, which introduced legislative powers for the first time, as you well know, in light of a pattern that hadn't worked prior to that. The referendum led to the legislative powers that exist at the moment. More powers have since been transferred, but it was the referendum that led to that. And there is scope to argue that the way in which power is taken back here does repatriate some powers currently held by the National Assembly. One isn't too concerned, particularly following the agriculture case. One isn't too concerned about those issues that one accepts are reasonable reservations but which weren't reserved because of some oversight—those are issues of state. But what I am concerned about are

materion sydd yn faterion y wladwriaeth. Beth ydw i'n pryderu amdano fo ydy'r mân bethau. Er enghraifft, rwy'n credu ei bod hi'n eithaf eglur ar hyn o bryd bod gan y Cynulliad Cenedlaethol y pŵer i gael gwared ar yr amddiffyniad mewn achos o ymosod ar blentyn o gystwyo rhesymol—*reasonable chastisement*. Pe bai'r Bil yma'n dod yn Ddeddf, rwy'n credu y byddai hynny'n diflannu, oherwydd y newidiadau mewn perthynas â chyfraith droseddol. Mae hynny'n un amlwg, ond fyddwn i ddim yn meindio rhoi arian go dda ar y tebygolrwydd fod yna nifer fawr iawn o enghreifftiau eraill oherwydd manylder y modd y mae'r pwerau wedi'u cadw yn ôl wedi'u cadw yn ôl.

the minutiae. For example, I think it's quite clear now that the National Assembly has the power to abolish the defence of reasonable chastisement when a child is struck. Now, if this Bill were to become law, I do think that that would disappear, because of the changes in relation to criminal law. That's an obvious example in a way, but I wouldn't mind putting a few quid on the likelihood that there are many other examples because of the detailed way in which the reservations have been reserved.

[66] **Mr Hughes:** The reservations contain so much minutiae that to try and talk about legislative competence at a level of principle is practically impossible, but let me give you just one example that I think shows where there is a loss of power, not just because of the linking words, not just because of the list, but because of the nature. For example, you've legislated about sprinklers in new-build homes. Paragraph 186 of the new Schedule 7A reserves:

[67] 'The regulation of—

[68] '(a) the design and construction of buildings,

[69] '(b) the demolition of buildings, and

[70] '(c) services, fittings and equipment provided in or in connection with buildings.'

[71] It would be very hard to see that sprinklers in houses doesn't relate to that. This is one of my favourite paragraphs, because, some time ago, I said that the previous Bill reserved everything but the kitchen sink when, actually,

this would reserve the kitchen sink as well. [*Laughter*.]

11:30

[72] **Lord Elis-Thomas**: Can I put to you, then, a further view, which I'm coming to, that this whole exercise is about the UK Government getting its own back on the Supreme Court? [*Laughter*.] I'm speaking plainly. I don't expect you to comment or make judgments on the Supreme Court, but it does seem to me that the way this has been drafted has the intention, and you mentioned this earlier—. The form of interpretation of the word 'relate', for example, in the Supreme Court judgment and the whole interpretation of the relationship between conferred powers and exceptions, which the Supreme Court concentrated on, especially in the agricultural wages board issue—that kind of judgment is closed down entirely, I would think, by this way of legislating. Isn't that, therefore, clearly resiling from the nature of the devolved settlement we have?

[73] **Mr Lewis**: Mae modd dadlau hynny, ond byddai rhywun yn eithaf cysurus pe na bai yna gymaint o gadw'n ôl. Hynny yw, mae'r fformiwla 'relates to' mewn perthynas â pwerau a gadwyd yn ôl, dyna'r un sy'n weithredol yn yr Alban. Mae'r Goruchaf Lys wedi dangos eu bod nhw'n tueddu i ffafrio pwerau deddfu y corff democrataidd etholedig, fel sy'n bodoli yng Nghymru ac yr Alban, ac eithrio, yn achos asbestos, lle roedd penderfyniad y mwyafrif fanna, yn anffodus iawn, yn agor y drws i gwestiynu barn wleidyddol y Cynulliad Cenedlaethol ar faterion yn ymwneud â hawliau dynol, sy'n rheswm arall pam rydw i'n credu bod y fformiwla y mae David wedi'i awgrymu, er nad yw yn Neddf yr Alban nac yn Neddf Gogledd Iwerddon, y byddai hynny'n rhywbeth pwerus iawn yn Neddf Cymru. Felly, ydych, rydych chi'n iawn. Ni fuasai

Mr Lewis: One could make that case, but one would be quite comfortable if there weren't so many reservations. The 'relates to' formula in terms of reserved powers is the one that is operational in Scotland. The Supreme Court has shown that it tends to favour the legislative powers of the democratically elected body, as exists both in Scotland and in Wales, with the exception of the asbestos case, where there was a majority decision there, which, very unfortunately, opened the door to questioning the political views of the National Assembly on issues related to human rights. This is another reason why the formula that David has suggested, although it's not in the Scotland or the Northern Ireland Act, would be very powerful in the Wales Act, or the Wales Bill as it currently is. But, yes, you are right. It wouldn't matter too much if the new

llawer o ots pe bai y setliad newydd yn llai cymhleth ac yn fwy rhadlon, felly, o ran ei fanylder. Felly, fel mater o egwyddor, nid wyf yn credu eich bod yn iawn, ond, fel mater o ffaith, yn yr achos yma, rydych yn iawn.

settlement were less complex and benign in terms of its detail. So, as a point of principle, I don't think you're right, but, as a matter of fact, in this case, you are right.

[74] **Mr Hughes:** I think Emyr alights on one of the risks that there is here. Emyr has mentioned, rightly so, that 'relates' has been given an interpretation in Scotland that is favourable to legislative competence, but then I think the asbestos case—and I might have been more relaxed about things until the asbestos case came, which—. As Emyr was saying, Lord Mance's speech—the majority speech; I think it was Lord Mance—has a very grudging flavour about it. It's not, 'This body is the democratic representative of a nation of equal dignity and respect as the other nations in United Kingdom'. So, if 'relates' stays, we're gambling. So, it's better to look for a different word. I don't know whether I can add that much more to what Emyr has said on this point.

[75] **Mr Lewis:** Rwy'n mynd i anghytuno â David. Rwy'n credu bod eisiau inni gael, os medrwn ni, fod ar yr un gwastad o fewn beth yw'r prawf ar gyfer cymhwysedd deddfu holl seneddau datganoledig y Deyrnas Gyfunol. Nid yw'r ateb newid y gair 'relates'. Yr ateb yw bod ag agwedd egwyddorol tuag at beth sy'n cael ei gadw'n ôl.

Mr Lewis: I'm going to disagree with David. I think, if we can, we need to have the same level playing field in terms of the legislative competence of all the devolved parliaments of the UK. The solution isn't to change the word 'relates'. The solution is to take a principled view of what is reserved.

[76] **Yr Arglwydd Elis-Thomas:** Rwy'n ddiolchgar iawn i chi am y dadansoddiad yna oherwydd—pe garwn i gysylltu ag un—un o'r pryderon sydd gen i hefyd ydy bod yr hyn a elwir yn setliad, neu'n ymgais i gael setliad diweddaraf, yn ei gwneud hi'n fwy anodd i hyd yn oed gyfreithwyr a bargyfreithwyr a gwleidyddion ac, yn sicr, y cyhoedd

Lord Elis-Thomas: I'm grateful to you for that analysis because one of the concerns that I have is that what is called a settlement, or an attempt at the latest settlement, makes it more difficult even for lawyers and barristers and politicians and, certainly, the public that takes an interest in constitutional matters, to understand how the constitution

sy'n cymryd diddordeb mewn materion cyfansoddiadol, ddeall sut mae'r cyfansoddiad yn gweithio. Felly, mae'n un o egwyddorion y pwyllgor yma ers blynyddoedd bod creu cyfansoddiad sy'n ddealladwy ac yn dryloyw ac yn weithredol yn un o'r pethau sylfaenol y dylem ni fod yn ei wneud.

works. Therefore, it's one of the principles of this committee, and has been for years, that creating a constitution that is understandable and transparent and operational is one of the basic things that we should be doing.

[77] Yn sgil hynny, fe hoffwn i ofyn yn olaf, rhag ofn imi gymryd gormod o amser y pwyllgor yma—ar yr adran yma, beth bynnag: rydym wedi cael enghreifftiau gan y ddau ohonoch chi o gymalau cadw penodol a manylion penodol rydych chi'n bryderus amdanynt. A oes gennych chi enghreifftiau eraill y carech chi eu cyflwyno inni yma heddiw, neu—ac rwy'n gweld bod gan David draethawd hir, ac mae'n siŵr ei fod o'n *alpha minus*, o leiaf—sydd yn gosod allan beth ydy'r gwendidau yma fel y gallwn ni gael y wybodaeth honno i'w hystyried wrth inni baratoi ein hadroddiad?

As a result of that, I'd like to ask, finally, in case I take up too much time of this committee—in this section: we have had examples from both of you of specific reservations and specific details that you're concerned about. Do you have other examples that you wish to present to us today, or—I see that David has a long essay which, I'm sure, is an alpha minus, at least—ones that set out what these weaknesses are so that we could have that information to consider as we prepare our report?

[78] **Mr Hughes:** Yes, I was speaking at an event a week or two ago about this and I was looking through the list of reservations. There are just the most ridiculous reservations in there. For example, knives are in there. So, a hypothetical cutlery Act from you would be impossible. Could you legislate for the sale of forks and spoons? Well, forks and spoons might arguably relate to knives.

[79] **Lord Elis-Thomas:** Which section is that?

[80] **Mr Hughes:** I don't have the number to hand, I'm afraid. Sorry.

[81] **Lord Elis-Thomas:** Okay. I'll find it.

[82] **Mr Lewis:** Yn Atodlen 7A y bydd o'n rhywle.

Mr Lewis: It will be in Schedule 7A somewhere.

[83] **Yr Arglwydd Elis-Thomas:** Ie, 7A.

Lord Elis-Thomas: Yes, 7A.

[84] **Mr Hughes:** We have private security. Is the control of bouncers necessary for the preservation of the United Kingdom? Similarly with hovercraft. One struggles to see any principle there whatsoever. One needs to simply look through it. You can pick your own choice of ridiculous reservations. There is one for every taste.

[85] **Lord Elis-Thomas:** Thank you.

[86] **Huw Irranca-Davies:** Thank you very much. Now, I'm just going to, at this juncture—we haven't, by the way, strayed into this territory—I'm just going to very gently flag up, in my new role as Chairman here, the Standing Orders of the National Assembly for Wales, just as a reminder to committee members to refrain from commenting on the conduct of judges in the courts of the United Kingdom in discharge of their judicial office, or discussion of individual judicial appointments. We haven't; I'm pointing that out. Okay? Very experienced members of this committee, far more experienced than me, would never do such a thing, but I'm just pointing out for my own benefit and also for new members of the committee as well. We can test the judicial boundaries but not discuss the persons who sit in those positions. Now, at that point, could I bring in one of those far more experienced members, David Melding, to take this on?

[87] **David Melding:** Thank you, Chair. I just want to talk about the necessity test. We have referred to Schedule 2, Schedule 7B, I think, as it makes provisions relating to private law, but, to us non-lawyers, it seemed here the Bill was actually making some progress in terms of—. It removes private law from necessity tests and extends the power we would have to modify criminal law. There are exceptions in terms of reserved matters of the law of England where a test of necessity would be required, but that exists in Scotland. So, you know, isn't this something we should be thankful for?

