



Welsh Affairs Committee

Oral evidence: Pre-legislative scrutiny of the draft Wales Bill, HC 449

Monday 23 November 2015

Ordered by the House of Commons to be published on 23 November 2015.

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Members present: David T C Davies (Chair); Byron Davies; Chris Davies; Gerald Jones; Christina Rees; Liz Saville Roberts; Craig Williams; Mr Mark Williams.

Questions 214 - 274

Examination of Witnesses

Witnesses: **Hefin Rees QC**, Chairman, Association of London Welsh Lawyers, **Kay Powell**, Policy Adviser, Law Society of England and Wales, and **Huw Williams**, Law Society of England and Wales, gave evidence.

Q214 Chair: Good afternoon. Thank you very much indeed, Mr Rees, Ms Powell, and Mr Williams for coming along today. We have a varied number of questions about the new Bill. I appreciate that two of you represent the Law Society of England and Wales and that Mr Rees represents the London Welsh Lawyers, so you may have slightly different approaches to it. Can I start by asking each of you in turn whether you think that this Bill in its current form can achieve what it sets out to achieve? Perhaps Mr Rees to begin with.

Hefin Rees: I hope that it can, but I think there are things that you need to look at to ensure that it does achieve what it is meant to achieve. The most important thing from any lawyer's perspective, either in London or Cardiff, is that the legislation is drafted clearly. It must be easier to follow than the Government for Wales Act 2006 because there were so many grey areas in that legislation, which was why the Supreme Court was troubled on so many occasions in relation to whether a matter that had been passed by way of an Assembly Act was competent or otherwise. The most important thing is to have clarity in the drafting of this legislation.

Q215 Chair: With a few tweaks in the drafting, perhaps with somebody of your expertise there, it could achieve the reserved powers model that the Government are seeking to achieve.

Hefin Rees: Yes, I think it could. There are various question marks about whether you need to have the term "necessity" in there in terms of the criminal law and civil law, in

terms of one of the reservations. As I understand it, that is a term that is used in the legislation for the Scotland Act 1998 and has not caused much concern there, but you have a different position in terms of legal jurisdiction in Scotland than you do in Wales. If there could be some clarity in terms of what is really meant by words such as “necessity”, and there is no attempt to nitpick by Whitehall bureaucrats to try to prevent the Welsh Assembly having its democratic say and putting into implementation what it believes it has a mandate to do, I think it can be a workable Bill.

Chair: Thank you. Ms Powell.

Kay Powell: To set the scene, the intention of our contribution today is to bring to you an example of reservation in the practice area of planning law, because it is only in looking at the specifics that we can assist you with the application. In terms of the Bill overall and good lawmaking, our general observation is that the draft Wales Bill is seeking to deliver a reserved powers model, but it is using the architecture of a conferred powers model—the Government of Wales Act 2006. So this is a surprise because what we are going to end up with is an amended piece of legislation and we will then end up with a string of legislation for what we expect to be a longer constitutional settlement.

Q216 Chair: That is interesting, but why do you say that? The previous Bill basically said that you certainly have the power to legislate in this, that, and the other area, and this Bill is clearly saying, “We are reserving the following powers to Westminster.” There is an argument going on as to which powers are being reserved and whether there are some that might not be conferred, or not reserved, but why do you say that it is a conferred model that they are using because they have clearly said, “We are holding this stuff back and the rest of it is over to you,” haven’t they?

Kay Powell: The architecture of the original Bill was set up in the way that it was set up, and it set up the schedule in the conferred powers arena. Moving forward, we would expect a reserved powers model to be a cleaner settlement in a way, but by doing this, and then ending up with your schedules being renamed and your sections renumbered and so on, it is not immediately going to be tidied up at the end of the day. It is going to like a very messy piece of legislation.

Huw Williams: I have some sympathy with both views that have been expressed. I think the Bill is disappointing in one sense, in that we had expected—perhaps optimistically at this point—that more work would have been done to drill down into the effects of some of the reservations. At the moment, the Bill does give the impression that the exceptions that previously existed have simply been converted into reservations, and that some of the silent subjects have now found a place in the reservations. As the paper that I have written indicates, there is a further piece of work that needs to be done. That involves looking at the reservations in detail and trying to see how these work out in a reserved powers model. At the moment it does not produce clear boundary. I accept it is a counsel of perfection to think that you can have a clear boundary, but there certainly could be a much clearer boundary between what is reserved and what is available to the National Assembly to legislate on.

I have some concerns as well about the introduction of the concept of necessity. I think that the use of this device in the Scotland Act was for a much more limited purpose. One can perhaps see that if, in a Scottish context, you have the reserved powers model, plus

control over civil and criminal law, then if you need to encroach beyond that, there must be quite a high bar of necessity. In my view, “necessity”, as a legal term, does indicate a high standard of proof.

Chair: Thank you for that.

Q217 Liz Saville Roberts: I was interested in what you were saying, Mr Williams, about the fact that more needs to be done to drill down into the reservations was interesting. I read your paper and you mention community infrastructure levies and 106 clauses. There are concerns that there are aspects of the Bill that are not being considered when we are discussing some very critical areas. This Government are talking of introducing this Bill early next year. Is this timing of the Bill more a matter of ensuring a gimmick for the Government to announce on St David’s day, rather than achieving a lasting piece of legislation that is fit for purpose?

Huw Williams: I think that might be drawing me into a political argument about the timing of this. What I would say is that this is a multi-layered process. Silk looked at the matter at some length and worked hard to achieve consensus. The matter then was the subject of further political consideration in what I suppose one must now call a dark, smokeless room. The result was the St David’s day Command Paper, but neither of these processes did this essential task of drilling down.

One of the other papers, by Keith Bush QC—I am not sure if it is before you, but it has certainly gone into the National Assembly—refers to Sir Jon Shortridge referring to the opportunistic nature of the powers of the old Welsh Office and the Secretary of State. There is no evidence at the moment that anybody has done this piece of detailed work to try to straighten out some of the kinks in the devolution boundary. My paper illustrating some of the things that have arisen with the Planning (Wales) Bill, where evidence-based policies proved to be incapable of being pursued under the current settlement, is just one example from my area of legal practice where this is the case. On the question of whether there is an opportunity to do this in the time available, I suppose one has to bear in mind this is a draft Bill and, clearly, there will be further opportunity for improvement when the Bill is introduced. I would certainly hope to see some evidence that some of this detailed work is now being done.

Q218 Liz Saville Roberts: I think there is a wider question about whether the timetable is being rushed and also referring back to the process because, when we have asked this of the Secretary of State and we have asked questions about the level of civic engagement, given that effectively what we have here is something that went through a political process, what we have been told is that the civic engagement occurred at the stage of Silk. Silk is now a while ago and there have been important pieces of legislation either in process, such as the new Scotland Bill, or that we have been discussing in English votes for English laws—other things that are significant have happened. Yet where is the civic engagement now? To come back to my rather flippant comment, are we rushing into something because there is a slot for the legislation or because there might be a desire to have something to announce? Are we going to have a piece of legislation that is not fit for purpose because we are rushing at it?

Hefin Rees: I think there is a strong sense that you are rushing at it. If you think back to, say, 1997 and if you catapulted yourself to 2005 by thinking, “By 2005, we will be on our fifth devolution settlement for Wales,” you would have gone, “What? No, no; we will manage the process much better than that. We will do a proper job of it.” If you look back

over the last 18 years, this is the fifth settlement for Wales. Each one has been cobbled together and rushed. I am not going to go through an analysis of each one, of course, but there is that sense that this is not the way to run it and this is not the way to get to grips with a detailed, complicated piece of legislation. I think Wales, if I may say so, deserves a devolution settlement that will be long lasting, and will have durability and clarity. By long lasting, one would expect the settlement to be at least for 10 years. I do not think that this will last anywhere near as long as 10 years because of the other issues that are not currently on the table. There is the very interesting issue of whether there is a need for a separate legal jurisdiction for Wales; not the full panoply of it, as in not the whole court system—

Chair: We will come to that.

Hefin Rees: Yes, good.

