Cofnod y Trafodion
The Record of Proceedings

Cyfarfod ar y Cyd:
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
Y Pwyllgor Materion Cymreig

Joint Meeting:
The Constitutional and Legislative Affairs Committee
The Welsh Affairs Committee

09/11/2015

Trawsgrifiadau'r Pwyllgor
Committee Transcripts

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Cynnwys
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Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal, cynhwysir trawsgrifiad o'r cyfieithu ar y pryd.

The proceedings are reported in the language in which they were spoken in the committee. In addition, a transcription of the simultaneous interpretation is included.

Aelodau'r Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol yn bresennol
Members of the Constitutional and Legislative Affairs Committee in attendance

Alun Davies	Llafur Labour
Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
Dafydd Elis-Thomas	Plaid Cymru The Party of Wales
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
William Powell	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats

Aelodau'r Pwyllgor Materion Cymreig yn bresennol
Members of the Welsh Affairs Committee in attendance

Byron Davies	Y Blaid Geidwadol The Conservative Party
Chris Davies	Y Blaid Geidwadol The Conservative Party
David T.C. Davies	Y Blaid Geidwadol (Cadeirydd y Pwyllgor) The Conservative Party (Committee Chair)
Carolyn Harris	Llafur Labour
Gerald Jones	Llafur Labour
Christina Rees	Llafur Labour
Antoinette Sandbach	Y Blaid Geidwadol The Conservative Party
Liz Saville Roberts	Plaid Cymru The Party of Wales
Craig Williams	Y Blaid Geidwadol The Conservative Party
Mark Williams	Y Democratiaid Rhyddfrydol Liberal Democrats

Eraill yn bresennol
Others in attendance

Emyr Lewis	Partner ac Uwch-bartner Rhanbarthol, Blake Morgan Partner and Regional Senior Partner, Blake Morgan
Yr Athro/Professor Richard Wyn Jones	Canolfan Llywodraethiant Cymru Wales Governance Centre
Yr Athro/Professor Roger Scully	Canolfan Llywodraethiant Cymru Wales Governance Centre
Yr Athro/Professor Thomas Glyn Watkin	

Swyddogion Cynulliad Cenedlaethol Cymru a Thŷ'r Cyffredin yn bresennol
National Assembly for Wales and House of Commons officials in attendance

Stephen Boyce	Y Gwasanaeth Ymchwil Research Service
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Ruth Hatton	Dirprwy Glerc Deputy Clerk
Gareth Howells	Cynghorydd Cyfreithiol Legal Adviser
Elin Jones	Cynghorydd, y Pwyllgor Materion Cymreig Adviser, Welsh Affairs Committee
Naomi Stocks	Clerc Clerk
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Richard Ward	Clerc, y Pwyllgor Materion Cymreig Clerk, Welsh Affairs Committee
Gareth Williams	Ail Glerc Second Clerk

Dechreuodd y cyfarfod am 13:31.
The meeting began at 13:31.

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

[1] **David Melding:** Good afternoon, everyone, and welcome to this joint meeting of the Constitutional and Legislative Affairs Committee and the Welsh

Affairs Committee from Westminster. Can I just start with some of the formalities? I've received apologies from James Davies MP. It is with great pleasure that I welcome everyone to this joint session. I think it's the first time that an Assembly and a Westminster committee have met together since 2012, and I believe it's the first time that the Constitutional and Legislative Affairs Committee and the Welsh select committee have had a joint meeting. So, we could be in the territory of precedent here, David, I hope. I'm delighted to welcome David Davies as Chair of the select committee and all our colleagues from Westminster. I will welcome the witnesses shortly.

[2] Can I just say that we do not expect a routine fire alarm, so if we hear the bell, please follow the instructions of the ushers, who will help us leave the building safely? Can you please switch all mobile devices to at least silent?

[3] These proceedings will be conducted in Welsh and English. When Welsh is spoken, there's a translation on channel 1. Should any of you be hard of hearing, you can amplify our proceedings on channel 0. Can I remind our colleagues from Westminster that you do not need to touch any of the microphones; they will operate automatically? Before I start the short formal proceedings of the Constitutional and Legislative Affairs Committee, before we go into our joint session, I'll just ask David to say a few words.

[4] **David T.C. Davies**: Just to say, Mr Chairman, it's a great pleasure to be back here at a joint meeting and also, if I may say, to be co-chairing a committee back in the Assembly with some very distinguished Assembly Members here, who may remember me coming here as a 28-year-old. Time moves on. Thank you very much indeed for your hospitality and, indeed, I hope this is a precedent and perhaps we'll be able to welcome you to a joint committee meeting in Westminster. I think it's wonderful that, despite the political differences that sometimes exist between some of us, we can all work together for the good of Wales. Thank you very much.

[5] **David Melding**: Thank you very much, David. We would very much welcome such an invitation, and it's a great pleasure to see you back here this afternoon, and other former colleagues, indeed, amongst the Members of Parliament here this afternoon. Of course, a particularly warm welcome to all other MPs who are here for the first time, anyway, in any formal sense. So, you're very, very welcome. The next couple of items will be just to get through some routine business that the Constitutional and Legislative Affairs Committee has to deal with.

13:34

Offerynnau Nad Ydynt yn Cynnwys Materion i Gyflwyno Adroddiad Arnynt o dan Reol Sefydlog 21.2 neu 21.3
Instruments that Raise No Reporting Issues under Standing Order 21.2 or 21.3

[6] **David Melding:** So, we move to item 2, which is instruments that raise no reporting issues under our Standing Orders, but they are listed there for Members. Are there any issues? Are we content? We are content.

Papurau i'w Nodi
Papers to Note

[7] **David Melding:** Item 3 is papers to note. There is a letter from Leighton Andrews. Shall we note that? Thank you very much. So, that ends the formal proceedings of the Constitutional and Legislative Affairs Committee. Now we move into our joint session.

Tystiolaeth mewn perthynas â'r Bil Cymru Drafft
Evidence in relation to the Draft Wales Bill

[8] **David Melding:** It's a great pleasure for me to welcome our first set of witnesses, Professor Thomas Glyn Watkin, and Emyr Lewis from Blake Morgan. Gentleman, you are most welcome this afternoon. I think you've just heard me welcome our visitors from Westminster. We're delighted this really important constitutional development is going to get fully scrutinised—in this session, anyway—by both committees. So, I'm delighted you are here. You're both very used to the way we work, so I suspect you're going to be very comfortable with us moving directly to questions. I suspect both of you will want to say something in response to most of the questions, but, obviously, on some issues you may not want to repeat points that you agree with, and there may be some areas where you feel your colleague has a more in-depth view and that you don't need to particularly cover those points, because we do, actually, want to cover quite a lot of material.

[9] I'm just going to start with a general question to set the context. Obviously, we will then move into the detail, so you don't need to be too comprehensive and lengthy in replying to this. When we looked at the command paper, the Constitutional and Legislative Affairs Committee said that

the principle of subsidiarity and the desire for clarity, simplicity and workability ought to be at the heart of the draft Bill. I think that might be a good place to start and whether you feel the draft either achieves that or gets very close to achieving it. Perhaps, Thomas, you would like to respond first.

[10] **Professor Watkin**: Thank you, Mr Chairman. I regret to say that I don't think that the manner in which the reserved matters have been arrived at does reflect what was asked for by the Constitutional and Legislative Affairs Committee, and that is that it should be approached on the basis of principle, the principle being subsidiarity. Looking at the list—and I've not analysed it in any great depth—it seems to betray, once more, a harking back to the days of executive devolution, and the hand of the history of executive devolution seems to lie very heavy upon it. I think that is unfortunate. The reason that I think it is unfortunate is this: the question of executive devolution is largely concerned with, when it is necessary, appropriate or convenient, implementing a policy in a different way in a different country. That strikes me as being a very different question from whether or not a policy itself should be determined differently in that country.

[11] The question about legislative devolution, to me, is about self-determination, and that does not raise the same issues as whether or not a common policy can be implemented differently in a different place. I very much regret, therefore, that that step has not been taken, because I think, actually, a satisfactory constitutional solution not just for Wales, but for the United Kingdom, requires, and requires urgently, an approach of that nature.

[12] **David Melding**: Emyr, do you concur with that?

[13] **Mr Lewis**: Rwy'n cytuno gyda'r sylwadau ynglŷn â sybsidiaredd. Fe wnaethoch chi ofyn hefyd ynglŷn ag eglurdeb a symlrwydd. Mae arnaf i ofn fod yna ddarpariaethau yn y Bil drafft yma nad ydyn nhw ddim yn eglur, sydd ddim yn rhai fydd yn arwain, rwy'n ofni, at eglurdeb a symlrwydd o ran bod y ddeddfwrfa fan hyn yn deall yn hollol beth yw rhychwant ei gallu i ddeddfu. Felly, yr ateb yw 'na,' ond, wedi dweud hynny, gydag ewyllys da, rwy'n siŵr, byddai modd trwsio'r

Mr Lewis: I do agree with the comments on subsidiarity. You also asked about clarity and simplicity. I'm afraid that there are provisions in this draft Wales Bill that are not clear and are, I fear, not provisions that will lead to clarity or simplicity in terms of the legislature here understanding exactly what the range of its legislative powers is. So, the answer to your question is 'no', but, having said that, with goodwill, I'm sure, we could fix the problems that have emerged, and,

problemau, a gydag ychydig o ddychymyg, byddai modd trwsio'r diffygion yma.

with some imagination, we could correct these deficiencies.

[14] **David Melding**: Thank you for those answers by way of introduction, and we'll now follow up and go into some of these matters in detail. I'll ask David to put the first question.

[15] **David T.C. Davies**: Could I ask either of the witnesses if either of you see any significance in the apparent omission in clause 3, of the Assembly being able to make any provision that could be made by an Act of Parliament? This was in the Government of Wales Act 2006. It doesn't appear to be there, but perhaps you could say whether you see any significance to that or whether it's by now very clear that the Assembly can make any Act that it wants to within the devolved powers, and that it therefore doesn't need to be restated.

[16] **Mr Lewis**: Rwy'n credu eich bod chi'n iawn yn eich dehongliad. Rydych chi'n iawn yn eich dehongliad. Nid oes darpariaeth felly yn Neddf yr Alban 1998. Roedd y Cynulliad yn gallu gwneud Mesurau, fel rydych chi'n gwybod, ac yna newidiodd hynny, yn sgil refferendwm 2011, i wneud Deddfau neu Actau. Yr oedd y geiriau hyn mewn lle ar gyfer Mesurau o dan yr hen drefn, rwy'n amau er mwyn osgoi unrhyw amheuaeth.

Mr Lewis: I think that you're right in your interpretation. You are right in your interpretation. There is no such provision in the Scotland Act 1998. The Assembly was able to make Measures, as you know, and then that changed, as a result of the 2011 referendum, to the Assembly making Acts. These words were in place for Measures under the old regime, I believe in order to avoid any doubt.

[17] **David T.C. Davies**: A oes raid inni gael y geiriau sydd yn y 2006 *Act*?

David T.C. Davies: Do we have to have these references in the 2006 Act?

[18] **Mr Lewis**: Mae'n help i'w cael oherwydd mae'n egluro, ac mae'n help mawr hefyd pan fyddwch chi'n dysgu myfyrwyr neu jest yn egluro natur y setliad. Rydych chi'n dechrau gan ddweud, 'Wel, edrychwch ar beth mae adran 108(1) yn ei ddweud. Mae e'n dweud,

Mr Lewis: It is of great assistance because it provides clarity, and it is also of great assistance when you are teaching students or simply explaining the nature of the settlement. You start by saying, 'Well, look at what section 108 says. It says,

[19] "an Act of the Assembly may make any provision that could be made by an Act of Parliament".

[20] Think about that. What does it mean?'.

[21] Reit? Mae'n helpu yn hynny o beth. Yn gyfreithiol, nid wyf yn credu ei fod yn angenrheidiol am y rhesymau yr ydych chi wedi'u rhoi.

Right? It helps in that regard. Legally speaking, I don't think that it is necessary for the reasons that you have outlined.

[22] **David T.C. Davies:** Diolch.

David T.C. Davies: Thank you.

[23] **Professor Watkin:** I agree with what Emyr Lewis has said on that. I was surprised to see the words omitted, but, compared with the Scotland Act, of course, we see that it brings it into line with the fact that there is no such statement there. The omission worried me, however, in one particular regard, and that was that it may introduce a suggestion that there is an inequality between the provisions in an Assembly Act and an Act of Parliament. In the recent decision in the Supreme Court in the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill reference, the majority judgment treated the legislation of devolved legislatures as being different from that of the sovereign legislature on the basis that it was open to the courts, and a human rights issue there, to look at the quality of decision-making behind the provisions. The minority judgment disagreed with that and said that there was no logical distinction for treating the devolved legislatures differently from the UK Parliament. When I see the omission in that context, it worries me that it may provide a distinction for future developments of that nature.

[24] **David Melding:** Thank you very much. I now want to look at the issue of necessity that's been introduced, and I'll ask Mark Williams to start.

[25] **Mark Williams:** Thank you, Mr Chairman. It's very good to be here in this joint committee. As the Chair said, when we talk about necessity tests, I think that's one of the real emerging concerns, to date, from the draft legislation. Firstly, as a general question, could you give the committee your views on the necessity tests of legislative competence in clause 3 and paragraphs 2, 3 and 4 of new Schedule 7B, and in particular what is likely to be the practical effect of those provisions?

[26] **Mr Lewis:** Wel, un rhan yw *necessity* o brofion ar gyfer p'un ai a

Mr Lewis: Well, necessity is just one part of tests as to whether the

yw'r Cynulliad yn gallu deddfu am rai materion penodol. Felly, dim ond un rhan yw *necessity*. Felly, os edrychwn ni, fel enghraifft, ar atodlen 7B(3), sef yr un sy'n ymwneud â'r gyfraith breifat—os gallaf i ei ffeindio fe; mae'n ddrwg gen i—fe welwch chi,

Assembly can legislate on certain specific issues. So, necessity is only one part of that. Therefore, if we look, for example, at Schedule 7B(3), which relates to private law—if I can find it; I do apologise—you will see,

[27] 'A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, the private law.'

[28] Ocê? Yna mae diffiniad o 'the private law', a wedyn mae'r peth ei hun yn dweud:

Okay? There is then a definition of 'the private law', and then it goes on to say:

[29] 'Sub-paragraph (1) does not apply to a modification which…is necessary for a devolved purpose or is ancillary to a provision made…which has a devolved purpose, and…has no greater effect on the general application of the private law than is necessary to give effect to that purpose.'

[30] Yn yr achos hwnnw, mae 'necessary' yn digwydd ddwywaith, 'ancillary' unwaith, ac mae'r ymadroddion 'devolved purpose', 'general application of the private law', a 'has no greater effect...than'. Mae pob un o'r ymadroddion hyn yn rhai sydd yn cynnig amwysedd o ran eu dehongliad. Mae pob un yn amwys ac, am y rheswm yna, fy mhrif gonsýrn i, i ddod at eich cwestiwn chi ynglŷn â'r effaith ymarferol—mae'n ddeublyg.

In that case, 'necessary' occurs twice, 'ancillary' once, and there are the phrases 'devolved purpose', 'general application of the private law', and 'has no greater effect…than'. All of these phrases are ones that actually provide ambiguity in terms of interpretation. They are all ambiguous and, for that reason my main concern, to come to your question on the practical effect of this—it's twofold.

13:45

[31] Yr effaith ymarferol cyntaf yw: mae e'n mynd i greu nerfusrwydd yma yng Nghaerdydd, yn y Llywodraeth, o ran yn union ba mor bell y maen nhw'n gallu deddfu, ond

The first practical effect is that it will create some nervousness here in Cardiff, in Government, as to exactly how far they can take legislation, but also it's going to be wonderful for my

hefyd mae e'n mynd i fod yn wych i fy mhroffesiwn, oherwydd bob tro bydd achos yn dod gerbron y llys, lle bo rhywun, er enghraifft, yn cael ei erlyn am drosedd sydd wedi ei chreu gan ddeddfwriaeth y Cynulliad, mi fydd ein *Perry Masons* ni yng Nghymru yn edrych ar hwn ac yn dweud, '*Well, let's have a look now. Is this within the competence? Is it necessary?*', ac yn y blaen ac yn y blaen ac yn y blaen. Felly, rwy'n pryderu bod yr ansicrwydd yma yn y cyd-destun yma yn mynd i beri anhawster.

own profession, because every time a case comes before the courts where someone is perhaps prosecuted for a crime made by Assembly legislation, then our Perry Masons here in Wales will look at this and will say, 'Well, let's have a look now. Is this within the competence? Is it necessary?', and so on and so forth. Therefore, I am concerned that this ambiguity in this context is going to create some difficulty.

[32] Os caf i ddweud un peth arall ynglŷn â'r *necessity test*, fel y mae'n cael ei alw, mae yna rywbeth tebyg yn Neddf yr Alban 1998. Mae adran—mae'n ddrwg gen i—mae paragraff 2 a 3, Atodlen 4, Deddf yr Alban 1998 yn gwneud rhywbeth tebyg. Ond, dim ond mewn perthynas â *reserved matters* yw hynny, a hefyd mae o'n eithrio cyfraith breifat a chyfraith droseddol yr Alban o hynny. Felly, beth sy'n digwydd yng Nghymru yw dau beth: yn gyntaf oll, mae'r prawf yn gymhleth iawn, ac yn yr ail le, mae e'n ehangach o lawer na'r hyn sy'n digwydd yn yr Alban.

If I could make one further point on the necessity test, as it's called, there is something similar in the Scotland Act 1998. Section—forgive me—paragraphs 2 and 3 of Schedule 4 to the Scotland Act of 1998 does something similar. But, that only happens in relation to reserved matters, and it also exempts private and criminal law in Scotland from the test. Therefore, what's happening in Wales is two things: first of all, the test is very complex, and, secondly, it is far broader than what happens in Scotland.

[33] **Mark Williams:** Can I just—? You've slightly pre-empted my second question.

[34] **Mr Lewis:** Apologies.

[35] **Mark Williams:** That's very helpful, because there has been a characterisation, in the minimal debate we've had so far, that the necessity test operates in Scotland and therefore we have nothing to fear. But you're clearly

telling us they are operating, potentially, under a very different context.

[36] **Mr Lewis:** It operates in Scotland in a very limited context.

