Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
The Constitutional and Legislative Affairs Committee

Dydd Llun, 21 Mai 2012
Monday, 21 May 2012

Cynnwys
Contents

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Mick Antoniw	Llafur (yn dirprwyo ar ran Julie James) Labour (substitute for Julie James)
David Melding	Ceidwadwyr Cymreig (Cadeirydd y Pwyllgor) Welsh Conservatives(Committee Chair)
Eluned Parrott	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats

Eraill yn bresennol
Others in attendance

Emyr Lewis	Uwch-gymrawd mewn Cyfraith Cymru, Ysgol y Gyfraith Caerdydd Senior Fellow in Welsh Law, Cardiff Law School
Yr Athro/Professor Dan Wincott	Athro Cyfraith a Chymdeithas Blackwell, Prifysgol Caerdydd Blackwell Professor of Law and Society, Cardiff University

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

Steve George	Clerc Clerk
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Joanest Jackson	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk
Alys Thomas	Y Gwasanaeth Ymchwil Research Service

Dechreuodd y cyfarfod am 2.30 p.m.
The meeting began at 2.30 p.m.

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datganiadau o Fuddiant
Introduction, Apologies, Substitutions and Declarations of Interest

[1] **David Melding:** Good afternoon and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I will start with the usual housekeeping announcements. We do not expect a routine fire drill, so if there is an alarm, please follow the instructions of the ushers, who will help us to leave safely. These proceedings will be conducted in Welsh and English; when Welsh is spoken, there is a translation on channel 1. Channel 0 will amplify our proceedings. Please switch off all mobile phones and electronic equipment completely, as they can interfere with our broadcasting equipment.

[2] I have apologies from Suzy Davies and Julie James; Mick Antoniw will be substituting for Julie James. You are very welcome this afternoon, Mick. I know that you have attended several meetings in the past, so we look forward to your contributions this afternoon. Simon Thomas has also sent his apologies.

2.31 p.m.

Offerynnau nad ydynt yn Cynnwys Unrhyw Faterion i'w Codi o dan Reol Sefydlog Rhif 21.2 neu 21.3
Instruments that Raise No Reporting Issues under Standing Order No. 21.2 or 21.3

[3] **David Melding:** There are three issues to be reported under our Standing Orders. The first is the Nitrate Pollution Prevention (Wales) (Amendment) Regulations 2012. There is something to note here, in that there is a new numbering system to respond to the use of Welsh, and how things are enumerated or given letters. I am not quite sure what the alphabetical equivalent to enumeration is. Gwyn will explain the new procedure, which is likely to set a precedent.

[4] **Mr Griffiths:** Dyma'r enghraifft gyntaf i ddod gerbron y pwyllgor o'r polisi newydd y mae'r Llywodraeth wedi ei fabwysiadu o ddefnyddio'r wyddor Saesneg yn unig wrth ddrafftio is-ddeddfwriaeth. Mae hyn yn dilyn y patrwm a sefydlwyd ar gyfer Mesurau yn y Cynulliad diwethaf, ac sy'n cael ei ddilyn gyda Biliau yn y Cynulliad presennol. Mae'r Llywodraeth wedi ymateb. Nid yw'n ychwanegu rhyw lawer at yr hyn sydd yn yr adroddiad drafft, ond mae'n dweud mai'r bwriad y tu ôl i'r newid yw hybu'r defnydd o destunau deddfwriaethol Cymraeg drwy symud y rhwystr sydd i'w defnydd effeithiol. Nid wyf yn glir pam ei bod o'r farn bod defnyddio'r wyddor Gymraeg yn rhwystr i ddefnyddio'r iaith Gymraeg mewn deddfwriaeth, ond dyna'r esboniad y mae'n ei roi. Mater i'r pwyllgor yw gwneud unrhyw sylw ynglŷn â'r newid hwn.

Mr Griffiths: This is the first example to come before the committee of the new policy that the Government has adopted of using the English alphabet only in the drafting of subordinate legislation. This follows the pattern established for Measures in the previous Assembly, which is currently followed with Bills in this Assembly. The Government has responded. It does not add much to what is in the draft report, but it says that the intention behind the change is to promote the use of Welsh legislative texts by removing a barrier to their effective use. I am not clear why it considers using the Welsh alphabet to be a barrier to using the Welsh language in legislation, but that is the explanation given. It is a matter for the committee to comment on this change.

[5] **David Melding:** If I have got this right, Gwyn, in the Welsh text the English alphabet will be used.

[6] **Mr Griffiths:** Yes.

[7] **David Melding:** We have noted that. I think that Members are content that the merits report covers that.

[8] The second instrument for our consideration is the Mental Health (Secondary Mental Health Services) (Wales) Order 2012. Joanest will speak to this. It is quite unusual: we have been given an option as to how we want to frame our merits report. Joanest will outline the decision that we will have to take, in terms of which option to choose.

[9] **Ms Jackson:** By way of some background—I am aware that the majority of the members of the committee may not have any prior knowledge of the Mental Health (Wales) Measure 2010 that was passed towards the end of the previous Assembly—the Order engages parts 1, 2 and 3 of the Measure. Under Part 1 of the Measure, local health boards and local authorities are charged with producing mental health provision schemes for their areas. These schemes are to set out primary mental health support services. In Part 2 of the Measure, provision is made for care and treatment planning and care co-ordination. Under Part 3 of the

Measure, provision is made to allow persons who satisfy certain eligibility criteria, when discharged from secondary mental health services, to refer themselves back to such services should they feel that their mental health is deteriorating. The Order makes it clear that what are provided as primary mental health support services are not to be regarded as secondary services and that, therefore, provisions for care and treatment planning, care co-ordination and the right to refer back would not apply in respect of the services provided as primary mental health support services.

[10] A further point is that the Order provides that secondary services provided in England, Scotland or Northern Ireland that are the equivalent of secondary mental health services provided in Wales be regarded as secondary mental health services for the purposes of the Measure.

[11] I have drafted the draft report in the alternative. This is an affirmative Order, so it will be debated in Plenary, but Members may wish to consider drawing the Assembly's attention to this. Guidance is being prepared on what should be considered as primary and secondary mental health services. The Order was subject to some consultation prior to being laid. That is the background. Your decision is on whether you consider this to be of sufficient public interest to draw special attention to it.

[12] **David Melding:** Is this the first Order under the Measure?

[13] **Ms Jackson:** No, there have been quite a number of Orders and regulations made already. Under Standing Order No. 21.3, I think that we drew attention to some of the very early ones, not as a point of criticism but to point out that these were the first Orders made under the Measure and introducing a Wales-specific regime and alterations to the way mental health services and treatments are provided.

[14] **David Melding:** I will be guided by Members. It may be appropriate to take this descriptive approach. I do not think that we are being particularly critical. However, it raises an important point with regard to the demarcation of primary and secondary care, the right of an individual who has been discharged from secondary care to refer themselves back and the fact that this should not be confused with primary health services. I will be guided by you, particularly given that it has affirmative status and will therefore be debated. You may feel that some explanation of that is appropriate to describe what the Order does.

[15] **Eluned Parrott:** My concern is that I am not convinced that I fully understand the consequences of the demarcation and what that means for individuals potentially affected and how they are able to access follow-up treatment and care should they need to. I would be grateful for an opportunity to find out more about that. I am not sure whether that would be through a debate in the Chamber, given that this has affirmative status, or whether there is another way to elucidate the position.

[16] **David Melding:** I think that Members would be free to put those questions to the Minister. Do I infer from that that you would like the option to provide some explanation by way of a merits report?

[17] **Eluned Parrott:** Yes, I think that that would be very helpful, and it would also inform the debate.

[18] **Ms Jackson:** Prior to the debate, I could forward to committee members the link I have to the guidance that was issued, if you would like to see that.

[19] **David Melding:** That would be helpful. In that case, we will go with the wording you have provided if we wish to submit something under merits scrutiny. As I say, it is descriptive

rather than saying that we feel that there are issues of particular public concern. A way of putting it might be to say that it is more of public interest.

[20] The final Order this afternoon is the Mink Keeping (Prohibition) (Wales) Order 2012. We are just identifying this because it seems to have expired some eight years ago and no-one noticed, and now it is being brought back to life. Gwyn will tell us why it is thought necessary that we have such information.

[21] **Mr Griffiths:** Nid yw'n glir, Gadeirydd, pam mae angen Gorchymyn o'r fath wedi wyth mlynedd heb un. Rwyf wedi gwneud ymholiadau pellach, a deallaf mai cymal machlud oedd yn berthnasol i'r Gorchymyn gwreiddiol. Felly, daeth i ben oherwydd bod y ddarpariaeth yn yr offeryn yn dweud bod y Gorchymyn yn dod i ben ar ddyddiad penodol. Felly, nid oedd angen i neb wneud dim er mwyn i'r Gorchymyn blaenorol ddod i ben. Nid yw hynny, wrth gwrs, yn esbonio pam mae angen un ar hyn o bryd na pham y mae wedi cymryd wyth mlynedd i ddarganfod bod hynny wedi digwydd, ond mater i'r pwyllgor yw hynny.