Kay Powell: Could I just add that we are in a situation where civic society does need to be seen to be consulted? The draft Bill does not simply put in place a general reserved powers architecture. It isn't a principled adoption of it, so we would expect, now that some of the issues have been drawn out with debate, that this is seen not simply as a redrafting exercise, but something that needs to be in the broader discourse within Wales.

Q219 Christina Rees: Coming back to the necessity test, would you like to elaborate on what you think it means and how will it be tested in the courts? Is there a risk of every Bill finding its way to the Supreme Court?

Huw Williams: As I indicated a moment ago, applying this test more widely—certainly wider than it has been applied in the Scotland Act, where it comes from—I think carries dangers. In my experience it is certainly not a term that is as well understood by lawyers as a concept, such as being ancillary or something being reasonable. If it is left at large I think, as has been indicated by other parties who have put in papers, it does open up the potential of legislation being challenged, not just in the course of conventional public law challenges and judicial reviews, but with challenges arising in the course of other civil and criminal proceedings that the extent of encroachment has exceeded the powers available to the National Assembly. One of things that the Bill does not do, which I certainly think needs to be considered, is to deal with whether there needs to be some statutory restriction on the ability to raise these sorts of challenge points outside a sensible period of challenge once a Bill has either passed the Assembly and is ready to receive Royal Assent, or immediately after Royal Assent. It could prove to be a fruitful source of inventive challenges and, while that may be good news for people like me and Hefin, I am not sure that it is in the best interests of the settlement.

Hefin Rees: The necessity test is introduced under Schedule 7B, isn't it, and the general restrictions? One of the reservations is civil law and the other one is criminal law and you have to have the necessity test.

Stepping back for one moment, before we look at the detail of the draft, it is part and parcel, I would have thought, of a legislature like the National Assembly, which has primary legislative powers, to be able to have as part of those powers the implementation of those powers in terms of enforcement. Of course that brings into question matters of civil and criminal law, so we cannot simply carve away from what the legislation in

Cardiff is meant to do, which is mainly to enforce the laws that the National Assembly is mandated, or feels it is mandated, to pass. It is part and parcel of the implementation of any legislature to have criminal and civil law as part of its devolved powers.

In terms of the necessity test, it has to be said it is a charter for lawyers, because who is going to assess this? Is it going to be the Supreme Court? If it is, this is a very easy measure by which to seek to delay Bills by anybody who may have self-interest.

Q220 Chair: Just quickly on that, surely there is no suggestion that the Assembly will not be able to amend private or criminal law; it is merely that it would have to ask permission in order to do so, and the presumption is that it would be automatically given permission to do so unless it was deciding to do something completely outrageous, such as something like bringing in life imprisonment for people who committed motoring offences. There is no real suggestion that it will not get permission providing that is reasonable and, dare I say, necessary.

Hefin Rees: Then perhaps you should use a different word than “necessary”.

Chair: Right.

Hefin Rees: If it had that clarity in there, I think you may remove a lot of the concern.

Chair: Okay, that is helpful.

Hefin Rees: If you had that clarity in there then—

Chair: Everyone is looking to come in. Mark Williams first.

Q221 Mr Mark Williams: I think my next question tackles some of the issues that Mr Rees can talk about. What I was going to say is another follow-up from what you have just said. We have heard this phrase “necessity test” and one of the justifications, by some at least, for its inclusion in the Bill is that this is applicable—one of you alluded to this—to Scotland as well. For the sake of clarity, could you explain the difference between the necessity bit of the Scottish legislation and this proposed legislation, and why some of us would assert that there is a pretty fundamental difference?

Huw Williams: Under the Scotland Act, as we know, Scotland has control of Scottish criminal law and Scottish civil law, plus it has legislative competence, apart from the reserved matters to the UK Parliament in the Scotland Act. The equivalent provision in the Scotland Act only allows the Scottish Parliament to stray outside those areas of competence if it is necessary. As Hefin said a moment ago, the difference is the nature of what is being proposed in Wales: civil law and criminal law—what a lot of people think of as being “the law”—is reserved to the UK Parliament but, of necessity, there has to be a margin within which the Assembly can encroach into that to make its laws work, in broad terms, either by imposing civil or criminal penalties, or making necessary adjustments to what is being proposed. If you look at the Scottish model, therefore, if they want to stray outside the powers they have, necessity makes sense because they must be wanting to do something pretty serious that is beyond that extensive reservation, plus the control of criminal and civil law, that they have in Scotland. Wales has a much broader extent of reservation to the UK Parliament. It has this area it has to encroach into simply in order to make its laws work, and necessity seems quite a high bar.

Chair: I had better stop you there, if I may.

Q222 Mr Mark Williams: That is a very good follow up to the question I was going to ask—it was an added extra. Following on from that, therefore, if criminal and civil law were devolved, would it be necessary or desirable to then move in the direction of a separate or—the buzz word we are hearing a lot about these days—distinct jurisdiction? What are your thoughts on that?

Kay Powell: To kick off, the Silk Commission obviously looked at this as a factor in looking at the reserved powers and the extension of powers for the National Assembly. It is acknowledged that this is a factor, but it also was acknowledged by Silk that it requires time. The Court Service and the judiciary are taking steps and, as a representative body, we have members across England and Wales whose views obviously range across the whole spectrum on this issue—some principled, some pragmatic, and some opinions grounded in the status quo and also looking to the economy. In terms of moving forward, this is an example of the types of issues that have come to be debated now in respect of the draft Bill that do need more time. They need to be looked at in the round and they also need to take into consideration different areas of the profession, and also access for citizens, and we need that debate to be undertaken not with the focus of this Bill taking it forward.

Q223 Mr Mark Williams: Notwithstanding what you said and the work that needs to be done—again I think a lot of us would concur that more time is required on these very technical matters—if criminal and civil law were to be devolved, are there specific offences that you would still like to remain reserved, or is that the kind of thing that you would need to reflect on? Secondly, more generally, other than the clarity that some of us would seek from this legislation, are there any other specific benefits that would arise from the creation of a separate or distinct jurisdiction?

Hefin Rees: I think if you devolve the whole of criminal law and civil law, you will trigger a separate legal jurisdiction, without question, and all the panoply that is involved in that, I think. What is now being considered, and I think was most clearly set out in the paper from UCL and Cardiff University published on, I think, 5 October this year, is that instead of talking about a separate legal jurisdiction—the whole thing: a new chief justice, a new DP, a new attorney general, a new Court of Appeal, High Court and everything—because that would be very expensive, some people have started thinking about what would be a halfway house or some kind of method whereby you could have a distinct legal jurisdiction in Wales as opposed to a separate legal jurisdiction. You could have a division of the High Court as part of England, so instead of the High Court of England and Wales, it would be the High Court of England and of Wales. It would be not just England and Wales—the one jurisdiction—so the Court of Appeal of England and the Court of Appeal of Wales.

You would have the benefit of all those brilliant judicial minds in London and also of course in Cardiff, too, but in terms of the specialist judges in the mercantile court and the commercial court in London and, of course, the Court of Appeal, you would have all that. It would be a division of the court system, where you would have a High Court division that dealt with Welsh law and you would have specialist judges dealing with that. I think that has a lot to recommend of it.

Kay Powell: We do need to begin to see some modelling of these types of accommodations of Welsh law within the current jurisdiction to see where we would place it and how we would come to a consensus on what a distinct jurisdiction would be that would be operable for Wales.

Q224 Mr Mark Williams: You hear politicians talking—as we heard last week—about the impact of a separate jurisdiction, or indeed a distinct one, as a mass exodus of the legal profession from Wales. What is your reaction to comments like that that we heard in the Chamber of the House of Commons last week?

Huw Williams: As a solicitor in private practice in Cardiff, can I say that I think we have some sympathy with that view?

Q225 Mr Mark Williams: The separate or distinct jurisdiction? The impact being?