[37] Mewn cyd-destun cyfyngedig iawn yn unig mae e'n gweithredu yn yr Alban, ac nid ydw i'n ymwybodol ei fod e erioed wedi bod gerbron llys yn yr Alban—mae'n bosib ei fod, ond nid ydw i'n ymwybodol o hynny, a byddwn i'n fodlon gosod arian ar y tebygolrwydd y byddai'r darpariaethau ym Mil drafft Cymru yn dod gerbron llys. In a very limited context—that's how it's operated in Scotland, and I'm not aware that it has ever been before the courts in Scotland—it is possible that it has been, but I'm not aware of that, and I would be willing to put money on the likelihood of these provisions in the draft Wales Bill coming before a court of law.

[38] **Professor Watkin:** Can I just come in there on that point about Scotland, because it goes to a more general point about the reserved matters. Quite often it's characterised that there are fewer problems in Scotland than have arisen in Wales, and that's due to the model. I've never been convinced of that—I've expressed my views previously to the Constitutional and Legislative Affairs Committee.

[39] The reason, in my view, that there have been fewer problems in Scotland is that the number of reservations is far smaller, so the space left in which you can legislate is much greater. That operates also with regard to this necessity test, because the number of things that can be hit by the test is very small. If you have a large number of reserved matters, the chances of being hit by the test become much greater. So, therefore, the greater the number of reserved matters, the greater the risk that you will fall foul of this test, and that all the difficulties that Emyr mentioned could arise.

[40] One other thing I'd like to add is: Emyr has talked about the problems that could arise in litigation and for the Assembly legislating, and it worries me greatly that this test will also effect policy development, particularly at the stage when policy is being turned into legislation. Faced with the question, 'Is it necessary to amend the criminal law? Is it necessary to amend the private law in order to achieve this?', policy makers will have a choice. Almost always, therefore, there will be an alternative choice; you can't really say that it's necessary in that sense. Even if they believe the better choice is the amendment of private or criminal law, there may be a reluctance to pursue it if it could lead to litigation and could lead to references, for example, to the Supreme Court. It

would delay policy implementation, and as a consequence, therefore, there could well be a timidity, as I've called it in the paper I supplied, in the development of policy.

[41] **Mark Williams**: Mr Chairman, just finally from me on this—the Secretary of State, when he gave evidence to our committee, set us something of a challenge—it may be a challenge for you and the groups you work on—when he said,

[42] 'If there are better ways of coming up with a mechanism then I would be keen to hear it, but we have taken the existing wording as is'.

[43] What would your advice be on a different mechanism?

[44] **Mr Lewis**: Wel, mae'r Ysgrifennydd Gwladol yn rhannol gywir, oherwydd mae'r geiriad yma yn debyg iawn i'r geiriad yn yr Alban sy'n ymwneud â'r *reservations* yn yr Alban, ond beth nad ydy'r geiriad yma'n ei gynnwys ydy'r rhan sydd yn y canol yn eithriad yr Alban, sy'n delio yn unig â *reserved matters*, lle mae'n dweud hyn:

Mr Lewis: Well, the Secretary of State is partially correct because this wording is very similar to the wording in Scotland that relates to reservations in Scotland, but what this wording doesn't include is the section that is in the middle of the exception in Scotland's case, which deals only with reserved matters, where it states that:

[45] 'Sub-paragraph (1) applies in relation to a rule of Scots private law or Scots criminal law…only to the extent that the rule in question is special to a reserved matter'.

[46] Felly, mewn geiriau eraill, mae cyfraith breifat a chyfraith droseddol yr Alban nad yw'n ymwneud â materion wedi eu cadw yn ôl ar gael. Maen nhw o fewn y cwmpawd deddfu. Dyna ffordd well o'i gwneud hi, yn fy marn i.

So, in other words, private law and criminal law in Scotland that does not relate to reserved matters is available. They are within the legislative scope. That is the more effective way of doing it, in my view.

[47] **Mark Williams**: Thank you.

[48] **David Melding**: Before I move on to Antoinette, Carolyn, have we covered the issues—?

[49] **Carolyn Harris**: Yes, it's been covered; thank you.

[50] **David Melding**: And Christina also.

[51] **Christina Rees**: Yes, thank you.

[52] **David Melding**: Then it's with you, Antoinette.

[53] **Antoinette Sandbach**: Subsection (5) makes clear that the exemption doesn't apply, or it doesn't apply where there's a devolved purpose, which means

[54] 'a purpose, other than modification of the private law, which does not relate to a reserved matter'.

[55] Do you interpret that, therefore, as meaning that that power to amend private law and criminal law relates to non-reserved matters, because that's how it was explained in evidence by the Secretary of State?

[56] **Mr Lewis**: Ydw; dyna yw'r bwriad, yn sicr.

Mr Lewis: Yes, I do; that's the intention, certainly.

[57] That's the intention—that's undoubtedly the intention.

[58] Ond, hefyd, mae paragraff 1 yn dweud

But also, paragraph 1 states

[59] 'the law on reserved matters'.

[60] Buasai hynny, rwy'n cymryd, yn gallu cynnwys materion troseddol a phreifat sydd wedi eu cadw yn ôl yn benodol—*expressly reserved matters.*

I take it that that would include criminal and private law matters that are specifically reserved—expressly reserved matters.

[61] There may be expressly reserved criminal or private law matters, which would fall under paragraph 1, but could still be legislated about through this ancillary necessary—.

[62] Dyna yw fy nealltwriaeth i.

That is my understanding.

[63] **Antoinette Sandbach**: Because, clearly, you spoke about the potential for some kind of legal dispute or challenge, but if it's been made clear in Hansard that the purpose of the provision is to ensure that the Assembly has the power to amend private law or criminal law where necessary to give effect to its legislation, but it can't go beyond its devolved competence, why do you think there would still be a challenge?

[64] **Mr Lewis**: Fy nealltwriaeth i, o ran sut i ddehongli hwn—. I ddelio â Hansard i ddechrau, mi fyddai angen i chi ddefnyddio Pepper v. Hart er mwyn cael hynny i weithio. Nid yw hynny'n sicr o ddigwydd beth bynnag, o gwbl. Ond, os edrychwn ni ar y geiriad—os edrychwn ni ar baragraff 4—yn gyntaf oll,

Mr Lewis: My understanding, with regard to how to interpret this— To deal with Hansard first of all, you would have to use Pepper v. Hart in order to get that to work. That is not at all certain to happen, in any case. But, if we look at the wording—if we look at paragraph 4—then first of all,

[65] the modification must be

[66] 'ancillary to a provision...which has a devolved purpose'

[67] ac wedyn and then

[68] 'has no greater effect on the general application of the criminal law than is necessary to give effect to the purpose of that provision'.

[69] Nid yw hynny'n eglur i fi—ddim o gwbl. Beth yw '*general effect*', a ble mae *necessity* yn dod i mewn? Pwy sy'n barnu beth yw '*necessity*'? Ai'r deddfwyr, fel y mae Thomas wedi awgrymu, neu'r llysoedd? Rwy'n credu, efallai, mai'r ffordd hawsaf o ddelio â'r pwynt yw edrych ar fel y mae pethau yn awr—y status quo. Nid yw'r cyfyngiadau yma'n bodoli o ran gallu'r Cynulliad i ddeddfu nawr. Nid oes *necessity test*, nid oes *ancillary test* mewn perthynas—

That is not clear to me—not at all. What is 'general effect', and where does necessity come into this? Who decides what constitutes 'necessity'? Is it the legislators, as Thomas has suggested, or the courts? I think, perhaps, that the easiest way to deal with the point is to look at how things are now—the status quo. These restrictions don't exist at present in terms of the Assembly's legislative powers. There is no necessity test, there is no ancillary test in relation to—

[70] **Antoinette Sandbach**: I accept that, but that distinction between private

law and non-devolved function—was that not the concern in the referral of the asbestosis case on the recovery of medical costs?

[71] **Mr Lewis:** Wel, mae yna un darn o ddyfarniad yr Arglwydd Mance yn y penderfyniad hwnnw, lle mae o'n dweud rhywbeth fel, '*Whatever this meant*'—a '*this*' oedd '*the funding of the NHS in Wales*', rwy'n credu—'*Whatever this meant, it didn't mean amending the law of tort and contract*'. Wel, rwy'n credu bod yr achos yna yn un arbennig o ran ei ffeithiau, a dweud y gwir, ac mae'n eithaf eglur o'r ffordd y mae'r Cynulliad wedi deddfu heb her ym meysydd troseddol ac yn y maes preifat, heb orfod poeni am y prawf *necessity* yma, fod y gallu yna ar hyn o bryd.

Mr Lewis: Well, there is one section of Lord Mance's judgment in that decision where he says something like, 'Whatever this meant'—and 'this' meant 'the funding of the NHS in Wales', I believe—'Whatever this meant, it didn't mean amending the law of tort and contract'. Well, I think that that case is very relevant, and it's quite clear from the way in which the Assembly has legislated without challenge in criminal and private law, without having to be concerned about this necessity test, that the competence is there at present.

[72] **Antoinette Sandbach:** I'm interested that you say that the Assembly has legislated without challenge, because there have been a number of referrals now to the Supreme Court, in a very short space of time, of legislation.

[73] **Mr Lewis:** Maybe I should repeat—or maybe not repeat what I said, but explain what I said. I didn't say 'without challenge'—

[74] **Antoinette Sandbach:** That's how it was translated.

[75] **Mr Lewis:** Yes, in the sense of not having been challenged at all. Not having been challenged on its ability to modify private law or modify criminal law is what I meant, and I probably didn't say that, so, fair enough.

[76] Digon teg. Fair enough.

[77] **Antoinette Sandbach:** But if the intention of the Act is to ensure that that purpose remains—in other words, there's an ability to legislate to give effect to changes in private law or criminal law in devolved areas but not in reserved—what is it that needs to change in the wording of these two particular—? How would you amend these two provisions?

[78] **Mr Lewis:** Buaswn yn eu tynnu allan.

Mr Lewis: I'd remove them.

[79] I'd remove them.

[80] **Antoinette Sandbach:** But then you'd still have the problem that exists with the Government of Wales Act and the challenges that have led to the Supreme Court referrals as they've existed already.

[81] **Mr Lewis:** Nid wyf yn credu—. Rydych yn rhoi Cymru ar yr un gwastad â'r Alban. Nid oes heriau tebyg wedi bod mewn perthynas â'r Alban—nid bod hynny ynddi ei hun yn ddadl dda. O dan y drefn newydd, y drefn o gael pwerau wedi'u cadw nôl, y cwestiwn yw: '*Does it relate to a reserved matter?*' Dyna'r unig gwestiwn. Felly, os ydy o'n newid y gyfraith droseddol, neu os ydy o'n newid y gyfraith breifat, os ydy o'n ymwneud â *reserved matter*, dyna ni. Dyna'r cwestiwn. Nid oes angen y pethau eraill, felly, yn fy marn i.

Mr Lewis: I don't think—. You're putting Wales on the same level as Scotland. There have been no similar challenges in relation to Scotland—not that that in itself is a strong argument. Under the new system, the reserved-powers model is, the question is: does it relate to a reserved matter? That's the only question. Therefore, if it changes criminal law or if it changes private law, if it relates to a reserved matter, then that's it. That's the question. There is no need for these other things, in my view.

[82] **Professor Watkin:** If I can just come in on that, what worries me about these two provisions is that, as has been said, they open up the ground for a set of challenges on new issues, which previously were not open to challenge. That worries me in two ways. Firstly, I'm not quite certain why one would want to give the citizen the right to challenge on these grounds, because the purpose of the private law and criminal law restrictions is explicitly stated in the explanatory notes to be to defend the unified jurisdiction. I would have thought that that was something that would be provided for in terms of a challenge prior to enactment if those who have responsibility for the jurisdiction wish to do so. I don't see that a post-enactment challenge is really in place. Of course, if one accepts that, it does rather expose the fact that what we are dealing with here is not a legal challenge to the competence of the Assembly in terms of its legislative competence, but rather a different sort of power of intervention whereby there would be a power to intervene where it is felt that the Assembly has gone further than someone else thinks is necessary

in order to carry out a policy by amending private law or criminal law. I think it would be more, if I can say so, honest to say that this belongs more in the category of intervention power than reference on legislative competence.

[83] **Antoinette Sandbach**: So, are you saying, then, that the private citizen in Scotland does not have that basis to challenge on the necessity test that is there, or do they?

[84] **Professor Watkin**: Well, in relation to whether or not a reserved matter has been trespassed upon, yes, but not in relation to private law and criminal law—not in relation to the means by which the Scottish Parliament chooses to give effect to its policies, other than in terms of whether or not human rights have been affected.

[85] **Antoinette Sandbach**: Thank you.

[86] **David Melding**: Alun Davies.

[87] **Alun Davies**: Thank you. It appears to me that the introduction of both the necessity tests and also the number of restrictions through the reserved powers means that the ability of the Assembly to act in an uncontested way is going to be significantly reduced. If you accept that proposition, then the sort of law that the Assembly will be able to produce here will be law that will add to complexity rather than reduce complexity.

14:00

[88] If I'm thinking back to the Control of Horses (Wales) Act 2014, for argument's sake, the clear, driving objective there was an animal welfare issue, but, in order to address that animal welfare issue, we had to address a series of issues in terms of human rights, and in terms of property and the rest of it. It appears to me now that, looking at the barriers we had to cross in order to get that first of all to the Assembly and then onto the statute book, that would be more difficult, would mean that we would have to legislate in a more restricted way, and would mean—. I would have thought that the implication of that is that the statute book becomes more crowded, less clear and that we have a confusion of law in Wales, and that we don't also enable this place to have greater coherence in policy making and legislative competence. Is that the sort of assumption that you would agree with?

[89] **Professor Watkin**: It has been my fear from the first that there was this

belief, as I said, that moving to a reserved-powers model would of itself be a panacea for the difficulties that have arisen. The worry that I've had about it is that, if you have a large number of reserved matters, and then add to them things that relate to those reserved matters, then in point of fact you can have a greatly restricted area of competence. The freedom of the Assembly to legislate within that area will then be compromised. If you add to that the other restrictions that are now being added about private law and criminal law, it is a further erosion of that power.

[90] I think that Mr Davies is correct in what he's saying, that what this may end up producing is laws that have to steer very carefully around all these restrictions unless they're going to be open to challenge, with the result that complex competence results in highly complex legislation. I think one can actually look at the legislative history of the Assembly and see that. If we go back to the third Assembly, and the previous settlement under Part 3 and Schedule 5, competence granted by the insertion of matters into Schedule 5 was often extremely complicated. Witness, for example, the National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009. There is much criticism these days of the complexity of the Welsh Language (Wales) Measure 2011, but the complexity of that Measure is entirely the result of the complexity of the competence that was granted. It is steering its way round the very complicated detail and restrictions that were imposed when the powers were granted from Westminster. I worry, therefore, that, if we are moving into an area where there is again a complex set of rules about competence, the ultimate result is legislation that is difficult to understand, complex, and inaccessible to the citizen and possibly even to the citizen's legal advisers.

[91] **David Melding:** Suzy.

[92] **Suzy Davies:** Thank you. Obviously this Bill, and the evidence that we're taking, is about trying to find out where the line is between the competence of the two legislatures, and in that we've got to look at intention and definition. So, the first question I wanted to ask you is: do you think this Bill, as it is drafted at the moment, evidences an intention that the Government of the day thinks that the decision on the Agricultural Wages (Wales) Bill went too far, and this is an attempt to try and recover ground, and then, secondly, whether you think that the definitions used in the Bill at the moment are of themselves problematic, because they still, despite attempts to be as tight as they can, leave open too much space for interpretation?

[93] **Mr Lewis:** Os caf i ddelio â **Mr Lewis:** If I may deal with the first

rhan gyntaf eich cwestiwn chi, roedd yr achos yn ymwneud â chyflogau amaethyddol wedi gwireddu'r hyn yr oedd nifer o bobl wedi'i ddarogan, sef bod y setliad presennol yn cynnig posibiliadau a hyblygrwydd deddfu a oedd yn ehangach na beth oedd pobl wedi'i ystyried oherwydd y materion distaw, y *silent subjects*, yma. Os ydych chi'n edrych ar oblygiadau hynny, maen nhw'n bellgyrhaeddol, o leiaf mewn egwyddor. Er enghraifft, mewn egwyddor, o bosib—mae yna ddadleuon, beth bynnag—gallasai'r Cynulliad ddeddfu mewn materion sydd, o safbwynt y Deyrnas Gyfunol, yn bethau y dylent fod yn cael eu deddfu arnyn nhw yn Llundain, megis y fyddin, amddiffyn y wladwriaeth, mewnfudo.

part of your question, the case in relation to agricultural wages had brought about what a number of people had forecast, which is that the current settlement offers possibilities and flexibility in terms of legislation that were wider than people had thought because of those silent subjects. If you look at the implications of that, then they are very far reaching, at least in principle. For example, in principle, possibly—there are arguments, anyway—the Assembly could legislate on matters that are, from the point of view of the United Kingdom, things that should be legislated on in London, such as the army, defence of the state, and immigration.