[88] **Mr Hughes:** It is, but can I give you a word of caution about it? I was reading the memoirs of a lawyer, who is a very well known in the legal profession, Michael Sherrard QC. He was talking about a case in which he was involved in which disclosure had been sought from one of the other parties. The other party didn't say 'no'. They sent a whole lorry-load of

documents round. I think there is a danger that you're going to get the equivalent here, instead of a necessity test that tells you, 'You can't do it unless it's necessary', what you've got is a whole lorry-load of things that just mean you have to plough through such a lot of things to do that the practical difference may not be that great. It's an improvement, but let's not think it's that much of an improvement.

[89] **Mr Lewis**: Yn gyntaf oll, rwy'n cytuno â chi: mae cael gwared o'r prawf angen i'w groesawu. Peidiwn ag ymddangos fel pe baem yn gyfan gwbl negyddol am y Bil yma. Mae yna bethau i'w croesawu yma. Un o'r pethau, yn arbennig, sydd i'w croesawu, os edrychwch chi ar nodyn esboniadol y Llywodraeth, neu Swyddfa Cymru, ar y Bil, mae'r siartiau llif yma sydd yn arbennig o dda ac yn help i egluro sut mae pethau'n mynd i weithio.

Mr Lewis: First of all, I agree with you that actually removing the necessity test is to be welcomed. Let's not appear to be entirely negative about this Bill. There are things that should be welcomed here. One of the things in particular to be welcomed, if you look at the Wales Office explanatory note on the Bill, you do have these flowcharts, which are excellent and are of great help in explaining how things will work.

[90] Ond mae'r prawf yn bodoli, mae wedi symud mewn perthynas â materion troseddol, ac rwy'n credu bod materion troseddol yn mynd i'r cyfeiriad cywir. Mewn materion preifat, mae yna brawf newydd wedi'i roi i mewn, fel mae David wedi sôn amdano, ac mae hynny'n drueni. Rhaid inni gofio nad oes dim prawf o'r fath yn bodoli ar hyn o bryd ar allu Cynulliad Cymru i ddeddfu mewn perthynas â chyfraith breifat—nid oes yna brawf o'r fath. Oddi mewn i libart y pwerau a roddwyd iddo, mae'r Cynulliad yn gallu deddfu heb gyfyngiad ar faterion cyfraith breifat.

But the test exists, it has moved in relation to criminal matters, and I think that that's moving in the right direction. In terms of private matters, there is a new test inserted, as David has mentioned, and that is a shame. We must bear in mind that there is no such test on the ability of the National Assembly to legislate on private law—there is no such test. Within the scope of the powers conferred to the Assembly, it can legislate without restriction on issues relating to private law.

[91] Mae'n bodoli nawr mewn dau gyd-destun. Yn gyntaf, yng nghyd-destun materion a gadwyd yn ôl, fel

It exists now within two contexts. First, in the context of reserved powers, as you said, and, in that

ddaru chi ddweud, ac, yn hynny o beth, mae'n union yr un fath â'r Alban. Mae hefyd yn mynd i fodoli mewn perthynas â materion sydd ddim yn '*apply in relation to Wales*'. Mae hwn yn dod â ni nôl at y cwestiwn o gyfraith Cymru a chyfraith Lloegr, a'r ffaith nad yw pawb yn ymwybodol ohono, sef bod Cynulliad Cenedlaethol Cymru yn gallu gwneud deddfau sydd mewn grym yn Lloegr. Mewn geiriau eraill, mae pobl yn Lloegr, yn byw yn Nottingham neu Carlisle, yn ddarostyngedig i rai deddfau Cynulliad Cymru. Mae'n beth od i feddwl, ond mae'n gywir. Mae'n un o'r problemau y mae rhai pobl wedi'i alw'n '*democratic deficit*' mewn perthynas â gallu deddfu Cynulliad Cymru.

regard, it's exactly the same as Scotland. It will also exist in relation to issues that don't apply in relation to Wales. This brings us back to the issue of Welsh law and English law, and the fact that not everyone is aware of, which is that the National Assembly for Wales can make laws that are enactable in England. In other words, people living in England, in Nottingham or in Carlisle, are subject to certain laws made by the National Assembly. It's a strange thing, but it is the case. It's one of the problems that people have described as a 'democratic deficit' in terms of the National Assembly for Wales's ability to legislate.

[92] Mae'r prawf angen wedi'i gyflwyno fan hyn; nid oes prawf cyfatebol yn bodoli yn yr Alban, achos nid oes modd i'r Alban ddeddfu gydag effaith o fewn i diriogaeth Loegr.

The necessity test is introduced here; there is no corresponding test in Scotland, because Scotland cannot produce legislation that will have an impact in England.

[93] **Yr Arglwydd Elis-Thomas:** Rwyf i wedi cael hyd i'r cyllyll, gyda llaw—adran B13, tudalen 49.

Lord Elis-Thomas: I have found the knives, by the way—section B13, page 49.

[94] **Lord Elis Thomas:** I've found the knives—page 49. You're perfectly right.

[95] **David Melding:** I'm not quite sure I understand how the provisions in relation to private law restrict what we can do to modify English law are a huge problem. I'm not quite sure what we can do that affects the good citizens of Nottingham. Is it because it introduces a more general principle that can be applied elsewhere? Why should we be worried?

[96] **Mr Lewis:** I ddechrau, mae dau gwestiwn fanna: un yn ymwneud â chyfraith breifat a'r llall yn ymwneud ag 'in relation to' a'r gyfraith sy'n weithredol yn Lloegr; nid cyfraith Lloegr achos nid yw hi'n bodoli—cyfraith sy'n weithredol yn Lloegr.

Mr Lewis: Well, first of all, there are two questions there: one in relation to private law and the other in terms of 'in relation to' and the operational law in England; it's not English law, because that doesn't exist—it is law that is operational in England

[97] O ran cyfraith breifat, mae David wedi egluro beth yw'r broblem yn y fan yna. O ran y llall, rwy'n cytuno, cyn belled ag y bod gennym ni, fel rhan o gynnal y paradocs yma, y cysyniad bod Cynulliad Cymru yn gallu deddfu gydag effaith y tu fas i'w diriogaeth, sydd yn weithredol yn y diriogaeth honno, mae angen rhywbeth tebyg; mae angen rhyw fath o gyfyngiad ar hynny. Ar hyn o bryd, y cwbl ydy o ydy *ancillary*, ond nawr, maen nhw wedi ychwanegu'r prawf yma o angen. Nid yw'n gwneud fawr o wahaniaeth yn y pen draw, ond dyna lle mae o.

In terms of private law, David has explained what the problem is in that regard. In terms of the other, I agree with you, as long as we have, as part of maintaining this paradox, this concept that the National Assembly can legislate in a way that has effect outside of its territory and which is operational within that territory, then you do need some sort of restriction on that. At the moment, all it is is ancillary, but now they have added this necessity test. It doesn't make too much difference, ultimately, but that's where it is.

[98] **David Melding:** That kind of leads me on to your views on the Secretary of State, who, when outlining this part of the Bill, said, because the necessity tests had either been highly restricted or removed, that there was no longer any great argument for a separate legal jurisdiction for Wales. I mean, I think I can anticipate your responses, but that's what the Secretary of State said. Is that a non-sequitur, or what?

[99] **Mr Hughes:** It doesn't. The Secretary of State is simply wrong. The fundamental problem with the Bill, other than the stylist problem of not starting afresh, is that it is trying to preserve something that's time has gone. It's perhaps unhelpful if people like the Secretary of State look at the single jurisdiction as a matter of principle rather than just as something that follows from the political choice that has been made to move to a reserved-powers model.

[100] I know there are often fears articulated about the move, but, if you

look around the world, (a) you see nowhere of which I am aware, in the common-law world, where you've got two primary legislatures sharing a single jurisdiction as we do. There are federal jurisdictions, but we're not one.

11:45

[101] Secondly, people worry about size. In fact, leaving aside the Indian states, and I'm not sure of the extent to which they or the Pakistani states or Nigerian states would be common-law jurisdictions as we would recognise them, it is not that Wales would be a small common-law jurisdiction; it is that England and Wales together are an exceptionally large one. England, without Wales, would be the largest common-law jurisdiction in the world, subject to those exceptions. The nearest other one would be California. Wales would be far more typical of the size of a common-law jurisdiction than England and Wales is. I think that, if we were in the United States, we would be thirtieth out of 50, leaving aside the territories, but you're still in the top 10 once you fall below the 10 million level. We're bigger, in population terms, than any of the independent states that have appeals to the Privy Council. The differences in size with the Australian states, with New Zealand, with Ireland—they're not large. If one looks around the world, the fears that people have and that one can understand are eased.

[102] **Huw Irranca-Davies**: You're nodding in agreement, Emyr—sorry, David.

[103] **David Melding**: At a conference, I put what I thought was a devastating point to a senior civil servant, and he just responded, 'You've got to learn to live with paradox.' [*Laughter.*] Does this matter? Should we be expending energy? Because there's obviously a political decision that, for whatever reason, we can't have a separate jurisdiction at the moment. Shall we just park it until people can sleep more soundly at night and grasp the inevitable eventually? How concerned should we be at this moment in time?

[104] **Mr Hughes**: We should be concerned because the problems that Emyr and I have been discussing are problems that come from this source. If you simply decide, 'We're going to bite this bullet', these problems can be dealt with much more easily. We're also, because of the events of last week, probably not going to have legislative time in Westminster to get this right again in the next 10 years. One of the characteristics of common-law jurisdictions is that we like to look for precedents, and we can find ample

precedent around the world for what Emyr and I are suggesting should be done about this. We can't find any precedent that encourages us to think that this can work.

[105] **Huw Irranca-Davies**: Mr Lewis.

[106] **Mr Lewis**: Wel, ie, wrth gwrs bod rhaid i ni fyw gyda gwrthebau. Rŷm ni'n byw mewn un paradocs enfawr ar hyn o bryd, rwy'n teimlo. Y pwynt yw hyn: beth yw effaith hynny? Ac effaith hynny yng nghyd-destun deddfu Cynulliad Cenedlaethol ydy creu cymhlethdod ac ansicrwydd ynglŷn ag yn hollol beth yw libart pwerau'r Cynulliad. Nid yw'r cymhlethdod ac ansicrwydd hynny yn bodoli yn San Steffan ynglŷn â sut ydych chi'n deddfu mewn perthynas â Lloegr. Gellid dadlau efallai'i fod e oherwydd yr *English votes for English laws*, ond ddim go iawn, ac nid yw'n bodoli i'r un graddau yn yr Alban ac yng Ngogledd Iwerddon. Felly, ie—

Mr Lewis: Well, yes, of course we have to live with paradoxes. We are living in one huge paradox at the moment, I feel. The point is this: what is the impact of that? And the impact of that in the context of legislation in the National Assembly is to create complexity and uncertainty as to what exactly the scope of the powers of the Assembly is. That complexity and uncertainty do not exist in Westminster in terms of how you legislate in relation to England. One could argue that perhaps it does because of English votes for English laws, but not in any real way, and it doesn't exist to the same extent in Scotland or Northern Ireland. So, yes—

[107] you have to live with paradox, but explain why we, the Welsh people, should be worse off as a consequence—

[108] fyddai fy ateb i. would be my response.

[109] **Huw Irranca-Davies**: Could I simply ask one supplementary to this? One of the concerns that's been raised about a separate legal jurisdiction is that we'd suddenly have a brain drain of talent flowing across the border out of Wales. What's your response to that?