Huw Williams: A move to a completely separate jurisdiction on a Scottish or Northern Ireland model. I am a partner in a firm that makes probably half its turnover in England and half of its turnover in Wales, and we hope to inwardly invest more legal services into England as time goes on. We see that there are important commercial and business advantages of being part of a unified system and certainly a unified profession across England and Wales. I can only speak for firms like my own, which are essentially practices dealing with many commercial and public law subjects. I think we would have some degree of concern that you would see a flight of talent. There is a constant tussle, and I have seen it ebb and flow over my legal career. Sometimes Cardiff can attract people back from London for lifestyle reasons and reasons of the interest of the work, and at other times the pull of London becomes stronger, so there is this constant tension. I would certainly say that maintaining a united England and Wales jurisdiction, I think, does not mean that it has to be completely uniform across England and Wales when it comes to the administration of justice and the court system, as Hefin has said. One observation, which I looked up on the train on the way up: the Ministry of Justice has seven junior Ministers and Minister No. 7 in the pecking order has devolution as one of his responsibilities. Maybe it is time that the MOJ elevated the relations between the two parts of England and Wales, and the emergence of a distinct body of Welsh law, up its agenda of considerations and started looking at how these things can work.

Q226 Chris Davies: I must say, having listened to the two sessions from legal brains, it seems that it is only the legal members sitting in front of us who are calling for a separate and distinct legal jurisdiction. I am not hearing it from the general public, and I must say I am surprised I have not heard it from that many politicians who have sat in front of us either. My question is: would a separate or distinct legal jurisdiction benefit the people of Wales or benefit the lawyers of Wales.

Huw Williams: I am all in favour of the rule of law, not the rule of lawyers. I think—this is an entirely personal view—that to an extent the jurisdiction argument has been over-egged. What we need are practical answers to the consequences of the fact that there is going to be legislature in Cardiff making laws that only apply within that entity that is Wales. If the focus was on configuring the institutions to take account of that, it is maybe it is going too far to say that the jurisdiction question will look after itself, but the jurisdiction question will move along and eventually accommodate what does emerge through the body of legislative activity from the National Assembly. I think the important

focus of this Bill should be to enable the National Assembly to come up with workable, enforceable legislation that does not need to be a subject that bothers UK Government Ministers too much and, even more so, does not bother the Supreme Court too much. I think that that is what is to be aimed at. There will then be some necessary reconfiguration of the court systems. Hefin has alluded to some of the things that we might see. There is movement around these sorts of institutions, and I think to a large extent the jurisdiction argument will look after itself.

Hefin Rees: Can I pick up briefly on this point? There is a respectable body of opinion within this discussion, which is not just from lawyers calling for a separate legal jurisdiction. It is a good thing generally, some would say, that you have devolution of things like the administration of justice, which involves access to justice for the local people who it is meant to serve. It is right that the court system and the administration of justice more generally, if at all possible, should be devolved to the people who are administering the work and those who are either benefiting from or—in a criminal context, obviously—being subject to the administration of justice, but generally I think it is a good thing to have that devolution.

Q227 Chris Davies: On your point, Mr Rees, there are court closures going ahead at the moment, including one in my constituency, and one likes to take the legal system locally. If, however, instead of paying for that local legal system we end up paying people in Cardiff to administer that around Wales, that money is coming out of that local court and local legal service and it is purely going into administration in Cardiff. I do not see that as a good way forward, but perhaps you have a different view.

Hefin Rees: After 2011, once the Welsh Assembly had primary legislative powers, the genie was out of the bottle. You now have two legislatures in one jurisdiction that are able to legislate for primary legislation. The statistics I have been given by the Welsh Government recently in relation to the amount of Welsh law—distinct Welsh law to English law—is fascinating. I don't know if you all know this. In terms of primary legislation, there have been 22 Assembly Bills since 2011. That is what I have been told, so perhaps it 20 or whatever. Between 2007 and 2011, there were 22 Welsh Measures. You have those 22 in terms of primary statutory legislation, but then what is underneath the iceberg is the secondary legislation. According to the Welsh Government statistics I have been given, since 1999 there have been over 4,500 statutory instruments that apply to Wales. Since 2011, the Welsh Government has made 2,577 statutory instruments, which stretch over 9,764 pages and they apply to Wales.

Chair: That is very interesting.

Hefin Rees: It is a huge body of law that is developing.

Q228 Craig Williams: A couple of issues, very quickly. I want to re-emphasise, given some of the political points that have been made, that we are in pre-legislative scrutiny. I think that is a first for a Wales Bill—correct me if I am wrong—and it is very welcome that we have a draft and this pre-legislative scrutiny. I appreciate much of what Mr Williams has said and, Mr Rees, the genie is out of the bottle, but all that primary legislation and the statutory instruments is still less than 2% of our England and Welsh legal system. We are all getting extremely excited here about less than 2%. I appreciate your views in terms of the arguments between separate and distinct, but I still as a layman cannot see this. We have a distinct legal

framework now in housing. Why can't we call it that and just all relax about it? Why are we getting so excited about these processes? If you are practising in anything to do with housing, there is now a distinct Welsh legal system. Nothing has stopped. There has been no panic in the courts. You have all got on because you are very learned people and you have practised it. What is the problem?

Huw Williams: You are quite right. Under the present settlement the National Assembly has clearly been able to legislate quite extensively in the field of housing and renting homes, as you will be aware. I won't repeat what is in my paper, but one of the problems is that there are some difficulties with the boundaries that are still causing the National Assembly problems in legislating in a completely holistic manner, which I think the draft Bill risks maintaining. But, yes, you are right. At the moment it is a small body of law, but it is going to grow. The point at the moment is that those concerned with policy development and the making of law in its broadest sense should be aware that there will eventually be a need to adjust the legal institutions for the administration of justice to take account of this growing body of law because, by and large, it is only going to go in one direction. It is going to get larger. Hefin captured the right phrase: the genie is out of the bottle. We have to discuss how we are going to deal with this. We have to consider what sort of things would be achievable without bringing the house down.

Perhaps I might be permitted to give one concrete example from my field of planning law. In the previous Parliament, the then Government—in their attempts, as they saw it, to reduce the volume of judicial review cases, and to speed up the general infrastructure planning process and the time taken for legal challenges—suggested that judicial reviews of planning cases be taken out of the High Court and heard in the tribunals service in an expanded version of what we call the lands chamber, which also deals with land compensation cases. That did not proceed because the High Court itself set up a planning court. But if, as part of a further process of planning reform, the National Assembly for Wales decided that that sort of an institution was a good idea for Wales, would having some ability to move that along through some recognised process with the MOJ be such a threat to the single jurisdiction that it should not be allowed?

Chair: This is very interesting, but I must push on, if I may.

Q229 Christina Rees: We have moved on a bit from what I was going to ask but, coming back to the necessity test, do you think there is a risk of argument about competence even without the necessity test? As it is at the moment the competence of Bills is not examined until after they have passed. Do you think this draft Bill would make any difference to that?

Kay Powell: I can't immediately see that it would make a difference compared with what we have now in terms of competence. What we would be looking at are the powers. Moving forward from that, the presiding officer does test in the initial stages whether there is competence, and I know that if there are grey areas, there would be even a stage earlier than that. It would impact on policymaking and the drafting of that legislation at the very first stage if there continued to be issues around competence, which would be derived from the definitions and descriptions within the reservations.

Q230 Gerald Jones: On the question of claims and counter-claims regarding the Assembly Acts, we have heard a figure of 25 from the Welsh Government in terms of Acts that could not have been passed under the proposed new legislation. The UK Government set that figure

at around five. Obviously there are claims and counter-claims. Do you have a view on where that sits?

Hefin Rees: I have not seen the research. I have seen it reported and I have seen the figures and I think I saw one of the extracts of the evidence of this Committee. It was referred to in front of the First Minister, I think. I have not seen the details of it, but if it is correct, it would be of very grave concern to this Bill. I think you need to hear evidence as to who did the research; if it is robust, this Bill has real problems in terms of its effectiveness. If it is going to have that level of drag effect on the National Assembly for Wales, the devolution settlement will fall to bits, I am afraid. It is an extremely important question you ask. I am afraid I do not have anything other than big question marks and grave concerns about that conclusion.