[94] Oherwydd bod y rhain yn *silent subjects*, mewn theori fe allasid estyn at y rheini, ac mae rhywun yn gallu gweld pam wedyn, o safbwynt yr undeb, fod angen diwygio er mwyn sicrhau bod y materion hynny sydd yn ymwneud â'r wladwriaeth Brydeinig yn aros yn San Steffan, fel sy'n digwydd gyda'r Alban ac fel sy'n digwydd gyda Gogledd Iwerddon, er y gellid dadlau, fel y mae Thomas Watkin yn ei wneud yn ei dystiolaeth, fod pobl Cymru wedi pleidleisio o blaid hynny. Rwy'n credu mai un rhan o'r hafaliad yw hynny; mae hynny'n iawn. Yr hyn sy'n fy mhryderu i yw, ar ben hynny, mae'r cyfyngiadau newydd yma yn erydu tiriogaeth sydd gan y Cynulliad nad ydy hi'n deg—i ddefnyddio un o feini prawf yr

Because these are silent subjects, in theory competence could extend to them, and one can see, therefore, from the point of view of the union, why there is a need for reform to ensure that those matters that relate to the British state remain in Westminster, as happens with Scotland and as happens with Northern Ireland, although it could be argued, as Thomas Watkin does in his evidence, that the people of Wales had voted in favour of that. I think that's one part of the equation; that's fine. What concerns me is that, on top of that, these new restrictions erode the Assembly's territory to an extent that is not fair—to use one of the criteria of the Secretary of State—to take away, particularly in relation to private and criminal law. That

Ysgrifennydd Gwladol—ei chymryd i ffwrdd, yn arbennig mewn perthynas â chyfraith breifat a chyfraith droseddol. Mae'r estyniad hynny o'r egwyddor, hefyd yr hyn y mae Thomas wedi cyfeirio ato eto, sef y rhestr faith o faterion sydd wedi'u heithrio—mae'r pethau yna ynghyd fel pe baent yn rhyw ymgais i adennill tir ar ôl yr achos rŷch chi wedi sôn amdano sydd yn mynd yn rhy bell. Felly, mewn geiriau eraill, mae yna gyfiawnhad mewn cymryd peth o'r diriogaeth yn ei hôl, ond nid ydy hynny'n rheswm digonol dros gau gymaint o diriogaeth.

extension of the principle, and also, again, what Thomas has referred to, namely the long list of matters that are excepted—those things taken together seem to be some kind of attempt, which goes too far, to regain ground following the case that you've mentioned. So, in other words, there's a justification in taking some of that territory back, but that's not a sufficient reason for shutting off so much territory.

[95] **Suzy Davies**: Thank you. On the second part about the definitions themselves being as much a problem as that they're trying to solve, I'll give you one, devolved purpose. Let us focus on one.

[96] **Mr Lewis**: Mewn unrhyw ddeddfwriaeth, rŷch chi'n gallu ffeindio mwy nag un ystyr os ydych chi'n gyfreithiwr da, a hyd yn oed os ydych chi'n gyfreithiwr gwael. Mae amwysedd yn mynd i fodoli. Mae diffiniadau yn ymgais i geisio egluro rhywbeth neu geisio torri i lawr y posibiliadau ar gyfer dadleuon twp, yn aml. A ydy'r diffiniad yma yn cau i lawr pob dadl dwp bosib? Na, nid ydw i'n credu ei fod e; mae'n siŵr y gellid tynhau, ond nid ydw i wedi edrych yn fanwl ar hynny.

Mr Lewis: Within any legislation, you can find more than one meaning if you are a good lawyer, and even if you are a poor lawyer. There will be ambiguity. Definitions are an attempt to try to explain something or to try and cut down on the possibilities for foolish arguments, often. Does this definition close down every possible foolish argument? No, I don't think it does; I'm sure it could be tightened up, but I haven't looked at it in detail.

[97] **Suzy Davies**: Diolch yn fawr.

Suzy Davies: Thank you.

[98] **David Melding**: Thank you. We want to look now at Minister of the Crown functions and issues relating to that, and I'll ask Christina Rees to take us through this question.

[99] **Christina Rees:** Do you agree that Minister of the Crown consents are an anachronism that should be abolished apart from in exceptional circumstances?

[100] **Professor Watkin:** The retention of the need for consent for the conferral, imposition, removal or modification of Minister of the Crown functions is, I think, in some ways anachronistic, but, here again, we actually face a situation where some things have been clawed back that were previously enjoyed by the Assembly. I think that the first two points I would want to make are that that fact—the loss of the power to legislate on incidental and consequential matters in order to remove or modify—is, in effect, a recovery of the ground that was lost in the Local Government Byelaws (Wales) Bill reference. There's also the loss of the fact that it was only pre-commencement functions to which the consent provision applied, so it's now applying across the board.

[101] This is an interesting issue. It's an interesting issue firstly because there is no doubt in my mind that the change that is proposed in the Bill increases clarity, because the rule now becomes clear. Wherever you confer, impose, remove or modify, you need consent. That gets rid of the doubtful matter, unless it's incidental or consequential, about who decides that. But it increases clarity at a cost, and the cost is paid for in a loss of competence, and it raises the question of 'clarity for whom'. It's clear when Minister of the Crown consent is needed, but not clear to the Assembly when it can legislate, necessarily, without it. If I could compare it perhaps with the situation where you have an examination hall and candidates sitting a three-hour exam, you put a notice on the wall that says 'Candidates may not leave the hall during the first half hour of the examination'. The rule is clear: the candidates know where they stand. A different rule is put up: 'Candidates may not leave the hall without the permission of the chief invigilator'. The rule is clear, but the candidates don't know where they stand, and the Assembly is in the latter position as a result of what is now being suggested. The rule is clarified, but the Assembly is left guessing.

[102] I feel that, in a sense, there may well be a need in relation to certain functions and an effect across the border that something of this nature is required, but there are other, I think, preferable solutions. And the time has come, if this is truly going to be a lasting settlement, not to find another accommodation but to cut the Gordian knot and put things on a stable basis, with clarity for all parties.

[103] **Christina Rees:** Thank you. Could I move on from that and ask: what is your assessment of the definition of a 'reserved authority' and that potential impact on legislative competence?

[104] **Mr Lewis:** Wel, mae hwn yn gysyniad newydd fan hyn, ac mae o'n cynnwys, wrth gwrs, Gweinidogion y Goron. Felly, mae Gweinidogion y Goron a'r awdurdodau eraill yma nad ydynt yn awdurdodau Cymreig, mae angen cydsyniad Gweinidog y Goron cyn deddfu amdanyn nhw. Mae'n ddiddorol cymharu â'r Alban. Yn yr Alban, mae yna drosglwyddo pwerau gweithredol Gweinidogion y Goron yn llwyr i Lywodraeth, Gweinidogion yr Alban, o dan adran 53, rwy'n credu, Deddf yr Alban 1998. Maen nhw i gyd yn trosglwyddo oni bai eu bod nhw wedi eu heithrio yn benodol. Nid yw hynny wedi digwydd yn y drafft yma, felly mae gyda ni'r cysyniad bod unrhyw swyddogaeth, hyd yn oed os ydy o fewn libart deddfu y Cynulliad a nad yw yn *reserved*, unrhyw bŵer sydd yn eistedd yn Llundain—ac mae Thomas yn sôn am yr enghraifft o gyflogau athrawon; nad oes dim modd deddfu am hwnnw heb ganiatâd Llundain. Felly, mae hwn yn newid y sefyllfa ar hyn o bryd, lle nad oes modd deddfu ynglŷn â phwerau cyn mis Mai 2011—*pre-commencement powers,* fel maen nhw'n cael eu galw.

Mr Lewis: Well, this is a new concept in this place, and it includes, of course, Ministers of the Crown. So, Ministers of the Crown and these other authorities that aren't Welsh authorities, Minister of the Crown consent is needed before legislating on them. It's interesting to compare with the situation in Scotland. In Scotland, there is a transfer of executive powers of Ministers of the Crown in their entirety to the Scottish Government and to Scottish Ministers under section 53, I believe, of the Scotland Act 1998. They all transfer unless they are specifically reserved. That hasn't happened in this draft, so we have this concept that any function, even if it is within the legislative scope of the Assembly and isn't reserved, any power that lies in London—and Thomas talked about the example of teachers' pay; it is not possible to legislate on that without the consent of London. So, that's a change in the current situation, where there is no means of legislating in relation to powers before May 2011—pre-commencement powers, as they're called.

[105] Ond wedyn, wrth gwrs, mae'n ymestyn hefyd i diriogaeth arall, ac un enghraifft gwerth sôn amdani, er enghraifft, yw'r Human Tissue Authority. Fe ddeddfodd y Cynulliad

But then, of course, it also extends to new ground, and one example worth mentioning is the Human Tissue Authority. The Assembly legislated in relation to organ donation. It placed

mewn perthynas â rhoi organau. Mi osododd swyddogaethau ar yr Human Tissue Authority. Nid oedd angen cydsyniad ar gyfer gwneud hynny. Mi fydd angen cydsyniad. Rwy'n credu bod hwn yn un o'r lleoedd lle mae'r Ysgrifennydd Gwladol a'r Prif Weinidog, Carwyn Jones yn gytûn y byddai angen cydsyniad ar gyfer gwneud hynny. Felly, fel y mae Thomas yn dweud, mae wedi cymryd pwerau yn eu hôl o le mae Cymru ar hyn o bryd.

functions on the Human Tissue Authority. Consent was not required to do that. Consent will now be needed. I think that's one area where the First Minister and the Secretary of State are agreed that there would need to be consent for doing that. So, as Thomas has said, it has taken powers back from the current situation in Wales.

[106] **Christina Rees:** Just a supplementary on that: do you think that's a particular case, because, in the case of the Bill that you've mentioned, transplant tissue would be available throughout the UK, so therefore it would necessarily need that?

[107] **Mr Lewis:** Rwy'n deall y rhesymeg pam mae rhai awdurdodau sydd yn weithredol ar draws ffiniau cenedlaethol mewnol y Deyrnas Gyfunol yn rhai lle mae pwerau yn cael eu cadw'n ôl yn Llundain. Ond rwy'n credu bod y broblem yn ymwneud â'r syniad yma o gydsyniad gweinidogol. Naill ai maen nhw'n *reserved* neu nad ydyn nhw ddim, ond mae'r rhain fel pe baent mewn rhyw dir canol.

Mr Lewis: I understand the reason why some authorities that do operate across national boundaries within the United Kingdom are those where the powers are reserved to London. But I think the problem arises in relation to this concept of Minister of the Crown consent. They are either reserved or they're not, but these seem to be in some sort of middle ground.

[108] **Christina Rees:** Okay. Do you think they should be listed in the Bill?

[109] **Mr Lewis:** Buasai hynny yn ei gwneud hi'n llawer eglurach.

Mr Lewis: That would make it much clearer.

[110] It would make it much clearer.

[111] Byddai'n llawer eglurach.

It would be much clearer.

[112] **Christina Rees:** Okay.

14:15

[113] **Professor Watkin:** I think you have to have one of two things: you either need a list of what the reserved authorities are, or you need a test that will give us what, in some areas of the law, is called conceptual certainty, so that you can actually say, according to that test, whether an authority is a reserved authority or not, and say that without any room for doubt. If you have any room for doubt, the test doesn't work. I think that that would be a very unsatisfactory place to end up. I noticed that, in the definition, it talks about offices and holders of offices that have public functions. This is a very, very difficult area of the law, which has exercised the courts recently. It is, I think, being looked at currently by the Law Commission in relation to some of its work, and it strikes me as very odd therefore to go down that line as a way of trying to solve difficulties of interpretation and definition in a settlement of legislative competence for a democratically elected body.

[114] **Christina Rees:** Thank you.

[115] **David Melding:** Antoinette, did you want to follow up something on this issue of Crown consent?

[116] **Antoinette Sandbach:** Yes, I wanted to come back to what you'd said earlier in your evidence to Suzy Davies in response to her question as to whether or not this Bill was a response to the decision of the judges on the agricultural wages Bill and, in fact, the Minister of Crown functions in relation to the local government bye-laws Bill. What's the constitutional position if the Supreme Court makes decisions in law that aren't agreed with by the UK Parliament? If the UK Parliament thinks that Supreme Court judges are making law that didn't reflect the law that was the law of Parliament, does Parliament have the right then to pass a law that does reflect what it says?

[117] **Mr Lewis:** Absolutely.

[118] **Antoinette Sandbach:** Because we don't have judge-made—. Well, we do have judge-made law in this country, but Parliament is always supreme. So, your arguments are expressed on the basis that, in fact, Parliament is taking powers back, but if those powers have been granted by Supreme Court decisions and weren't the original intention of Parliament, is it really a taking back of those powers?

[119] **Mr Lewis:** Wel, rwy'n credu mai'r sefyllfa gyfreithiol yw mai bwriad y Senedd yw'r hyn sydd yn y Ddeddf.

Mr Lewis: Well, I believe that the legal situation is that the intention of Parliament is what is in the Act.

[120] The intention of Parliament is what is in the legislation.

[121] Mae hynny'n cynnwys Deddf Llywodraeth Cymru 2006. Dehongli y Ddeddf y mae'r barnwyr yn ei wneud. Os nad yw'r ddeddfwrfa yn hoffi y dyfarniad, yna wrth gwrs nid oes neb yn dadlau na all y ddeddfwrfa sofran newid y Ddeddf. Nid dadl gyfreithiol, mewn ffordd, yw hyn; mae'n ddadl wleidyddol efo 'w' fach. Rhaid inni beidio ag anghofio, yn ogystal â'r ffaith bod Deddf wedi bod, mae yna hefyd refferendwm wedi bod, yn 2011. Felly, fel y mae Thomas eto yn ei ddweud yn ei dystiolaeth ardderchog, cyn eich bod chi yn lliniaru neu'n gwanhau y sefyllfa sydd wedi cael ei phleidleisio arni drwy refferendwm, mae eisiau bod yn ofalus iawn.

That includes the Government of Wales Act 2006. The judges interpret that Act. If the legislature does not like that judgment, then of course nobody is arguing that the sovereign legislature cannot change the Act. This is not a legal argument, in a way; it's a political argument with a small 'p'. We mustn't forget that, as well as there being an Act, there has also been a referendum, in 2011. So, as Thomas also says in his excellent evidence, before you dilute or weaken the situation that has been voted on in the referendum, you have to be very careful.

[122] **Antoinette Sandbach:** Sorry—

[123] **David Melding:** I'm not sure that we need to develop this point particularly because I think most of us would agree—well, everyone here would agree—that the Supreme Court has a right of interpretation and justified inference from statute, but if a statute changes or is amended, that sets the position until there's further interpretation of what was meant in areas of ambiguity potentially. I'm quite keen to look at the list of reservations, and Liz Saville Roberts will put this question to you.

[124] **Liz Saville Roberts:** Diolch yn fawr iawn. Un o'r pethau sydd wedi fy nharo i nid jest yn y drafodaeth rwan

Liz Saville Roberts: Thank you very much. One of the things that struck me not only in the debate this afternoon,

hyn, ond cyn hynny, yw ein bod yn trafod rhai o'r cysyniadau ac egwyddorion mawr, ac efallai ar draul y rhestr. Efallai nad ydym yn rhoi digon o sylw, hwyrach, i'r rhestr o bwerau a gedwir yn ôl. Un peth, jest o ran egwyddor, hoffwn ofyn: ai model o bwerau a gedwir yn ôl mewn enw yn unig sydd gennym yma, fel term bachog, hwylus? Ond buaswn yn leicio gofyn eich barn chi am y rhestr hirfaith o faterion, ac ynghylch cynnwys y rhestr a'i heffaith potensial. Hefyd, a ydyw'n destun pryder ein bod, efallai, heb roi digon o sylw, hyd yn hyn, a digon o graffu iddynt?

but also prior to this debate, is that we are discussing some major concepts and principles at the expense, perhaps, of the list of reservations. Perhaps we are not giving sufficient coverage to the list of reserved powers. One thing, as a point of principle: do we have a reserved-powers model in name alone here? I'd also like to ask for your views on this lengthy list of reservations, on the content of the list and its potential impact. Also, is it a cause of concern that perhaps, to date, we have not given sufficient attention and scrutinised this list adequately?

[125] **Yr Athro Watkin**: Nid wyf i wedi edrych yn fanwl ar y rhestr o bwerau sydd yn cael eu cadw nôl, oherwydd rwy'n credu bod eisiau barn arbenigwyr, nid yn unig yn y gyfraith, ond ar sail polisi i weld sut mae'n mynd i effeithio ar eu gwaith nhw. Beth rwy'n ei ofni yn y sefyllfa yma yw bod cymaint o gwestiynau yn codi—cwestiynau o bwys—o gwmpas y rhestr, i wneud â phethau fel, 'A ydy e'n angenrheidiol i wneud hynny?', y newidiadau i swyddogaethau Gweinidogion y Goron, a'r fath bethau. Mae'r ddadl yn symud at y pethau yna ac rydym ni'n colli golwg ar y pethau mwyaf pwysig. Hynny yw: pa bwerau sydd yna er mwyn i'r Cynulliad ddeddfu arnyn nhw? Rwy'n ofni, efallai, ar ddiwedd y dydd, dyna le fyddwn ni'n diweddu lan, gyda rhyw fath o gonsensws ynglŷn â'r pethau o

Professor Watkin: I haven't looked at the list of reserved powers in detail, because I think you need the views of experts, not just on the law, but on the basis of policy to see how it will affect their work. What I'm concerned about in this situation is that there are so many questions arising—important questions—around the list to do with things like whether it is necessary to do that, the changes to functions of Ministers of the Crown, and so on. The debate is moving towards those things and we're losing sight of the more important things. Those things are: what powers are there so that the Assembly can legislate on them? I am concerned that, ultimately, that's where we'll end up, with some kind of consensus about the matters around the settlement, but accepting, without sufficient analysis, what is at the core of the settlement, and that is, of

gwmpas y setliad, ond yn derbyn, heb ddigon o ddadansoddiad, yr hyn sydd yng nghanol y setliad, a hynny yw, wrth gwrs, y pwerau sydd yn cael eu neilltuo ac effaith hynny ar bwerau'r Cynulliad i ddeddfu.

course, the reserved powers and their effect on the powers of the Assembly to legislate.

[126] **Mr Lewis**: Cytuno.

Mr Lewis: I would agree.

[127] **David Melding**: There may be a Member trying to attract my eye. Well, let's look at the issue of a separate Welsh jurisdiction, which has been caught up in the whole discussion of the draft Bill, it's fair to say, and I'll ask William Powell to start.

[128] **William Powell**: Diolch, Gadeirydd. I believe you've previously both helped this committee in our consideration of the merits and otherwise of a separate Welsh jurisdiction, but is it your view that there can be an effective implementation of a reserved-powers model, or more easily, under such a separate legal jurisdiction for Wales?

[129] **Mr Lewis**: Rwy'n credu bod y gair '*jurisdiction*,' neu 'awdurdodaeth' sydd wedi tueddu cael ei ddefnyddio yn y ddisgŵrs Gymraeg, yn air sydd yn cymylu rhai o'r cwestiynau creiddiol. Mae awdurdodaeth a *jurisdiction* yn golygu pa lysoedd sydd yn cael clywed pa achosion—pa lysoedd sydd ag awdurdodaeth dros achosion penodol. Yn aml iawn, fe ddiffinnir hynny mewn termau'r math o gyfraith—cyfraith droseddol neu gyfraith sifil—neu mewn termau o diriogaeth. Hynny yw, pan ddechreuais i weithio fel cyfreithiwr, roedd llysoedd ynadon Pontlotyn ac Aberdâr ac ati yn clywed achosion a oedd yn dod o'r cylch, ac roedd yn rhaid ichi eu trosglwyddo nhw'n ffurfiol.