Mr Griffiths: It is not clear, Chair, why there is a need for such an Order after eight years without one. I have made further inquiries, and I understand that it was a sunset clause that was relevant to the original Order. So, it expired because the provision in the instrument set out the specific date on which the Order was to expire. Therefore, there was no need for anyone to do anything for the previous Order to expire. That, of course, does not explain why it is needed now or why it has taken eight years to discover that it had expired, but that is an issue for the committee.

[22] **David Melding:** The merits report essentially says that. In general, our attitude is that we should slim down the statue book, including secondary Orders, as much as we can and discourage them being made just for the sake of it, especially after an eight-year lapse when no-one noticed it was missing. However, if Members feel that this is too pedantic an approach, I will be guided.

[23] **Eluned Parrott:** I am wondering whether in this particular instance, because it was an administrative oversight, it is a case where people who may have had reason to question the law just assumed that the law was in place, and therefore there is a need to continue it in this particular instance because the oversight was not noticed.

[24] **David Melding:** You are such a charitable person. Do you want to respond, Gwyn? I see that you will just note that.

[25] **Mick Antoniw:** As I understand, there is an ongoing mink issue, but I do not know precisely the extent of it. I am sure that, if we ferret away, we will discover the true outcome. [*Laughter*.]

[26] **David Melding:** Are we happy with the report? We could just say at the end that the committee notes that, and perhaps that would tone it down a bit if we feel that we are being a bit harsh, because what is noted is the case. So, should we say 'notes' instead of 'concerned'? I see that you agree with that.

2.43 p.m.

Ymchwiliadau'r Pwyllgor: Ymchwiliad i Sefydlu Awdurdodaeth ar wahân i Gymru
Committee Inquiries: Inquiry into the Establishment of a Separate Welsh Jurisdiction

[27] **David Melding:** I am delighted to welcome our witnesses this afternoon. This is our fifth oral evidence session in our inquiry into whether a separate Welsh jurisdiction should be established. I welcome Emyr Lewis, who is a partner at Morgan Cole solicitors and senior fellow in Welsh law at the Wales Governance Centre, and Professor Dan Wincott, Blackwell professor of law and society at Cardiff Law School and co-chair of the Wales Governance Centre. You are both very welcome this afternoon.

2.45 p.m.

[28] I suspect that you are experienced in terms of how our inquiries work, but I will just say that we have a range of questions that we want to put to you after reading the written evidence, and we will take it in turn to put those questions. I will also encourage supplementary questions as the evidence develops. Right at the end, if we have left out something that is pertinent, I will give you a chance to put anything further that you want to put to us. I assume that, for most of the questions, both of you may have a view, but if I hear just one response, I will not draw out the other, unless you particularly want to give it.

[29] As I said, we have now received a fair body of evidence and are particularly interested to hear what you feel in terms of a Welsh jurisdiction. Perhaps I could start by posing the question: to what extent is it already there?

[30] **Mr Lewis:** I raddau, mae perygl i ni drafod angylion yn dawnsio ar ben pin wrth edrych ar y cwestiwn hwn yn rhy ofalus. Os ydym yn derbyn mai ystyr 'awdurdodaeth' yw, fel rydym yn awgrymu yn ein papur, y graddau y mae gan rywrai awdurdod dros bethau cyfreithiol yn gyffredinol, gellid dadlau, er enghraifft, fod gan y Cynulliad Cenedlaethol awdurdodaeth ddeddfwriaethol. Mae modd dadlau felly. Fodd bynnag, y cwestiwn o'n blaenau yw i ba raddau y mae cyfundrefn gyfreithiol Gymreig a llysoedd yn gwrando achosion Cymreig ac i ba raddau mae hynny yn bodoli ar wahân i'r gyfundrefn gyffredinol. Ac eithrio mewn rhai ffyrdd penodol megis Tribiwnlys y Gymraeg ac ambell dribiwnlys arall, efallai, sy'n cael eu gweinyddu gan Weinidogion Cymru yn hytrach na Gweinidogion San Steffan, mae'n anodd dadlau bod awdurdodaeth gyfreithiol yn yr ystyr ymarferol hwnnw yr ydym yn edrych arno.

Mr Lewis: To a certain extent, we are at risk of discussing angels dancing on the head of a pin in looking at this question in too much detail. If we accept that the meaning of 'jurisdiction', as we suggest in our paper, is the extent to which certain people have authority over legal matters in general, it could be argued, for example, that the National Assembly has legislative jurisdiction. It is possible to make that case. However, the question before us is to what extent is there a Welsh legal system and courts hearing Welsh cases and to what extent does that exist separately to the general system. With the exception of certain aspects such as the Welsh Language Tribunal, and certain other tribunals, perhaps, that are administered by Welsh Ministers rather than Westminster Ministers, it is difficult to argue that there is a legal jurisdiction in the practical sense that we are considering.

[31] **David Melding:** Please do not feel that you have to add anything unless you need to, Professor Wincott.

[32] **Professor Wincott:** That pretty much covers my view.

[33] **David Melding:** We will move to Mick Antoniw, who will ask the first set of questions on the more practical points that need to be teased out.

[34] **Mick Antoniw:** There have been a lot of changes since the Government of Wales Act 2006, particularly on the implementation of Part 3. Perhaps I ought to start by saying that I found your paper very helpful. It was very succinct; this is one of those subjects where the more words you include, the more complex the subject becomes and the more problems arise; hence the succinctness of your analysis of 'jurisdiction' at least brings us down to a practical level as to what we are talking about. In your note, you make reference to paragraph 374 of the explanatory notes to the Government of Wales Act 2006 and you note the difference between conferred and reserved powers. Can you explain a little more about that and whether it has any relevance or whether we are creating an artificial argument?

[35] **Professor Wincott:** I will take that question One of the underlying points that we were seeking to make was very much along the lines that you were just suggesting. In other words, when the 2006 Act was written, although the power to make what we would generally call primary legislation had been given in principle, nonetheless, it appeared at that stage as if it might be in relatively small areas, and would build up slowly over a long period. In a sense, that made the principle of the primary character of the legislation a bit less clear, and less challenging to the existing system. I suppose that our argument is that, now, with the change to Part 4 and the existence of a reasonably wide-ranging area of primary legislative competence, the difference between a conferred and reserved powers system is less pertinent than it might have appeared just five or six years ago to the issues raised in relation to the administration of justice, the organisation of justice and these other practical aspects. You are right that we wanted to emphasise the practicalities that would be linked to the notion of jurisdiction.

[36] **Mick Antoniw:** In paragraph 4.3, in particular, there are some quite interesting comments. I wonder whether this is the nub of the point that you are making. I am merging a couple of points in light of that answer to try to get at the potential differences between the two and what relevance they might have. With regard to the jurisdiction issue, taking the comparison with Scotland, an England-and-Wales system is based in principle on Norman and common law, as opposed to the Scottish system, which is based in principle on Roman law, and what Part 3 of the Government of Wales Act 2006 did was introduce legislative powers that enabled us to move into whole areas of statutory law. However, the underlying theme with England and Wales is that you still have the base common law, which will continue to be common and will influence jurisdiction however it operates. Is that really the nub of your point: the difference between reserved and conferred powers? Is that an important issue to consider in respect of the concept of a Welsh jurisdiction?

[37] **Professor Wincott:** You are quite right in identifying the differences between Scots law and the law of England and Wales, and there is also a very important sense in which, however things develop in Wales and England, there is a basic, underlying approach to the law in a general sense that would remain similar in its fundamentals. That having been said, one could say the same thing about Northern Ireland. One could probably say a similar sort of thing about Australia and New Zealand. There is a common law family that shares some basic principles, and this may prefigure some of the things that you go on to ask us about. For example, undergraduate legal education is essentially the same in England, Wales and Northern Ireland, with many students studying in Wales and England going on to qualify professionally to practise as solicitors or barristers in Northern Ireland. That essential similarity is in contrast to Scots law. Indeed, if you do an undergraduate degree in Scotland, you cannot then move straight to the professional qualification stage in Northern Ireland. It is pertinent for the question of jurisdiction, but I would not feel that that commonality mandates the maintenance of a single jurisdiction in England and Wales. I do not know whether that was where you were going, but that would be my view.

[38] **Mr Lewis:** Rwy'n cytuno. Mewn egwyddor, byddai'n bosibl i'r gyfraith gyffredin ddatblygu yn wahanol yng Nghymru ac yn Lloegr, ond rwy'n cymryd mai, yn y pen draw, rôl Goruchaf Llys y Deyrnas Gyfunol, fel y mae'n cael ei adnabod bellach, yw datrys a chanfod y gyfraith gyffredinol fel y mae'r Cyfrin Gyngor wedi gwneud dros y blynyddoedd.