Huw Williams: In the papers the First Minister deposited in the Assembly library I have seen there is an extremely detailed schedule of individual powers and sections in pieces of Assembly legislation that it is claimed would fall foul of the provisions in the draft Bill. I have only looked at a sample of those. Some of them are relatively minor. Others, in some of the other areas of law, such as the Welsh language, are going to be much more substantial. I have not had the time to drill down through them. What I would say is that what they are indicative of is this point that I have made previously, which is the need to test where the boundaries lie. A lot of these difficulties are not traps that have been put there out of any element of deliberate intent to roll back the boundaries. It is simply the matter that I think there needs to be this level of detailed work to try to make straight the path of devolution, which at the moment is quite erratic in certain instances.

As I have illustrated in my paper, you have the community infrastructure levy, which frankly is a solution to a problem of funding infrastructure in the south-east of England, which has been passed over to Wales by the operation of the Planning Act 2008. There is a review being conducted by DCLG of the community infrastructure levy that was announced this month. It has no Welsh input into it at all. It just seems to me that CIL was there. There were exceptions to the financial levy previously, so we converted it into a reservation. There has been no work done to try to examine whether it is still a relevant thing to have reserved.

Q231 Gerald Jones: One further question in terms of the revised Minister of Crown consents regime. What are your views about the clarity of drafting of the revised regime?

Huw Williams: My view on that is conditioned by a paper that has been prepared by Keith Bush QC, a former legal adviser to the National Assembly, which I am not sure has come into this Committee. It has certainly gone into the committee in Cardiff. What is currently drafted certainly perpetuates a very difficult situation. Keith's solution is that we follow the model in Scotland, which basically aligns the executive powers of the Welsh Ministers with the areas of devolved competence. The fact that we now have a permanent situation where Minister of the Crown powers have to be the subject of specific consents is, I think, a recipe for continuing potential confusion. Again, it comes back to this problem that I have highlighted about the imprecise manner in which the old Welsh Office powers were assembled and the way that those still influence the nature of devolved powers.

To give you an example in a related field to planning and compulsory purchase, if you are certainly in circumstances dealing with planning applications involving statutory

undertakers or the compulsory acquisition of their land, there are certain decisions that have to be taken jointly by what is now the Welsh Government, formerly the Secretary of State, and by what is called the appropriate Minister. Now, the appropriate Minister can in some situations be the Welsh Government. In other situations, it is still a UK Government Minister, and it is a devil of a job working out who it is.

Chair: May I ask that we just speed things up a little bit, with the greatest of respect?

Huw Williams: I am sorry.

Q232 Liz Saville Roberts: If I might come back—I do appreciate you have not seen this, so I will describe it to you—we did ask for an interpretation from the Welsh Government of the 25 Acts that they were holding up as being in question. Then we had a response from Wales Office legal advisers, and now we have had a response back from the Welsh Government, and they do not agree with each other. Where there is this degree of variation of interpretation among legal experts as we stand now, would it be a reasonable conclusion on our part to be worried about the clarity of operating this Bill into the future?

Hefin Rees: The gravity of the distinction is whether it is a minor issue that has just been put forward as a makeweight in terms of the argument—of course, I have not seen the research, so I cannot give any specific comment on it. If, however, the Welsh Government are maintaining that that is correct, you must obviously be concerned that that level of legislation would not have passed through if you impose the current plan into this draft Bill.

This is complex and I think what the legal profession and what the public really want from you is clarity of drafting; not you yourselves, of course, but parliamentary draftsmen. In the last 12 months the Supreme Court have racked their brains about the Government of Wales Act—schedule 7 as it is currently drafted—in terms of the agricultural wages Bill. They looked at that. They came to a conclusion entirely inconsistent with what the Attorney General for England and Wales was arguing—totally inconsistent. They rejected all his arguments on that and accepted that the Bill was in competence of the Assembly. Then you have the asbestos NHS recovery of charges case, which went to the Supreme Court as well—differently constituted courts. They came up with a different view in relation to where the grey areas are in terms of the boundaries of devolution, because you are dealing with a different issue there. You are dealing with the NHS. The insurance industry were hugely keen on that because it would have had a major impact on their coffers. If that Bill had passed and had been found to be competent, they would have had to pay significant sums.

Liz Saville Roberts: Which implies that what is significant to England is unlikely to be allowed to be decided in Wales.

Q233 Christina Rees: Coming back to Minister of the Crown consents, do you think that the prevarication and delay is a problem? They took 16 months to get some consents for the Social Services and Well-being (Wales) Act and the Wales Office is very small compared to other Whitehall departments, so Wales is not a priority and that delay will continue.

Huw Williams: Before coming here today, I tried to find out in the literature exactly how this Minister of the Crown consent process actually works. It is one of these pieces of the

hidden machinery of Whitehall. I would welcome some clarity and a degree of process to be imposed on the situation. I do not know whether these things just go into a Department and get passed around until somebody picks it up, or whether there is the machinery to say, “This is to do with Wales; it needs to be looked at.”

Chair: We are running a little over time and there are two other panels coming in, but does anyone have any very quick-fire last questions? Nobody is catching my eye, so in that case thank you all very much indeed for coming in today. Hopefully, we will bring some clarity to this Bill in our considerations and report. We look forward to hearing from you again. Thank you very much.

Examination of Witness

Witness: **Alan Trench** gave evidence.

Q234 Chair: Good afternoon, Alan. We know each other very well. Thank you for coming back before the Select Committee again.

Alan Trench: It is a great pleasure to see you again and to meet your colleagues, most of whom I have not met before.

Chair: I understand you want to make a short statement first, which is fine, but you will appreciate we have quite a few panels today, so if you see me gesticulating, you will know, having been a special adviser, Alan, what I am getting at.

Alan Trench: I will be brief. The first thing I want to say, by way of introduction, is that I think what this Bill is seeking to do is a very laudable objective. It is to try to put in place—in the terms that the Secretary of State used—a clear, robust and lasting devolution settlement for Wales. That is a wholly laudable approach. Wales badly needs that. The question is whether the Bill achieves that and is workable on its own terms, and there I think it is profoundly problematic. The reason, first of all, is that it starts from the wrong place. It starts in a very boring and literal sense. It starts by trying to amend the 2006 Government of Wales Act, rather than replacing it, as the 2006 Act replaced the Government of Wales Act 1998. That would be a far preferable approach because it would produce a much clearer and neater piece of legislation that people could look at and, one would hope, try to understand.

The problem with the Bill then is that I think it demonstrates four misconceptions. The first is that you can simply graft a reserved powers model on to the existing division of powers between the UK Parliament and the National Assembly. The work that we did over the summer on the report that we prepared through the constitution unit in the Wales Governance Centre, *Delivering a Reserved Powers Model of Devolution for Wales*, convinced me of what I had already suspected: that simply is not possible.

The second misconception is that it treats what it calls private law and criminal law, for the purposes of the new Schedule 7B, as subject areas to be reserved, rather than understanding that they are, in fact, mechanisms by which legal policy is delivered. Now, in some cases, that legal policy relates to the thing itself. The law of murder or of homicide is obviously at the core, for example, of criminal law, but the criminal law is

itself a mechanism, not a subject. The same applies to what the Bill calls private law and that leads into a great sequence of difficulties.

The third is that it will be possible to identify devolved functions or devolved matters under these new arrangements. That is not possible when you have a reserved powers approach. It simply does not work, because devolved matters are everything that is not reserved. You cannot identify something by reference to a supposed devolved function or devolved matter like education or health, because it has disappeared into the generality of that which is devolved.

Q235 Chair: But what is the problem with that, Alan? We know because it has not been reserved that it is devolved.

Alan Trench: Because the Bill then proceeds on the basis that you can identify whether there is a devolved purpose in order to determine whether a provision is ancillary to something that is permitted, or is necessary in relation to something that is permitted. It is at that point that we start to get into some ferocious legal tangles.

The fourth misconception I would say, if I may, Chairman, is that what we are going to get out of this Bill if it were to reach the statute book would indeed be some sort of lasting, robust, durable settlement that could form the status quo, and I very greatly fear that that is not so. I fear that if you were to put this Bill on the statute book, it would prove to be utterly unworkable and we would be back here in two or three years' time.