Mr Lewis: I believe the word 'jurisdiction,' or '*awdurdodaeth*' as is used generally in Welsh, is a word that clouds some of these core considerations. Jurisdiction and *awdurdodaeth* mean which courts can hear which cases—which courts have jurisdiction over specific cases. Very often, that is defined in terms of what sort of law we're dealing with—criminal law or civil law—or in terms of territory. That is, when I started to work as a lawyer, the Pontlottyn, Aberdare and other magistrates' courts heard cases from that locality, and you had to transfer them formally.

[130] Nid wyf yn credu mai gwraidd y broblem yw awdurdodaeth llysoedd. Gwraidd y broblem yw: ar y naill law bod gennym ni'r cysyniad o gyfraith Cymru a Lloegr—*the laws of England and Wales*—ac, ar y llaw arall, mae gennym ni gyfreithiau sydd yn wahanol yng Nghymru ac yn Lloegr. Mae gennym ni *the laws that apply in Wales and the laws that apply in England.* Maen nhw'n mynd yn fwy gwahanol i'w gilydd. Ond, ar yr un pryd, rŷm ni'n ceisio cadw'r cysyniad yma mai dim ond un *law of England and Wales* sy'n bodoli.

I believe that the root of the problem is not the jurisdiction of the courts, but it is that, on the one hand, we have the concept of the laws of England and Wales, and, on the other, we have laws that are different in Wales and in England. We have the laws that apply in Wales and the laws that apply in England. They are diverging more and more. But, simultaneously, we are trying to retain this concept that there is only one law of England and Wales.

[131] Fy mhryder i yw, er mwyn ceisio cynnal beth rwy'n credu sy'n baradocs, mae yna lot o gymhlethdod a lot o ddrafftio cymhleth yn digwydd er mwyn ceisio cynnal y paradocs hwnnw. Fy marn bersonol i yw y byddai'n llawer haws pe baem ni'n cydnabod bod yna gyfraith Cymru—*a law of Wales*—a chyfraith Lloegr—*a law of England*—sydd yn gweithredu o fewn tiriogaeth Cymru—*the territory of Wales*—a thiriogaeth Lloegr—*the territory of England*. Ni fyddai hynny ynddo'i hun yn eich gorfodi chi i ddatganoli gweinyddu cyfiawnder, i sefydlu llysoedd neu system o lysoedd ar wahân yng Nghymru, nac i sefydlu proffesiynau cyfreithiol ar wahân rhwng Cymru a Lloegr. Nid oes yn rhaid ichi gael yr holl bethau yma.

My concern is that, in order to try and maintain what I believe is a paradox, there is a great deal of complexity and a great deal of very complex drafting going on in order to try and maintain that paradox. My personal view is that it would be far easier if we were to acknowledge that there is a law of Wales and a law of England, that operate within the territory of Wales and the territory of England. That, in and of itself, wouldn't force you to devolve the administration of justice, to establish separate courts or a separate system of courts in Wales, or to establish separate legal professions in England and Wales. You don't have to have all of those things.

[132] Fy mhryder i yw bod yr holl sôn am awdurdodaeth wedi codi'r

My concern is that all this talk of jurisdiction has raised all of these

holl gwestiynau atodol yma, lle mae'r broblem ei hun yn un llawer mwy syml. Fy marn i yw, pe baech chi'n mynd at ddatganiad o ddweud 'Cyfraith Cymru a chyfraith Lloegr', mi fyddai hynny'n gwneud y setliad yma'n llawer mwy eglur, yn llawer mwy ymarferol ac yn llawer symlach hefyd. Dyna fy marn i, beth bynnag.

supplementary questions, where the problem itself is far simpler. My view is that if you were to move to a statement saying that there is a law of Wales and a law of England, that would make this settlement far clearer, far more practical and far simpler, too. That's my view, at least.

[133] **Professor Watkin:** I mean, there's one word, I think, that you used in your question that I would disagree with, and that's the word 'separate'. There doesn't need to be a separate jurisdiction in the sense of a separate legal system. I think it is sufficient that you have courts in Wales, as Emyr has said, that have the authority to apply the law that applies in Wales and likewise in England, and, of course, a concurrent authority to apply the law that is common to both countries. That really duplicates what was done at the end of the nineteenth century with the creation of the High Court and the Court of Appeal, which had full authority to implement common law and equity—two distinct systems of law—without actually necessarily merging them—jurisdiction over the two bodies of law, but in the same court. Well, we'd only be doing the same thing, but this time not on the basis of the body of law, but on the basis of the territory where it applies.

[134] **William Powell:** I'm very grateful for that clarification. In the context of what you've both said, do you believe that the proposals that were set out recently in the Wales Governance Centre and the constitution unit's report, 'Delivering a Reserved Powers Model of Devolution for Wales', could actually have the desired effect and maybe draw on the kind of thinking that you've outlined?

[135] **Mr Lewis:** Gan fy mod i'n un a oedd yn ymwneud â'r adroddiad hwnnw, well imi beidio—. Mae yna ddau ddewis yn cael eu cynnig yn fanna: un ydy'r hyn sy'n cael ei alw'n awdurdodaeth ar wahân, ond sydd, a dweud y gwir, yn nes at yr hyn yr oeddwn i'n ei ddisgrifio; a'r llall oedd rhyw reol o gyfraith a fydd yn penderfynu pryd mae cyfraith Cymru

Mr Lewis: As I was involved with that report, perhaps it's best that I don't—. There are two options proposed there: one is what is called a distinct jurisdiction, but, to be honest, is closer to what I've described; and the other is a rule of law that would decide when Welsh law and when English law would be operational. I prefer the first model, because it's simpler.

a phryd mae cyfraith Lloegr yn weithredol. Mae'n well gen i'r model cyntaf, oherwydd ei fod yn symlach.

[136] **William Powell**: I'm grateful. Thank you very much.

[137] **David Melding**: Carolyn, is there an area—

[138] **Carolyn Harris**: Mine has been covered.

[139] **David Melding**: You feel it's been covered, again. Okay. In that case, we've touched on the issue of clarity and such issues, and probed them in the evidence, but there is, perhaps, a question—. Oh, Craig, was there—

[140] **Craig Williams**: I'd love to, Chair.

[141] **David Melding**: Oh right. If there is still something on the jurisdiction, sorry.

[142] **Craig Williams**: Very quickly. I've asked both the Secretary of State, in terms of the Welsh Affairs, and Sir Paul this morning, in terms of the Silk commission, about this jurisdiction debate that seems to have raised its head. Everyone in the housing sector says that there is a distinct jurisdiction now emerging of law on housing in Wales. I've been asking and I was wondering whether I could ask your considered opinion on whether you've got any practical examples of any cases in Wales where there has been a problem in terms of the legislation coming out of the Assembly and the difference between England and Wales.

[143] **Mr Lewis**: Mae yna straeon, ond tystiolaeth anecdotaidd, am fargyfreithwyr yn dod o Lundain i glywed achosion yng Nghymru nad oedd yn ymwybodol bod y gyfraith yn wahanol, er enghraifft, mewn achosion yn ymwneud â iawndal am ddamweiniau ac yn hawlio tâl presgripsiwn yn ôl fel rhan o'r iawndal.

Mr Lewis: There are stories, but anecdotal evidence, of barristers coming from London to hear cases in Wales who weren't aware that the law here was different, for example, in cases related to accident compensation and they were claiming prescription costs back as part of that compensation claim.

[144] Ond, i fynd yn fwy eang, mae

But, to take this more broadly, some

yna achosion wedi eu clywed sydd yn delio â chyfraith benodol Gymreig. Er enghraifft, roedd achos yn ddiweddar yn ymwneud â chludo plant i ysgol Babyddol yn Abertawe a oedd, ymysg pethau eraill, yn gofyn dehongliad o adran 10 Mesur Teithio gan Ddysgwyr (Cymru) 2008 y Cynulliad Cenedlaethol. Felly, mae cwestiynau o gyfraith Gymreig, felly, yn codi'n aml. Wrth gwrs, rydych chi'n sôn am y gyfraith yn ymwneud â thai, wel, os bydd y ddeddfwriaeth newydd sy'n mynd drwy'r Cynulliad ar hyn o bryd yn dod i rym, fe fydd yna wahaniaethau mawr mewn cyfraith landlord a thenant a fydd yn golygu'r angen am weithdrefnau gwahanol o fewn llysoedd yng Nghymru, ymysg pethau eraill.

cases have been heard that deal with specifically Welsh law. For example, there was a case recently related to transport of children to a Catholic school in Swansea, which, among other things, required an interpretation of section 10 of the Learner Travel (Wales) Measure 2008, drawn up by the Assembly. So, questions of Welsh law do come up regularly. Of course, you talk of housing legislation, well, if the new legislation currently going through the Assembly does come into force, then there will be major differences in landlord and tenant law that will require different procedures within courts in Wales, among other things.

[145] **Craig Williams:** But apart from that anecdotal evidence, there isn't that body out there at the moment, or there isn't anything either of you could point to, saying, 'Look, there is a crying out for this to be changed'.

[146] **Mr Lewis:** Reit, ocê. Mae'r galw am newid i gael tiriogaeth Gymreig a thiriogaeth Seisnig yn deillio o'r cymhlethdod sy'n ymwneud â'r Bil drafft yma. Cwestiwn pellach, rwy'n credu, yw: a oes angen y cyfarpar—y *superstructure*—ar gyfer system gyfiawnder Cymreig? Mae'n gwestiwn arall. Y cwbl rwy'n ei ddweud ydy nad oes raid cael hynny er mwyn trwsio'r Bil yma. Mae'r cwestiwn arall yna'n un y gallwn sôn yn hir iawn amdano, ac mae yna enghreifftiau.

Mr Lewis: Right, okay. The demand for change to have a Welsh territory and an English territory emerges from the complexities of this draft Wales Bill. I think it's a further question as to whether the mechanism—the superstructure—is required for a Welsh justice system. That's a separate question. All I'm saying is that you don't have to have that in order to put this Bill right. That other question is one that I could discuss at very great length, and there are examples.

14:30

[147] Mae'n bwysig bod cyfreithwyr a barnwyr yn gwybod y gyfraith, ac felly byddai rhywun yn cymryd bod angen iddynt gael eu hyfforddi am gyfraith Cymru. Nid yw hynny o anghenraid yn golygu bod yn rhaid i chi gael proffesiynau ar wahân.

It is important that lawyers and judges do know the law, and therefore one would assume that they need training on Welsh law. That doesn't necessarily mean that you have to have separate professions.

[148] **Craig Williams**: I think we could talk about it for a while, but I don't think the Chair would let me—or Chairs, sorry.

[149] **David Melding**: Indeed.

[150] **Professor Watkin**: Could I just add one point of information to that question? That is, the suggestion behind the question would appear to be that, if there are no problems currently arising, nothing needs to be done about it. But that could just be putting off the day until problems begin to arise, and then it's too late. The point is there has been a constitutional change, and the manner in which justice is administered needs to reflect it. We don't wait for things to go wrong. The administration of justice needs to keep pace with the way in which legislation is being produced for England and Wales. That's why I think the restrictions with regard to private and criminal law are counterproductive in that regard. They send out the signal that you assume that the law of England and Wales is the same. That's the signal that's being sent out: it will only be different where it's necessary in relation to private law and in relation to criminal law. That, I think, is the wrong signal. The professions need to be told, and students need to be told, that the law of Wales is not now always the same as the law of England, and they need to be aware of that, and the structures need to reflect that.

[151] **David Melding**: We've opened the floodgates now. Chris Davies, quickly.

[152] **Chris Davies**: Thank you, Chair. It's just a quickie—whether we'll have a quick answer I don't know. Having sat and tried to digest the majority of what has come out of two very clever legal brains from a Welsh perspective, I certainly glean a great deal of disquiet towards this Bill. Perhaps I'm wrong, but I don't think so, from your perspective. What would you suggest the Secretary of State for Wales does with this Bill—with this draft Bill, shall we say—before it becomes a Bill?

[153] **Professor Watkin**: What I would like to be heard currently is not so much

the voice of lawyers and those who study constitutional matters and politics, but what actually civic society thinks about the Bill—its clarity, its coherence, its complexity. I attended a meeting last Friday of a body that, on behalf of the churches in Wales, monitors legislation in both Cardiff and Westminster in order to see how they are affected by it, and to participate in consultation exercises. One of the things that was said to me afterwards was that they were terrified by the complexity of the Bill as they saw it, and they were relieved to know that the complexity was one of the issues on which they could comment. I think it's the voice of those who are going to be affected by it in that way, and those who'll be affected by the laws that will be made as a result of a complex structure, that needs to be heard. The only thing that I think I would ask the Secretary of State to do with the Bill at this point is to listen to what is being said by civic society, listen to the calls of the Constitutional and Legislative Affairs Committee for a principled approach, and realise the benefits that would come in the long term, because I cannot see a settlement that is lacking in clarity, lacking in coherence and complex possibly being long-lasting or durable, and that must be the ultimate aim.

[154] **David Melding**: Alun, that has answered your question as well, so I'm afraid we're going to pass over that. As is very appropriate, I'm going to give the final question to Dafydd Elis-Thomas, a former Presiding Officer of this noble institution.

[155] **Yr Arglwydd Elis-Thomas**: Nid wyf yn siŵr a yw hynny'n syniad da, Gadeirydd. Rwy'n meddwl mai dyma'r pumed ymdrech yn ystod fy ngyrfa gyhoeddus i gynhyrchu cyfansoddiad i Gymru. Mae'n fy nharo i mai dyma'r ymdrech salaf hyd yn hyn. Felly, mae yna rywbeth yn bod ar gyfundrefn nad yw'n gallu darparu cyfansoddiad priodol sy'n adlewyrchu barn gyhoeddus, yn enwedig pan fyddwn yn ystyried y traddodiad anrhydeddus yng Nghymru o ddyddiau Richard Price, athronydd mawr cyfansoddiad yr Oleuedigaeth, hyd at y cyfreithwyr dysgedig sydd o'n blaen ni heddiw. Pe byddech yn ysgrifennu cyfansoddiad i Gymru o'r newydd, ble

Lord Elis-Thomas: I'm not sure whether that's a good idea, Chair. I think that this is the fifth attempt during my public career to create a constitution for Wales, and it strikes me that this is the worst effort yet. So, there is something wrong with a system that can't provide an appropriate constitution that reflects public opinion, especially when we're considering the excellent tradition in Wales from the days of Richard Price, the great constitutional expert of the enlightenment, up to the very learned lawyers that we have before us. But if you were to write a new constitution for Wales, where would you both start?

fyddech chi'ch dau yn cychwyn?

[156] **Mr Lewis:** Gofyn i chi, Dafydd, siŵr o fod.

Mr Lewis: Probably ask you, Dafydd.

[157] **Yr Athro Watkin:** Nid wyf yn gwybod os gallaf ateb y cwestiwn, ond rhoddaf sylw ar y cwestiwn. Un peth sy'n fy nhrwblu i yw'r ffaith bod pob Cynulliad ond un sydd wedi dod yn ôl i'r bae yma yng Nghaerdydd ar ôl etholiad wedi dod yn ôl i setliad newydd. Mae hynny'n golygu nad oes traddodiad ynglŷn â defnyddio'r setliad yn datblygu yng Nghymru. Bob tro mae Aelodau yn cyrraedd bae Caerdydd, maen nhw'n gorfod dysgu setliad newydd—yn 1999, nid yn 2003, ond yn 2007, yn 2011, ac efallai eto nawr yn y Cynulliad newydd. Tan fod yna ryw fath o draddodiad yn datblygu, lle mae pobl yn gyfforddus yn defnyddio'r pwerau ac nid yn dysgu sut i ddefnyddio'r pwerau a'r cymhwysedd, ni fydd y Cynulliad yn ffynnu yn y modd y mae angen iddo fe ffynnu ar gyfer pobl Cymru.

Professor Watkin: I don't know if I can answer that question, but I will comment on the question. One thing that troubles me is the fact that all Assemblies bar one that have been returned to Cardiff bay after an election have come back to a new settlement. That means that a tradition in terms of using the settlement does not develop in Wales. Every time Members reach Cardiff bay, they have to learn a new settlement—in 1999, not in 2003, but in 2007, in 2011, and perhaps once again in the next Assembly. Until there is some sort of tradition established, where people are comfortable using the powers, rather than constantly learning how to use their powers and their competence, the Assembly will not prosper in the way that it needs to prosper for the benefit of the people of Wales.

[158] **Mr Lewis:** Rwy'n credu fy mod i'n gwybod lle buaswn i'n cychwyn, ac os caf i fod yn gadarnhaol, mae'r Ysgrifennydd Gwladol wedi cychwyn yn yr un man, sef

Mr Lewis: I think that I know where I would start, and if I can be positive, the Secretary of State has started in the same place, namely

[159] 'An Assembly for Wales is recognised as a permanent part of the United Kingdom's constitutional arrangements.'

[160] Rydym ni wedi bod yn pigo ar y mân feiau—wel, maen nhw'n feiau eithaf mawr, ond ar y manylion—ond

We've been looking at the small faults—well, some of them are quite significant faults, but on the details—

mae'n bwysig nodi hefyd fod y datganiad yna o fewn Bil seneddol Prydeinig yn beth gwerthfawr iawn.

but it's important to note that having that statement within a British parliamentary Bill is very valuable indeed.

[161] **Yr Arglwydd Elis-Thomas:** Ydy, ac mae hynny'n cyfateb i'r datganiad yn yr Alban, felly nid ni a wnaeth hynny.

Lord Elis-Thomas: Yes, it is, and it corresponds to the statement in Scotland, so that's not something that we've done.

[162] **Mr Lewis:** Na, ond mae o yna.

Mr Lewis: No, but it's there.