Mr Lewis: I agree. In principle, it would be possible for the common law to develop differently in Wales and in England, but I take it that, ultimately, the role of the Supreme Court of the United Kingdom, as it is now known, will be to resolve and identify the common law, as the Privy Council has done over the years.

[39] Mae gennym y myth nad ydy barnwyr yn gwneud y gyfraith, ond 'canfod' y gyfraith. Mae e fel pe bai'r gyfraith yn rhyw fath o ddelfryd platonig maent yn ei chanfod. Dyma beth yw'r gyfraith gyffredin. Mae'r gyfraith gyffredin yn gynnyrch amser—yr amser a'r amgylchiadau cymdeithasol pan 'ganfyddwyd' y gyfraith am y tro cyntaf. Rydym yn defnyddio'r enghraifft fan hyn o gystwyo plant. Os yw rhiant yn taro plentyn, mae ganddo'r amddiffyniad posibl o gystwyo rhesymol. Nid yw hynny wedi'i gynnwys mewn unrhyw statud. Mae hi wedi cael ei darganfod fel cyfraith rywbryd gan ryw farnwr. Pe bai'r un math o gyfraith yn cael ei 'chanfod' heddiw am y tro cyntaf, ai dyma fyddai'r canfyddiad? Felly, mae'r gyfraith gyffredin, o'i hanfod, yn rhywbeth sy'n symud ac yn newid o hyd. Fodd bynnag, fel y bu imi ddweud, rwy'n cymryd, cyn belled â bod Deyrnas Gyfunol a chyn belled â bod, o fewn y Deyrnas Gyfunol, awdurdodaethau y mae'r sail iddynt yn gyfraith gyffredin, yna bydd un llys yn y pen draw yn barnu beth yw'r gyfraith honno o fewn gwahanol awdurdodaethau.

We have the myth that judges do not make the law, but simply 'find' it. It is as if the law is some sort of platonic ideal that they find. This is what common law is. Common law is a product of time—the time and the social environment when that law was first 'found'. We use the example here of chastising children. If a parent hits a child, he or she has the possible defence of reasonable chastisement. That has not been included in any statute. It has been discovered as law by a judge at some point in time. Were such a law to be 'found' for the first time today, would we end up with the same outcome? Therefore, the common law, by its very nature, is something that moves and changes all the time. However, as I have said, I take it that, as long as there is a United Kingdom and as long as, within that United Kingdom, there are jurisdictions that are based in common law, then one court will ultimately end up adjudicating on what that law is within the various jurisdictions.

[40] **Mick Antoniw:** I do not know whether you will agree that, effectively, a Welsh jurisdiction consists of the administration of law—buildings, people, judges, circuits, and so on—and the actual jurisprudence of the law itself. Is it necessary for the two to go hand in hand, or, for example, would the jurisprudence aspect of the jurisdiction of Welsh law develop in any event from Welsh legislation and from Welsh case law interpretations of that law, and it is just a question of how you choose to administer it?

[41] **Professor Wincott:** I think that we would both probably agree with that.

[42] **Mick Antoniw:** I will move on to the more specific question that I was going to ask. In your view, for the development of Welsh law, a Welsh jurisdiction, jurisprudence and administration, and so on, can we separate the civil from the criminal, or is it necessary to look at the two hand in hand?

[43] **Mr Lewis:** Os ydym yn ystyried y patrwm o fewn y Deyrnas Gyfunol, gwelwn

Mr Lewis: If we consider the pattern within the United Kingdom, we see that it suggests

ei fod yn awgrymu bod gan lysoedd o fewn tiriogaeth awdurdodaeth dros faterion sifil a throseddol o fewn y diriogaeth honno. Y pwynt pwysig yw bod ei hawdurdodaeth yn awdurdodaeth ecsgliwsif—hynny yw, dim ond llysoedd y diriogaeth honno sy'n cael clywed rhai mathau o achosion. Rwy'n cymryd, mewn theori, y byddai'n bosibl gwahanu'r ddwy gyfundrefn, ond nid yw'n eglur i mi yn ymarferol pam y byddai rhywun yn dewis gwneud hynny, ac eithrio, o bosibl, yr uwchadeiledd a'r gost o gael cyfundrefn droseddol, lle rydych yn sôn am bethau fel yr heddlu, carchardai, profiannaeth, ac yn y blaen, fel rhan o'r pecyn. Fodd bynnag, ac eithrio'r rheswm hwnnw, nid wyf yn gweld mewn egwyddor pam y byddai'r ddau beth yn cael eu gwahanu.

that courts within a territory have jurisdiction over civil and criminal matters within that territory. The important point is that its jurisdiction is an exclusive jurisdiction—that is, only the courts in that territory can hear certain types of cases. I assume that, in theory, it would be possible to separate the two systems, but it is unclear to me why one would choose to do that in practice, except, possibly, with regard to the superstructure and the cost of the criminal justice system, where we are talking about such things as the police, prisons, the probation service, and so on, as part of the package. However, except for that reason, I do not see in principle why the two would be separated.

[44] **Mick Antoniw:** So, it could be done, but, administratively and organisationally, it does not look as if it makes sense to do so.

[45] **Mr Lewis:** What is the point?

3.00 p.m.

[46] **Professor Wincott:** I suppose that there are two kinds of issues here: whether you would separate the civil and criminal law into separate parallel courts systems, one of which was an England-and-Wales system and the other of which was a system for Wales, or whether you could see one courts system administrating both some law that was Welsh law and some law that was the law of England and Wales or perhaps even the law of the United Kingdom. The final point is whether there would be some legal or political pressure to devolve criminal justice to Wales. There is a danger in putting Scots law in a completely separate category, because many areas of policy are made for Scotland in Westminster, and cases related to those in Scotland are all heard in Scots law courts. There is a possibility that they may be interpreted slightly differently, given that they are interpreted within the courts of a different jurisdiction, so the interpretation may be slightly different from the interpretation in England and Wales. However, as a matter of principle, that is what happens, and, as Emyr said, it is for the Supreme Court to set the framework within which that takes place. I see no reason of principle why that could not happen for Wales in relation to any of those three scenarios that I have just set out.

[47] **Mick Antoniw:** One of the complications, I suppose, is that the legislation that we pass creates criminal penalties. So, to create a division would create a certain paradox within the legal system as well, would it not?

[48] **Mr Lewis:** Yn gwmws. Mae natur setliad Deddf 2006 yn golygu bod gan y Cynulliad nid yn unig y pŵer i greu troseddau, ond hefyd y pŵer i ddeddfu ym maes cyfiawnder troseddol, cyhyd â bod hynny ynghlwm wrth un o'r 20 maes a ddatganolir, er enghraifft diogelu plant, fel rydym yn dweud yn ein papur. Felly, mae'r tebygolrwydd y bydd cyfraith droseddol

Mr Lewis: Exactly. The nature of the settlement provided by the 2006 Act means that the Assembly not only has the power to create offences, but also the power to legislate in the area of criminal justice, as long as that is related to one of the 20 devolved fields, such as child protection, as we mention in our paper. So, the likelihood that the criminal law of Wales will diverge

Cymru yn wahanol i gyfraith droseddol Lloegr mewn ffyrdd sylfaenol yn eithaf uchel.

from English criminal law in fundamental ways is quite high.

[49] **David Melding:** Are you going to pursue questions 6 and 7, Mick? I see that you are. I should say to the witnesses that a couple of Members have sent apologies, so we all have a longer set of questions each than we anticipated.

[50] **Mick Antoniw:** I am in fact getting to the questions that I wanted to ask, but I thought that I would be abusing my position. There has been a certain amount of legislation and a certain number of cases, but it is fair to say that the development of a Welsh jurisprudence is in its infancy. However, there is considerable potential in terms of the legislative programme, in relation to planning, social care and so on. There is tremendous scope in those areas.

[51] In terms of those developments, would it be sufficient at the moment to develop a Welsh jurisprudence, that is, ensuring that Welsh judges are able to hear those cases and ensuring that there is competence in terms of the knowledge of those developments, through things such as administrative measures? For example, a measure where a box is ticked to indicate that a case involves Welsh law—a bit like what happens in relation to human rights legislation—which then guarantees that the case is allocated to specific judges, possibly by means of practice directions. Would that be a sufficient way, in the short to mid-term, of ensuring that the concerns in terms of ensuring that judges, as well as the lawyers and so on, have the understanding and knowledge, are dealt with?