Chair: Okay. Well, it is certainly not straightforward, is it?

Q236 Mr Mark Williams: Thank you, Alan. I do not know where we would be without your words of wisdom on inquiries such as this, so it is good to see you back here. You mentioned those four bits. I suspect that some of those four observations you made will be taken up by colleagues, but I want to take a step back into a more general question. You have taken an interest in devolution over a very long time. We heard from the earlier witnesses about the 18 years of this debate and various perhaps inadequate steps towards devolution. Could you perhaps start by setting this draft Bill in the wider context of the devolution debate in the UK? Some of us will always take a uniquely Welsh perspective, but it would be foolhardy not to acknowledge that what has happened in Scotland and, indeed, the increasing move for devolution in England, are part of this debate.

Alan Trench: Indeed, they are and, of course, in the Committee room behind me I believe a discussion on the Cities and Local Government Devolution Bill is taking place this afternoon. We have a Scotland Bill that is about to have its Second Reading in the Lords that has been the subject of a degree of criticism, most recently from the Lords Economic Affairs Committee, which provides for substantial fiscal devolution and has a number of problems. Of course, we also have the recently adopted amendments to the Standing Orders of this House regarding English votes for English laws, and this is a very dynamic and active area. One of my long-standing concerns has been that each of these approaches has been considered completely in isolation from the others and there is no attempt to take an overarching, overall view. Indeed, this is something that we did a lot of work on earlier this year in a report for the Bingham Centre for the Rule of Law, which was published in May entitled *A Constitutional Crossroads: Ways Forward for the United Kingdom*. That was an attempt to talk about all these issues in relation to each other and in the round.

What particularly bothers me about this Bill is that we have a number of very effective precedent models—from Scotland in particular—that would appear to work pretty well. That is partly due to some very effective liaison behind the scenes, but the Scotland Act 1998 has proved to be a pretty effective overall approach to delivering the reserved powers model of devolution. This Bill departs from that model in an awful lot of ways, with two particular consequences. The first is a general constitutional one. That means that we are moving away from, rather than towards, the idea of a British model of devolution, which is not simply a sequence of ad hoc bilateral bargains between particular parts of the UK and the whole, but something that actually tries to make it work in a UK-wide context. The second is what this is going to mean for the courts. Although the UK Supreme Court has tried very hard to develop a body of devolution jurisprudence, and has said in at least one case—I have to say to my mind illogically—that all three devolution settlements resembled each other and had to be considered as working in the same way, those differences between particularly the draft Wales Bill and the Scotland Act will make it very hard to apply that jurisprudence in a consistent and coherent way.

Q237 Chair: Are you saying, Alan—if I may just butt in for a moment—that we could have something that looks like the Scotland Act, but with perhaps a few more powers reserved, and that that would achieve everything that we need to achieve?

Alan Trench: I think that would be a preferable approach. It would require some quite big changes and we might want to talk about those when it comes to the working of the legal jurisdiction—I heard you discussing that with the previous witnesses—and in relation to the devolution or not of civil and criminal law, and how those areas might work. Those are fundamental differences between the Scotland Act and the draft Bill. The other fundamental difference—just to note this, Chairman—is in relation to ministerial powers. These key issues are the fundamental distinctions between what is going on in relation to Wales and where we are in relation to Scotland.

If I may just return to trying to answer Mark Williams’s question, the other issue that I think is very material about this Bill is how it interacts with the working of English votes for English laws. I personally regret the way in which the Standing Orders for English votes for English laws have been framed because they try to use the principle of whether a Bill relates to England or not, which is to mirror the criterion for territorial application that is used for the competence of the Scottish Parliament, the National Assembly and the Northern Ireland Assembly. That is a departure from the approach that the McKay Commission took, which was to talk about legislation that had a separate and distinct effect for England. Once you get into that degree of mirroring, particularly given how the Sewel convention works, this becomes a hall of mirrors. I am not quite sure what I am looking at when I walk into that hall of mirrors, but I do think that a clear and coherent workable piece of legislation for Wales is also part of making English votes for English laws work.

Chair: Let me bring in some others, if I may.

Q238 Chris Davies: We had heard where you thought the Bill was wrong and your four main points. I would be interested to hear which way you think we should be going on this. You have already touched on part of it. Should it be shelved? Should we rip it up and start again?

Alan Trench: I think we need something that is a fairly fundamental reconstruction in order to produce a workable piece of legislation that delivers a clear, robust and lasting settlement.

Chris Davies: Is that shelved or ripped up?

Alan Trench: I would say fundamentally reworked and I think that, in order to do that degree of reworking, it would be very hard to comply with the proposed timetable that would see a Bill introduced into Parliament somewhere between February and April next year. There is some quite serious work that needs to be done, and I have to say that I regret that that work has not been done in preparation for this Bill.

Q239 Chair: A quick question, if I may. If the word “reasonable” was substituted for the word “necessary”, would that make this more workable?

Alan Trench: Not greatly, and the reason is that both those principles will involve a degree of subjectivity. There is more room for manoeuvre with “reasonable” than with “necessary”, but they both involve a degree of subjective judgment, which is going to be a bone of contention. There was mention made in the previous session of the submission made by the Welsh Government of the schedule of Assembly Acts that had been passed that the Welsh Government said could not be made under the settlement. In many cases, the Wales Office then claimed that they could be, and there was then a further riposte—

Chair: We have this, yes.

Alan Trench: Indeed. The real point about that is that it indicates the complexity of all this.

Q240 Chair: Is there an easy word then, Alan? I look for simple solutions. If “reasonable” is no good—you are an expert—what word would you use?

Alan Trench: If we are talking about this in connection with the reservations of private law and criminal law in Schedule 7B, which is one of the key difficulties. I do not believe there is such a word.

Q241 Liz Saville Roberts: Is the problem here the fact that we are trying to emulate the Scotland Act 1998, which necessarily refers to the reserved powers only, but that which is reserved and that which is devolved to Scotland is a far clearer package, whereas here we are trying to use the same terminology and the same pattern, but the package that we are working with is nowhere near so clear?

Alan Trench: Yes. There are three big differences in this respect between the Scotland Act and the draft Bill. One is the proposed reservation of private law. The second is the proposed reservation of criminal law and procedure, and the third is the general grant of devolved functions and the scope of the reservations in schedule 5 to the Scotland Act and in the proposed schedule 7A to the draft Bill. Those reservations in draft schedule 7A are much more detailed and much more likely to affect the functioning of the National Assembly as a legislature than those in the Scotland Act. Again, that is partly a matter of simple and straightforward drafting, but there are quite a number of substantial reservations that would, I think, make it increasingly hard for the Assembly to legislate

effectively because it has to pick its way through a much more complex web than is the case in Scotland.

If I might give one example, there is a proposed reservation—reservation No. 101, head C20: “Pedlars and street trading”. Many people would regard street trading as archetypically a matter for local government regulation, but if you have to pick your way and ensure that you are not interfering with a different legislative framework for something as detailed as that, it is going to cause material difficulties for the National Assembly.

Q242 Chair: If the reservations were sorted out perhaps a bit more generously towards the Assembly, could this still be a workable Bill?

Alan Trench: There are the makings, certainly. Yes, there are certainly the makings of a Bill there, but that is taking one back in the direction of the Scotland Act. I am afraid to say that I think this Bill gets worse the further away from the Scotland Act model it strays.

Q243 Chair: What is the gap, then, between not workable in your point No. 4 and the possibility of it working?

Alan Trench: I think it is partly some of the detail of reservations such as that or the reservation in relation to safety of sports stadiums, for example, which are relatively small, niggly matters, but they will increase the complexity. As I have already said, the essence of the problems with the Bill is the reservation of private law and of criminal law and procedure, and the protection of the position of Ministers of the Crown. Additionally, there is also the difficulty of the nature of the functions of Welsh Ministers and the fact that they are still not coterminous with the devolved legislative powers of the Assembly. Indeed, the Bill in some ways makes that worse.

Q244 Chair: It is a matter for the Welsh Assembly that they have not made their powers coterminous.

Alan Trench: No, not entirely, if I may say so, Chair.