[110] **Lord Elis-Thomas**: I think there's plenty left, as is evident today. [*Laughter.*]

[111] **Mr Hughes**: There are several responses. I was talking to a Northern Irish barrister about this, and she had an interesting perspective. Northern

Ireland barristers lived in a country where bombs were going off, where lawyers were being murdered—Northern Irish solicitors were being murdered. People went on the bench in Northern Ireland knowing that they were putting themselves at daily risk of assassination—they were going to have armed protection day and night. If they can do that, if their commitment to justice to the people of Northern Ireland is that good, frankly, we in Wales are nowhere near that sort of thing. If people aren't committed to providing justice services for the people of Wales, then why should we bother? I practised in Gibraltar for nearly 10 years. I know some excellent lawyers there; Gibraltar silks who would have become silks in this jurisdiction. They went back to practise in a town of 29,000 people. All right, the weather's better than in Wales. But a lot of them went back to practise when there was a closed border, when they were living under siege. So, I mean—some people would leave, but most, I suspect, wouldn't, and the ones who leave, well, how committed are they?

[112] **Huw Irranca-Davies:** Okay, thank you. David, would you like to take us on to the area of justice impact assesments?

[113] **David Melding:** Yes. I'm not sure we need to spend an awful lot of time on this, but I've read people say that justice impact assessments are rather purposeless, really, but perhaps not objectionable. Are they potentially objectionable? Could they be a constraint on our legislative powers and their scope?

[114] **Mr Lewis:** Rwy'n meddwl, o ran egwyddor, eu bod nhw yn annerbyniol.

Mr Lewis: I think, as a matter of principle, they are unacceptable.

[115] I think they're objectionable out of principle.

[116] Oherwydd maen nhw yn gorfodi'r Cynulliad Cenedlaethol i fynd drwy broses benodol wrth ddeddfu. Nid oes un ddeddfwrfa arall yn y Deyrnas Gyfunol nad yw'n rhydd i ddatgan ei phroses ddeddfu ei hun o fewn Deddf. Nid oes un. Nid oes dim byd o'r fath yng Ngogledd Iwerddon, ac nid oes dim byd o'r fath yn yr Alban. Nid oes dim byd o'r fath

Because they require the National Assembly to go through a particular process in legislating. No other legislature in the UK isn't free to actually decide on its own legislative process within an Act. There is nothing of the kind in Northern Ireland, and there is nothing of the kind in Scotland. There is currently no such provision in the National

ar hyn o bryd o fewn y Cynulliad Cenedlaethol, ac unwaith eto, nid yw'r byd wedi dod i ben o ganlyniad i absenoldeb hwn.

Assembly. Again, the world hasn't come to an end as a result of the absence of such a provision.

[117] Mewn egwyddor hefyd, byddai modd i hwn, wedi'i gyplysu gyda phwerau'r Ysgrifennydd Gwladol i roi feto ar ddeddfwriaeth Gymreig o dan adran 152 y Ddeddf 2006—fe fyddai'r ddau beth yna gyda'i gilydd yn gallu bod, o bosibl, yn niweidiol. Rwy'n gwybod bod yr Ysgrifennydd Gwladol wedi dweud yn Nhŷ'r Cyffredin na fyddai'n gweithredu'r feto. Os felly, pam ydych chi angen hwn? Nid oes rheswm drosto fo. Neu, gadewch inni ysgrifennu mewn i'r Ddeddf na chaiff yr Ysgrifennydd Gwladol ddim defnyddio ei feto dan adran 152 o ganlyniad i hyn. Wedyn, byddwn i, efallai, yn meddwl, 'Wel, mae'r peth yn ddi-bwynt, ond o leiaf mae'n saff yn gyfreithiol'.

Also, as a matter of principle, this, linked to the powers of the Secretary of State to veto Welsh legislation under section 152 of the 2006 Act—those two things together could be very damaging. I know that the Secretary of State has said in the Commons that he wouldn't implement a veto. If so, why is it needed? There is no reason for having it. Or, let us draft into the legislation that the Secretary of State cannot use his veto under section 152 as a result of this. Then, perhaps, I would think, 'Well, it's pointless, but at least it's legally sound'.

[118] **Huw Irranca-Davies**: Thank you very much. And at that point, if we can move on to Michelle, who's going to take us on to the areas of the Wales public authority, and what that might mean.

[119] **Michelle Brown**: Thank you, Chairman. Do you have any comments in relation to the definition of the Wales public authority? Do you think it might muddy the waters any more than they're already muddied? By the sound of it, they're pretty muddy already.

[120] **Mr Lewis**: Mae'r diffiniad yma yn Atodlen 7B yn ymwneud â chyfyngiad arall i'r Cynulliad ddeddfu. Mi fuaswn i'n dweud ei fod yn welliant sylweddol ar y ffordd yr oedd hyn yn cael ei ystyried o'r blaen. Yn sylfaenol, mae o'n

Mr Lewis: This definition in Schedule 7B relates to another restriction on the Assembly's ability to legislate. I would say that it's a significant improvement on the way in which this was taken into account previously. Fundamentally, it

rhwystro'r Cynulliad—y prif ran—rhag newid swyddogaethau rhai mathau o gyrff cyhoeddus, ac eithrio '*Welsh public authorities*'. Mae yna restr ohonyn nhw, ac mae yna ddiffiniad sydd yn eithaf eang. Mae'n ychwanegu at y cymhlethdod, ond rwy'n gweld y rheswm pam ei fod o yna. Mae o'n teithio i'r cyfeiriad cywir, rwy'n credu. Nid yw'n gystal â chael cyfraith Cymru a chyfraith Lloegr, ond mae'n teithio i'r cyfeiriad cywir.

prevents—or the main section prevents—the Assembly from changing the functions of certain types of public bodies, with the exception of 'Welsh public authorities'. They are listed, and there is a definition, which is quite broad. It adds to the confusion and complexity, but I see the rationale behind it. It is moving in the right direction, I think. It wouldn't be as good as having Welsh law and English law, but it is a move in the right direction.

[121] **Mr Hughes:** I've nothing to add to that.

[122] **Huw Irranca-Davies:** Thank you very much. David, ministerial consents.

[123] **David Melding:** Minister of Crown consents—we seem to have made progress here as well; not quite where the Scotland Act is. But should we be concerned there's still a bit of a gap, or should we just warmly welcome the fact that it's mostly been sorted out, it seems to me?

[124] **Mr Lewis:** Wel, unwaith eto, mae hwn yn rhywbeth sydd yn deillio o'r cysyniad o Gymru a Lloegr fel un endid. Fel rydych chi'n ei ddweud, mae Deddf yr Alban yn llawer symlach, a dyna, yn wir, a wnaeth y Cynulliad Cenedlaethol alw amdano. Mae gennyf fan hyn y llyfr ardderchog, 'Constitutional Law of Scotland' gan Alan Page, lle mae o'n dweud:

Mr Lewis: Well, once again, this is something that emerges from this concept of England and Wales as a single entity. As you say, the Scotland Act is far simpler, and that, indeed, is what the National Assembly called for. I have here the excellent book 'Constitutional Law of Scotland' by Alan Page, where he states:

[125] 'The Scottish Ministers, like their UK counterparts, exercise a mixture of statutory and common law functions. The functions derived initially from the Scotland Act 1998 ("the Scotland Act"), s. 53 of which transferred existing ministerial functions to the Scottish Ministers "so far as they are exercisable

within devolved competence".'

[126] Dyna'r cwbl mae'n ei ddweud—dyna'r cwbl sydd yn yr Alban. O fewn Cymru, oherwydd y cysyniad yma o '*England and Wales*'—yr un gyfraith sydd i gael, ac un diriogaeth gyfreithiol sydd i gael—oherwydd hynny, mae gennym ni gymhlethdod ar ben cymhlethdod eto. Mae'r sefyllfa yn sicr yn fwy—. Mae yna fwy o *leeway* a llai o *lock* yma nag oedd o dan y Bil drafft, ac y mae hynny i'w groesawu, ond mi fuaswn i'n dweud mai'r hyn y mae'r Cynulliad yma wedi galw amdano fo ydy rhywbeth sydd jest yn trosglwyddo pwerau gweithredol i Weinidogion Cymru heb orfod mynd trwy ormod o'r *flow charts.* That's all he says—that's all there is in Scotland. Within Wales, because of this 'England and Wales' concept—that there is one law and one legal territory—as a result of that, we have complexity upon complexity. The situation—. Certainly there is more leeway and less lock here than there was under the draft Bill and that is to be welcomed, but I would say that what this Assembly has called for is something that simply transfers executive powers to Welsh Ministers, without having to go through too many of these flow charts.

[127] **Huw Irranca-Davies:** Thank you. Michelle, would you like to take us on to clause 51?

[128] **Michelle Brown:** Yes. I'd just like to ask the witnesses what their views are on the operation of clause 51 and, in particular, whether you think that it's in some way going to undermine the capacity of the Assembly to legislate for the future, because it seems to be that the Secretary of State can come along and modify Assembly Acts and Measures without the consent of the Assembly. So, what are your comments on that, please?

[129] **Mr Lewis:** Mewn egwyddor, rydych chi'n iawn. Rwy'n gweld bod yr Athro Thomas Watkin wedi rhoi tystiolaeth fanwl i chi ar hwn y tro diwethaf ichi gwrdd, ac rwy'n credu bod ei ddadansoddiad o'n ardderchog. Nid oes gen i ddim byd i'w ychwanegu at hynny, ac eithrio dweud efallai fod angen sicrhau, fel rwy'n credu y dywedodd yr Arglwydd **Mr Lewis:** In principle, you are right. I see that Professor Thomas Watkin gave you detailed evidence about this the last time you met and I think that his analysis is excellent. I have nothing to add to that with the exception of saying that perhaps we need to ensure, as Lord Dafydd Elis-Thomas said during your last session, that there is space for the

Dafydd Elis-Thomas yn ystod eich sesiwn diwethaf chi, fod yna ofod i'r Cynulliad yn y broses yma, neu i Weinidogion Cymru yn y broses yma, yn ogystal â'r Ysgrifennydd Gwladol.

Assembly in this process, or for Welsh Ministers in this process, as well as the Secretary of State.

[130] **Huw Irranca-Davies**: And Lord Dafydd Elis-Thomas, these are interesting times that we live in. I think you might have a question related to that and what might mean to us.

[131] **Yr Arglwydd Elis-Thomas**: Rwy'n ddiolchgar iawn i David Hughes am gyfeirio at ei brofiad yn ymarfer y gyfraith ar dir mawr Ewrop. A gaf fi ofyn felly iddo fo os oes ganddo fo ac Emyr sylwadau ynglŷn â'r effaith cyfansoddiadol? Nid wyf yn gofyn am effaith gwleidyddol rŵan, ond effaith ar gyfraith gyfansoddiadol y penderfyniad a wnaeth pobl Cymru a gweddill y Deyrnas Unedig, ac eithrio Gogledd Iwerddon a'r Alban—a Llundain a Gwynedd a Chaerdydd, a rhai llefydd eraill. [*Chwerthin.*] Beth ydy'r effaith gyfansoddiadol? Er enghraifft, fe ellid dadlau, os oes yna drosglwyddo grymoedd deddfwriaethol o gyfraith Ewropeaidd i'r Deyrnas Unedig, y dylai pob pŵer, er enghraifft, sydd wedi'i ddatganoli'n barod, neu bwnc sydd wedi'i ddatganoli'n barod, megis amgylchedd, amaethyddiaeth a physgodfeydd—llefydd lle nad oes bellach gyfraith Brydeinig gan ein bod ni'n gweithredu yn ôl cyfraith Ewropeaidd yng Nghymru ac yn weddill y Deyrnas Unedig—y dylai'r grymoedd yma ddod yn syth i fan hyn.