[52] **Mr Lewis:** Mae hynny'n awgrym ymarferol defnyddiol yn y byr dymor, ond ni chredaf ei fod yn datrys y broblem yn yr hirdymor. Mae'r enghraifft sydd gennym o hyn, sef *Practice Direction 54D—Administrative Court (Venue)*, yn sôn am gychwyn achosion ar gyfer adolygiad barnwrol y tu allan i Lundain. Mae'r *practice direction* yn dweud y gellir cychwyn achosion yng Nghaerdydd ac yn y blaen, ac mae awgrym y dylid gwneud, ond nid oes rhaid gwneud hynny.

Mr Lewis: That is a useful practical suggestion in the short term, but I do not think that it resolves the problem in the long term. The example that we have of this, namely Practice Direction 54D—Administrative Court (Venue), deals with commencing cases for judicial review outside London. The practice direction states that it is possible to commence cases in Cardiff and so on, and there is a suggestion that that should be done, but there is no requirement to do so.

[53] Yn fy mhrofiad i, mae hynny'n gallu arwain at sefyllfaoedd anffodus. Er enghraifft, lle bo achosion yn cael eu cychwyn yn Llundain—mae'n rhaid inni wynebu ffeithiau, mae mwy o gwmnïau cyfreithiol yn Llundain sy'n arbenigo ym maes adolygiad barnwrol yn unig, felly'r peth hawdd iddynt ei wneud yw cychwyn achos yn Llundain—mae'r mater yn gorfod dod gerbron barnwr i benderfynu a yw'r mater yn ymwneud â Chymru ai peidio ac, os ydyw, mae'n cael ei drosglwyddo i Gymru. Pe bai'r achos wedi cael ei gychwyn yng Nghaerdydd, byddai'r mater wedi dod gerbron barnwr a, mwy na thebyg, byddai'r broses wedi mynd rhagddi yn ystod y misoedd y byddai'n eu cymryd i'r papurau

In my experience, that can lead to unfortunate situations. For example, where proceedings are initiated in London—we have to face facts that there are more legal firms in London that specialise only in the judicial review field, so the easy thing for them to do is initiate proceedings in London—the matter must come before a judge in order to decide whether or not the issue relates to Wales and, if so, it is then transferred to Wales. If the case had been initiated in Cardiff, it would have come before a judge and, more than likely, have been dealt with during the months that it would take for the papers to reach the judge in London in order for the judge to decide whether the Welsh tick-box was right or not. I am concerned about that,

gyrraedd y barnwr yn Llundain iddo benderfynu a oedd y *tick-box* Cymreig yn dweud y gwir ai peidio. Rwy'n bryderus ynglŷn â hynny, oherwydd gallwn ddadlau y gellid cael cyfiawnder yn gynt yng Nghymru, yn sicr yn y maes hwn, pe bai gorfodaeth i gychwyn achosion yng Nghaerdydd yn hytrach na'r rhyddid hefyd i'w cychwyn yn Llundain.

because one could argue that justice could be delivered more swiftly in Wales, certainly in this area, were there to be an obligation to initiate cases in Cardiff rather than also having the freedom to commence proceedings in London.

[54] **Mick Antoniw:** I would like to follow that up with a question, if I may. Does that cause any issues in respect of the legal profession? You mentioned going often to London because of there being certain specialisms and so on, but I presume that you are not suggesting that it would pose any restriction with regard to the choice of where you might go or who you might want to pursue a case. As we know, many representatives of the Welsh Bar are now based in London—and very eminently based in London. However, do you think that that would interfere with those developments?

[55] **Mr Lewis:** Mae dau bwynt i'w gwneud. Yn gyntaf, nid sôn am y Bar oeddwn i ond am gwmnïau o gyfreithwyr sydd yn gwneud, bron â bod, eu holl waith ar adolygiadau barnwrol. Oherwydd maint Llundain, mae hynny'n bosibl. Y peth hawsaf iddynt ei wneud yw cychwyn yr achos yn Llundain. Yn ail, cyn belled ag y bod gennym un awdurdodaeth ar gyfer Cymru a Lloegr, nid wyf yn dweud na ddylai cyfreithwyr y tu allan i Gymru gychwyn achosion o'r fath. Yr unig amod y byddwn yn awgrymu sydd ei angen, o ddilyn eich awgrym ymarferol chi, yw bod gorfodaeth i gychwyn achosion lle mae'r *tick-box* Cymreig yn bodoli yng Nghymru a bod dim rhyddid i'w cychwyn y tu allan i Gymru.

Mr Lewis: There are two points to make. First, I was not talking about the Bar but about firms of solicitors that do almost all their work on judicial reviews. Given the size of London, that is possible. The easiest thing for them to do is to begin the case in London. Secondly, as long as we have one England and Wales jurisdiction, I am not saying that lawyers outside Wales should not initiate such cases. The only condition that I would suggest is needed, following your practical suggestion, is that there is an obligation to initiate cases where the Welsh tick-box exists in Wales and that it is not possible to initiate such cases outside Wales.

[56] **David Melding:** On the point about the distinctiveness of Welsh law—even if we do not call it a jurisdiction—in your evidence, I think that you ask us to reflect on the Government of Wales Act 2006. Part 3 and Part 4 point in very different directions. Part 3 would take us on a very gradual path of distinctiveness, under which it would take several decades for a substantial body of distinctive law to be developed, whereas I sense that you think that with Part 4, although it is still a conferred-powers model, because the 20 fields are so significant, the ramifications are also significant. How quickly do you think those ramifications will lead to quite substantial distinctiveness between practice in England and Wales?

[57] **Professor Wincott:** I wish that we had brought with us our crystal ball for predicting the future. The one thing that I would say about that, picking up a little on some of the earlier conversation, is that the existence and the significance of those subject areas mean that the law of England and the law of Wales will diverge, even if nothing very much happens in Wales—or at least there is a strong likelihood that that happens, assuming that we do not get lots of legislative consent motions and just say, 'We will have the same as them'. So, my sense is that there will be significant divergence and that it will probably happen sooner than we think, not least because the current Government in Westminster seems quite active and is moving in a direction that I think, in general, people do not expect the Government here

would follow.

[58] Going back to the previous question, that is one of our main concerns. We are fairly relaxed about gradualism, but we are very concerned about ad-hocery, so we would like to see gradualism taking place within a framework, not just in the medium term, but in the long term, so that we think through, and rethink as developments unfold, where it is we think we might be going. It is about making a distinction between just letting things happen and trying to think systematically about an approach that may well be gradual. I have some conceptual problems with imagining what it would mean to say 'Today we have a separate jurisdiction; it is all bright and shiny and new and everything changes in a single moment'. We were trying to think through the implications of that divergence.

[59] **David Melding:** That is a very interesting point, namely that it is not just activity in our legislature that will create distinctiveness, but in those fields, you will need Welsh Bills if you are going to change the law. There may be Bills in Westminster that dramatically change these areas relating to England, and that will also accelerate this process of distinctiveness. I suppose that what I am trying to get a feel for is whether we could have rather dysfunctional structures in five or 10 years' time, or never. Can the current system of administration cope with two quite different legal systems gradually emerging, although gradual can still be very significant in a fairly small space of time, it seems to be. Sorry, I have answered my own question, which is not good technique. How critical is this whole issue of Welsh jurisdiction, or do you think that time will lead inevitably to where we have to go? Do we need to anticipate?

[60] **Mr Lewis:** Mae dwy agwedd i hyn, fel mae nifer o'r tystion wedi dweud—yr agwedd wleidyddol a'r agwedd ymarferol. Mewn termau gwleidyddol, mae'n dibynnu lle rydych chi'n sefyll ar gwestiwn hunaniaeth Cymru a natur y politi Cymreig. Mae papur diddorol iawn, ymysg eich papurau, gan yr Athro Gerry Maher o'r Alban, lle mae'n sôn am beth yw natur system gyfreithiol yr Alban. Mae'n datgan, yn y pen draw, bod system gyfreithiol yr Alban yn bodoli oherwydd bod yr Alban yn bodoli. Mae rhan o hyn yn wleidyddol ac, fel unigolyn, rwyf o blaid Cymru yn cael cymaint o rym ag sy'n ymarferol ac yn ddoeth i reoli'i hun.

Mr Lewis: There are two aspects to this, as a number of witnesses have said—the political aspect and the practical aspect. In political terms, it depends where you stand on the question of the identity of Wales and the nature of the Welsh polity. There is a very interesting paper, among your papers, by Professor Gerry Maher from Scotland, in which he talks about the nature of the Scottish legal system. He says that, ultimately, the Scottish legal system exists because Scotland exists. Part of this is political and, personally, I am in favour of Wales gaining as much self-governing power as is practical and sensible.