[163] **Yr Arglwydd Elis-Thomas:** Beth sy'n boen i mi ydy, wedi'r datganiad cyfansoddiadol cyffredinol yna, mae'r canlyniad yn fwy cyfyngedig na beth sydd gennym ni heddiw. Mae hwn yn fater o ddicter moesol i mi, mae'n rhaid i mi ddweud, achos roeddwn i wedi gweld hyn yn dod, achos nid oes gwahaniaeth mewn egwyddor—fel rydym wedi ei drafod o'r blaen, yn sicr—rhwng materion wedi cael eu gosod i Gynulliad gydag eithriadau, a materion sydd wedi eu neilltuo gyda mwy o eithriadau. Felly, ble mae'r eglurder cyfansoddiadol yn y sefyllfa hon?

Lord Elis-Thomas: What is of concern to me is that, following that general constitutional statement, the result is more restrictive than what we have at present. That is a cause of great moral concern to me, and anger, I have to say, because I saw this coming, because there is no difference in principle—as we have discussed before, certainly—between matters that have been conferred to the Assembly with exceptions and matters that have been reserved with more exceptions. Therefore, where is the constitutional clarity in this situation?

[164] **Mr Lewis:** Cywir, ond mi fuasai model pwerau wedi eu cadw yn ôl da yn well na'r hyn—

Mr Lewis: You're absolutely right, but a good reserved-powers model would be better than what—

[165] **Yr Arglwydd Elis-Thomas:** Megis Gogledd Iwerddon, er enghraifft.

Lord Elis-Thomas: Such as Northern Ireland, for example.

[166] **Mr Lewis:** Wel, efallai. Buasai'n well na'r hyn sydd gennym ar hyn o bryd.

Mr Lewis: Well, maybe. It would be an improvement on the situation we currently have.

[167] **David Melding:** With that question, which leaves us still a lot of material to ponder, I'd like to thank Professor Watkin and Emyr Lewis for their evidence this afternoon, which has been very stimulating, and I'm sure it will be a great assistance to both committees when we come to formulate our reports. As well as the people of Wales and civic bodies, we do hope the Secretary of State will pay a great deal of attention to our respective reports on the draft Wales Bill. Thank you both very much indeed.

14:38

Tystiolaeth mewn Perthynas â'r Bil Cymru Drafft
Evidence in Relation to the Draft Wales Bill

[168] **David Melding:** I'll ask our next set of witnesses to join us: Professor Richard Wyn Jones and Professor Roger Scully, both of the Wales Governance Centre and other august institutions and universities. I can describe both Richard and Roger as serial witnesses. [*Laughter.*] They have done much over the years—unpaid—to help with our work. So, we're very, very grateful. I'm sure you heard the earlier session. Obviously these proceedings are conducted bilingually, and you'll get a translation on channel 1. You do not need to touch your microphones, they'll be operated automatically. I'm going to ask Gerald Jones to start this session of questions.

[169] **Gerald Jones:** Thank you, Chair. Good afternoon, gentlemen. A fairly straightforward question to start. You'll note I did say 'fairly straightforward'. The Secretary of State has described wanting these proposals to provide a clear, robust and lasting settlement for Wales; how much do you feel that these proposals actually mirror that statement?

[170] **Yr Athro Jones:** Diolch am y croeso, Gadeirydd. Mae'n rhaid i mi ddweud mai dyma'r tro cyntaf erioed i fi roi tystiolaeth gerbron eich pwyllgor chi. Mae'r pwyllgor dethol yn San Steffan yn llawer iawn mwy croesawgar ohonof i. [*Chwerthin.*]

Professor Jones: Thank you for your welcome, Chair. I have to say that this is the first time that I have ever given evidence before your committee. The select committee in Westminster is far more welcoming to me. [*Laughter.*]

[171] **David Melding:** It just feels as if you've given a lot of evidence. [*Laughter.*]

[172] **Yr Athro Jones:** O ran ymateb

Professor Jones: In terms of responding

i'ch cwestiwn chi, yr ateb byr ydy 'Na', ond rwy'n meddwl ei bod hi'n bwysig deall pam nad ydy'r hyn sy'n cael ei argymell yn y Bil drafft yn darparu'r math o setliad mae'r Ysgrifennydd Gwladol a phob un ohonom ni yn ei ddeisyf. Ac yn syml iawn, rwy'n meddwl bod y broses sydd wedi arwain at y Bil drafft wedi creu'r amwysedd rydym ni rŵan yn delio efo fo. Roedd yna nifer o gwestiynau y bore yma i arweinwyr y pleidiau ynglŷn â'r broses Gŵyl Ddewi. Mae yna rywbeth pwysig iawn i'w ddweud am y broses Gŵyl Ddewi, achos rwy'n meddwl ei fod o'n ganolog i lle rydym ni rŵan.

to your question, the brief answer is 'No', but I do think it's important to understand why what is being recommended in the draft Bill doesn't provide the kind of settlement that the Secretary of State and each and every one of us aspires towards. And quite simply, I think the process that's led to the draft Bill has created the ambiguity that we're currently dealing with. There were a number of questions this morning to the party leaders on the St David's Day process. There is something very important that I need to say about the St David's Day process, because I think it is at the heart of where we currently are.

[173] Yn gyntaf, nid pwrpas a nod y broses oedd darparu sail gydlynol, eglur i setliad datganoli Cymru; nod proses Gŵyl Ddewi oedd cael rhyw fath o ddealltwriaeth rhwng y pleidiau. Felly, beth ddigwyddodd oedd eistedd i lawr, edrych ar yr hyn a oedd yn cael ei gynnig gan Silk a chan Smith—mae pobl yn anghofio bod yr hyn a oedd yn cael ei argymell gan Gomisiwn Smith ar gyfer yr Alban yn rhan o'r hyn a ystyriwyd gan y broses Gŵyl Ddewi—ac wedyn roedd y pleidiau yn gallu dweud 'Rwy'n cytuno neu'n anghytuno efo hynny'. Nid oedd rhaid i'r pleidiau egluro pam roedden nhw yn cymryd y safbwynt yna. Nid oedd rhaid i'r pleidiau egluro sut roedd yr hyn roeddwn nhw'n ei awgrymu yn mynd i arwain at setliad a oedd yn ymddangos yn barhaol, a oedd yn eglur, ac ati. *Lowest common*

First of all, the purpose and aim of the process was not to provide a cohesive, clear devolution settlement for Wales; the aim of the process was to have some sort of understanding between the political parties. What happened was they sat down, they looked at what was proposed by Silk and by Smith—people do tend to forget that what was recommended by the Smith Commission for Scotland was also part of the considerations of the St David's Day process—and then the parties could say 'I agree or disagree with that'. The parties didn't have to explain why they took those positions. They didn't have to explain how what they suggested was going to lead to a settlement that would appear to be permanent and provided clarity, and so on. It was a lowest common denominator approach. So, the aim of the process was consensus rather than

denominator oedd hi. Consensws yn hytrach na rhywbeth synhwyrol oedd nod y broses.

a sensible approach.

[174] Yr ail beth i'w ddweud ynglŷn â'r ddogfen yma—dogfen '*Powers for a Purpose*'—ydy, yn ychwanegol at y broses honno, fe ychwanegwyd nifer o atodlenni—'*annexes*'—ac nid yw'n eglur i mi o le daeth yr *annexes.* Ond, yn *annex B* yn arbennig, mae llawer iawn, iawn o'r trafferthion rydym ni yn delio efo nhw heddiw. Yn *annex B* mae'n awgrymu y byddai'n rhaid cadw nôl—

The second thing that I should say about this document—'Powers for a Purpose'—is that, in addition to that process, a number of annexes were added, and it isn't clear to me where those annexes came from. But, in annex B particularly, many of the difficulties that we are dealing with today emerge. In annex B, it suggests that one would have to—

'The Areas Where Reservations Would Be Needed: An Illustrative List...Civil Law and Procedure...Criminal Law and Procedure...'

[175] Nid wyf yn gwybod pwy yn lle benderfynodd bod yr hyn a gytunwyd arno fo rhwng y pleidiau yn golygu bod yn rhaid cadw nôl *civil law and procedure* a *criminal law and procedure*. Nid oedd trafodaeth rhwng y pleidiau. Nid oedd trafodaeth ehangach, ond mae yna rywun wedi cymryd yn ganiataol bod hynny yn dilyn, ond nid wyf yn derbyn y rhesymeg. Mae llawer iawn, iawn o'r trafferthion rydym yn eu cael heddiw yn deillio, rwy'n meddwl, o'r ddogfen gychwynnol yma nad oedd, i ailadrodd, ynglŷn â darparu setliad clir a chadarnhaol ond a oedd, a chwarae teg i'r Ysgrifennydd Gwladol am drio—nid wyf yn ei feio am drio; yn wir, rwy'n meddwl ei fod yn haeddu canmoliaeth am drio—roedd o'n trio gwthio'r agenda yn ei blaen ar sail Silk a Smith, ond nid oedd

I don't know who, and in what place, decided that what was agreed upon by the parties meant that you would have to reserve civil law and procedure and criminal law and procedure. There was no discussion between the parties. There was no broader discussion, but someone has assumed that that follows naturally, but I don't accept the rationale. Many of the difficulties that we're facing today do emerge from this initial document, I believe, which, to repeat, wasn't about providing a clear and permanent settlement, but was, and fair play to the Secretary of State for trying—I don't blame him for trying; I think he deserves great praise for attempting to do this—he was trying to push the agenda forward on the basis of Silk and Smith, but that wasn't an adequate foundation.

hynny'n sail ddigonol.

[176] **Professor Scully**: I don't have a great deal to add to that; I agree with pretty much everything my colleague has said. One thing I would add is that, understandably, since the publication of the draft Bill, discussion has very much focused overwhelmingly on problems or potential problems that some people perceive in the Bill. In the one area that's actually closest to my own particular area of expertise—matters of elections—I think actually there is a rather more positive story to tell. I believe the provisions regarding elections in the draft Bill are appropriate, substantive and broadly positive.

[177] **Gerald Jones**: Could I ask a follow-up question? Do you believe the new arrangements will lead to fewer Assembly Bills being referred to the Supreme Court?

[178] **Yr Athro Jones**: Nac ydw. Gadewch imi ddweud fel rhyw fath o ragarweiniad bod yna nifer o dystion y bore yma wedi cyfeirio at y gwaith mae Canolfan Llywodraethiant Cymru wedi bod yn ei wneud dros y misoedd diwethaf. A gaf i jest ddweud fel pwynt cyffredinol wrth y pwyllgorau fod yr amserlen sydd wedi cael ei gosod ar y broses yma yn ei gwneud hi'n anodd iawn, iawn i gyrff cymdeithas sifig fel prifysgolion ymateb yn synhwyrol i'r hyn sy'n mynd ymlaen? Mae'r amserlenni mor heriol. Rydym yn ceisio darparu adroddiad manwl ar y Bil drafft. Yn y bôn, mae gennym fis i'w sgwennu o. Nid oes gennym ddim cyllideb, dim staff. Mae'n anodd iawn, iawn i ymateb mor gyflym i ddeddfwriaeth sydd—. Fel mae'r Arglwydd Brif Ustus wedi dweud, hwn ydy'r setliad datganoli mwyaf cymhleth ohonyn nhw i gyd, ac rydym ni'n delio â fo ar ras wyllt, ac mae hynny'n gwneud pethau'n anodd iawn. Mae'n ddrwg **Professor Jones**: No. Let me say as a word of preamble that many witnesses this morning have referred to the work that the Wales Governance Centre has been doing over the past few months. May I just say as a general point to the committees that the timetable set out for this process does make it extremely difficult for civic society organisations such as universities to make a sensible response to what is going on? The timetable is so challenging. We are trying to provide a detailed report on the draft Bill, and essentially we have a month to draft that. We don't have a budget, we don't have staff. It's very, very difficult to respond so swiftly to legislation which—. As he Lord Chief Justice has said, this is the most complex devolution settlement of them all, and we are dealing with it in great haste, and that does make things very difficult indeed. I apologise for making that point, but I think that it's important that I did so.

gen i am ddweud hynny, ond rwy'n meddwl ei bod hi'n bwysig gwneud y pwynt

14:45

[179] O ran y Goruchaf Lys, rwy'n gweld dwy ardal lle mae yna broblemau potensial sylweddol. Mae'r cyntaf yn ymwneud â'r materion sydd wedi'u cadw'n ôl—y rhestr hirfaith yna—ac, yn benodol, y geiriau pwysig 'relates to'. So, nid yn unig mae gennym ni 267, rwy'n credu, o faterion wedi'u cadw'n ôl, ond mae gennym ni y 'relates to' yma, sydd wedi cael ei fewnforio o ddeddfwriaeth yr Alban ac sydd efallai'n gwneud synnwyr yng nghyd-destun yr Alban, lle mae'r rhestr o bwerau sydd wedi'u cadw'n ôl gymaint â hynny'n llai. Ond, yng nghyd-destun 260—beth bynnag ydy o—o feysydd, mae hynny'n agor y drws i bob math o heriadau a allai'n hawdd ddiweddu yn y Goruchaf Lys.

In terms of the Supreme Court, I see two areas where significant potential problems could emerge. The first relates to reserved matters—that lengthy list—and, specifically, the important words 'relates to'. So, not only do we have 267 reservations, I believe, but we have this 'relates to', which has been imported from Scottish legislation and perhaps makes sense in the Scottish context, where the list of reserved powers is so much shorter. But, in the context of 260 or so areas, that opens the door to all sorts of challenges that could quite easily end up in the Supreme Court.

[180] Yr ail ardal o anawsterau ydy'r ardal sydd ar hyn o bryd yn cael ei hadnabod o dan faner 'prawf angen'—*necessity test*. Rŵan, y broblem sylfaenol yn fanna ydy, wrth gwrs, y ffaith bod penderfyniad wedi cael ei wneud yn atodlen B i'r Papur Gwyn sy'n dweud bod yn rhaid cadw'n ôl i Lundain gyfraith droseddol a chyfraith breifat. Yn sgil hynny, mae ymdrech i greu rhyw le bach i'r Cynulliad allu gwneud yr hyn y mae deddfwrfa yn ei wneud, sef deddfu. Mae'r gofod cyfyngedig iawn

The second area where difficulties emerge is this area that at present is known as the necessity test. Now, the fundamental problem there, of course, is that a decision was taken in annex B of the White Paper that states that criminal and private law must be reserved to London. In light of that, there is an attempt to create a small space for the Assembly to do what a legislature does, which is to create legislation. That very limited or restricted space, which is policed in different ways, I think, will lead quite

yna, sy'n cael ei blismona mewn gwahanol ffyrdd, rwy'n meddwl, yn mynd i arwain yn amlwg iawn at achosion yn y Goruchaf Lys. Felly, mae yna ddwy ardal sylweddol iawn yn fan hyn, rwy'n meddwl, sy'n gallu arwain at sialens.

clearly to cases in the Supreme Court. So, there are two very significant areas here, I think, which could lead to challenge.

[181] **David Melding:** Liz Saville Roberts.

[182] **Liz Saville Roberts:** Diolch yn fawr. Rwy'n cofio gofyn i'r Ysgrifennydd Gwladol am y rôl ymgynghori gyda'r gymdeithas ddinesig y tro cyntaf y gwelon ni o ar ôl cyhoeddi y Ddeddf ddrafft. Fe ddywedodd e wrthyf i yr adeg hynny fod yna ymgynghori trwyadl iawn wedi bod trwy Gomisiwn Silk. Ond mae amser wedi mynd heibio ers hynny. Mae refferendwm wedi digwydd yn yr Alban; mae pethau'n newid ynghylch EVEL yn San Steffan, ac mi rydych chi newydd sôn eich hun am rôl y gymdeithas ddinesig. O ran lle rydym ni rŵan, beth ddylem ni ei wneud felly?

Liz Saville Roberts: Thank you very much. I remember asking the Secretary of State about the consultative role with civic society the first time that we saw him after publishing the draft Bill. He told me at that time that there had been very thorough consultation through the Silk Commission. But time has passed since then. A referendum has happened in Scotland; things have changed in relation to EVEL in Westminster, and you've just spoken yourself about the role of civic society. In terms of where we are now, what should we do therefore?

[183] **Yr Athro Jones:** O ran yr holl beth? Wel, mae pwynt ynglŷn â phroses. Os ydym ni'n dymuno bod y drafodaeth hwn yn symud y tu hwnt i fod yn ddadl rhwng llywodraethau, mae'n rhaid oedi'r broses, achos, mewn cyd-destun lle mae gennym ni rywbeth sydd mor astrus o gymhleth ac mae'r amserlen mor fyr, dim ond llywodraethau sy'n gallu bod yn rhan o'r drafodaeth honno. Felly, i roi enghraifft benodol i chi—. Mae'n debyg y gwnaiff rhywun ofyn i mi ar

Professor Jones: In terms of the whole thing? Well, there is a point on process. If we want this debate to move beyond an argument between governments, then we have to delay the process, because, in a context where we have something which is so incredibly complex and the timetable is so brief, it is only governments that can participate in that discussion. So, to give you a specific example—. I'm sure someone at some point will ask me about the 260, or whatever it is, areas

ryw bwynt ynglŷn â'r 260, neu beth bynnag ydy o, o feysydd sydd wedi cael eu cadw'n ôl, a beth yw fy marn i ynglŷn â hynny. Wel, rydym ni'n trio ysgrifennu adroddiad ar y Bil drafft ar hyn o bryd. Y broblem ydy, mewn mis, sef beth sydd gennym ni yn y bôn, nid oes modd i unrhyw gorff, hyd yn oed gydag arbenigwyr cyfansoddiadol o faintioli'r bobl sydd yn rhan o'r pwyllgor bach sydd yn ysgrifennu'r adroddiad, i wneud y gwaith. Felly, fe allwn ni gymharu'r hyn sy'n cael ei gadw'n ôl i Gymru o'i gymharu â'r Alban a Gogledd Iwerddon, a dweud 'Wel, nid oes cynsail ar gyfer hyn; nid oes cynsail ar gyfer y llall' ond allwn ni ddim mynd ymhellach na hynny yn y gofod o amser sydd ar gael. Felly, mae'r amserlen yn ei gwneud hi'n anodd iawn, iawn i bobl y tu allan i'r Llywodraethau. Mae'n rhaid ei bod yn her eithriadol i chi, Mr Gadeiryddion, i ddelio â rhywbeth mor gymhleth â hyn.

that are reserved, and what my view is on that. Well, we are trying to write a report on the draft Bill at present. The problem is that, in a month, which is essentially what we have available to us, then it isn't possible for anybody, even with the constitutional experts of the stature that we have supporting those people who are part of the small committee writing the report, to do the work. So, we can compare what's being reserved for Wales as compared with Scotland or Northern Ireland, and say 'Well, there is no precedent for this; there is no precedent for the other' but we can't take it any further than that in the time that is available. Therefore, the timetable makes it very, very difficult for people outwith the Governments. I'm sure that it must be a huge challenge for you, Mr Chairs, to deal with something as complex as this.