Lord Elis-Thomas: I'm very grateful to David Hughes for referring to his experience in practising law on the European mainland. May I ask him therefore if he and Emyr have any comments regarding the constitutional impacts? I'm not asking about the political impact, but the constitutional impact of the decision of the people of Wales and the rest of the United Kingdom, with the exception of Northern Ireland and Scotland—and London and Gwynedd and Cardiff and some other places. [*Laughter.*] What is the constitutional impact? For example, one could argue that, if there is a transfer of legislative powers from European law to the United Kingdom, every power, for example, that has been devolved already, or every subject that has been devolved already, such as environment, agriculture and fisheries—areas where there is no British law because we're operating European law in Wales and in the rest of the United Kingdom—should come straight here.

[132] **Mr Hughes:** I think we need to—. Was it Mao who, when asked about the impact of the French Revolution, said that it was too soon to tell? That is obviously the case here. I think what we need to have in mind is that the idea that anything is settled now is out the window. If we understand that and we understand that the next 10 years are likely to be very, very legislatively clogged up, those are the things we need to have in mind.

[133] The second thing we need to understand is that, assuming that whatever form our leaving takes, if that's what happens, there would be such a vacuum created by abolishing the European law that applies in this county that it is very hard to see how leaving does not take the form that everything that applies now continues to apply until Parliament says otherwise. It's more a political than a legal judgment about transferring things that are subject to European competence now to Wales.

12:00

[134] You will have gathered from the things that I've said before that my personal approach would be to have an expansive approach to legislative competence in Wales, but that's a personal rather than a legal view. What recent events also teach us is the virtue of clarity and the virtue of certainty, and this Bill offers neither clarity nor certainty.

[135] **Lord Elis-Thomas:** Well, before I go back to bed, I'll ask Emyr— [*Laughter.*]

[136] A oes gennyt ti sylwadau pellach?

Any further comments on that?

[137] **Mr Lewis:** Wel, fel mae'n digwydd, mae'r Athro Jo Hunt, yng Nghanolfan Llywodraethiant Cymru Prifysgol Caerdydd, a chydweithwyr, wedi bod yn edrych ar y cwestiwn yma o sut mae cymwysterau deddfu ac eraill y Gymuned Ewropeaidd—sut byddai'r rheini'n mapio ar y setliad datganoli. Byddai'n werth i chi efallai ofyn iddi hi i roi tystiolaeth i chi. Ond, mae hynny yn cymryd yn ganiataol mai'r hyn sy'n digwydd yw,

Mr Lewis: Well, as it happens, Professor Jo Hunt at Cardiff University's Wales Governance Centre and colleagues have been looking at this question of how legislative and other types of competence in the European Union would map on to the devolution settlement. It may be worthwhile if you were to take evidence from her. But, that does make an assumption that what will happen is that, tomorrow, there will

yfory, nad oes dim cyfraith Ewrop yn bodoli dim mwy ac rydym ni jest mewn rhyw fath o anarchiaeth gyfreithiol. Mae'n annhebygol mai dyna fydd hi. Mae yna drafodaethau yn gorfod bod os ydy Prydain—mae'n ddrwg gen i, y Deyrnas Gyfunol—yn parhau yn rhan o'r farchnad sengl, boed hynny'n rhan o'r EEA neu'r EFTA—wel, nid cweit yn EFTA—neu yn y gymuned—wel, fydd hi ddim yn yr Undeb Ewropeaidd—mi fydd cyfreithiau Ewropeaidd yn dal i fod yn weithredol. Mi fydd yna awdurdod y tu hwnt i San Steffan, felly, a fyddai'n dal yn weithredol, boed hwnnw'n Llys Cyfiawnder Ewrop neu lys cyfiawnder yr EEA. Felly, rydym ni mewn sefyllfa o'r fath ansicrwydd na fedrwn ni ateb cwestiwn o'r fath.

be no European law anymore and we would be in some sort of legal anarchy. It's very unlikely that that will be the case. There will have to be negotiations if Britain—sorry, the UK—remains a part of the single market, either as part of the EEA or EFTA—well, not quite EFTA—or in the European community—well, certainly not in the European Union—then European law will still apply. There will be a jurisdiction beyond Westminster that will still apply, be that at the European Court of Justice or the EEA court. So, you know, we're in a position of such uncertainty I couldn't answer such a question.

[138] Ond mae yna ddau bwynt yn codi o'r refferendwm, rwy'n credu, y dylem ni i fod yn eu gwneud, ac mae un yn ymwneud â phroses, sef y pwynt a wnaeth David: nid oes dim llawer o gyfle i gael Deddf Cymru arall yn mynd i fod, felly mae'n rhaid achub ar y cyfle i gael y Ddeddf yma'n iawn a'i chael hi drwodd. Yr ail bwynt ydy hyn—a dim ond yn ysgafn rwy'n cyffwrdd â hwn—nid mewn perthynas â phwerau, ond deddfu mewn perthynas â'r setliad cyllidol, oherwydd pan fydd y Deyrnas Gyfunol yn ymadael â'r Undeb Ewropeaidd, hyd yn oed os ydy hi'n rhan o'r EEA, nid ydy'r EEA yn gweithredu ar y ffordd o drosglwyddo arian rhwng rhanbarthau a'i gilydd er mwyn

However, there are two points arising from the referendum, I believe, that we should make, and one relates to process, and that's the point that David made: there isn't going to be much opportunity to have another Wales Bill, so we must take the opportunity and get this Bill right and get it through. The second point is this—and I've only touched lightly upon this—its legislation, not only in relation to powers, but also in terms of the financial settlement, because when the UK leaves the European Union, even if it is part of the EEA, the EEA doesn't operate on a model of transferring funding between regions in order to enable the poorer regions to receive more money.

galluogi'r rhanbarthau tlotach i gael mwy o arian.

[139] Ar hyn o bryd, mae yna rywfaint o ailddosbarthu yn digwydd drwy'r system les, fel mae pobl eraill wedi dweud, ac fel mae Richard Wyn Jones wedi sôn. A hefyd, mae'n digwydd, i raddau, drwy Barnett. Ond, rwy'n credu efallai fod yr amser yn dechrau dod inni edrych ar ble y dylid deddfu mewn perthynas â sicrhau tegwch cyllidol ar draws rhanbarthau'r Deyrnas Gyfunol—nid sôn jest am Gymru fan hyn; rwy'n sôn am y rhanbarthau eraill hefyd.

Now, at the moment, there is some redistribution through the benefits system, as others have mentioned, and as Professor Richard Wyn Jones has mentioned. It also happens, to a certain extent, through Barnett. But I do think the time is approaching when we will need to look at where we should legislate in terms of securing financial fairness across regions of the UK. I'm not just talking about Wales here, but also other regions.

[140] **Yr Arglwydd Elis-Thomas**: Jest un sylw byr ar hynny. Hynny yw, roeddwn i'n ymwybodol iawn, wrth fod yn gyfrifol am gymhwysedd deddfwriaethol, beth yr oeddem ni'n ei wneud yma—ein bod ni'n delio â deddfwriaeth Ewropeaidd, deddfwriaeth y Deyrnas Unedig, a bod rhaid i'n Deddfau ni fod yn gymwys o fewn hynny. Felly, beth sydd wedi digwydd, fel yr oedd David yn ei ddweud yn gynharach, ydy bod deddfwriaeth Ewropeaidd wedi cael ei thrawsffurfio, wedi cael ei rholio drosodd, megis, i ddeddfwriaeth y Deyrnas Unedig a deddfwriaeth Cymru, ac felly mae dad-wneud hynny'n dasg amhosibl.

Lord Elis-Thomas: Just one brief comment on that. I was very aware, in being responsible for legislative competence, what we were doing here—we were dealing with European legislation, UK legislation and our Acts had to have competence within that. So, what has happened, as David was saying earlier, is that European legislation has been transformed, has been rolled over into UK legislation and Welsh legislation, as it were, and so unravelling that is an impossible task.

[141] **Mr Lewis**: Wel, na. Mae'n bosibl, ond mae'n mynd i fod yn dasg faith. Mae yna 40 mlynedd o ddeddfu, felly mae'n mynd i gymryd 40 mlynedd arall, o bosibl, i

Mr Lewis: Well, no. It is possible, but it is going to be a long journey. There's 40 years of legislation, so it could take another 40 years for Government lawyers to undo that if

gyfreithwyr y Llywodraeth eu dad-ddeddfu, os mai dyna yw'r penderfyniad polisi, achos mewn nifer o fannau, rwy'n cymryd y byddech chi'n cadw'r deddfau beth bynnag. Ac rwyf newydd sylwi fy mod i wedi cyfeirio at Gymru fel rhanbarth. Gobeithio eich bod chi'n maddau i mi.

that's the policy decision, because there are several places, I assume, where you would retain the legislation. Also, I've just realised that I referred to Wales as a region. I hope you will forgive me.

[142] **Yr Arglwydd Elis-Thomas:** Mae Cymru'n rhanbarth deddfwriaethol Ewropeaidd yn ogystal ag yn genedl yn y Deyrnas Unedig—a ydy hynny'n iawn?

Lord Elis-Thomas: Wales is a European legislative region as well as being a nation within the UK. Is that okay?

[143] **Mr Lewis:** Diolch yn fawr am fy ngosod ar y trywydd cywir.

Mr Lewis: Thank you for putting me right.

[144] **Huw Irranca-Davies:** Thank you. You've been very generous with your time. I only have one further question, and it's the fundamental question of: if this proceeds pretty much as it is, is this—from a practical point of view, from a practising law point of view, from a statutory point of view, a constitutional point of view, ignoring the political will of the people of Wales and so on—is this durable, is it sustainable, or will we be back here sooner rather than later to do this again? This may just be a 'yes' or 'no' question. Is this a durable settlement?

[145] **Mr Hughes:** No.

[146] **Huw Irranca-Davies:** No?

[147] **Mr Lewis:** Mi bariff am beth amser, ond, os mai *durable* yw am byth, na.

Mr Lewis: It will remain for a certain amount of time, but, if durable means forever, then no.

[148] **Huw Irranca-Davies:** Well, thank you very much, both of you. Diolch yn fawr iawn—very helpful indeed. If you do have any further comments that you think we haven't covered that you'd like to send to us, please do. But, thank you very much.

[149] **Mr Hughes:** Mr Chairman, I want to add one very brief thing to the answer to the question you asked me about a brain drain, because I know this is something that has been flagged up. I would urge you to speak to lawyers in smaller places—ask the Northern Irish and ask the Irish if they're having a brain drain; ask Queensland if it's having a brain drain to New South Wales.

[150] **Huw Irranca-Davies:** Thank you very much. Thank you, both. If I could suggest we adjourn just for two minutes, just for a hiatus, in case anybody does want to stretch their legs or any other matters. Are you all okay? Shall we come back at 12.10 p.m? Just to stretch our legs.

[151] **David Melding:** I wouldn't mind taking a break.

[152] **Huw Irranca-Davies:** There we are; brilliant.

Gohiriwyd y cyfarfod rhwng 12:06 ac 12:11.
The meeting adjourned between 12:06 and 12:11.

Tystiolaeth yn Ymwneud â Bil Cymru
Evidence in Relation to the Wales Bill

[153] **Huw Irranca-Davies:** Very good. Well, good morning.

[154] Bore da i chi gyd. Good morning to you all.