[61] O edrych ar y peth mewn termau ymarferol yn unig, yr hyn y dylech edrych arno yw beth sy'n rhoi'r gorau i bobl Cymru, a beth sy'n darparu'r gwasanaethau a'r gyfundrefn orau i bobl Cymru ym maes cyfiawnder. Mae nifer fawr o ystyriaethau yn y fan honno, o gost i pa mor dda yw'r gyfraith, pa mor dda mae'r cyfreithwyr yn adnabod eu cyfraith, pa mor hawdd a hygyrch yw'r proffesiwn cyfreithiol a pha mor hygyrch yw'r llysoedd. Mae rhywun yn teimlo, yn yr un modd ag ym maes iechyd ac addysg, bod Cymru yn canfod atebion gwahanol mewn polisi ac yn ymarferol i

Looking at this only in practical terms, what you should consider is what provides the best solution for the people of Wales, and what provides the best services and the best system for the people of Wales in terms of justice. There are many considerations there, from cost to how good the law is, how well the lawyers know their law, how accessible the legal profession is and how accessible the courts are. One feels, as is the case in health and education, that Wales finds different solutions in terms of policy and in practice in the provision of these services. Welsh political priorities might deliver different

ddarparu'r gwasanaethau hyn. Efallai y byddai blaenoriaethau gwleidyddol Cymreig yn esgor ar atebion gwahanol, yn arbennig, rwy'n credu, ym maes hygyrchedd y gyfraith. Mewn ffordd, mae'n wleidyddol ar bob lefel.

solutions, particularly, I believe, in terms of accessibility of the law. In a way, it is political on all levels.

[62] **David Melding:** That is very interesting and we are keen to hear points that emanate from political philosophy, rather than strict evidence in terms of the current functional demands that are placed upon us. I sense from you, Professor Wincott, that you are not so anxious that the current system of administrating justice cannot cope with this bifurcation; am I parodying your views or would that be a fair statement?

[63] 3.15 p.m.

[64] **Professor Wincott:** I am not sure that that is exactly my view. I think that there is clearly a sense in which the political question of what powers there should be in Wales is very much linked up with the sorts of issues that we are talking about now.

[65] Again, I come back to the point that I made about Scotland, and this may be the notion that underpins some of the ideas that I sometimes hear, which seem to me a little metaphysical, about when there is a sufficient body of distinctive law to justify the change. For me, the question is similar, but slightly different, and it is really about whether the distinctive law of Wales is interpreted judicially, primarily through a framework that will become increasingly English—which I think is more or less the likely consequence of not grasping this nettle—or whether that body of law and policy will be interpreted in a way that treats its origins in and for Wales as primary.

[66] In that sense, there are a number of illustrations that one can give, but I will go back to ours about the chastisement of children: if someone on holiday had smacked their child on a beach in Aberystwyth, would one expect a court in Skegness, when they went home, to say that it understands Welsh law, that it understands the priorities of the law that was made there and to interpret the law in that way? Is it reasonable to expect all of the judges of England to understand and to have imbibed the distinctiveness of law as it applies to Wales? Or should one say that these cases are different and should be heard where they are matters of the law as it applies to Wales—or, if we move to the jurisdiction point, to Welsh law—in Wales, just as if a similar incident happened in Scotland it would be heard in Scotland?

[67] So, I still think that there is an important issue there, which does not contradict my earlier remark that I suspect that, if we do not go for a big-bang approach, we are in for a gradual approach. However, if we take a gradual approach, I think that it should be one that is self-consciously managed, rather than one that is just allowed to happen.

[68] **David Melding:** That is very clear and helpful. We need to pursue some of the practical matters. Eluned has been very patient and will now take us through the next range of questions.

[69] **Eluned Parrott:** To clarify that last point, are you saying that you believe that there is a danger for misinterpretation of Welsh law through a lack of understanding of context?

[70] **Professor Wincott:** I would not demure from that description of what I said.

[71] **Eluned Parrott:** In which case, what would you say are the implications of that? We talked a little earlier about not wanting to establish a system, for example, where practice direction says that Welsh matters should be dealt with in Wales. However, is there not some kind of anomaly in that, because on the one hand you are saying that there is a potential for

misinterpretation while, on the other hand, I think that I heard you say that you did not think that there should be a practice direction, because the practical implications of that were complex?

[72] **Mr Lewis:** Na. Mae'n ddrwg gennyf, efallai nad oeddwn wedi egluro'r *practice direction* yn ddigon clir. Gallasai'r *practice direction* fod yn ffordd ymarferol, fel yr awgrymodd Mick Antoniw, i ddelio, yn y byr dymor, â'r cwestiwn o sicrhau bod achosion sy'n ymwneud â Chymru yn dod gerbron barnwyr sy'n deall y gyfraith.

Mr Lewis: No. I am sorry, I may not have explained the practice direction clearly enough. The practice direction could be a practical way, as suggested by Mick Antoniw, to deal, in the short term, with the question of ensuring that cases relating to Wales come before judges who understand the law.

[73] Fodd bynnag, nid yw'n datrys y broblem yn yr hirdymor oherwydd nid yw'r rhain yn ôl eu hanfod yn bethau sefydlog; maent yn rheoliadau sy'n gallu cael eu newid. Mae hwnnw'n gwestiwn ynddo'i hun.

However, it does not solve the problem in the long term because these are not stable things in their essence; they are regulations that can be changed. That is a question in itself.

[74] **Eluned Parrott:** So, in effect, the practice direction does not go far enough in terms of looking after that issue.

[75] **Mr Lewis:** Quite.

[76] **Eluned Parrott:** Okay, thank you; I understand. Looking at some of the practical issues, you and The Law Society have described the establishment of a Wales law reform commission as an essential element of establishing a jurisdiction. Could you explain why you believe that to be the case?

[77] **Mr Lewis:** Mae ein meddwl wedi symud ymlaen ar hwn ers i ni baratoi'r dystiolaeth, yng ngoleuni'r hyn a ddywedodd yr Athro Gwynedd Parry wrthoch chi am ei syniad o sefydlu comisiwn er mwyn cynllunio gogyfer awdurdodaeth Gymreig. Rydym ni'n dau yn cefnogi hwnnw fel rhan o'r hyn y mae Dan eisoes wedi cyfeirio ato fel osgoi 'ad hocery'.

Mr Lewis: Our thinking on this has progressed since we prepared the evidence, in the light of what Professor Gwynedd Parry told you about his idea of establishing a commission to plan for a Welsh jurisdiction. We both support that as part of what Dan has already referred to as avoiding 'ad hocery'.

[78] Mae ein hawgrym yn y papur yn sôn am sefyllfa lle mae awdurdodaeth Gymreig eisoes yn bodoli. Ein barn ni yw y byddai angen comisiwn cyfraith Cymru am nifer o resymau. Un rheswm yw bod Comisiwn y Gyfraith ar hyn o bryd dros Gymru a Lloegr yn gwneud ymchwiliadau thematig mewn i faterion a dywedwch ei fod, er enghraifft, yn dewis rhywbeth fel tai, bydd felly yn edrych ar y thema honno mewn termau Saesneg ac wedyn mewn termau Cymreig, ond nid yw'r dewis o thema yn cael ei yrru gan yr agenda Cymreig. Fel mae'n digwydd, mae'r cwestiwn o dai a chartrefi yn un pwysig yng Nghymru, ond gallasai fod yn fater arall nad yw efallai mor bwysig yng Nghymru. Felly,

Our suggestion in the paper relates to a situation where a Welsh jurisdiction already exists. Our view is that we would need a Wales law commission for several reasons. One reason is that the Law Commission in England and Wales currently carries out thematic investigations into issues and if it were to choose something like housing, for example, it would look at that theme in English terms and then in Welsh terms, but the selection of the theme is not driven by the Welsh agenda. As it happens, the question of housing and homes is an important one in Wales, but it could be another issue that may not be so important in Wales. Therefore, a Wales law commission

byddai comisiwn cyfraith Cymru yn gallu defnyddio arian Cymreig er mwyn blaenoriaethu anghenion cyfreithiol Cymru. Dyna un o'r rhesymau.

would be able to use Welsh money to prioritise the legal needs of Wales. That is one reason.

[79] Y rheswm arall y byddai'n ddefnyddiol—ac y mae hwn yn awgrym a wnaed gan yr Athro John Williams—yw'r syniad na fyddem yn gallu cael comisiwn fel sydd yng Nghymru a Lloegr gyda staff go fawr arbenigol, ond y byddai comisiwn yn tynnu mewn y proffesiwn ac academia hefyd fel ffordd o estyn ffiniau ac o ddiffinio cyfraith Cymru. Credwn fod hwnnw'n awgrym gwerthfawr tu hwnt.

The other reason that it would be useful—and this is a suggestion made by Professor John Williams—is the idea that we would not be able to have a commission such as that in England and Wales with a sizeable specialist staff, but the commission would draw in the profession and academia as well as a means of extending the boundaries and defining Welsh law. We believe that that is a very valuable suggestion.

[80] **Eluned Parrott:** We are not compelled to follow the model that they already have in England for England and Wales in any way. You talked about this evolving role of helping to establish the jurisdiction. In what other ways could a Wales law commission be tailored particularly to suit our needs here?