[184] O ran sylwedd y peth, y tu hwnt i edrych yn fanwl ar y meysydd sydd wedi'u cadw'n ôl, rwy'n meddwl mai'r ddau beth pwysig wedyn yw edrych o ddifri ar y syniad o greu awdurdodaeth gyfreithiol i Gymru, yn yr ystyr gyfyngedig rydym wedi bod yn ei drafod dros yr wythnosau diwethaf. Rwy'n meddwl byddai hynny o bosibl yn helpu gyda'r problemau ynglŷn â phrawf angen—y pethau sy'n dod o dan y pennawd yna. Ac rwy'n meddwl bod yn rhaid edrych eto yn fanwl iawn ar y

In terms of the substance of the issue, beyond looking in detail at the reserved areas, I think that the two important things then are to look in earnest at the concept of creating a legal jurisdiction for Wales, in the restricted meaning that we have been discussing over the past few weeks. I think that would quite possibly assist with some of the problems around the necessity tests—those things that are included under that heading. And I think we must look again in very great detail at the issue of Minister of the Crown consents. There

cwestiwn o gydsyniad gweinidogol. Roedd yna deimlad yn Swyddfa Cymru, yn ôl yr hyn rwy'n ei ddeall, mai'r hyn roedden nhw'n ei wneud oedd mewnforio'r drefn sy'n bodoli yn yr Alban. Nid yw hynny'n wir, ac rwy'n meddwl ei bod yn creu problemau gwleidyddol y gellid eu hosgoi. Ond, mae angen mwy o amser i wneud hyn i gyd.

was a feeling in the Wales Office, as I understand it, that what they were doing was importing the system that exists in Scotland. That isn't the case, and I do think that that creates political problems that could be avoided. But, we need more time to do all of this.

[185] **Liz Saville Roberts**: Ac i ofyn cwestiwn cwbl bragmataidd, felly, rwy'n meddwl bod ein hamserlen ni yn disgwyl bod yna ail ddrafft gyda ni erbyn diwedd y mis yma?

Liz Saville Roberts: And to ask an entirely pragmatic question, therefore, I think that our timetable expects a second draft by the end of this month?

[186] **David T.C. Davies**: Nid wyf yn siŵr, a bod yn onest. Mae'r dyddiadau yn symud drwy'r amser, rwy'n credu.

David T.C. Davies: I'm not sure, to be honest. The dates are moving all the time, I believe.

[187] **Craig Williams**: But, of course, Chair, there would be a Committee Stage—you could feed into that.

[188] **David T.C. Davies**: I suppose there would.

[189] **Craig Williams**: So, it's not just a month. There's a Committee Stage also.

[190] **Liz Saville Roberts**: Lle rwy'n trïo mynd efo hyn ydy: faint o amser a ddylai fod gennych chi, a gennym ni?

Liz Saville Roberts: Where I'm trying to go with this is: how much time should there be for you, and for us?

[191] **Yr Athro Jones**: Rwy'n cymryd, efallai, mai'r hyn yr oedd fy nghyfaill, Craig Williams, yn ei awgrymu oedd bod yna gyfleon yn dod yn nes ymlaen yn y broses. Mae nifer o bobl wedi gwaredu y bore yma—rwy'n credu mai Byron Davies oedd yn

Professor Jones: I assume that what my colleague, Craig Williams, was referring to was that there will be opportunities later in the process. Many people have regretted this morning—I think it was Byron Davies who was regretting the two Governments going head-to-head

gwaredu bod yna ddwy Lywodraeth yn mynd ben-ben â'i gilydd. Rhan o'r ffordd o osgoi hynny ydy cael trafodaeth ehangach, yndê, ac mae'n mynd i fod yn anodd iawn i gael y drafodaeth ehangach yma ar amserlen mor gyfyngedig? Ac rwy'n derbyn, wrth gwrs, fod yna fodd diwygio wrth i chi fynd drwy'r broses yn Nhŷ'r Arglwyddi, ac ati, ac ati. Ond, rwy'n meddwl bod cwestiynau mor sylfaenol ynglŷn â'r bensaerniaeth.

on this issue. Part of the way of avoiding that is to have a wider discussion, isn't it, and it's going to be very difficult to have that discussion given such a tight timescale? And I do accept, of course that there are opportunities to amend, as you go through the process in the House of Lords, and so on and so forth. But I do think that there are such fundamental questions regarding the architecture.

[192] Un arwydd o'r brys—sori, mae hwn yn obsesiwn personol—ond un arwydd o'r brys ydy'r ffaith bod cymaint o'r Bil drafft yn diwygio deddfwriaeth flaenorol ac nad oes yna ddim *consolidation*. Felly, i ddarllen hwn, mae'n rhaid i chi gael copi o Ddeddf 2006, a thywel efo dŵr oer wedi ei lapio o gwmpas eich pen, a chymharu'r ddwy ddeddfwriaeth. Fel cyfansoddiad Cymru, nid yw hwn yn hylaw, ddywedwn ni.

One sign of the haste—sorry, this is a personal obsession of mine—but one sign of the haste is the fact that so much of the draft Bill amends previous legislation and that there is no consolidation. So, to read this, you have to have a copy of the 2006 Act, and a towel doused in cold water wrapped around your head, and you have to compare the two pieces of legislation. As a constitution for Wales, this isn't user friendly, shall we say.

[193] **David Melding**: Carolyn.

[194] **Carolyn Harris**: Thank you, Chair. Richard, from what you've said, and from my perception of things so far, I would argue that the Bill has been rushed, the scrutiny has been rushed, and the end result is going to be rushed. Is there an argument for pulling the reins, as it were, and seeking to get longer time? Because, with the Bill as it stands, is it really doing the best, and delivering the best, for Wales?

[195] **Yr Athro Jones**: I gael bod yn gadarnhaol iawn ynglŷn â'r cyd-destun, fe ddeilliodd proses Gŵyl Ddewi o ddatganiad gan y Prif Weinidog, David Cameron, a oedd yn

Professor Jones: To be very positive about the context here, the St David's Day process emerged from a statement made by the Prime Minister, David Cameron, and said, 'Look, we've had

dweud, 'Edrychwch, rydym wedi cael refferendwm yr Alban, ac rydym ni rŵan eisiau darparu setliad mwy synhwyrol i Brydain gyfan.' Ac mae hynny'n cynnwys *English votes for English laws*, ac rydw i, efallai, mewn lleiafrif o un o gwmpas y bwrdd yma yn credu bod hynny'n syniad da—[*Chwerthin.*] Ocê, lleiafrif bach o gwmpas y bwrdd yma. Ond, roedd bwriad gan David Cameron i ddweud, 'Edrychwch ar gyfansoddiad Prydain, a beth am gael rhywbeth sy'n fwy sefydlog?'. Dyna'n amlwg y mae Llywodraeth Cymru ei eisiau, a dyna, rwy'n credu, mae'r pleidiau yn y Cynulliad i gyd yn dymuno ei weld.

the Scottish referendum, and we now want to provide a more sensible settlement for the whole of Britain.' And that includes English votes for English laws, and I am, perhaps, in a minority of one around this table in believing that that's a good idea—[*Laughter.*] Okay, a small minority around this table. But, it was David Cameron's intention to say, 'Look at the constitution of Britain, and let's have something that's more stable'. That's clearly what the Welsh Government wants, and I think that that's what the parties in the Assembly all want to see.

[196] Felly, mae llawer iawn o bobl eisiau mynd i'r un cyfeiriad yn y fan hyn, a, beth bynnag yw diffygion proses Gŵyl Ddewi, o leiaf roedd y pleidiau i gyd yn fodlon bod yn rhan o'r drafodaeth. Ac mae cydweithwyr i mi yn yr Alban yn synnu'n barhaol bod y pedair plaid yng Nghymru yn gallu eistedd i lawr a thrafod yn waraidd efo'i gilydd, a chytuno. Felly, mae hynny'n gadarnhaol hefyd.

So, very many people want to travel in the same direction here, and, whatever the deficiencies of the St David's Day process, at least all of the parties were willing to be part of that discussion. And colleagues of mine in Scotland are continually shocked that the four parties in Wales can actually sit down and have sensible discussions, and come to agreement. So, that is positive too.

[197] Y broblem ydy—a mynd yn ôl at broses Gŵyl Ddewi—yr hyn a gafwyd drwy broses Gŵyl Ddewi oedd man cychwyn. Roedd angen wedyn edrych ar yr hyn a gytunwyd, i edrych a oedd hynny'n synhwyrol, a oedd hynny'n sail ddigonol i symud ymlaen. Ni chafwyd y broses yna. Yr hyn a wnaethpwyd oedd neidio'n syth i mewn i ddrafftio, ac mae'r problemau yn y Papur Gwyn i gyd jest

The problem is—going back to the St David's Day process—that what emerged from the St David's Day process was a starting point. There was a need then to look at what was agreed, to see whether that was sensible, whether that was a sufficient basis to move forward. That process didn't take place. What happened was they jumped straight into drafting, and the problems in the White Paper have simply been

wedi cael eu trosglwyddo i mewn i'r Bil drafft.

transposed into the draft Bill.

[198] Felly, rwy'n meddwl y byddai oedi yn synhwyrol, ond oedi, a hefyd ystyried. Nid oes pwynt oedi er mwyn oedi. Mae oedi yn gorfod arwain at ystyriaeth—rwy'n gobeithio—gydweithredol, ryng-bleidiol.

Therefore, I do think that a delay would be sensible, but we also need to consider. There is no point delaying just for the sake of it. Delaying matters must lead to consideration—I hope—on a collaborative, cross-party basis.

[199] **David Melding:** Right, okay. I think we've had a truly amazing, awesome view of the horizon in its totality. We do need, however, to get to some specifics, so, Mark Williams.

[200] **Mark Williams:** I enjoyed your interpretation of the St David's Day process. Having been one of the people privy to those discussions, I would say that you were spot on. Your analysis was very accurate indeed. You touched on this earlier on, but I want to return to the test of competence and the issue of the civil and criminal law. You've sat through the evidence this morning and, as a group of academics, you've done a strong body of work on the issues of those new tests and the constraints. How restrictive are they in terms of the scope of a proposed new devolution settlement and how practically will they impact on the Assembly's legislative competence, and, I was going to say, if so, I would suggest it would be more a case of how they will restrict the Assembly's work?

[201] **Yr Athro Jones:** Gan ein bod ni'n dau yn dilyn yr Athro Thomas Watkin ac Emyr Lewis, rwy'n meddwl fy mod yn hyderus iawn yn eich cyfeirio yn ôl at eu sylwadau doeth nhw ynglŷn â'r pwynt. Yr hyn y byddwn ni eisiau tynnu sylw ato ydy pam mae'r prawf angen yno yn y lle cyntaf, achos, o fy narlleniad i o'r prawf angen, fel roeddwn yn ceisio egluro yn f'ateb blaenorol, mae'n deillio o'r penderfyniad yna fod cynnal awdurdodaeth gyfreithiol unedol i Loegr a Chymru yn golygu cadw yn ôl i San Steffan gyfraith

Professor Jones: As we both are following Professor Thomas Watkin and Emyr Lewis, I think I'm very confident in referring you back to their very wise comments on this point. What I would want to draw your attention to is why this necessity test is there in the first place, because, from my reading of the necessity test, as I tried to explain in my previous response, it stems from that decision that maintaining a united legal jurisdiction for England and Wales means reserving to Westminster criminal and private law. Someone, somewhere, has decided that that is

droseddol a chyfraith breifat. Mae yna rywun yn rhywle wedi penderfynu mai dyna sy'n dilyn o'r awydd i gynnal un awdurdodaeth. Nid oedd dim trafodaeth o gwbl o hynny. Unwaith rydych wedi gwneud y penderfyniad eich bod yn cadw hyn yn ôl, gan na allwch chi gael deddfwrfa sydd ddim yn creu deddfau ar droseddau a chyfraith sifil, mae'n rhaid ceisio creu gofod i'r Cynulliad Cenedlaethol allu gweithredu. Yr ymdrech i gyfyngu ar faint y gofod yna sydd wrth wraidd yr holl ddadleuon yma ynglŷn â'r prawf angen.

what stems from the desire to maintain a single jurisdiction. There was no discussion at all on that. Once you've made the decision that you're reserving this, as you can't have a legislature that doesn't make laws relating to crime and civil law, then a space has to be created for the National Assembly to be able to operate. It's that effort to restrict the extent of that space that is at the root of all of these discussions on the necessity test.

[202] **Suzy Davies**: On that last point, when we talk about private law, I still think there's a fundamental problem in the definition of what private law is, and criminal law for that matter. I'd be surprised if anyone around this table would be comfortable with Wales interfering with concepts of mens rea and laws of evidence, for example, but less worried about whether we create new offences or not. So, is there a central problem in calling the thing 'criminal law' or 'private law' in the first place and that that in itself is creating a problem rather than solving it?

[203] **Yr Athro Jones**: Rwy'n cytuno. Mae yna broblem ddiffiniadol fawr. Mae tystiolaeth ardderchog yr Athro Thomas Watkin sydd wedi'i chyflwyno i chi yn nodi'r broblem ynglŷn â diffinio cyfraith breifat, ac, yn yr adroddiad ddaru i ni ei ysgrifennu ar y Papur Gwyn, un o'r pwyntiau roeddem ni'n ei wneud yn y fan yna oedd bod y penderfyniad yna i geisio cadw'r pethau yma yn ôl i San Steffan yn creu problemau sylfaenol, yn gysyniadol ac yn ymarferol.

Professor Jones: I agree there is a problem in terms of the definitions. The excellent evidence from Professor Thomas Watkin that has been submitted to you notes the problem with defining private law, and, in the report that we wrote on the White Paper, one of the points that we made there was that that decision to try to reserve these things to Westminster does create fundamental problems, conceptually and practically.

[204] **David Melding**: I'd like to ask our co-Chair just to test out this issue, or

the consequences of it, of Crown conset.

[205] **David T.C. Davies:** I have a feeling I know the answer to this, but what would your opinions be, gentlemen, on the fact that the Bill will, apparently, remove the ability of the Assembly to modify the functions of UK Ministers? Does that make it more restrictive than was previously the case?

[206] **Yr Athro Jones:** Mae'n rhaid i mi gyfaddef, a dyma gyfaddef gwendid, mai'r rhan o'r Bill drafft sy'n ymwneud â chydsyniad ydy'r rhan yr ydw i'n ei ffeindio yn fwyaf cymhleth ac astrus. Roedd o'n gysur i mi y diwrnod o'r blaen fy mod i wedi siarad ag un o brif arbenigwyr cyfraith gyhoeddus yr ynysoedd hyn ac roedd o'n cydnabod ei fod o ei hun yn cael trafferth efo'r rhan yma o'r ddeddfwriaeth gan ei bod mor gymhleth. Felly, nid wyf yn siŵr bod gennyf lawer iawn i ychwanegu i'r hyn yr ydych chi wedi ei glywed eisoes heddiw.

Professor Jones: I have to confess, and this is a confession of weakness, that the part of the draft Bill relating to consent is the part that I find most complex and abstruse. It was of some comfort to me the other day that, in speaking to one of the main experts on public law in these isles, he himself acknowledged that he had some difficulty with this part of the legislation because it's so complex. So, I am not sure that I have a great deal to add to what you've already heard today.

15:00

[207] Yr unig bwynt fyddwn i'n ei wneud, ac mae hwn yn bwynt gwleidyddol yn hytrach na chyfreithiol, yw fy mod i'n credu fod pawb yn teimlo y byddai symud i sefyllfa lle mae yna llai o wrthdaro gwirion rhwng Bae Caerdydd a glannau'r Tafwys yn fuddiol. Rwy'n credu bod pawb yn meddwl bod hynny'n rhywbeth rŷm ni i gyd yn deisyf ei weld. Mae'r ffordd mae'r cysyniadau yma wedi'u gosod allan—maen nhw mor gynhwysfawr, mae'n anodd rhagweld eu bod nhw'n arwain at ddim ac eithrio gwrthdaro. The only point that I would make, and this is a political point rather than a legal point, is that I believe that everyone feels that moving to a situation where there is less foolish conflict between Cardiff bay and the banks of the Thames would be very beneficial. I think that everybody would see that that's something that we all aspire to. But the way that these concepts have been set out—they're so comprehensive that it's very difficult to foresee that they lead to anything but conflict. Co-chair, you will remember as well as I do the LCO period and the

Byddwch chi, cystal â fi, Mr Cyd-gadeirydd, yn cofio yn ôl i'r cyfnod LCOs a'r drafodaeth ynglŷn â'r cyfnod yna cyn gweithredu Deddf 2006 lle roedd pobl yn dweud, 'Wel, bydd hwn yn gweithio'n iawn achos bydd yna ewyllys da ar y ddwy ochr a bydd yna ddim problem', ac nid felly y bu. Felly, ar ôl y profiad yna, rwy'n credu y dylem ni i gyd fod yn ofalus iawn cyn dilyn cyngor sy'n dweud, 'Wel, mae ewyllys da yn bodoli a bydd hyn ddim yn broblem'.

discussion about that period before the implementation of the 2006 Act when people said, 'Well, this will work very well because there'll be goodwill on both sides and there won't be any problem', and that didn't turn out to be the case. So, after that experience, I think we should all be very careful before pursuing advice that says 'Goodwill exists and this won't be a problem'.

[208] **David T.C. Davies**: Rwy'n teimlo'n well eich bod chi'n ffeindio'r holl broses yn anodd achos nid wyf i'n gallu deall popeth chwaith—yn Gymraeg na Saesneg a bod yn onest. Mae'n debyg i fi, pe na fuasai'r Gweinidogion ym Mhrydain yn gallu newid rôl Gweinidogion yn y Cynulliad, nid yw hi'n deg bod Gweinidogion yn y Cynulliad yn gallu newid rôl Gweinidogion ym Mhrydain, neu faterion nad ydynt yn *devolved*. Efallai ei bod hi'n bosibl dweud bod y Bil yn gwneud pethau yn fwy teg ar bob ochr—a ydych chi'n meddwl hynny?