[155] You're very welcome here to the Constitutional and Legislative Affairs Committee. This is our second session of the morning, taking evidence on the latest iteration of the Wales Bill that's in front of us. Thank you so much for sparing the time to come to us. We've had some interesting sessions already and I'm sure you'll add a lot to our deliberations as well. Could I perhaps ask you at the outset just to do a couple of words of introduction for the committee of who you all are? Perhaps we could start with Mr Rick Rawlings.

[156] **Professor Rawlings:** I'm Professor Richard Rawlings. I'm professor of public law at University College London. I'm a former legal adviser to the House of Lords' Constitution Committee.

[157] **Huw Irranca-Davies:** Thank you.

[158] **Professor McAllister**: My name is Laura McAllister. I'm professor of governance at the University of Liverpool.

[159] **Huw Irranca-Davies**: Thank you, Laura.

[160] **Dr Stirbu**: My name is Diana Stirbu and I am senior lecturer in public administration at London Metropolitan University. I did my PhD on the National Assembly for Wales—the move from a corporate body to a parliamentary structure—years ago.

[161] **Huw Irranca-Davies**: Very good. Thank you very much. Now, because we've got the three of you with us here, we're going to go through quite a wide range of issues. If you feel you want to add to something that somebody else has said, please do as per normal. If there's nothing more that you want to add, feel free to actually constrain yourselves as well. But if I can just begin at the outset with a broad question: in relation to this latest Bill we see in front of us, as it goes forward, is it an improvement on what we saw previously as the draft Bill? If it is an improvement, in what ways is it an improvement?

[162] **Professor McAllister**: Shall I begin on that?

[163] **Huw Irranca-Davies**: Yes, thank you.

[164] **Professor McAllister**: I think what we probably, all three of us, would say is that we'd give a cautious welcome to the new Bill in the sense that it is an improvement on the draft Bill, but it remains to be seen whether the improvements are significant enough to make this a durable and more simplified settlement for Wales. We might say that we'd give it two and a half cheers rather than three cheers in terms of recognising some changes. I guess it depends against which framework we're measuring the Bill. If we're assessing it against the tests and the reasons that Stephen Crabb, the former Secretary of State for Wales, gave for a pause in proceedings back in February, then, clearly, some of those issues have been addressed in the new Bill. However, we would respectfully make the case that we need to be assessing the Bill against a more ambitious framework than that.

[165] I feel very strongly that any constitutional change should be rooted in principle, and we still don't see any firm constitutional principles that run through this Bill. I guess, again, it depends what one's principles are, but I would suggest that they are around intelligibility and clarity, and around

accountability, which are really important concepts, and around legitimacy and autonomy for this institution. I think, against most of those principles, there are still some significant flaws.

12:15

[166] I think the other thing that I would say, before handing over to colleagues, is that we hoped that there would be some connectivity in this Bill with a lot of other significant constitutional developments that are happening across the UK, which, in fact, have been given added impetus and urgency following last week's referendum result. And still we feel there is a disconnect between some of the areas of the Bill that are really important to Welsh devolution but also very important to the constitutional map of the United Kingdom as a whole.

[167] **Huw Irranca-Davies:** Right, thank you. Mr Rawlings, would you have anything to add?

[168] **Professor Rawlings:** Yes. I would associate myself with all of that. I think, just drilling down a little bit further, I had the honour to be rapporteur for the report entitled 'Challenge and Opportunity: The Draft Wales Bill 2015', which was jointly sponsored by the Wales Governance Centre and the Constitution Unit, and I'd like to draw colleagues' attention to pages 21 to 23 of that report, under the heading 'Squeezes', where we were referring to provisions of the draft Bill that we felt had the potential to create significant adverse effects on policy development and law making in Wales. We identified three key areas. The first area was the general restrictions, and what are now I think commonly regarded as the infamous necessity tests. No doubt, as we talk further this afternoon, we'll observe that two of the four necessity tests have been withdrawn—we would like to think in part, because of that report, but, of course, because of the criticism from this committee and also, of course, the Welsh Affairs Committee. Secondly, there was the issue of occupation of legislative space. We felt that Westminster was not being sufficiently generous to Wales in terms of reservations and I think my view would be that there are marginal improvements there with an emphasis on the word 'marginal'. Then, thirdly, the so-called executive veto, ministerial consents, and there, there clearly has been some improvement, not least in terms of the development of the listing of Wales's public authorities. Clearly, there is a gain there in terms of clarity. So, on the key pressure points that we identified in that report, there has been improvement—an uneven improvement—but no doubt we will discuss that

further.

[169] **Huw Irranca-Davies**: Indeed, we will return to them. Do you to want to add anything or are you okay, Dr Stirbu?

[170] **Dr Stirbu**: The only thing that I would add is that, from a constitutional perspective, in my opinion, and I think my colleagues agree, a constitutional settlement should be also aspirational. And I think what we fail to see is a clear ambition and aspiration for the constitutional status of Wales and for how Wales will be constitutionally repositioned within the UK. So—

[171] **Huw Irranca-Davies**: Can I just test you on that? Why should a constitutional settlement be aspirational? Just explain that to me. Why shouldn't it just be practical and pragmatic?

[172] **Dr Stirbu**: Because I think constitutions send messages about what kind of politics you are conducting in a country, what kind of society you want to live in, what kind of aspirations you have for your future generations. And all these messages, symbolic or not, at declarative level or at a very technical level—I think the constitution should go further than just technical and legalistic expressions of political reality.

[173] **Huw Irranca-Davies**: Okay. Thank you very much.

[174] **Professor McAllister**: If I may, Chair, just to add to that? I think it relates to the durability argument as well because there has to be some headroom in a Bill of this kind that will become an Act to avoid the constant revisiting of a piece of legislation the equivalent of a Wales Act every three to four years.

[175] **Huw Irranca-Davies**: Yes, okay. Very good. We're going to pass on now to some questioning from Michelle Brown.

[176] **Michelle Brown**: Do you have any comments on the changes to clause 1 pertaining to the permanence of the Assembly? And do you also have—? Can I ask two questions at once?

[177] **Huw Irranca-Davies**: Yes, of course.

[178] **Michelle Brown**: Do you have any comments as well about the concept of a distinct body of Welsh law having a distinct legal jurisdiction?

[179] **Professor McAllister:** If I can take the permanence one and hand over to Rick for the other one, I think, obviously, the clause 1 is a declaratory clause in the sense that one parliament or one institution can't necessarily bind a subsequent one, but I think it's an important one, nonetheless, because it makes it clear that this institution is enshrined not just by constitutional statute but by popular legitimacy. I think the introduction of the concept of abolition is not a bad one, actually, because it's vitally important that an institution such as this becomes entrenched in popular legitimacy as much as its existence is protected by statute. Clearly, when we've looked at the clauses around abolition potential, they're not crystal clear by any stretch of the imagination. I think that requires some drilling down and more forensic analysis, but, equally, I think the principle is the right one and gives this institution the opportunity to really establish itself in the public mind and amongst the Welsh public and gain support on that basis, too. And, respectfully, again, I think that all of us have got some work to do around that in Welsh civic society as much as amongst the politicians and officials who are based here. We know that, in the last Assembly election, just a matter of weeks ago, a party that stood on the basis of abolition gained quite some support. So, we know there's work to be done on that, which, obviously, will set an agenda for the Assembly going forward.

[180] **Huw Irranca-Davies:** Professor Rawlings.

[181] **Professor Rawlings:** Right, turning then to the second part of clause 1, which is the recognition of Welsh laws provision, I'm really pleased, if I may say so, to have had that question, because I think that this a provision that, with respect, I think this committee should really focus on. I say that because I think it tells you a lot about where we are, but also, of course, in a pragmatic way, this is a provision that did not appear in the draft Bill. So, it's entirely new, and it seems to me, therefore, to be appropriate for this committee to focus very strongly on it.

[182] Can I start by saying just a little bit of backtracking as to what lies behind that provision? What I'd like to do first is to draw the committee's attention to, to place on the record, as it were, one of two documents I'd like to refer to this morning from the UK Government. This is the UK Government's response to the Welsh Affairs Committee pre-legislative scrutiny report on the draft Bill. Apologies for referring to a response to another committee, but, of course, that's the way our constitution works and this committee does not get a formal response from the UK Government, so I

have to go there.

[183] I'd like to draw your attention to a couple of points in that document, because I think they really help to explain the thinking behind this new provision. I'd like to draw your attention to page 4 of the document, where the Government is responding to the idea of having a separate or a distinct jurisdiction, a matter, of course, on which this committee has been intimately involved for a number of years. The first point I'd like to make is that the UK Government, and I quote,

[184] 'sees little to distinguish, in practice, between a "distinct" and separate jurisdiction'

[185] to which I think my response is 'oh dear'. That seems to suggest that they've not really taken on board the report of this committee, they've not taken on board the report of the Welsh Affairs Committee, they've not taken on board the report that I was involved in, called 'Challenge and Opportunity: the Draft Wales Bill 2015' and, more recently, they've not taken into account the Welsh Government's what we may call 'alternative draft Bill'. I think everybody around this table would understand the idea of a distinct jurisdiction as against a separate jurisdiction, accepting, of course, that you can have different models of a distinct jurisdiction. But for the UK Government to simply say, 'We see little to distinguish it', really just does not hold water.

[186] The second point I'd like to make is because I think this shows the level of misunderstanding in Whitehall about the devolutionary process. The point is made that actually there isn't that much difference because, and I quote,

[187] 'the quantum of Assembly law is small, and will remain small, compared to the body of law that is common to England and Wales.'

[188] Well, again, anybody who has studied this area or reflected on this area will understand that the divergence between the law that is applicable in England and the law that is applicable in Wales does not only happen because of what is done in this Assembly. It also happens because of what is done in the UK Parliament in respect of law in England. And, of course, we've all heard of English votes for English laws and so on and so forth. So, to understand this, one has to think about the double dynamic, not a single dynamic. I think it's very telling that this formal response to the Welsh Affairs

Committee makes such a fundamental error as that.

[189] Now, moving on to the second half of clause 1, the recognition point, what we have here is the rejection by the UK Government of what essentially was a compromise solution put forward by this committee, namely the idea of a distinct jurisdiction. That has gone, according to the UK Government. Instead we get this recognition of Welsh law idea. I want to put it on record that I regard this provision as a shocker. It is poorly drafted, it is lacking in substance, it is positively misleading, and it may have unfortunate side-effects. As such, it demonstrates the problems of trying to do something symbolic when you don't really want to do anything at all.

[190] Allow me to explain: the first clue is in the presentation of the clause. Members will have noted perhaps where it appears. It appears as part of clause 1, but clause 1 is headed 'Permanence'. The heading of the clause does not actually refer to the idea of the recognition of Welsh law. One is driven to the conclusion that this provision was added so late in the day that they didn't even have enough time to renumber the clauses to give it a clause of its own.

[191] Second, let us consider the purpose of this. It says:

[192] 'The purpose of this section is…to recognise the ability of the Assembly and the Welsh Ministers to make law forming part of the law of England and Wales.'

[193] Well, colleagues, if you'll excuse the vernacular, that is a statement of the bleeding obvious. Let us now compare that with the explanatory notes, which, again, I think are very telling. I would like to refer colleagues to paragraphs 24 to 26 of the explanatory notes, and, in particular, paragraph 26. I'll want to read this one out; it's a gem.

[194] 'Subsection (2) explains that the purpose of making this declaratory statement does not in any way affect the devolution boundary and in particular the fact that the single legal jurisdiction is a reserved matter.'