[81] **Professor Wincott:** Once there was an initial period of identifying the shape and boundaries and so on of how things were changing, I very much agree with this idea that such a commission could be an important way of avoiding ad hocery, but then it would be a question of identifying, in the context of Welsh social and political life, matters of priority for investigation of how the law operates. I am sorry, but I am drawing a blank on particular examples that would be important, but I am sure that we could come up with them fairly easily.

[82] **Eluned Parrott:** On drawing on the expertise of the profession and the law schools, although there is an attractiveness to that in terms of being able to involve those who are currently involved in Welsh legal practice and to streamline the potential for costs, one of the potential downsides might be an inability to access enough of those individuals' time, particularly those who are the very best in their profession, for them to be able to make a significant contribution to the development of a jurisdiction. What are your thoughts on that?

[83] **Professor Wincott:** I think that that is of real concern; it is a real issue. I suppose that there are some other potential issues about drawing on academics and the profession, and one would want the commission to have a degree of independence as well. There is a sense in which, for example, universities are seen as having a somewhat independent role in society, but that would be a different form of independence. So, I can see that there are a number of issues there, and I suppose that you really just have to live with or manage those issues in the absence of a pot of gold being found somewhere to establish a completely independent commission.

[84] **David Melding:** Northern Ireland has to manage that, and it seems to do an okay job. I do not know if you want to go on record as saying that it is to be commended or that it is inadequate or whatever your view is.

[85] **Professor Wincott:** I certainly think that, in the context of thinking through these issues, exploring the experience of Northern Ireland would be particularly valuable, given the underlying similarities of the legal systems, given that it is a society where legal institutions have been under considerable pressure and that it is a society on a smaller scale than Wales. I think that there are many lessons that we could learn from there.

[86] **David Melding:** You are not the first witness to make that point strongly to us and, in fact, we will be drawing specific evidence from politicians and lawyers in Northern Ireland around these issues. We are doing that work in addition to what we originally thought we might have to do when we scoped the inquiry, because it seems to us that it is the main comparator jurisdiction in the UK for us.

[87] **Mick Antoniw:** It seems to me that there is a total paradox within it, and I am not quite sure what the resolution to it is. The paradox is that one of the roles of a law commission is to proactively develop, recommend and advise on law changes within the ambit of a particular direction within society. That is not necessarily subject to the Government of the day. Where you have a divergence of polity with regard to Wales and England, that role becomes almost a split role. How do you decide what you want to make recommendations on in the area in terms of aspects of law that are within the ambit of England or Wales, where there are differences in direction and philosophy as to the direction that society should go? It is a problem that probably does become more acute over time. Is that a fair reflection?

[88] **Mr Lewis:** Ydy, yn gyfan gwbl. Hefyd, mae'n rhaid inni ystyried ochr arall hyn, sef yr angen i gydgrynhoi cyfraith Cymru i gael gwybod yn hollol lle rydym yn sefyll o ran meysydd megis addysg ac iechyd ac ati sydd, ar hyn o bryd, yn gyfuniad o ddeddfau San Steffan, deddfau Cymru ac ati. Mewn ffordd, dyna'r sylfaen mae cyfraith Cymru yn adeiladu arni, tra bod llawer o'r sylfaen hwnnw yn cael ei ddadelfennu yn Lloegr oherwydd y newidiadau sy'n digwydd, yn arbennig ym maes iechyd, yr ochr arall i Glawdd Offa. Rhan o'r dasg o'n blaenau yw gwybod lle rydym yn sefyll ar hyn o bryd.

Mr Lewis: Yes, completely. Also, we must consider the other side of this, which is the need to consolidate Welsh law so that we know exactly where we stand in areas such as education and health and so on, which are, at present, a combination of Westminster legislation, Welsh legislation and so on. In a sense, that is the basis on which Welsh law is being built, while much of that basis is being dismantled in England because of the changes that are happening, particularly in the field of health, on the other side of Offa's Dyke. Part of the task ahead is to know exactly where we stand at present.

[89] **Eluned Parrott:** I want to move on to talk about practical issues about, if the law in Wales diverges from English law, how the legal profession in Wales would cope with that. In your paper, you suggest that a test of competency to practise as a lawyer in Wales may become necessary. Can you expand on why you think that that is likely to be the case and what kind of time frame are you thinking of?

3.30 p.m.

[90] **Mr Lewis:** Roedd cynhadledd yng Nghaerdydd bythefnos yn ôl lle roedd y Legal Services Board yn cynnal rhan o'i sioe deithiol o gwmpas Cymru a Lloegr yn edrych ar beth oedd yr her o ran rheoleiddio'r proffesiwn ar gyfer y dyfodol, ac yn arbennig beth oedd maes a swyddogaeth addysg yn y cyd-destun hwnnw. Roedd hi'n eithaf eglur bod anwybodaeth ynglŷn â sut mae'r gyfraith yng Nghymru eisoes yn wahanol i'r gyfraith yn Lloegr a bod angen paratoi'r proffesiwn ar gyfer hynny. Y cwestiwn yw a yw hi'n ddigonol i gyfreithiwr o Chelmsford, dyweder, i ddod i lys sirol i rywle yng

Mr Lewis: A conference was held in Cardiff a fortnight ago, where the Legal Services Board held part of its roadshow around Wales and England looking at the challenge of regulating the profession for the future, and particularly at the role and function of education in that context. It was quite clear that there is ignorance about how the law in Wales already differs from the law in England and the need to prepare the profession for that. The question is whether it is adequate for, say, a solicitor from Chelmsford to come to a county court somewhere in Gwynedd in a particular field

Ngwynedd mewn rhyw faes arbennig heb fod gan y person hwnnw wybodaeth ynglŷn â chyfraith Cymru. Mewn rhai meysydd, mae hi'n mynd i fod yn hanfodol. Nid wyf yn gallu gweld sut all unrhyw un ymarfer ym maes cyfraith gyhoeddus—cyfraith iechyd, addysg neu gynllunio—yng Nghymru heb fod yn gwybod beth yw'r gyfraith Gymreig. Mewn meysydd eraill, ni fydd yr un mor bwysig, er enghraifft, ym maes cyfraith fasnachol neu faes cyfraith gyflogaeth, lle nad yw cymhwyster deddfu'r Cynulliad yn estyn iddynt, neu ddim yn debygol o estyn iddynt. Felly, bydd yn amrywio. Yn yr un modd ag yn awr, cyn eich bod yn gallu gwneud rhai mathau o achosion—achosion teulu, er enghraifft—mae angen rhyw fath o gymhwyster arnoch. Rwy'n gallu gweld y bydd angen rhyw fath o docyn Cymreig; ni fydd hwnnw'n gymhwyster arbennig o drwm, ond bydd yn un angenrheidiol.

without that person knowing about Welsh law. In some areas, it is going to be essential. I cannot see how one can practise in the field of public law—health, education or planning—in Wales without a knowledge of Welsh law. In other areas, it will not be as important, for example, in commercial law or employment law, where the Assembly's legislative competence does not extend, or is not likely to extend. So, it will vary. In the same way as is the case now, before you may undertake some types of cases—family cases, for example—you need some sort of qualification. I can see that there will be a need for some kind of Welsh ticket; that qualification will not be a particularly onerous one, but it will be necessary.

[91] Hefyd, dylai fod yn hanfodol i bob cyfreithiwr yng Nghymru a Lloegr ddysgu peth elfen o gyfraith Cymru, oherwydd cyhyd â bod gennym awdurdodaeth unedig Cymru a Lloegr, bydd y gyfraith yng Nghymru yn rhan o gyfraith Cymru a Lloegr. Felly, dylai dysgu am natur Cynulliad Cenedlaethol Cymru a Llywodraeth Cymru fod yn rhan hanfodol o'r cwrs sylfaen, yn ogystal â gwybodaeth am yr achosion pwysig sy'n ymwneud â hwy, er enghraifft, achos AXA ac achos Ysgol Sefydledig Brynmawr. Dylid sicrhau bod pob myfyriwr y gyfraith yn gwybod am yr achosion hyn fel rhan sylfaenol o addysg gyfreithiol.

Also, it should be essential for all lawyers in England and Wales to learn some elements of Welsh law, because, as long as we have a single England and Wales jurisdiction, the law in Wales will be part of the law of England and Wales. Therefore, learning about the nature of the National Assembly for Wales and the Welsh Government should be an essential part of the foundation course, as should knowledge of the important cases that have involved them, such as the AXA case and the Brynmawr Foundation School case. It should be ensured that each law student knows these cases as a fundamental part of a legal education.

[92] **Eluned Parrott:** To what extent is that Welsh dimension covered in the undergraduate law schemes at Cardiff? Is it part of the core course or are there optional modules, and what kind of proportions are people able to study?