Q245 Chair: You are not suggesting that we should tell the Welsh Assembly Ministers what their powers and titles should be?

Alan Trench: Not in that context, but there is a curious interaction. The problem is that the Welsh Ministers have greater powers in a number of areas than the Assembly does, not that they have narrower powers, because their powers are not simply those powers that the Assembly has chosen to confer on them in the way that UK Ministers have powers that are conferred on them by Parliament. It is the fact that many of these powers have been conferred either by pre-1998 legislation or, indeed, by post-1998 legislation, directly on the Welsh Ministers. This is a particular issue before the expansion of the powers of the Assembly in 2011. In some ways, the Act makes this worse—the draft Bill makes this worse—because it confers powers directly again on the Welsh Ministers, for example in the detailed functions of the harbours and ports provisions, rather than conferring those powers on the Assembly and letting the Assembly work out where the line lies between the Assembly’s powers and those of its Ministers.

Q246 Christina Rees: Having said all that, what would a workable, least-change option look like?

Alan Trench: I think that that necessarily has to involve accepting that the power of the Assembly to create criminal offences has to be devolved. That is part and parcel of an effective version of the reserved powers model. That is extending the powers the Assembly already has to create provisions for enforcement or for incidental consequential purposes under section 108(5) of the Government of Wales Act 2006. There has to be a general power in relation to the civil law because there is very little that the Assembly does that does not one way or another affect what the Bill calls private law and what I might otherwise call civil law. These were very clear conclusions that we came to in the work that we did over the summer in the Wales Governance Centre Constitution Unit group.

What you then need in relation to that is to work out how you are going to deal with territorial applicability because, in the same way in which the Assembly needs to be able to do things within Wales, it should not be able to do things that affect people in England where, of course, no one will have voted for the Assembly. There are a number of ways that one can try to do that. One can come up with a sequence of ad hoc bespoke mechanisms. My concern about those is that they may prove to be very convoluted and very complicated again. They will not be clear. They will not produce a clear, robust, lasting settlement because they will involve a sequence of ad hoc decisions being made in particular instances and perhaps then in particular cases that go to the courts. For that reason, I came to the conclusion that some sort of Welsh legal jurisdiction in the shorthand terminology that I gather is now in wider circulation was to call that a distinct jurisdiction, not a separate jurisdiction. It need not involve the devolution of the full panoply of the courts and so on, but the idea that you draw a line on the map that distinguishes Wales as a legal entity from England as a legal entity, rather than treating the two as one shared unit—

Chair: On that point then, Alan—

Q247 Christina Rees: Broadly speaking, could you have a joint court system—the same court system, but with those courts able to operate England and Welsh law, Welsh law and English law.

Alan Trench: Not entirely. It would be a shared rather than a joint court system. It would be that the same judges would form the High Court of England and the High Court of Wales or the Court of Appeal of England and the Court of Appeal of Wales, but they would be distinct courts with distinct territorial scope. They would operate in different arenas. There would not be, I think, under this approach any longer any such thing as the law of England and of Wales. There would be many areas where the law of England and of Wales would be the same, but it would be the law of Wales or it would be the law of England in the same way that there is a law of Northern Ireland that is in many cases the same as the law of England and Wales—not in all cases, but in many. Therefore, for example, precedents of the Court of Appeal of England and Wales will often be treated with great, great seriousness even if they are not formally binding in the law courts in

Northern Ireland, because they are relevant precedents, in the same way that one might treat as persuasive authority decisions from the courts of Canada or of Australia.

Q248 Chair: Just to pick up on this, we have had a Greater London Authority in London now since 1999, or about then. Presumably, they must have passed regulations that have amended private or criminal law.

Alan Trench: I am sure that they have. They will certainly, as local authorities across England and Wales do, have—

Chair: Like particular speed limits in certain areas or maybe certain fines for parking in non-parking areas. There will be things that happen in London that do not happen elsewhere, won't there?

Alan Trench: There is a fine for parking and there is a—

Chair: Okay, I use it as an example.

Alan Trench: Perhaps a better example is bylaws, because bylaws exist. They are made locally; of course, they then have to be confirmed by a higher authority with presumptions of confirmation in a number of instances; and they can create criminal offences. It is perfectly lawful hypothetically—I do not know the rules—that you might well have a bylaw to proscribe skateboarding or rollerblading on the promenade in Rhyl, although it is perfectly lawful to do that on the street in Chester.

Q249 Chair: The point I am trying to make is that we already have a situation in Wales and in London—and, for all I know, in other local authority areas—where you can amend criminal law. Obviously, the Assembly will have the ability to do that in more areas than a local authority, but there is no reason why this should not work, is there, because it is already working across the whole of the UK?

Alan Trench: It is a question of a difference of degree becoming a difference of kind. The extent to which the Assembly can do that becomes greater and greater, and that in turn is what means it becomes impossible to do that—that you reach the limit of that. I recall sitting and taking evidence with a Committee of the other House, I think, in about 2002 from Sir Jon Shortridge, who described how they had at that time stretched the elastic of the Government of Wales Act as far as it would go. It was a phrase that stuck in my mind. That is again, I think, where we are likely to be quite soon in a Welsh context. One advantage of establishing a distinct if not separate legal jurisdiction is that it does tell everybody very, very clearly that you must assume that the law may be different in Wales to the law in England. It might be the same, but it might not, and that is a very clear way of signalling that that therefore avoids the hazard that people do not realise that things could be different.

Q250 Liz Saville Roberts: Is the debate over legal jurisdiction getting hung up over whether you are inclined towards or inclined against devolution as a concept, rather than a pragmatic evaluation? Should this matter to people in Wales?

Alan Trench: I am not sure that the debate as such matters to people in Wales, but I think the outcome in terms of being able to have a clear constitutional structure for the making of law and the implementation of policy is something that everyone has an interest in, and

that may be in danger of being undermined. Securing that goal I think ought to be what everyone would want to see. It is not in anyone's interests to have ineffective, hobbled legislatures, not least because not only are they unable to do things effectively, but you then create a politics of blame shifting. One Government blame the other for not being able to do things, and that is the big attraction of getting to the point of a clear, robust, lasting settlement—it minimises the scope for that.

Chair: Liz, do you have a further question on that?

Liz Saville Roberts: No, that is fine.

Q251 Chris Davies: Following on from your answer there, just throwing a ball in the air, you say that it is in everybody's interest to have a clearer settlement, but is it in the people of Wales's interest to have further devolution?

Alan Trench: I am not in a position to answer that. The answer that I would give is that that is what was agreed—or what was recommended—by the Silk Commission, and the point of the Bill is to implement on the back of the recommendations of the Silk Commission those proposals that were agreed to be taken forward by the St David's Day process. One of those decisions was the adoption of the reserved powers model, and my advice is that you cannot implement the reserved powers model in an effective way without taking these other steps. If you try to do so, you will create an unworkable approach to how devolution operates and that in turn means that you will have ineffective government and/or a settlement that will simply collapse under its own weight.

Q252 Chris Davies: We are always, by the look of it—having had five settlements already and now going for the sixth—going to end up in a bit of a mess somewhere along the line. We are never going to please everybody, so apart from with total devolution—total independence—do you think we are always going to end up in this mess?

Alan Trench: I don't know about that it is always going to end up in this mess. I think we are where we are because of a sequence of limited interim settlements that have tried to achieve a pragmatic agreement at the expense of trying to put in to place something that is durable and workable. That is why the Secretary of State's ambition in *Powers for a purpose* is so laudable. Having followed these debates for quite a long time, I cannot recall any Secretary of State setting that as the goal.

Q253 Chris Davies: I completely agree with you. I think the Secretary of State for Wales, Stephen Crabb, has done an excellent job in trying to bring a settlement, but in all the what seems to be hours of witness evidence-taking that we have now done, with still more to go, I have not yet heard anybody who is happy with it. I ask the question then: what should we be learning from the last five settlements that we have had?