[195] In other words, the statement in the explanatory notes is not a statement of purpose; it's a statement of non-purpose. Then we get to the conceptual confusion that is evident in this idea of a body of Welsh law. Here, all I need to do is to echo the powerful evidence that this committee received from Professor Thomas Watkin in your first session, where he was making

the point that the way this is set up is in terms of who formally makes the law, rather than the law that is actually applicable in Wales. As such, it is confusing, it is going to be difficult to explain to people in civil society and the people of Wales at large, and it simply doesn't capture the reality of the situation.

12:30

[196] Let me give you a concrete example. I speak as somebody who wishes the UK to continue. I also speak as somebody who is a strong devolutionist and I also speak as somebody who is a taxpayer. Now, against that background, let us consider legislative consent motions. I think legislative consent motions make a lot of sense. When the UK Parliament is doing something, okay, the National Assembly could do that legislation, but it can leave it to the UK Parliament to do it through England and Wales, because what's the point of simply echoing provisions that the UK Parliament is making down here in Wales? From the taxpayer's point of view, that seems to me to be eminently sensible.

[197] But think, colleagues, about the way in which this provision cuts across this: it is Welsh law if the Assembly decides not to pass a legislative consent motion and decides, 'We'll do it ourselves'. That is to be classified as 'Welsh law'. If, however, the Assembly says, 'Oh yes, we'll do a legislative consent motion' and so the UK Parliament then does the legislation for Wales, this, according to the Bill, is not Welsh law. This is ridiculous.

[198] **Huw Irranca-Davies**: Right. Thank you. I think we might return to some of those areas as we go through, but, if we could move on now to Lord Dafydd Elis-Thomas. I'm holding back from—. Because I don't think that committees reflect ironic statements such as, 'After that ringing endorsement, we'll move on'. Lord Dafydd Elis-Thomas, take us on, please.

[199] **Lord Elis-Thomas**: What I would like to ask the three of you to comment on—the three of you have written substantial pieces of work and have reflected on the development of this institution from 1999. I was responsible, during part of that time, for making statements relating to the competence of Measures and then Bills that the Assembly was to consider and I always had this concern about those statements to try to ensure that the definition of competence was not only accurate, on which I had very substantial legal advice, obviously, but also that it was something that was intelligible to the Welsh public in what we were trying to do.

[200] Have we moved forward at all, in this latest Bill, along the trajectory that we've developed from being a corporate body upon which a Cabinet system was imposed with secondary legislative powers to where we are now, or are we indeed almost in reverse formation, as they say on Great Western Railway, where we are now in a situation where a conferred model turns into a model that is reservation with exceptions, but the exceptions again are greater than what Thomas Watkin called the other week 'the legislative space'? Isn't that where we are?

[201] **Professor McAllister**: I think there's a strong argument for that. The legal adviser to the National Assembly, Elisabeth Jones, I think summed it up very well in the scrutiny process of the draft Bill, when she talked about a reserved model from a conferred model mindset. It strikes me that that remains. It's almost like getting dressed without having a shower, you know, to put it simply.

[202] **Lord Elis-Thomas**: Well, none of us would do that, would we? [*Laughter*.]

[203] **Professor McAllister**: We hope not. But there isn't the right synergy, I think, between the way in which the reservations have been constructed and compiled from Whitehall departments. I think it takes us back to my very first point around principles. We were assured by the former Secretary of State, and I think subsequently by the current Secretary of State, that there would be a more principled approach to the compilation of reservations and that we would be clearer why reservations were made and what the implications of those were. Taking something such as teachers' pay, which I know the First Minister has raised already with the Secretary of State, it seems to me that both that area and the area of alcohol licensing has implications for the strategic policy remit of the National Assembly, in the latter case around public health, which I know is a priority for the Welsh Government in this session. And, again, I struggled, on reading the reservations and the exceptions and the implications, to understand why some of those were included and what the benefits were, either for Whitehall departments or, indeed, for this institution. And I think what we all hoped for in this Bill would be a little bit more clarity, a little bit more principle, and a little bit more acceptance of the maturity of this institution to make policy for the people of Wales without being constrained by things that don't seem to have any real powerful rationale.

[204] **Dr Stirbu:** If I may add to what Laura has said, and returning to your question of whether devolution in Wales has improved in terms of intelligibility, obviously, since 1999, there has been great progress in clarifying, at least at a structural level, especially with the move towards a parliamentary structure, who is accountable, who makes the laws and who scrutinises. However, in terms of legislative competence, it seems very strange that we are here now and almost contemplating the fact that the conferred model was very clear in what the Assembly legislative competence was, because that was explicitly written down. It was explicitly expressed, whereas now, we're moving to another type of model where the legislative competence is not explicitly written down. We have to guess it by navigating this list of reservations and exceptions. I think, overall, the move is positive towards a reserved-powers model, as long as it is made and as long as it is designed with a reserved-powers model in mind, returning back to Laura's question.

[205] With regard to the intelligibility of the framework of the proposals, I think setting the bar to whether it's more intelligible than the draft is kind of setting the bar a little bit too low. Whether it is more intelligible than the current settlement is another question, but we have to expect complexities and we have to expect some difficulty in understanding this, for two reasons. One is because of the existing clutter that was left from the conferred-powers model—and that's very difficult to get rid of—and because, obviously, of the intricacies and the barriers of the England-and-Wales legal jurisdiction, which seemingly makes this move towards a reserved-powers model very complicated in the way the reservations and the exceptions are written down. So, it is an improvement, but I don't think it's a significant improvement in terms of intelligibility.

[206] **Professor McAllister:** Just to be really specific, Chair, if I may, I think, for me—I think Thomas Watkin raised this as well—for me, it's about those additional reservations that cut across the parts of the conferred model that were 'relating to' and 'falls within' and so on, and there's a lot of that in these reservations, which I think will pose really significant problems for both Government in planning legislation and then the parliamentary side in terms of scrutinising the opportunity to make legislation.

[207] **Professor Rawlings:** On reservations, I want to start by saying that I have sympathy with the UK Government in the light of the agricultural wages case. I think the broad thrust of the agricultural wages case, to try to make the devolution settlement in Wales a workable one, was correct, but, clearly,

it raised issues around legal certainty from the UK Government's perspective, and I can perfectly well see why the UK Government wants to clear that up in moving to a reservation-based model.

[208] Again, I'd like to refer to the response to the Welsh Affairs Committee, because, picking up on what Lord Elis-Thomas said, that communication confirmed what we all know, that, quote:

[209] 'The starting point in developing the reserved-powers model was the current devolution settlement'.

[210] And, essentially, what has changed between now and the draft Bill in process terms is that there has now been some serious engagement with the Welsh Government on the crafting of the reservations—serious engagement which should, of course, have happened much earlier in the process. But I would like to suggest that colleagues reflect on the UK Government response to the report on the draft Bill from this committee, and also that of the Welsh Affairs Committee. Now, both committees suggested that the UK Government should revisit its approach to reservations in what the Welsh Affairs Committee called a second attempt, or what, in universities, we like to call a 'resit'. But crucially, the Welsh Affairs Committee, and also this committee, asked for much greater transparency in that process, and in particular the Welsh Affairs Committee asked for guidance to be published in advance about the questions that Whitehall departments should ask themselves when constructing these questions. Obviously, that would help with transparency, it would help with accountability, and it would also help to promote coherence. I have to say to colleagues that that simply has not happened. Whitehall did not publish any such guidance for revisiting the reservations.

[211] Instead, we are told not to worry. On page 4 of this document it states, and I quote,

[212] 'the explanatory notes that accompany the Bill provide a clear rationale for each reservation included in the list'.

[213] I have to say to colleagues that that is simply not true. The explanatory notes are classic explanatory notes. They say what the provision says; they do not tell you why the provision says what the provision says. So, one is forced to conclude that either that statement is deliberately misleading, or that the author of that response to the Welsh Affairs

Committee had never actually seen the explanatory memorandum accompanying the Bill.

[214] **Huw Irranca-Davies:** Thank you. Could I just extend this line of questioning a little bit further? I wonder what your views, as a panel of witnesses, are on the reservations that refer to the 'subject-matter' of particular Acts? I'm looking at the moment—here in front of me we have on page 71, section M3, clause 182, registration of agricultural charters and debentures, and it refers to

[215] 'the subject-matter of sections 9 and 14 of, and the Schedule to, the Agricultural Credits Act 1928'.

[216] In terms of this discussion and the issues of, as Lord Dafydd Elis-Thomas has raised, the legibility of this, and transparency and clarity, what are your thoughts on this question of subject matter?

[217] **Professor Rawlings:** I think, if I may say so, Chair, your question has given us the answer. The very fact you've asked the question makes the point. It is clearly going to be very difficult, right, for people to understand what is covered by that kind of formulation. And I do think there is a broader point to make here, that, yes, at one level, the devolution settlement that we arrive at is going to be worked through by the Governments on a day-to-day basis, we hope in a suitably collaborative and co-operative way. But, by definition, the settlement has to be worked to by all of the rest of us. We will be governed by it in Wales. Public authorities need to know where they stand. Civil society needs to know where it stands. Lawyers giving advice to clients need to know where they stand. And that kind of provision does nothing for that understanding.

[218] **Huw Irranca-Davies:** Okay, thank you.

[219] **Professor McAllister:** I think as well it's worth saying that we have to be really clear that reducing the list of reservations does not necessarily create more clarity or space for legislative competence—going back to Lord Elis-Thomas's comments—because unless there is absolute tightness around the reservations that generates clarity, in essence, they can make the whole settlement more opaque, rather than less.

12:45

[220] **Huw Irranca-Davies**: Right, thank you. At this point, David, we're going to come across to you for the next line of questioning, if we may.

[221] **David Melding**: You did say earlier that there are improvements on the draft, and I think reference was made to the necessity tests, which now only remain in terms of law relating to England—I know it's difficult for me as a non-lawyer to talk about this, because there isn't really English law; I suppose I mean England-and-Wales law that's a matter for Parliament, but we may need to change some of it—and then on reserved matters. Is this a huge advance? Do you think it really has clarified the situation by just retaining, really, necessity? Certainly in one of the areas where it's retained, it reflects what happens in Scotland, but in terms of criminal law and private law, it's now really moved on and given us good clarity.

[222] **Professor McAllister**: Let me start, and I'll hand over to Rick then. I still have concerns that, whilst the necessity tests have gone in relation to private and criminal law by and large, they still seem to be those two areas that are more restrictive than in Scotland. You referred to reserved matters and cross-border issues, and I think, in relation to cross-border issues, that does set some alarm bells ringing for me, because apart from the realities of us having a long and porous border with England, we would wish to see some real rationale and principle behind why necessity tests would need to be applied generally to all of those cross-border issues, rather than to some very specific ones. I don't know if Rick's got any harder evidence on that.

[223] **Professor Rawlings**: Well, I wanted to broaden it out a little bit. It seems to me that there are real improvements around the issue of private law and criminal law. It seemed to me right from the outset that we could not have a National Assembly for Wales that could make, perhaps, the best environmental legislation in the world but was unable to give that environmental legislation teeth, whether it was through a proper use of the criminal law, or by giving people rights and obligations to enforce in private law. Likewise, landlord and tenant, and you can multiply across. And I know, Mr Melding, under your chairmanship, CLAC was very strong on that opint. So, I think there are real improvements there. But, I think it's important to reflect on the linkage here back to the previous points I was making on jurisdiction.