[93] **Professor Wincott:** It is part of core courses, particularly in public law, which is one of the core elements of a qualifying law degree for anyone who wants to go on to practise. There are also optional modules, which are relatively small in scale at the moment, but it is present in both optional and compulsory elements. I do have some numbers about our students, but not specifically on that aspect.

[94] **Eluned Parrott:** Do you happen to know how many students, as a percentage of your entire student body, take individual modules that specialise in Welsh law?

[95] **Professor Wincott:** I do not know that off the top of my head for the undergraduate programme, but I could try to do some very rough-and-ready calculations now and get back to you on that.

[96] **Eluned Parrott:** If you could feed that information back to the committee, that would be helpful. What is the make-up of your student body? What proportion of students are Welsh domiciled, and what proportion comes from England and elsewhere?

[97] **Professor Wincott:** I do have some numbers on this. These were put together relatively quickly, so if you treat them as rough-and-ready numbers, that would be good. I have broken them down by our current year cohorts across the three years. In our current final year, just over 70% are home students, which means that about a quarter are from overseas. This speaks to the point about the common law family: we have a lot of Malaysian students who can do their degree and the professional stage of their qualification, if they follow the barrister's route, here and then go back to practise in Malaysia. Just over half of our home students in the current final year are Welsh domiciled. The proportion varies quite a lot between the years. It is a little less than half in our current second year, and it is more or less exactly half in our current first year.

[98] **Eluned Parrott:** I note that one of the specialisms of the school at Cardiff University is European Union law and the legal studies that you provide through that route. Is European Union law more or less popular than Welsh law in your school?

[99] **Professor Wincott:** European Union law is a compulsory element of a qualifying law degree, as a separate module, while Welsh law would feature mostly in the public law module. I am not even sure that we have undergraduate models on areas like education or healthcare law. Everyone will have studied European Union law, and so that would substantially outweigh the number of students who will have studied a specialist module on the law of devolution in Wales.

[100] **Eluned Parrott:** Given that the current jurisdiction covers England and Wales, to what extent is it your understanding that students learn about the devolved institutions in English law schools?

[101] **Professor Wincott:** I am afraid that I am not really in a position to comment on the undergraduate curriculum in English law schools. I would imagine that most of them, by now, teach something about devolution, broadly speaking, in the context of UK, or British or English constitutional law—choose your adjective. However, I would be surprised if there were a huge concentration on Wales in particular within that. I suspect that the distinctiveness of Scots law would probably take the lion's share of that component. I would not want to hazard a guess as to how many of the students study in detail, for example, important recent Supreme Court decisions that have a bearing on questions of the status of devolved law in the UK system.

[102] **Mr Lewis:** Mae datblygiadau datganoli wedi rhoi pin yn swigen rhai o'r pethau sy'n cael eu hystyried fel y pethau pwysicaf yng nghyfansoddiad Prydain, ac yn arbennig felly sofraniaeth San Steffan. Mae'r cysyniad o sofraniaeth San Steffan wedi newid yn sgîl gallu Senedd yr Alban a Chynulliadau Gogledd Iwerddon a Chymru i ddiwygio Deddfau San Steffan. Law yn llaw â'r angen am gydsyniad deddfu a'r Sewel motions yn yr Alban, mae cyfansoddiad Prydain wedi symud ymlaen o ble yr oedd pan oedd y rhan fwyaf—a fi yn sicr—yn hyfforddi i fod yn gyfreithwyr. Byddai'n beryglus i beidio â dysgu sut y mae pethau

Mr Lewis: The developments of devolution have burst the bubble of some of the things that were considered to be the most important elements of the British constitution, especially parliamentary sovereignty. The concept of parliamentary sovereignty has changed as a result of the ability of the Scottish Parliament and the Assemblies of Northern Ireland and Wales to amend Acts of Parliament. Side by side with the need for legislative consent and Sewel motions in Scotland, the British constitution has moved on from where it was when the majority of lawyers were in training—and certainly in my case. It would be dangerous not to learn

wedi datblygu ar y lefel elfennol honno.

how things have developed on that fundamental level.

[103] **David Melding:** Professor Wincott, are you concerned that, as Welsh law becomes more distinct, it will be more difficult to recruit English students? Will that affect the viability of the law school?

[104] **Professor Wincott:** I have heard that kind of concern being articulated. If it becomes a real concern, that would have more to do with a slightly misguided sense of the mood music than to do with the character or quality of the undergraduate education.

[105] I mentioned before that we have a lot of students from Malaysia. Losing them would do considerable damage to the financial viability of the law school. Indeed, they are a significant export for Wales and bring consumption into the Cardiff area on a significant scale as well. However, given the realities of a legal education, for reasons of a commonality of philosophy, approach and so on, I see no reason why the basic undergraduate legal education should become anything other than a good background for someone, whether they want to practise in England, Wales, England and Wales, Malaysia, India or wherever.

[106] I would see the main differences emerging at the professional qualification stage rather than the undergraduate education stage. However, even at that professional qualification stage, we have been talking about this idea of a test of competence—and I am talking personally now—and it seems to me to be sensible for law schools in Wales and my institution, which provides professional stage qualifications, to include some elements that would be especially attuned to Wales. That is increasingly likely to be important, whatever decision is made about whether we call something a separate or distinct jurisdiction. Having said that, for the foreseeable future, I would still expect that someone could get that qualification and go on to practise in a number of different places. I suspect that professionals working in major law firms in Cardiff, many of which also operate significantly in England, would probably take a similar view about being able to practise in both places.

[107] **Mr Lewis:** Yn ddiddorol, yn nigwyddiad y Legal Services Board yr oeddwn yn cyfeirio ato yn gynharach, mynegodd rhywun o Goleg y Gyfraith wrthyf fod nifer o fyfyrwyr sydd wedi dod o Gymru i astudio yn y coleg yn gofyn am wybodaeth am gyfraith Cymru fel rhan o'r hyfforddiant proffesiynol a bod galw amdano. Y rheswm yw eu bod yn dymuno dod yma i weithio ac ymarfer fel cyfreithwyr a chyfreithwragedd. Felly, mae galw amdano.

Mr Lewis: Interestingly, in the Legal Services Board event that I referred to earlier, someone from the College of Law related to me that a number of Welsh-domiciled students that have gone to study at the college are asking for information about Welsh law as part of their professional training and that there is demand for that. The reason is that they want to come here to work and practise as lawyers. So, there is demand for it.

[108] **Mick Antoniw:** I just want to get back to some of the practical aspects of this and the reality of the way in which lawyers and the legal profession operate. By applying the laws of physics to the law—namely that for every force, there is an equal and opposite force—just as we may say that if you want to practise in Wales you may need to have done at least an element of Welsh law, there is a counter side to that where the opposite is happening, with the divergence of English law. As well as a Welsh jurisdiction developing, there is an English jurisdiction developing. One of the great practical problems that I see developing is to do with the skills and qualifications and so on, given the size of Wales and the size of the legal industry. How do you ensure that the people who are practising, whether in Wales or England—and few lawyers limit themselves to just Wales or wherever—are developing their skills, expertise and so on? There is also the question of the commercial viability of law within Wales itself. So, there are some serious practical issues that work against making this

too much of a barrier; rather, there is a recognition of the need for certain skills on both sides.

[109] **Professor Wincott:** One could say the same thing about judges, their recruitment, and so on. You are talking about a potential pool of people, and I suppose that this is one of the points about thinking through the implications of gradualism and avoiding ad hocery. What might the Welsh judiciary look like? What would be their professional biographies? From what sort of pool would one be recruiting? Do you want to have a completely separate pool of professionals and judges? I am not offering a view on that in one way or another; I am just saying that these are things that need to be thought about now. Too often in the discussion, the emphasis is on a 'distinct' and 'separate' jurisdiction, and people are led to make assumptions about the implications of what is being discussed that are not always accurate.

[110] **David Melding:** There are certainly enough Welsh lawyers to be senior judges, but the question is whether some of them would want to remain in London. I presume that, as a culture, we generate as much legal expertise as any other population of 3 million, do we not?

[111] **Mr Lewis:** Mae hynny siŵr o fod yn wir. Ni fyddwn yn dymuno cyfyngu'r farnwriaeth yng Nghymru i farnwyr o Gymru. Gallant ddod o unrhyw le yn y byd cyhyd â'u bod yn ddigon da, yn ddigon cyfiawn, ac yn gwybod eu cyfraith—y gyfraith Gymreig, hynny yw. Unwaith eto, mae gan Ogledd Iwerddon lawer i'w ddysgu i ni. Rhaid bod y cwestiynau hyn yn codi yn ymarferol o ddydd i ddydd yng Ngogledd Iwerddon. Beth sy'n digwydd pan fydd achos ym maes eiddo deallusol yng Ngogledd Iwerddon? Pa ystyriaethau a pha drefniadau sydd yn eu lle er mwyn delio â hynny?