Alan Trench: I think you need to take a careful, long-term view of what is trying to be achieved, rather than having a quick, rushed job—frankly, the St David's Day process was a quick, rushed job. It operated with very considerable despatch and I fear that the timetable that has been proposed for this draft Bill similarly precipitates the process and stops it reaching an effective outcome. You also have to take a clear, long-term view. Now, there have been two constitutional processes in Wales that have tried to take that

clear, long-term view. One was the Richard Commission, which was published in 2004, and the other is the Silk Commission. I do not think it is an accident that those were both the least party political processes that there have been—they had considerable non-party involvement in them as well—and that they were an attempt to take a step back and take that longer term, wider view. I think that it is a matter of regret that neither of those commissions was fully implemented in the way that their members foresaw.

Chair: Can I quickly bring in Byron because I do not think he has—

Q254 Byron Davies: My question was very similar to Chris Davies's. It all seems to be very negative and I just wonder is this achievable ever.

Alan Trench: To have a much better settlement that is legally clear and workable is most certainly achievable, but it requires going a bit further than we have with the laws.

Q255 Mr Mark Williams: I would first like to endorse what you said about the process of the St David's Day agreement. As somebody who was a participant in that, it certainly was rushed. Would you agree that one of the problems of the St David's Day agreement was that while there might have been a consensus and there was a consensus between four political parties on the concept of a reserved powers model, what the St David's Day Agreement did not do was go into that concept in any great depth in the discussions and, consequently, with any agreement between the parties? In many ways we are having that debate now, albeit with different participants to the discussion. Following on, the question I was going to ask, which is my scripted question, although it is relevant to what colleagues have just said: in terms of the way forward, do you not agree that one of the problems—this was alluded to in the evidence the First Minister gave to us in Cardiff a few weeks ago—was perceived weakness in the Wales Office, not about personalities in the Wales Office, who I think have a commitment to this Bill and this process, but the position of the Wales Office vis-à-vis other Government Departments? When the Wales Office pioneers write-rounds to other departments, would it be a fair characterisation of Departments like the Home Office and the Ministry of Justice, for example, that they have had a very belligerent attitude towards the Wales Office, the National Assembly and the devolution process itself?

Alan Trench: To answer the first point you made, I could not possibly comment on what went on within the St David's Day process, because I was obviously not a member of it, but it certainly looks from the outside very much as if a commitment was made to something that was agreed to be a good thing without the sort of advice that there perhaps should have been to explain what the implications were of making that commitment and more—

Mr Mark Williams: Might I just say as a point of clarity, as somebody who was on the inside literally, you are correct?

Alan Trench: As regards the Wales Office, it is certainly one of the smaller and less substantial parts of Whitehall and I fear it is very easy for the Wales Office to be outgunned when it is trying to deal with Departments, and particularly important and powerful Departments such as the Ministry of Justice or the Home Office.

Q256 Mr Mark Williams: I am conscious that the Chair is going to tell us about time in a moment. Moving forward—some of us do want this Bill to move forward—the fact that we

are doing pre-legislative scrutiny gives us that opportunity before the publication of the Bill, so how much of a problem is that in moving this agenda forward as some of us hope we can?

Alan Trench: I would hope that Departments such as the Home Office would see the advantage of securing a clear, workable settlement rather than protecting every minute bit of what they perceive—I think perhaps wrongly—as departmental interest. I cannot, for example, for the life of me see why it is a material matter that has to be consistent between England and Wales that we have the same rules in relation to the safety of sports grounds, or pedlars and street trading. The mere idea of legal homogeneity there defeats me.

Q257 Chair: I have one more, if I may, Alan. If you were advising somebody asked you how they could secure greater independence for Wales, would you be advising them that they should support this Bill or oppose it? Let's pretend I am an arch nationalist, Alan, and I want to create a better Wales. What would you say to me that I should do when it came to voting on this Bill?

Alan Trench: It depends what you mean. By “greater independence”, do you mean independence in the form of secession and Wales as a separate state?

Chair: Yes.

Alan Trench: I would say that, as it stands, this Bill is a first-class way of reinforcing that case.

Q258 Chair: Here I am, I am the arch nationalist looking for an independent Wales, and I am just about to go into the Lobby. Should I vote for it or against it?

Alan Trench: If you were seeking secession, you would want to support this Bill because it will show that devolution cannot deliver. It is clear that devolution is popular in Wales. People like it. Broadly speaking, the public opinion evidence is that people like it and people want more of it.

Chair: Hang on; I am not sure I understand this now.

Alan Trench: If you want to create an unworkable settlement, you will exclude that option. You will show that independence is the only way to have that form of self-government and you cannot have meaningful self-government within the United Kingdom.

Q259 Liz Saville Roberts: But if you wanted to make governance in Wales more effective, what should you do?

Alan Trench: You would reconstruct this Bill.

Chair: Okay, Alan, you got out of that one nicely. Thank you very much indeed for coming along; and we will see you again soon, no doubt.

Examination of Witnesses

Witnesses: **Rachel Banner, Annie Mulholland and Roger Cracknell,** True Wales, gave evidence.

Chair: It is a great pleasure to welcome Rachel Banner, Annie Mulholland and Roger Cracknell from True Wales. Some of my colleagues thought it was time to hear the other point of view. Obviously, I am quite sympathetic to it—as is well known—but my job is, I am afraid, to keep order here. Just to show my impartiality, I am going to ask Liz Saville Roberts, who I think has the opposing, diametrically opposite view, to start off and get a good conversation going.

Q260 Liz Saville Roberts: The Secretary of State has told us that devolution is here to stay, but the previous legislation has been inadequate. Would you agree with either comment, bearing in mind that a YouGov poll in October last year revealed that 63% of respondents thought that Wales should have the same powers as Scotland?

Rachel Banner: I would like to thank everyone for having us here today before I carry on. We are grateful to have that opportunity.

Yes, I think we would not take that particular poll seriously. There have been many polls that have been produced that suggest other things. What I would suggest is that we seem to have a one-way street here. Power seems to be moving in one direction—from Westminster to Cardiff Bay—and it seems sensible to take this moment to think about what kind of devolution we want in Wales. Wales has a different tradition from Scotland and we have a history of Chartism. We have had the co-operative movement, particularly in south Wales, and I think we ought to be thinking about devolving power closer to the people, rather than a more nationalist form of devolution to Cardiff Bay, which is centralist. I think our politicians are centralising power in Cardiff Bay rather than thinking what devolution is for. It is for devolving power closer to the people so that they feel that their views are taken into account and that they are an active part of decision making. When you consider that when the Silk Commission went round the country and hardly anyone turned up, and similarly with the All Wales Convention—there were the usual faces of politicians, lawyers, constitutional experts, but not people—what would get people trusting in their politicians again? It would be being consulted at a local level, I think.

Annie Mulholland: I would like to agree with Rachel about the 63% of people wanting the same powers as Scotland. YouGov is just asking somebody yes or no, and it is out of context, so it is not a sensible poll to use, I think. One thing that did occur to me today was the question that was twice asked: would it benefit the people of Wales? Whatever you do, that should fundamentally always underpin everything. I didn't know anything about the Wales Bill until Rachel kindly asked me to get involved, and I honestly feel as if I have been dropped from a great height without a parachute into this debate. What I would say about the legislation to date in Wales and how devolution to date has worked is that it hasn't worked very well for me as a member of the public, either in education or health, which are not doing very well.

One of the reasons it hasn't done very well is because Wales has been unable, so far, to do its own thing almost out of serendipity. It has the power to do its own thing, but it does not have the funding or the resources to do the thing differently and do it better for the people of Wales. Often we see new ideas coming out of Wales with the Welsh Government doing things differently. Certainly, from my 22 years working in education at the national level, they often did it worse for the children of Wales. That is why we have school standards

failing and it is why the best universities in the UK are finding it difficult to recruit Welsh students because they are not getting the right grades. Just lastly with health, I am a patient. The health provision for me in Wales would mean that I would die before I need to. I live and I vote in Wales and I have an NHS address in England because I am therefore likely to live longer. These are things that mean something to the people of Wales, so thank you for your question.