[224] I was reading the Second Reading debate on the Bill, and I thought that perhaps one of the most striking comments that was made by the Secretary of State was when the Secretary of State argued that, because we

had shifted on the two necessity tests in this area, that in some way diminished the argument in favour of a distinct jurisdiction. Now, I know that the committee asked—I think it was you, Chair, who asked—Professor Watkin about this, and Professor Watkin rightly made the point that, of course, there are other considerations in place, such as the language. But, I would like, if I may, just to tackle this head on. For once in my life, I find that I'm in agreement with the Ministry of Justice. Let us go back to the draft Bill. We learned in the draft Bill that the Ministry of Justice clearly thought that the necessity tests for private law and criminal law were required in order to provide, I believe the phrase was, 'general protection' for a unified legal system. I understood that rationale. That could not stand on grounds of democratic principle, in terms of the effects on the National Assembly, and legal certainty—how would one work a necessity test? They had to go. Roll it forward: we now have a situation where that project has failed. Those necessity tests have gone, but the logic of the Ministry of Jutice's argument is still there, that, over time, there will be more and more divergence in the area of private law and criminal law because of the removal of the necessity test. And, therefore, far from diluting the argument for jurisdiction by getting rid of the necessity tests, it seems to me, not in the long term, but in the medium term, it will actually drive the argument for a distinct jurisdiction. So, I want to place on record that I think the Secretary of State has got that the wrong way round and that I cite in confirmation of my opinion the UK Government's Ministry of Justice.

[225] **Huw Irranca-Davies:** Content with that? Yes, okay.

[226] **David Melding:** Then, there's this issue of the justice impact assessments, which, from what we've heard from other witnesses, and even from what the UK Government seems to be saying, don't have a very obvious purpose. But are we missing something? They may be largely redundant in the scheme of things in terms of their practical effect. Well, can we safely assume that? Or should we be aware of grimmer implications in the concept of having justice impact assessments?

[227] **Professor McAllister:** I struggled, with the concept of the justice impact assessments, to try to decipher what their value would be, especially as I think the Secretary of State made it clear that they weren't to be used in a veto capacity. I'm conscious that the Presiding Officer has also made it clear that your own Standing Orders here allow for assessments of implementation and implications from legislation and so on. So, it does seem to me that—I would struggle to find any real purpose or value in those justice impact

assessments.

[228] **Professor Rawlings:** I think, Chair, you asked Professor Watkin a question about this in his evidence session, and you rightly pointed out that the Secretary of State had given ministerial assurance in the House that it would not be used for veto purposes. When I read that, I was reminded of my work as legal adviser to the House of Lords' Constitution Committee and the members on the Constitution Committee were always very firm about this kind of point. Ministerial assurances are no substitute for what is stated on the face of the legislation. Policy changes and Ministers come and go, governments fall and governments come into being. If one doesn't like the idea of justice impact assessments, one should get them out of the Bill, not rely on ministerial assurances about the way in which they may or may not operate in the future. Just building on that a little bit: I echo Laura's point about this being essentially covered by Standing Orders. It should essentially be a matter of inter-governmental co-operation. Let's be clear; this is essentially about money and potential costs for the UK Government of provisions in Welsh legislation. This should be determined in the usual way, as happens on a regular basis between the different governments in the United Kingdom. The Presiding Officer is absolutely right: there is a basic issue of constitutional principle here. It is not for Westminster to tell the National Assembly what should be in the National Assembly's Standing Orders, save in core matters like the requirement to have an auditor and so on and so forth. She is absolutely right about that. It cuts against—doesn't it—other excellent provisions in the Bill where we see the cutting of the umbilical cord, as it where, that was first there in 1998 with the Secretary of State having rights of access in terms of the Assembly and so on and so forth. So, this actually is a little provision, but it is a provision that cuts against the appropriate constitutional status of the National Assembly. So, the way I would put it is this—and, again, I stress that I'm speaking, if you like, from a unionist and a devolutionist perspective—this provision, to me, is cack-handed. It is an irritant and it reflects a petty approach. This is precisely the kind of provision that, from a unionist perspective in particular, you just don't want to include in devolution legislation. Get it out.

[229] **Huw Irranca-Davies:** David, if I could just take it on from there. Aside of the constitutional propriety of this approach that's outlined in the justice impact assessments, the Secretary of State's response to Jonathan Edwards MP in the Commons was categorical:

[230] 'No, there will be no veto arising out of the justice impact

assessment'.

[231] Your point was well made in terms of the reliability of ministerial assurances compared with what is written on the face of statute, I quite understand that, but is there anything technical, aside of the constitutional issues, within this that we should be worried about that the Secretary of State or somebody else could, indeed, effect a power of veto?

[232] **Professor Rawlings**: You have to tie this, don't you, to the powers of intervention in the Government of Wales Act 2006, which are being, essentially, replicated but subject to the introduction of a reserved-powers model in the Bill. The Secretary of State does have powers of intervention to prevent the National Assembly doing things if the Secretary of State doesn't like them.

[233] **Huw Irranca-Davies**: So, your extrapolation is that, regardless of his assurance and what may be in this particular iteration of the legislation, when you couple that with already long-standing statute, he could well interpret a justice impact assessment to say, 'I'm now going to have step in, I'm afraid'.

[234] **Professor McAllister**: Yes.

[235] **Professor Rawlings**: I can't tell you that that is going to happen and, of course, I respect the ministerial assurance that the Secretary of State has made. I don't, in any way, doubt the veracity of the Secretary of State, but it goes back to my House of Lords constitution point, which is that one government cannot speak for another government down the road. The way in which you produce clarity and security, as it were, is not to have this kind of provision in the Bill in the first place.

[236] **Huw Irranca-Davies**: Thank you. Michelle.

[237] **Michelle Brown**: I'd like to move on to clause 4, please. Do you have any views on the clarity of the definition of 'Welsh public authority' in the Bill? Do you foresee any practical difficulties or any undermining of the Assembly's ability to legislate?

[238] **Professor McAllister**: I haven't got a great deal to say on that other than I think the new definition of public authorities is stronger than the one that was contained in the draft Bill. Having re-read it and looked at some of

the evidence that I think was set out in the letter from the Presiding Officer to the Secretary of State, there was a suggestion that not all relevant public authorities are listed in that Schedule, and I think that's something that needs greater attention, because, clearly, it would pose difficulties if the list is added to incrementally as we progress rather than getting some proper clarity over that at the very outset of the process.

[239] **Dr Stirbu:** I think it does add a bit more clarity to the draft Bill. I remember that, when we were scrutinising the draft Bill, everybody was really concerned about the definition of what is a Welsh public authority, so this is a welcome addition. The fact that that list of Welsh public authorities is open, or that you can add to it, is also welcome, but it needs a little bit more clarity in terms of really identifying all the organisations that would fit under that.

[240] **Huw Irranca-Davies:** Okay. Thank you.

[241] **Professor Rawlings:** There is one thing—[*Inaudible.*]—that I think the committee might like to push a little bit on. The test is set out in 157A(2)—it's a double channel, isn't it? You either pass the test or you can be listed as a Wales public authority. One assumes that they've gone down the list route, because perhaps there are public authorities that don't quite fit the general test, and that's interesting.

13:00

[242] I think the committee might like to compare the wording of 157A(2) with the wording of 157A(5)(b)(i). Let me try and explain that for you. The standard test is:

[243] 'A public authority meets the conditions in this section if its functions are exercisable only in relation to Wales.'

[244] That's the first limb of the test. Then it must also be:

[245] 'wholly or mainly functions that do not relate to reserved matters.'

[246] When you look at the test for additions for new ones, the test is actually different. The test is:

[247] 'Her Majesty may, by Order in Council, amend…so as to add or substitute a public authority whose functions…are exercisable wholly or

mainly in relation to Wales'.

[248] So, the original test is: 'only in relation to Wales'. The test for change is:

[249] 'wholly or mainly in relation to Wales'.

[250] I would have thought—. I've looked at the explanatory memorandum; it's not clear to me why the wording is different, but the wording is different. In other words, it seems that there is a greater capacity to bring in public authorities when you get to the Order in Council stage than you have initially, which causes me to question why we do not have that more generous approach first up. All I can do, colleagues, is present that point to the committee and suggest that the committee might seek clarification on that point.

[251] **Huw Irranca-Davies**: Very helpful, very helpful. David, would you like to take us on?

[252] **David Melding**: Yes. Another area of the Bill that does seem to have advanced is that on ministerial consents. It doesn't quite take us to the position of the Scotland Act 1998, but is that one of the areas where you'd give it two and a half cheers, Laura, which you referred to earlier, or should we return to this and say, 'For heaven's sake, let's just complete the job and follow the Scotland Act model'?

[253] **Professor McAllister**: I think this does fit very well within my initial comment about the qualified support for the Bill, but it strikes me that a clearer model would still be the Scottish approach. I fail to see, again, the principles behind the eliminations from the complete Scottish model, and I just think that, in terms of clarity and intelligibility, again, a clearer cut model based on the Scotland Act would resonate better against all of those principles, really, than the one we see set out in this Bill.

[254] **Huw Irranca-Davies**: Okay, fine. Very good. In which case, Michelle, clause 51 is an area of interest.

[255] **Michelle Brown**: Thank you. Clause 51 is quite interesting. It seems to give the Secretary of State the power to amend Assembly Acts and Measures. What are your views on that? And do you think that undermines the capacity of the Assembly to legislate firmly for Wales, without the Secretary of State

sailing in and altering what we've done?

[256] **Professor Rawlings:** I would like to see that clause amended in 51(7) so that the consent of the Assembly is required for the exercise of that power. That seems to me to be a more appropriate approach in the evolving constitution in which we live.

[257] **Huw Irranca-Davies:** So, to clarify, amending that so it's the consent of the Assembly.

[258] **Professor Rawlings:** Yes. At the moment, the statutory instrument is to be approved by the resolution of each House of Parliament. So, in other words, what the Secretary of State does is checked by both Houses of Parliament, and that's clearly appropriate, but it seems to me not to go far enough. It seems to me that one would need to gear this to situations where the legislation that was being effected was a Measure or Act of the National Assembly for Wales because 51 can bite in two rather different situations: where there's an Act of Parliament or where there's a Measure or an Act of the National Assembly for Wales. I would certainly think that where the Secretary of State is making consequential provision in relation to a Measure or Act of the National Assembly for Wales, it should be part of the constitutional settlement, as it were, that that requires the consent of the Assembly.

[259] **Huw Irranca-Davies:** Now then, we live in very interesting times—we are blessed in that way—and I believe that Lord Dafydd Elis-Thomas might want to explore that and the implications for this.

[260] **Lord Elis-Thomas:** Yes, clearly, I want to ask about your views on the effect of recent events in the United Kingdom and in Wales and Scotland and Northern Ireland and, of course, Gwynedd and Cardiff and other places that voted in a different way, on the whole question of the repatriation of powers from the European Union to the United Kingdom, if and when that happens. I'm thinking in particular of the areas of policy where there are very few reservations in the Wales Bill, such as environment policy, agricultural policy and fisheries policy. Indeed, one could argue that there are no British policies in this area now because they're currently European, but if they're no longer to be European, shouldn't they all come here? And the answer is 'yes'. [*Laughter.*]

[261] **Professor Rawlings:** This is a kind of a PhD question, isn't it really, and

things obviously move as we speak? I was thinking about this and I've tried to address this on a series of levels. Clearly, the narrowest, strictest legal view is that there are certain provisions in the Bill, as it currently stands, which will need revisiting now or at some point in the future. Obviously, I'm operating here on the basis that some form of Brexit, however that is defined, goes ahead.

[262] Clearly, clause 18 on Welsh Ministers' powers to operate under section 2(2) of the 1972 Act would have to go, if there isn't a 1972 Act; likewise, and most obviously, the general restriction on competence—that, of course, the Assembly and Ministers too can't operate incompatibly with European Union law. Obviously, that needs revisiting. So, that's the first bit.