Mr Lewis: I am sure that that is true. I would not want to limit the judiciary in Wales simply to judges from Wales. They could come from anywhere in the world as long as they were sufficiently competent, sufficiently just and as long as they know their law—Welsh law, that is. Once again, Northern Ireland has a great deal to teach us. These practical questions must arise on a day-to-day basis in Northern Ireland. What happens when there is a case involving intellectual property in Northern Ireland? What considerations and arrangements are in place to deal with that?

[112] **David Melding:** You have both been hugely generous with your time, but I still have a couple of questions because your evidence is so relevant to our inquiry. Emyr, you mentioned a Welsh statute book earlier, and several witnesses have. We have also heard that the real deficiency at the moment is the lack of a commentary on Welsh law and Welsh cases, and we will be all the poorer for that if the deficiency is not met as Welsh law becomes more distinct. How would that higher scholarship be provided? Are there implications for the public purse or could we look to the law school and Welsh legal journals to offer that type of commentary?

[113] **Professor Wincott:** That is a real issue at the moment. I do not think that the solution to this problem of commentary—and I am not talking about a statute book at this stage—would be limited to people working in law schools in Wales. I would argue that the most distinguished academic commentator on the law of devolution in Wales is Professor Richard Rawlings, who works at University College London. My own sense is that we, in Cardiff Law School, are making significant strides in this direction, and this is another area in which a strategy that is inevitably gradualist, or at least takes some time to develop, will not, I hope, fall into the trap of ad hocery. For example, we have a prestigious president's PhD scheme, named for Sir Martin Evans, who became the president of the university, and the only scheme in the broad area of law and social science is a scheme on the law, policy and politics of Wales. We have a number of PhD students funded through that scheme, who are working on issues like primary legislative powers in Wales and what that means.

[114] We have a student working in the medium of Welsh, funded through another scheme,

on precisely this question of jurisdiction, and I am sure that she will be studying your conclusions in great detail. This is an attempt to build up a group of people with a primary interest and expertise in this kind of an area. Another point that might be relevant to the earlier question about the undergraduate population—which is not directly on the issue of the distinctiveness of Welsh law and the question of jurisdiction, but, practically speaking, is related to it—is that Cardiff now has 20 or so undergraduates on Welsh-medium scholarships who do a significant proportion of their degrees through the medium of Welsh, and many of them are very interested in questions of devolved law in Wales. That, I am sure, will also have an impact on the numbers choosing to do options that specialise in this sort of area. We have recruited a number of members of staff in this area as well. So, there is a growing body of people working on this area as a primary concern.

[115] I am sure that will translate into a broader body of commentary on Welsh law. Whether it will immediately, or even in the medium term, produce a lot of detailed commentary and scrutiny of particular significant cases in relation to Welsh law that applies in Wales, I am a bit less sure. I would certainly want to encourage people working in the profession to engage in that kind of commentary. Very often, those cases are perhaps better understood by the people who are actively engaged in them, whereas the academic commentary is of a slightly different kind. There is a real issue here and, within my law school, significant efforts are being made to address it, but I do not think it is a question of snapping fingers and things changing dramatically in the short term.

[116] **Mr Lewis:** Mae hefyd yn werth ystyried hyn o'r cyfeiriad arall, sef yn hytrach na chyfraith Cymru fel y cyfryw, cyfraith mewn meysydd penodol lle mae Cymru yn gwahaniaethu. Rwy'n sôn, er enghraifft, am faes diogelu plant neu faes iechyd meddwl, lle mae unigolion mewn prifysgolion, fel Jane Williams yn Abertawe, wedi edrych ar y cwestiynau ac, yn wir, wedi bod yn ymwneud â'r broses o ddeddfu, gan roi tystiolaeth. Felly, i raddau, un o'r pethau y dylem ystyried ei wneud yw dweud pa mor freintiedig yw pobl sy'n gallu astudio'r gyfraith mor agos at ddeddfwrfa ac astudio sut mae gwahaniaethau polisi yn yr yn wladwriaeth yn gallu arwain at wahaniaethau yn y gyfraith. Byddai hynny fel astudiaeth ynddi'i hun yn ddiddorol. Fodd bynnag, wrth gwrs, nid yw llwybr gyrfa academia ac ymchwil yn naturiol yn dilyn cyfeiriad Cymreig, ond yn hytrach gyfeiriad rhyngwladol. Mae angen edrych ar y ddeddfwrfa Gymreig fel rhywbeth arbennig yn rhyngwladol efallai. Byddai hynny'n rhyw fath o help.

Mr Lewis: It is also worth looking at it from the other direction, so, rather than looking at it from the point of view of Welsh law, looking at law in specific areas where Wales does diverge. I am thinking, for example, about child protection or mental health, where individuals within universities, such as Jane Williams in Swansea, have looked at these questions and, indeed, have been involved in the legislative process and have provided evidence. Therefore, in a way, one of the things we should consider doing is to say how privileged people are in being able to study law so close to a legislature and study how policy divergence within the same state can lead to differences in law. That as a study in and of itself would be interesting. However, a career path in academia and research does not naturally follow a Welsh direction, but rather an international direction. The Welsh legislature needs to be looked at as something exceptional internationally. That might be of some assistance.

[117] **David Melding:** I think we are reaching the final question we want to put to you. Wales, unlike Northern Ireland, has a land border with England, and unlike England's border with Scotland, our land border is quite heavily populated in parts. Is this going to cause any difficulties if we progress to a distinct Welsh jurisdiction, or, as things become more distinct even in a gradual way, are there issues that you want to bring to our attention for us to look at, or issues that will need to be looked at in the years ahead?

[118] **Professor Wincott:** As you have set out, there are substantial differences of fact and practicality as between the position in Wales and the positions in Northern Ireland and Scotland, although, Northern Ireland also has a land border with another jurisdiction so there may be lessons there. My view is that, although there will certainly be differences of intensity, it is not clear to me that there are differences of fundamental principle in how these issues would have to be addressed. I would have thought that the sorts of lessons one could learn from the land border between Scotland and England or between Northern Ireland and the Republic of Ireland would be very helpful.

[119] Also, to focus on the practicalities, if there are issues that need to be managed, they will be need to managed, albeit perhaps in a slightly different way, whether we name something as a separate jurisdiction or not. If school buses in and around Cheshire are used to move children in north-east Wales around, they will have to conform to the law as it applies to school transport in Wales. At the moment, that might be managed in one kind of way, and it might have to be managed in a slightly different sort of way. I cannot see any reason of principle why inspectors would not be allowed in at the depot to look at those buses. It does not seem to me to be a problem of principle. It may be that someone can give me an example where there is an issue of principle that is at stake but, for me, there may well be issues and problems, but it does not seem to me that they hinge on the jurisdiction issue.

[120] **David Melding:** There are federal states all over the world that have to grapple with these sorts of things, presumably.

[121] **Mr Lewis:** Hoffwn ychwanegu bod holl gwestiwn awdurdodaeth ynghlwm wrth diriogaeth eisoes yn rhywbeth yr ydych yn edrych arno. Un enghraifft fyddai maes y Bil rhoi organau. Mae cwestiynau, yn gyntaf, ynglŷn ag organau pwy ac, yn ail, ymhle mae'r cydsyniad yn weithredol—a yw'n weithredol yn Lloegr, yr Alban neu yng Ngwlad Belg? Mae'r cwestiynau hyn eisoes yn rhai yr ydym yn gorfod ymwneud â hwy gan fod gennym ddeddfwrfa sydd â'i ffiniau yn rhai tiriogaethol.

Mr Lewis: I would like to add that the whole question of jurisdiction linked to territory is already something that you are looking at, one example being the organ donation Bill. First, there is the question of whose organs, and, secondly, of where the consent is in operation—is it in operation in England, Scotland or Belgium? These are all questions that we already have to grapple with because we have a legislature that has territorial boundaries.

[122] **David Melding:** That brings us to the end of the questions that we wanted to put to you. It has taken us nearly an hour and a half, so we have presumed on your good nature and intellectual curiosity. However, if we have not covered something that you think is relevant and that you would want to bring to our attention now, please feel free to add it. I see that you do not have anything else to add, so it just remains for me to thank you. We have had an outstanding session. You have brought great rigour and clarity to many fundamental issues. I have been whispering to our faithful clerk many little points that we will chase up with people in Northern Ireland and put to other witnesses that we are likely to have in the future in relation to some of the issues that you have raised. I am very grateful to both of you for your time and commitment to help us with our work. Thank you.

3.59 p.m.

Cynnig o dan Reol Sefydlog Rhif 17.42 i Benderfynu Gwahardd y Cyhoedd o'r Cyfarfod
Motion under Standing Order No. 17.42 to Resolve to Exclude the Public from the Meeting

[123] **David Melding:** I move that

the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order No. 17.42(vi).

[124] I see that the committee is in agreement.

[125] Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 3.59 p.m.
The public part of the meeting ended at 3.59 p.m.