David T.C. Davies: I do feel better that you are finding this whole process very difficult because I can't understand it all either—in English or in Welsh if truth be told. But it appears to me that if Ministers of the Crown can't change roles of Ministers in the Assembly, then it doesn't seem fair that Assembly Ministers can change the roles of UK Government Ministers, or deal with non-devolved issues. So, it may be possible to say that the Bill makes things fairer on all sides—would you agree with that?

[209] **Yr Athro Jones**: Rwyf wedi clywed y pwynt yn cael ei wneud ac, yn wir, mae'r Ysgrifennydd Gwladol wedi gwneud y pwynt wrthyf i. Yr hyn fuaswn i'n ei ddweud mewn ymateb ydy nad ydych chi'n cymharu tebyg at ei debyg. Mae Whitehall gymaint â hynny yn fwy pwerus—felly, rwy'n meddwl, efallai yn ymddangosiadol, ei fod e'n creu tegwch, ond nid wyf

Professor Jones: I've heard that point being made and, indeed, the Secretary of State has made that point to me. What I would say in response is that you're not comparing like with like. Whitehall is so much more powerful—so, I think it might appear to create fairness, but I'm not sure about that.

yn siŵr am hynny.

[210] A gaf i jest wneud un pwynt sydd hefyd yn bwynt gwleidyddol? Rwy'n meddwl y dylai fod o ddiddordeb mawr i aelodau deddfwrfeydd fel y bobl sydd rownd y bwrdd yma. Yr hyn mae'r busnes ynglŷn â chydsyniad yn ei wneud ydy rhoi'r grym i'r weithrediaeth—i'r *executive*—ac un o'r pethau sydd wedi nodweddu y broses ddatganoli yng Nghymru, yn fy marn i, ydy ei bod wedi rhoi gormod o rym i'r weithrediaeth ar draul y ddeddfwrfa. Mae'r busnes yma ynglŷn â chydsyniad—grym i Weinidogion ydy hwn, grym sydd ddim, wir yr, yn atebol. Rwy'n gobeithio, fel aelodau o ddeddfwrfeydd, y byddwch chi'n nodi mai'r ddeddfwrfa ddylai fod yn arwain, yn hytrach na'r weithrediaeth.

May I make one other point that's also a political point? I do think it might be of interest to the members of a legislature such as those around this table. What the business in relation to consent does is give power to the executive, and one of the things that has been characteristic of the devolution process in Wales, in my opinion, is that it's placed too much power in the hands of the executive at the expense of the legislature. This business about consent—it's power to Ministers, that's what this is, power that isn't accountable. I do hope that, as members of legislature, you will note that it's the legislature that should be leading on this rather than the executive.

[211] Rwy'n meddwl bod hon yn nodwedd rŷm ni wedi ei gweld dro ar ôl tro yn hanes datganoli. Rŷm ni i gyd wedi gwaredu at hynny yn y gorffennol, wel dyma ni enghraifft wych o hynny ac rwy'n gobeithio y byddwch chi'n trio rhoi stop arno. Dyma un o broblemau datganoli Cymreig yn cael ei hailadrodd.

I do think that this is a characteristic that we've seen time and time again in the history of devolution. We've all been surprised by this in the past, well this is an excellent example of this and I hope that you will try to put a stop to it. This is one of the problems of Welsh devolution being repeated.

[212] **David Melding:** Antoinette.

[213] **Antoinette Sandbach:** You spoke about the conflict between the Welsh Assembly and the UK Government, in effect. There was a recommendation in the Silk report of an arbitration mechanism to be laid out by statutory instrument; a code of practice, effectively. Do you think that would be a useful addition to the Bill in order to take some of the heat out of it? I note your recommendation to slow things down, but if we do slow things down, then

we're taking it right into the heart of an Assembly election where there may be much more polarised views in the run up to May coming from the three parties. Really, from that point of view, I'm concerned that slowing down the whole process will actually lead to a worse outcome than sticking with the current timetable, albeit that it causes problems for civil society—and I'm sure that's not the intention.

[214] **Yr Athro Jones**: A gaf i ddechrau efo'r ail bwynt? Rwy'n credu fy mod i'n anghytuno efo chi ynglŷn â chanlyniadau arafu o ran cyd-daro â'r etholiad. Yn ôl yr hyn rwy'n ei ddeall, yr amserlen ar hyn o bryd—ac roedd Liz yn holi David ynglŷn â hyn yn gynharach—. Yn ôl yr hyn yr ydw i'n ei ddeall, bwriad y Llywodraeth Brydeinig ar hyn o bryd ydy diwygio'r Ddeddf a'i gyhoeddi'n fuan iawn yn y flwyddyn newydd a sicrhau ail ddarlleniad erbyn y Pasg. Mae hynny yn union yng nghanol y cyfnod etholiadol. Felly, byddai oedi yn ei fwrw y tu hwnt i'r etholiad yn syth, ac rwy'n credu byddai hynny'n help o ran tynnu'r pwysau gwleidyddol allan o'r broses.

Professor Jones: May I start with the second point in your question? I think that I would disagree with you on the outcomes of slowing down this process and its impact in terms of the election. As I understand the timetable at present—and Liz asked David about this earlier—. As I understand it, it's the UK Government's intention at present to amend the legislation and to publish it very early in the new year and to secure a second reading by Easter. That falls directly within the election period. Therefore, any delay would put it beyond the election immediately, and I think that would be of assistance in terms of taking some of the political heat out of the process.

[215] O ran y syniad yma o gael rhyw fath o gorff sydd yn cadw'r ddysgl yn wastad, os liciwch chi, rhwng Caerdydd a Llundain, mi fyddwn i, wrth gwrs, yn croesawu hynny. Mae nifer o bethau—roedd Syr Paul Silk yn dweud bod hynny'n rhan o'r adroddiad oedd, efallai, ddim wedi cael digon o sylw, ac rwy'n meddwl bod hynny'n deg. Beth fyddwn i hefyd yn ei ddweud yw nad yw hynny, ynddo'i hun, yn mynd i fod llawer iawn o help os ydy pensaernïaeth sylfaenol y setliad yn

In terms of this concept of having some sort of body that maintains a balance between Cardiff and London, of course, I would welcome that. There are a number of things—Sir Paul Silk stated that that was a section of the report that hadn't been adequately covered, perhaps, and I think that's a fair point. What I would also say is that that, in and of itself, isn't going to be of great assistance if the fundamental architecture of the settlement is problematic. So, of course, we need to do what Paul Silk has suggested—and

broblematig. Felly, wrth gwrs, mae angen gwneud yr hyn y mae Paul Silk yn ei awgrymu—yr oedd comisiwn Silk yn ei awgrymu—ond rwy'n credu bod yn rhaid hefyd edrych ar bensaernïaeth sylfaenol y setliad, ac, am resymau rwyf wedi ceisio eu hegluro, rwy'n meddwl bod yna broblemau sylfaenol efo'r hyn sy'n cael ei gynnig hyd yma.

what the Silk commission suggested—but I do think that we must also look at the fundamental architecture of the settlement and, for reasons that I've tried to outline, I do think that there are fundamental problems with what's been proposed to date.

[216] **David Melding:** In the introductions, Professor Scully did refer to the electoral procedures that would come to the Assembly, and we'd now like to look at some of these issues and related matters. I'll ask a former Member of this Assembly, Byron Davies, to put these questions.

[217] **Byron Davies:** Thank you, Chair. On to elections, then, I know, Professor Scully, you've, in a recent blog, described the electoral provisions in the draft Bill as significant—of course, this is a question to both of you. So, perhaps I could ask you, then, about the provisions in the draft Bill relating to new powers for the Assembly over electoral arrangements in Wales, and the extent to which the powers would be, perhaps, coherent and workable.

[218] **Professor Scully:** Okay, thanks. It's interesting; in the draft Bill, there are clearly some things that are reserved, such as European elections, House of Commons elections, also Police and Crime Commissioner elections—a reservation that, I think, makes sense for reasons that, maybe, we can come back to. There are then specific powers given for National Assembly elections, and I talked in my blog about some of the details there. Of course, there's the important silence in the Bill in terms of local elections. So, they're not listed as a reserved matter; that is in line with the Silk report and the St David's Day White Paper. They would, therefore, presumably be transferred. Those are significant.

[219] My own view is that, certainly, the detailed provisions on National Assembly elections, including the super-majority requirement, are sensible and coherent; they certainly allow for significant flexibility. At the same time, they make it very clear that you could not have a single party imposing, even if they had a narrow majority in the Assembly, change on the electoral system for their own benefit. The super-majority requirement is pretty stringent, and we can get details of that if you want, but I think that provides a reasonable balance.

There is flexibility built into some of the detailed provisions. At the same time, you need to clear a fairly high threshold of consensus to actually achieve any change, and, to me, that strikes, I think, a pretty appropriate balance.

[220] **Byron Davies**: What about those electoral laws that remain reserved? Any views on that?

[221] **Professor Scully**: I think that makes eminent sense. House of Commons elections and European Parliament elections are organised on a UK-wide basis. It would, therefore, seem to make eminent sense for competence for them to stay at the UK level. The one that is potentially, I suppose, to some people, a bit more controversial is Police and Crime Commissioners, but I think there is a political argument to be had about whether you devolve policing to Wales or whether that's kept as an England and Wales matter. As the process has not led to agreement on devolving policing it, therefore, clearly would not make sense—. If Police and Crime Commissioners are part of the model of how you supervise and control policing within England and Wales, then it clearly would make no sense to devolve Police and Crime Commissioner elections while the rest of policing has not been devolved. Were you to, at some point, have a political agreement that policing should be devolved within Wales, then that reservation should be removed. But given where we are politically on that general issue of devolving policing, I don't think it would make sense to do anything other than keep Police and Crime Commissioner elections reserved.

[222] **Byron Davies**: Okay. From a practical point of view, any view on how the Assembly and its electoral arrangements could change if the proposed powers in the draft Bill become law?

[223] **Professor Scully**: Well, the specific provisions do create quite a lot of scope for flexibility in terms of the fact that there are specific provisions for changing the electoral system, the number of constituencies, regions, areas and the number of members elected for each constituency. So, in practice, almost everything is up for grabs. At the same time, though, the super-majority requirement of two thirds of all Assembly Members is likely to make it quite difficult to actually change given that we are in a context where, politically, the largest party, frankly, has a political interest in making the system less proportional and the other parties currently represented in the Assembly have a political interest in making the system more proportional. Therefore, to surmount a two thirds of all Assembly Members threshold will actually be quite a difficult thing, politically, to do.

[224] I am, currently, with the Electoral Reform Society Cymru, working on something which we hope to publish in the next few weeks. Would there be possible ways of redesigning the electoral system that might potentially be able to get a consensus? I think, in practice, you're going to have to have a system that is about as proportional as the current system is, so that it doesn't manifestly disadvantage either those who currently benefit from less proportionality or those who would benefit from more proportionality. Within that I think there is still, possibly, scope—and we will be publishing some recommendations—there is possibly scope for changing the electoral system, but it is going to be very difficult. I think we should notice, with this two thirds super-majority requirement, as two thirds of all Assembly Members—well, taking account of the fact that some people are absent for a vote for one reason or another—in practice, therefore, it's more like a 70 per cent or so majority requirement. At no point in the lifetime of the Assembly thus far could the Labour Party and the Liberal Democrats combined have had the votes to change the electoral system on that requirement. Also, the Labour Party and the Conservative Party combined would not have had sufficient votes in the first and the third Assemblies.

[225] So, this is a pretty high threshold that you'll have to reach agreement on. In practice, as long as they don't slip below 20 Assembly Members, the Labour Party will always have a veto on change, but also you would need to get at least one other significant party agreeing on change. Throughout the lifetime of the Assembly, except for the third Assembly, you would have needed to get parties that got over 60 per cent of the constituency vote behind change to actually have sufficient votes to push it through. So, this is going to be quite a high threshold to agree. Personally, I think that's fine because I think electoral systems are so fundamental. Parties have such an inherently strong self-interest there. So, they should be protected against parties being able to manipulate them to their own benefit. So, I think that's fine, but I think the committees should be aware of just how high a threshold this is going to be and how difficult it would be to get, given the political realities as well, consensus around change.

[226] **Byron Davies:** You've made elections sound very interesting.

[227] **Professor Scully:** It's a speciality of mine. [*Laughter.*]

[228] **Yr Athro Jones:** Tra'n cytuno â phopeth y mae fy nghyfaill diddorol wedi ei ddweud, carwn ddweud yn

Professor Jones: While I agree with everything that my interesting colleague has said, I would also like to

ogystal mai un o'r pethau yr ydym wedi bod yn ei wneud fel canolfan yw ceisio ystyried beth yw goblygiadau maint y Cynulliad ar hyn o bryd, os liciwch chi, i ansawdd democratiaeth yng Nghymru. Un o'r pethau sydd yn drawiadol—ac rwy'n mynd yn ôl at bwynt a wnes i ynglŷn â grym y weithrediaeth, yr *executive*'—ar hyn o bryd mae gennym ryw 42 o Aelodau mainc cefn yn y Cynulliad yn dal Llywodraeth cymharol rymus, a dweud y gwir, yn atebol, ac, yn ein barn ni, yn eu chael hi'n anodd dal y Llywodraeth yna yn atebol.

say that one of the things that we, as a centre, have been doing is to try to consider what the implications of the size of the Assembly, as it currently stands, if you like, are in terms of the quality of democracy in Wales. One of the things that is very striking—and I return to a point that I made on the power of the executive—is that, at present, we have some 42 backbench Members in the Assembly holding a relatively powerful Government to account, and, in our view, have difficulty in holding that Government to account.

15:15

[229] Un o'r pethau ddaru i ni ei wneud yn sgil hynny—ac rwy'n gwybod nad yw hyn yn boblogaidd efo pawb, ac rwy'n gweld Chris Davies yn eistedd yn fanna—oedd edrych ar beth ydy'r gymhareb ryngwladol o ran maint corff tebyg i'r Cynulliad efo'r math o rymoedd sydd gan y Cynulliad. O wneud hynny, beth ydych chi'n ffeindio ydy bod y Cynulliad yn fychan iawn mewn termau cymharol.

One of the things we did in light of that—and I know that this isn't popular with everyone, and I see Chris Davies sitting there—was to look at the international ratios in terms of the size of bodies similar to the Assembly, with powers similar to those of the Assembly. In doing that, what you find is that the Assembly is very small in comparative terms.

[230] O geisio edrych ar y dystiolaeth ryngwladol ar beth fyddai maint corff tebyg i'r Cynulliad efo'r math o bwerau sydd gan y Cynulliad a pha mor fawr y byddai fo, rydych chi'n edrych ar tua 100 o Aelodau. Roedd hynny, wrth gwrs, yn symud y drafodaeth sydd wedi bod ynglŷn â 60 *versus* 80; nid yw 80 wedi seilio, hyd y gwelaf i, ar unrhyw sail

From looking at the international evidence on what the size of a body similar to the Assembly with similar powers to those of the Assembly, would be and how large it would be, you are looking at around 100 Members. That, of course, moved the discussion, which has been about 60 versus 80; 80, as far as I can see, isn't based on any evidence base. Now, I

dystiolaethol. Rŵan, rwy'n gwybod, wrth gwrs, bod hyn yn ddadleuol tu hwnt, ond mae'n werth nodi mae'n debyg bod nifer yr Aelodau Seneddol o Gymru yn mynd i leihau, ac mae'n debyg bydd nifer y cynghorwyr o Gymru yn lleihau. Ar hyn o bryd, mae gennym ni lot o Aelodau Seneddol y pen a lot o gynghorwyr y pen—

know that this is very contentious, but it is worth noting that the number of MPs from Wales is likely to reduce and it's likely that the number of councillors in Wales will be reduced. At the moment, we have a number of MPs and councillors per capita—

[231] **Byron Davies:** And MPs.

[232] **Yr Athro Jones:** Ie—Aelodau Seneddol; rwy'n golygu Aelodau San Steffan. Bydd y nifer yna'n lleihau, mae'n debyg, a nifer y cynghorwyr yn lleihau. So, efallai bod yna le i gael trafodaeth—nid wyf yn gallu rhagweld beth fydd canlyniad y drafodaeth, ond efallai bod yna le i gael trafodaeth—ynglŷn â maint y Cynulliad, oherwydd bod hynny'n bwysig i ddal Llywodraeth yn atebol—maint y Cynulliad, felly. Trafodaeth ynglŷn â maint y Cynulliad er mwyn ystyried a ydyn ni'n dal Llywodraeth Cymru'n atebol yn y ffordd y dylem ni fod yn ei wneud.

Professor Jones: Yes—MPs; I am talking about Members in Westminster. The numbers there are likely to reduce and the number of councillors is likely to reduce. So, there may be room for a debate—I don't know what the outcome of that debate would be, but perhaps there is scope to have a debate—on the size of the Assembly, because that's important in terms of holding the Government to account—the size of the Assembly, that is. A debate on the size of the Assembly in order to consider whether we are holding the Government to account in an appropriate manner.

[233] **Professor Scully:** If I could just—

[234] **David Melding:** There is a danger that we'll end up talking not about the powers, but the policies that are permitted under the powers. David.

[235] **David T.C. Davies:** Yn fyr iawn, pa wledydd yr ydych chi wedi eu hystyried?

David T.C. Davies: Very briefly, what countries have you looked at?

[236] **Yr Athro Jones:** Rwy'n hapus iawn i ddanfon copi o'r adroddiad atoch chi, ond mae'n wledydd y

Professor Jones: I'm very happy to send you a copy of that report, but it's Commonwealth nations and the nations

Gymanwlad a gwledydd Ewrop, felly dyna—. Ond rwy'n hapus iawn i ddanfon copi.
of Europe, so, that's. But I'm more than happy to send you a copy.

[237] **Professor Scully**: If I could just add to the comments of my colleague there two very short points, firstly is that, given the relative weakness of the media environment in Wales, which I won't need to explain, I think, to anyone in this room, frankly, effective scrutiny of the Government isn't likely to come from the media outside the Assembly and the Welsh Government. If you're going to get really effective scrutiny of the Welsh Government, it's probably going to have to come, largely, from within the Chamber, and I think that's one of the arguments that, for me, most underpins the broad arguments we've made in favour of increasing the size of the Assembly.