[263] The second bit, I think, is the one that you were tackling, Lord Elis-Thomas. Clearly, there are fields—fisheries, environment and agriculture—where, if those powers were to be repatriated to the UK because, largely, they are the subject of EU legislation, we would have to have a very thoroughgoing conversation as to how those powers should then be divided between central Government and the devolved Governments and, in turn, that raises questions that Laura and Diana would be much better placed to address than I am in terms of institutional capacity. It also raises, of course, issues of fair funding, the Barnett formula and the basis on which that transfer of powers would operate. Again, clearly until we see what form of Brexit we're actually talking about, which is the subject of presumably the negotiation, one can't come to a firm conclusion on that.

[264] The third level that I've thought about is process. It seems to me that, if I may say so, this committee is now awkwardly placed. As colleagues will know this morning, it is clear that this Bill—the current Wales Bill—is going to be hurried through Parliament, or shall we say at least the House of Commons. We are now talking about completing committee stage in the next fortnight and we could be talking about Report and Third Reading before Parliament breaks up for summer. Of course, it's not for me to say how this committee should proceed, but I do think the committee has to take that on board very seriously—about how the committee now goes forward with its deliberations and its report. There is going to be a serious problem of scrutiny with the Wales Bill in the light of what has been happening all around us.

[265] The fourth one: durability—Laura's already mentioned this. I think colleagues will have got the impression already that I don't think the Wales

Bill is durable, because of the signal failure to deal with the key infrastructure foundational question of jurisdiction. But, in addition, it is hard to conceive how the—. Well, it cannot be conceived. If Brexit is actually going to happen in some form, of course we will have to revisit the Welsh devolution settlement very soon after the passage of the Wales Bill—assuming that the Wales Bill is passed, and that we don't have a general election and the whole legislation falls anyway.

[266] And then lastly, Brexit is bound to prompt further questions about the whole make-up of the United Kingdom. Indeed, looking at my mobile phone just before I came in, I see that the First Minister has already gone back to his suggestion of more federal thinking for the United Kingdom—of course, the topic that Mr Melding has written excellently on—and all this is going to be back in play, given Scotland and there are real issues around Northern Ireland. It's Laura's point about connectivity, isn't it? We in Wales are going to be part of that broader discussion. There is no escape, nor should there be escape from that.

[267] **Professor McAllister**: I think Rick has said a lot of what I would say there. The only addition, I think, is around this concept of subsidiarity. I've struggled to see why there's been such resistence to the concept of subsidiarity in terms of the thinking around the Bill, but that isn't communicated in the Bill. For me, subsidiarity can be a really important principle around the union as much as it can around devolution. So, it strikes me that, in the midst of the discussions that Rick has alluded to there, it's right and proper to expect the principle of subsidiarity—i.e. appropriateness of decision-making competence—to come back in the frame around these discussions over the future constitution of the UK. I think it's really important, from my own point of view, that we put on record that the concept of subsidiarity is actually one that can benefit the union as much as it can benefit the devolved institutions.

[268] **Dr Stirbu**: Just to add to Laura's point, I would like to go back to the principle of the approach to the constitution and the importance—probably more than ever—of constitutional rigour. We haven't seen this in the way devolution has progressed in the UK. I think, within the current context, the territorial recognition of constitutional differences is very important, but we seem to have this bilateral recognition inter-institutionally. So, the Bill now recognises the permanence of the National Assembly and uses this inter-institutional commitment from the UK Government and Parliament towards the National Assembly and the Welsh Government, whereas I think what is

needed is for the UK Government to recognise the multinational status of the UK. And the other point I wanted to make was on—whatever constitutional debates and whatever constitutional changes are going to happen, they need to take into account this multinational status of the UK.

13:15

[269] The other point I wanted to make was on the message that the Wales Bill is transmitting. What is it saying, at the end of the day? It's saying that we're recognising the permanence of the National Assembly and that is empowering the Assembly, and on the other hand it's saying: what we're actually recognising is a body of England-and-Wales law to which the National Assembly and the Welsh Government are contributing. It's saying about empowering, but on the other hand it tries to put in unnecessary restrictions, such as the justice impact assessments. So, there are very contradictory messages here. My question is: was Wales truly at the heart of this Bill, or was it just a wholehearted expression of the political reality of today?

[270] **Lord Elis-Thomas**: May I ask just one question on that, very quickly? There is an argument, which I put earlier in our scrutiny sessions in this committee, that if this is resiling from, in a sense, where we were in 2006, and especially when, after 2006, it was implemented by the referendum of 2011, isn't that going against the express democratic will of the people of Wales in that referendum, in that they voted for more law-making powers and didn't get it?

[271] **Dr Stirbu**: There is a good argument there. I think, because the message in the Wales Bill is not very clear—what is the focus and who is truly at the heart of this Bill—you can make that argument. I think I'll stop there with my assessment.

[272] **Professor McAllister**: I think that the Bill has a lot of the hallmarks of a lack of mature partnership and a lack of acceptance of the trajectory of devolution that you allude to there, Dafydd, from the 2006 Act to the referendum to what's happened subsequently. I think that's disappointing, and I think it's anachronistic. It reflects a kind of oddity in mindset that is not in tune with a lot of the zeitgeist, let's say, politically in Wales at the moment.

[273] **Huw Irranca-Davies**: Right. Now, I'm going to ask you, in a moment,

whether you have anything else you want to add before we conclude this session, but you've already, all three of you, firmly answered the issue over the durability of this. In your strong opinion, it is not durable; we'll be back here sooner rather than later. Could I ask you, if this Bill progresses pretty much as it is, without any major changes to the issues over reservations and so on—you, Professor McAllister, at the very beginning, said that you gave this a two-and-a-half out of three cheers—but if it goes as it is, is this a step forward, on balance, or is this a risk to where we currently stand with the devolution settlement?

[274] **Professor McAllister:** Well, for me, it's a step forward from a very poor base, which was what I was alluding to when I raised the issue of comparability with the draft Bill. I think there remain too many significant problems within it for any of us to say with any certainty that this can survive and make a workable settlement for Wales either in the short or medium term.

[275] **Huw Irranca-Davies:** But would it make it worse as it stands?

[276] **Professor McAllister:** It has the potential to make it worse if key parts that we've referred to in our evidence today are not addressed.

[277] **Professor Rawlings:** I agree with that assessment.

[278] **Huw Irranca-Davies:** Is there anything you'd like to add at this moment?

[279] **Dr Stirbu:** No, thank you.

[280] **Professor Rawlings:** I do.

[281] **Huw Irranca-Davies:** You do. Please do.

[282] **Professor Rawlings:** If I may, Chair.

[283] **Huw Irranca-Davies:** Yes, indeed.

[284] **Professor Rawlings:** I'd like to take us back once again to jurisdiction. Colleagues will have read the Second Reading debate, and colleagues will note that both the Secretary of State and the junior Minister laid great emphasis on the fact that, going along with the legislative package, Whitehall

would be establishing a justice in Wales working group. It seems to me that this committee needs to be thinking about this committee because it is very much part of the package. I simply have to draw attention to the terms of reference:

[285] 'To provide clear and efficient administrative arrangements for justice in Wales that fully reflect the distinctiveness of Wales and the distinct body of Welsh law within the England and Wales justice system.'

[286] Now, clearly, a cynical approach would be to say that this is just window dressing and that, clearly, the UK Government is under pressure to be seen to do something in relation to Wales and the justice system and this is just part of it. I'm going to not take that view. I'm going to take the Ministers at their word that this is a serious enterprise and that we should approach it accordingly.

[287] On that basis, I want to draw colleagues' attention to a number of features about that committee. I believe that you have the paper in front of you that sets out the terms of reference. This is publicly available now on the UK Government website. Firstly, I'd like to draw attention to the membership of the committee. It is a bog-standard Whitehall officials group. The change, of course, is that it has been suddenly thrown into the public domain, but it has a membership that all colleagues who are familiar with the internal workings of the UK governmental system would recognise instantaneously as an officials group. Let us consider. The first point to make is that it's notable, though, that it includes, it is said, officials from the Welsh Government. That is perhaps surprising because, if you were to look again at the other document I placed in front of the committee this morning, namely the response to the Welsh Affairs Committee, the references to this group quote 'engaging' with the Welsh Government. So, we seem to have a situation where there are officials on this group from the Welsh Government, but, at the same time, this group is engaging with the Welsh Government, which is interesting.

[288] I want to emphasise a further point. Because it is an officials group, excluded are all elements of civil society. There is no representation from the professions, the bar, solicitors, CABs, consumer groups, universities, et cetera, et cetera, in a committee that is following this very wide objective. I would like to suggest to the committee that that just cuts across the whole idea of the spirit of devolution in Wales.

[289] I'd also like to draw attention to the reporting lines. One reads that:

[290] 'The group will provide regular progress reports to the Secretary of State…and the Lord Chief Justice.'

[291] It makes no reference to reporting to the First Minister. How can we have a committee on which there are said to be Welsh Government officials that does not report to the First Minister?

[292] I'd then like to draw attention to the idea of stakeholder engagement. We read that:

[293] 'The group will consult relevant stakeholders…focusing on those who administer justice in Wales and the recipients of those services.'

[294] There is no reference to a website. There is no reference to public meetings. There is no reference to consultation reports. How then is this engagement to take place, absent all those features?

[295] So, in short, what I'd like to suggest is that the committee could usefully reflect and probe further on the role and situation of that committee, which, as I said, the Secretary of State and the junior Minister in the Second Reading put such emphasis on. And I will suggest the following: that this committee shows some unfortunate features. It is inward looking and it is top down. It suggests an element of being the bad loser on the part of the Ministry of Justice in particular: i.e., if we can't have necessity, we'll try to maintain control by other bureaucratic means. And it is a failure to think through matters in constitutional terms, which is so typical of Whitehall since 1998. I'd like to end, Chair, by drawing attention to your own report on the draft Bill. It picks up a point that Diana made earlier. This is paragraphs 23 and 25 of your committee's report. You expressed concern that that draft Bill was being

[296] 'made *for* Wales rather than one made *with* Wales.'

[297] And you then went on to say:

[298] 'We believe that a "made with Wales" approach with joint working across UK Government departments and with the major players in Wales…is an approach that is surely required for constitutional development'.

[299] I would like to suggest that that committee runs quite contrary to the spirit of that recommendation. Diolch.

[300] **Huw Irranca-Davies:** Thank you very much. Thank you very much, and I'm glad we took that additional point or series of points indeed. Well, thank you all. Thank you all very much for your time. We will, as per normal, send you a transcript of proceedings so you can check it for accuracy. If there is anything subsequently that you want to feed through to us, please do as well because we, despite the concertinaed timescale, will be thinking very carefully about how we attempt to garner this evidence and influence the deliberations that are going on, including through the summer to the other House and the House of Lords and so on as well. So, please do submit that, but thank you very much.

13:26

Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o'r Cyfarfod
Motion under Standing Order 17.42 to Resolve to Exclude the Public from the Meeting

Cynnig:

bod y pwyllgor yn penderfynu gwahardd y cyhoedd o weddill y cyfarfod yn unol â Rheol Sefydlog 17.42(vi).

Motion:

that the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order 17.42(vi).

Cynigiwyd y cynnig.
Motion moved.

[301] **Huw Irranca-Davies:** We will end this session here and go into a brief private session where we can deliberate for a moment, but thank you all. Diolch yn fawr.

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 13:26.
The public part of the meeting ended at 13:26