[238] I think, also, if we're looking at possible changes to the electoral system, if there isn't at least some flexibility in the number of Members—. It's going to be difficult enough already to get some consensus on any changes to the electoral system at any point. If there were absolutely no flexibility as well to the total number of Assembly Members, I think it would make it more or less impossible to square that circle.

[239] **David Melding**: Before we move on, can I—? This is a subject that's left scars on Assembly Members and this committee—the issue of disqualification. It's surprising that that's not going to be devolved, given, as I said, our particular unfortunate experiences. A report of this committee clearly outlined the problems we have at the moment where the issue isn't devolved and we can't get on and really draft effective, clear law in this area. What's your view on disqualification?

[240] **Professor Scully**: That's not something I've written about, but it would seem to me, if you're going to devolve the electoral system and most other matters of electoral arrangements, it would be simpler to devolve that, as well, at the same time, probably subject to fairly similar super majority requirements, in that you ought to acquire substantial consensus before you actually change any provisions there.

[241] **David Melding**: I'd like us to look at this issue of Welsh jurisdiction. We've been told that it doesn't necessarily have to be separate; a distinction that's not always clear, I think, in people's minds—or my own, really. Craig Williams, did you want to start on this?

[242] **Craig Williams**: I'm happy to, David. We've spoken a lot about this today and a lot in previous committees, and it's been interesting to develop the argument today about a distinct jurisdiction rather than separate. Can I ask you more broadly about this, because, you know, a rose by any other name—? Now that the Assembly is making these laws and we're starting to get a distinct jurisdiction, do you think there's a confidence issue in terms of Welsh civic society in not saying, 'We have a distinct jurisdiction and this is an issue of training and everything else now'?

[243] **Yr Athro Jones**: Diolch am y cwestiwn, a diolch am y cyfle i drafod y mater yma. Rwy'n credu bod yr adroddiad mi ddaru inni gyhoeddi ar y cyd efo *constitution unit* Coleg Prifysgol Llundain wedi bod yn bwysig o ran cyflwyno'r syniad yma. Fel y bu i'r Cadeirydd awgrymu, mae'r derminoleg efallai wedi gwneud hyn i gyd yn fwy cymhleth nag sy'n rhaid iddo fod. Mae pobl wedi cael yr argraff fod creu awdurdodaeth i Gymru yn golygu creu system lysoedd cyfan gwbl wahanol, gosod y proffesiwn cyfreithiol ar seiliau gwahanol, datganoli cyfiawnder, ac ati ac ati. Felly, mae pobl wedi gweld hyn fel rhyw gam nid yn unig sylweddol yn weinyddol, ond fel rhyw gam *existential* mawr iawn. Mae'n bosib bod yna ddadleuon dros wneud y pethau yna i gyd, ac mae hynny'n drafodaeth y fedrwch chi ei chael, ond mae yna fodd i chi greu awdurdodaeth mewn ystyr llawer iawn yn fwy cyfyngedig, a dyma beth rydym wedi ei galw'n awdurdodaeth benodol, *distinct jurisdiction.*

Professor Jones: Thank you for the question, and thank you for the opportunity to discuss this matter. I believe that the report that we published on a joint basis with the constitution unit of University College London has been important in putting forward this idea. As the Chair suggested, the terminology has perhaps made all of this more complex than it needs to be. People have got the impression that creating a jurisdiction for Wales means creating an entirely different courts system, placing the legal profession on a different basis, devolving justice, and so on and so on. So, people have seen this as not only a substantial administrative step, but as some sort of considerable existential step. It's possible that there are arguments for doing all of those things, and that is a debate that you can have, but it is possible for you to create a jurisdiction in a much more restricted sense, and this is what we have called a distinct jurisdiction.

[244] Rwy'n credu bod Emyr Lewis wedi mynegi hyn yn dda iawn yn y

I believe that Emyr Lewis expressed this very well in the previous session, where

sesiwn blaenorol, lle'r oedd yn dweud bod hyn yn fater o gydnabod fod cyfraith Cymru yn bodoli. Felly, mae ynglŷn ag *extent.* Felly, rwy'n meddwl mai cydnabod—yn hytrach na bod y lle yma'n pasio neu'n creu deddfwriaeth *England and Wales*, sef y sefyllfa bresennol, ein bod ni jest yn derbyn realiti, mewn ffordd, bod y lle yma'n pasio deddfwriaeth Gymreig. Mantais fawr hynny ydy ei fod yn delio â'r broblem rydym ni wedi ei chael yn deillio o atodlen B 'Powers for a Purpose', sy'n dweud ein bod ni'n cadw yn ôl i Lundain cyfraith droseddol, cyfraith breifat, ac yn y blaen. Os ydych chi'n creu awdurdodaeth benodol i Gymru yn yr ystyr mwy cyfyngedig yna, wel mae llawer iawn o'r problemau yna yn diflannu. Felly, mi allai hyn, i rai pobl, fod yn gam i'r cyfeiriad cywir o greu awdurdodaeth yn gyfan gwbl ar wahân rhyw dro, neu mi allai fod yn ddiwedd y daith. Rhywbeth weddol bragmatig ydy hyn i ddelio â'r anawsterau sy'n codi, rwy'n meddwl, o'r ffaith bod rhywun wedi diffinio goblygiadau'r hyn a gytunwyd ym mhroses Gŵyl Ddewi fel rhywbeth sy'n golygu trin gofod deddfu'r Cynulliad fel rhywbeth cyfyngedig dros ben.

he said that this is a matter of acknowledging that Welsh law does exist. Therefore, it is about extent. So, I think that it's about acknowledging—rather than this place passing or creating England-and-Wales law, which is the current situation, that we accept the reality, in a way, that this place passes Welsh legislation. The great advantage of that is that it deals with the problem that we've had stemming from annex B of 'Powers for a Purpose', which says that we reserve to London criminal law, private law, and so on. If you create a distinct jurisdiction for Wales in that more restricted sense, then many of those problems disappear. So, this, for some people, could be a step in the right direction of creating an entirely separate jurisdiction at some point, or it could be the end of the journey. It's quite a pragmatic way of dealing with the difficulties that arise, I believe, from the fact that someone has defined the implications of what was agreed in the St David's Day process as something that means treating the Assembly's legislative space as a very restricted thing.

[245] **Craig Williams:** But coming back to my key question about is this just Welsh civic life not having the confidence to say, 'Look, a rose by any other name; we have our own Welsh jurisdiction on these laws. We are making laws, we have made laws, they are being interpreted, they are being implemented; it is already there', why are we looking up at Westminster and saying, 'Please, guys, will you tell us we have a Welsh jurisdiction', when we've got one?

[246] **Yr Athro Jones**: Mae'n ddrwg gen i, roeddwn yn araf yn deall y cwestiwn. Ie, rwy'n cytuno, yn yr ystyr mai mater yw o'r cyfansoddiad yn dal i fyny efo realiti deddfwriaethol. Rwy'n deall y pwynt yna. Beth fuaswn yn dweud ydy, oherwydd nad ydyw wedi cael ei gydnabod yn ffurfiol, beth rydych yn ei gael ydy'r prawf angen a'r math yma o beth. Felly, ie, y realiti ydy bod y lle yma'n creu deddfwriaeth Gymreig, ond oherwydd nad yw'r cyfansoddiad yn cydnabod hynny, rydym rŵan yn wynebu sefyllfa lle mae yna Fil drafft o'n blaenau ni sy'n cynnig syniadau rwy'n meddwl sydd yn mynd i fod yn gymhleth tu hwnt er mwyn cynnal yr ideoleg, am wn i, o *England and Wales*.

[247] **Professor Jones**: I'm sorry, I was slow to understand the question. Yes, I agree, in the sense that this is a matter of the constitution catching up with the legislative reality. I understand that point. What I would say is that, because this has not been acknowledged formally, what you get is the necessity test and that sort of thing. So, yes, the reality is that this place is creating Welsh law, but because the constitution doesn't acknowledge that, we now face a situation where there is a draft Bill in front of us that offers ideas that I think will be extremely complicated in order to maintain the ideology, as far as I know, of England and Wales.

[248] **Craig Williams**: And you don't think that's just a follow on from our glorious unwritten constitution and the complex nature of all this, and that this is just the Secretary of State setting out very pragmatic ways to work this through?

[249] **Yr Athro Jones**: Mae'n rhaid i mi ddweud fy mod i'n edmygydd mawr o'r hyn mae'r Ysgrifennydd Gwladol wedi bod yn ceisio ei wneud drwy'r broses yma, er fy mod i'n feirniadol o le rydym wedi ei gyrraedd. Nid wyf yn gweld llaw'r Ysgrifennydd Gwladol y tu ôl i'r prawf angen. Buaswn i'n dychmygu mai'r Weinyddiaeth Gyfiawnder, efallai, sydd wedi penderfynu mai dyma'r ffordd ymlaen, yn hytrach na'r Ysgrifennydd Gwladol dros Gymru.

Professor Jones: I have to say that I am a great admirer of what the Secretary of State has been trying to do through this process, even though I am critical of where we have reached. I don't see the hand of the Secretary of State behind the necessity test. I would imagine that it's the Ministry of Justice, perhaps, that's decided on this way forward, rather than the Secretary of State for Wales.

[250] **David Melding**: Alun Davies.

[251] **Alun Davies:** Thank you very much. I read the report on the distinct jurisdiction, and I've listened to the debate and the discussion that we've had, but is it not the case that the reason that we've made such a mess of devolution in Wales over the last 20 years, and we've had a new Act of Parliament delivering a durable, lasting settlement every four or five years—

[252] **Professor Jones:** Lasting for a generation.

[253] **Alun Davies:** A generation, yes. It is because we've tried to steer our way through 1,000 sacred cows and ended up delivering nothing more than a fudge that satisfies nobody and works only with the most extraordinary complexity and 1,000 textbooks to teach people the simplicity of making law and running a Government. Is it not time that we actually took the opportunity here to take the Secretary of State at his word and create some clarity, some simplicity and some durability in this settlement, and, by doing so, we create a jurisdiction that delivers law in Wales within the context of the United Kingdom and we create a federal solution here that actually creates the simplicity that we're trying to achieve? Because it appears to me that the paper—it's very well written, I enjoyed reading it, but it doesn't deliver any of the ambitions or the objectives of either the Secretary of State or any one of the parties represented around the table here.

[254] **Yr Athro Jones:** Mae gen i gryn dipyn o gydymdeimlad efo hynny, Alun, ac nid ydym yn ceisio awgrymu fod awdurdodaeth benodol yn ateb y problemau i gyd. Fe wnes i ddweud bod yna dair set o broblemau efo'r Mesur drafft. Un ydy yr ardaloedd sydd wedi eu cadw yn ôl, a 'relates to', sy'n eu hehangu nhw ymhellach. Yr ail ydy'r canlyniadau sydd yn codi o gadw yn ôl i Lundain gyfraith droseddol a phreifat, a'r trydydd ydy cydsyniad gweinidogol. Dyna'r meysydd problematig. Rwy'n meddwl byddai awdurdodaeth benodol yn eich helpu chi i ddelio â'r ail. Ni fuasai yn delio â'r cyntaf. Mi fyddai creu awdurdodaeth ar wahân—

Professor Jones: I have some sympathy with that, Alun, and we're not seeking to suggest that a distinct jurisdiction is a panacea. I did say that there were three sets of problems with the draft Bill. One is the reservations, plus the 'relates to', which expands them further. The second is the outcomes of reserving criminal law and private law to London, and the third is Minister of the Crown consents. Those are the problematic areas. I think a distinct jurisdiction would help you deal with the second. It wouldn't help with the first. The creation of a separate jurisdiction would help you with that first problem, because if you look at that list of 267 reservations, many of

separate—yn eich helpu chi efo'r cyntaf, achos os ydych chi'n edrych ar y rhestr o 267 o feysydd wedi eu cadw yn ôl, mae lot ohonyn nhw yn ymwneud â chyfiawnder. Ond, hyd y gwelaf i, nid oes yna awydd trawsbleidiol i ddatganoli cyfiawnder, ac felly mae'r syniad o greu awdurdodaeth ar wahân yn *non-starter* yn yr ystyr yna. Ond mi fyddai awdurdodaeth ar wahân a datganoli cyfiawnder yn lleihau yn sylweddol y nifer o feysydd sydd wedi eu cadw yn ôl, ond nid wyf yn gweld unrhyw awydd trawsbleidiol i wneud hynny. Beth rwy'n gobeithio ydy y bydd yr awydd trawsbleidiol yna i edrych ar yr ail o'r cwestiynau yna, ac rwyf yn meddwl y byddai awdurdodaeth benodol yn help sylweddol wrth edrych ar hynny. Ond nid yw yn *panacea*—nid wyf yn honni ei fod o—ond mae o'n helpu efo un broblem benodol y gallai yna fod sail drawsbleidiol i symud ymlaen arni o bosibl.

them relate to justice. But, as far as I can see, there is no cross-party desire to devolve justice, and therefore the concept of creating a separate jurisdiction is a non-starter in that sense. But a separate jurisdiction along with the devolution of justice would significantly reduce the number of reservations, but I don't see any cross-party desire to do that. What I do hope is that the cross-party desire will be in place to look at the second of those questions, and I do think that a distinct jurisdiction would be of great assistance in looking at that. But it's not a panacea—I'm not claiming that it is—but it does help with one specific problem where there could be cross-party agreement to move forward.

[255] **Alun Davies**: But that's the problem, isn't it, because we've always worked on the basis of what's politically expedient today or tomorrow, and not what is right and what is a point of principle that will deliver the best governance for the people of Wales, and the best governmental structure within the United Kingdom. It would appear to me, having listened to a lot of these debates, that we are still steering our way through this jungle rather than actually establishing a structure of governance that will be durable for this generation and the next generation, and will provide the simplicity that we all say that we require. That does mean—I accept what you say, by the way, but that does mean the political parties actually looking hard at themselves and changing and challenging themselves, rather than being pushed by the reality of generations of fudges.

[256] **David Melding**: I think we've covered this rather a lot, and that view

stands on the record. I've got Byron Davies. Chris Davies, were you trying to attract my eye? I'm losing count now of people.

[257] **Chris Davies:** It was on a previous point. I won't go back to it now, Chair.

[258] **David Melding:** I beg your pardon. I'll go to Liz Saville Roberts first, then Byron and then we're going to have to close.

[259] **Liz Saville Roberts:** Diolch yn fawr iawn. Buaswn yn licio cymryd cam yn ôl a pheidio rhuthro i'r sefyllfa lle rydym yn derbyn bod cydsyniad gwleidyddol yn anochel i ni symud ymlaen, achos nid yw hynny i'w weld yn creu cyfanwaith cydlynus i ni, ac mae'n bwysig rŵan ein bod yn edrych ar beth yw'r cam yn ôl.

Liz Saville Roberts: Thank you very much. I would like to take a step back and not rush to a situation where we accept that political consent is required for us to move forward, because that doesn't seem as if it creates a co-ordinated picture, and it's important that we do take that step back.

15:30

[260] Mi oedd yn ddiddorol gennyf weld eich adroddiad chithau yn ôl ym mis Medi ar y model o bwerau a gedwir nôl yn rhestru saith cwestiwn fel dull o ddehongli a all rywbeth, neu a ddylai rywbeth, gael ei ddatganoli neu ei gadw yn y canol. Nid wyf yn meddwl bod neb ohonom wedi defnyddio'r saith cwestiwn hynny ynglŷn â'r 200-plws o faterion sy'n cael eu rhestru yn y Mesur yma. Nid wyf yn gwybod—a fuasech chi'n awgrymu bod hwnnw'n ddull defnyddiol a niwtral, efallai, i edrych ar y pethau sydd wedi cael eu rhestru yn y Ddeddf?

It was interesting to see your report in September on the reserved-powers model listing seven questions as a method of interpreting whether something could or should be devolved, or reserved at the centre. I don't think that any of us have used those seven questions or asked them in relation to the 200-plus matters that are listed in this Bill. I don't know—would you suggest that that would be a useful, neutral method, perhaps, to look at those things that are listed in the Bill?

[261] **Yr Athro Jones:** Byddwn, ond mi fyddwn i hefyd yn rhybuddio nad yw hwnnw'n broses syml. Mi ddaru, rwy'n credu, i'r Athro Thomas Watkin

Professor Jones: Yes, but I would also warn that that isn't a simple process. I think Professor Thomas Watkin made a point that, in looking at reservations,

wneud pwynt, wrth edrych ar y meysydd wedi'u cadw nôl, fod angen siarad nid jest efo arbenigwyr cyfansoddiadol fel fo, a phobl sy'n ymddiddori yng ngwleidyddiaeth y cyfansoddiad fel fi, ond arbenigwyr polisi mewn meysydd penodol, ac os oes yna 267 o feysydd, mae hynny'n heriol dros ben. Mae eisiau ymarferiad fel yna, ond mae'n mynd i fod yn amhosibl i'w wneud yn yr amser sydd ar gael.

there's a need to speak to not just constitutional experts such as him, or those who take an interest in the politics of the constitution such as myself, but policy experts in certain areas, and when there are 267 areas, that's very challenging indeed. You need an exercise of that sort, but it's going to be impossible to do it given the timescales available to us.

[262] **David Melding:** Dafydd, I think we've covered most issues on clarity and durability now, so, as you can see, Haydn's farewell symphony is going to start if we're not careful. [*Laughter.*] So, I will draw these proceedings to a close with our most grateful thanks to the witnesses who have illuminated these complex matters, and, I think, set them in a wider political context, which is what we were hoping to do to balance the earlier session, which really did go into some of the legal questions in proper depth.

[263] Can I thank all Members this afternoon for your forbearance? I did call everyone, I think, but not necessarily when you wanted to be called. It is a bit of a challenge, chairing a joint committee, but thank you very much for your co-operation. Can I also thank the secretariats of both our committees, who've worked very hard behind the scenes to ensure that today's meeting was a success? For those of us who are left, there is a joint photograph before the Welsh Affairs Committee convenes again to scrutinise the First Minister. So, we wish you will with that session, and we will keep an eye on it. But, with that, thank you very much, diolch yn fawr.

Daeth y cyfarfod i ben am 15:32.
The meeting ended at 15:32.