Roger Cracknell: Can I just echo what Annie was saying? The things that matter to the people of Wales are health, education and jobs; I am afraid that they are not that interested in the minutiae of constitutional change. You have to ask the people of Wales what the Wales Bill will do for them. Will it make them healthier and will it make them richer? The answer, almost certainly, is no. The poll that you quoted is interesting because people look at Scotland and see that they have free personal care and free tuition fees. You can't blame the people in Wales for saying, "Yes, I would like those, too. Wouldn't it be great if the Welsh Assembly could deliver on those?" But, then, the reality is that you have to look at public spending per head in Scotland compared with Wales or England, and I am afraid that is the sad reality. We just have to stop focusing on the need for endless constitutional change and just focus on what matters to ordinary people.

Q261 Liz Saville Roberts: Surely what matters to ordinary people is that the Government, who influence health and education, are able to do a decent job. That is partly what we are seeing here: they are held up in the Supreme Court arguing over minutiae, making money for lawyers. I would say the YouGov poll was a matter of 1,000 people. It was not a 300 people off the street job. It was respectable and it was held shortly after the Scottish referendum, when people were very aware of what the powers were in Scotland and what had been discussed there.

Rachel Banner: More laws will not make a better health service. They will not get another ambulance on the road. They will not make new beds in hospitals. They will not improve our education results. We don't need more laws, we need better Government.

Q262 Mr Mark Williams: It is generally good to have you here to share your views with this Committee, but you will appreciate the Committee is looking specifically at the draft Bill. We have been charged with that responsibility and to make some conclusions in the coming weeks and months. Are there any aspects at all of the draft Bill that you do reflect on as being a positive in terms of the current devolution settlement? For instance, we have talked about devolution and I have some sympathy in what you say about devolving power to the lowest possible level, but there are areas, are there not, for instance the electoral arrangements of the National Assembly? It would be wholly appropriate for an all-Wales-level discussion on resolution of electoral arrangements, rather than in this place. That is just one positive; I can personally, as you probably appreciate, think of many, many more positives.

Rachel Banner: There are elements of that that could be a positive thing. However, I am concerned about a potential increase in the number of AMs, after politicians vociferously argued that a yes vote would not lead to more AMs. Our solution would be perhaps that where there are problems of scrutiny, MPs could fill the gap where there are insufficient scrutinising resources.

Q263 Mr Mark Williams: You would acknowledge—and others in this Committee who probably know better than I from personal experience—a perception looking from outside from this place is the lack of capacity in the National Assembly to have detailed scrutiny—something that we are undertaking now. That may be unfair and I am not doing colleagues a disservice, but it does come down to numbers, does it not?

Rachel Banner: But they said they could do it without more numbers and currently Welsh MPs, with due respect to the people present here, had a lot of duties given away to Assembly Members when education, health and other key portfolios were devolved. We have problems of co-ordination between MPs and AMs, and there are constant battles, it seems, between Westminster and Cardiff Bay. That seems to me a way of perhaps gluing things together a little bit, creating a bit more unity for the interests of the people of Wales.

Q264 Chair: Can I play devil's advocate with you, having stood with you on the same platform? I have always argued that when we set up the Welsh Assembly, we were giving 60 people a job that was previously done by three, because there were two junior Ministers at the time. I suppose you could argue that we were giving 60 people a job previously done by three, but scrutinised by another 647. What we are lacking is that scrutiny because those three Ministers, who made the decisions that are done by the Assembly, were scrutinised by any Member of Parliament—in fact, also by any Member of the House of Lords. Arguably—I don't know what the figures were then—over 1,000 people would have been able to scrutinise the decision of the Secretary of State for Wales and his two juniors, whereas now those same decisions over health and education are being made, theoretically, by 60 people, but scrutinised by the same 60 people, and that is a flaw, is it not, in the—

Rachel Banner: It is a flaw, but this is where MPs could perhaps step in as well. The point about scrutiny is fundamental and another aspect of that is that our press—the Welsh press—is too inadequate to deal with scrutinising the political class, particularly in Cardiff Bay where powers are becoming stronger. That deficit in scrutiny is certainly one of the things that needs to be looked at.

Annie Mulholland: In going forward with the Wales Bill, for me, external scrutiny of the four countries of the United Kingdom needs to happen, particularly in Wales. We have a 178-mile border, so it is easy for people to say, “I don't like the health service in Wales. I will go to England.” This is ridiculous. There should be scrutiny that is independent. Every single party in the United Kingdom must be required to return information in a way that we can all compare, because we then know how good our provision is and the people can do something about it to effect change. What is happening up until now with, for instance, the Welsh Government refusing to let the OECD come and do an independent review of the NHS in the United Kingdom is totally unacceptable for the people of Wales.

Roger Cracknell: It is very important that there are ways of comparing outcomes between the states and nations of the UK because for whatever reason there is a divergence. For example, in the education system, we see new different GCSEs already in Wales compared to England, because the Welsh GCSEs are constrained to use the Welsh board and obviously they stopped using modular exams in England before that. There is already some anecdotal evidence that the Welsh baccalaureate is not being accepted in all English universities. We are already seeing those deviations and, because there are differences, it makes it harder to make the comparison of outcomes. Where we have seen comparisons of outcomes for things that have been run by the Welsh Assembly Government, I am afraid

those outcomes have not been favourable, for example if you look at what has happened in health. Obviously then there was the independent PISA tests, in terms of literacy and numeracy, which showed the failures of the education system in Wales. Indeed, you see now that the literacy and numeracy framework has been brought in to try to stick a plaster over that. We do need scrutiny, but you need independent scrutiny of outcomes and having difference for difference's sake, which you often get, thanks to the Welsh Assembly Government, it makes it harder to scrutinise things.

Q265 Byron Davies: I was a Member of the National Assembly and I am totally with you. I think that the scrutiny is appalling. It is worse than appalling, the National Assembly of Wales. Rachel, you have just said that you certainly think it needs to be looked at. I would be interested in knowing how you think it should develop. You have said it should be independent, Roger, and I wonder what you mean by independent.

Roger Cracknell: For example, the OECD PISA tests are a very good example of something that is independent. You have a metric that is applied across all the OECD countries. I am not sure that that would be appropriate for everything, but I would like to see a situation in which the other educational outcomes can be directly compared across the board. I would like to see a way in which health outcomes can be directly compared. I don't know exactly quite how we should do that, but it is important that we do do that, because I detect very strongly that, rather than trying to get better outcomes than the rest of the UK, the Welsh Assembly Government is trying to prevent everyone from seeing how bad things have become in Wales.

Rachel Banner: Can I just answer briefly the question?

Byron Davies: Yes, of course, please do.

Rachel Banner: Our scrutinising resources should be shared across the UK. We can use independent scrutiny, whether politicians or different authorities across the UK, and make the most of being a United Kingdom.

Q266 Liz Saville Roberts: Forgive me, but are you not confusing the structures and powers of the Assembly for Wales with the failings of the Labour Welsh Government? If you were approaching the powers of Westminster and talking about whether we should be increasing or reducing them on the grounds of the policies of the Westminster Government, that would never happen, would it?

Annie Mulholland: If you had independent scrutiny—up to now the Government of Wales seek devolution—it would have had to have been much more answerable and it could not have hidden, as it has done. It is just that the Government have not been held to account.

Liz Saville Roberts: We need more Members.

Annie Mulholland: No, you need independent scrutiny and for every Government in the United Kingdom to agree how we are all going to compare, because the citizens in the United Kingdom deserve to know what they are getting for their taxes.

Liz Saville Roberts: That does not happen in Northern Ireland or Scotland.

Chair: Let me bring in Chris Davies and possibly somebody from the Labour party may want to come back on your last comment as well.

Q267 Chris Davies: I don't know if the Labour party will be commenting on that. Thank you very much for coming along today. A little bit like you, I got involved in various things in Wales, since becoming a Welsh politician. My children go to a local school and I see education—as you quite rightly say—going backwards in Wales, not forwards. My wife used to work in a council unit in Cardiff and now she is working in Hereford and, again, I see the difference in English and Welsh NHS. I worked on the back of farming virtually all my life and I can see how the difference is either side of the border. I agree with you; the question going away from here is—I have asked it twice today—are the people of Wales benefitting from the Welsh Assembly and the further powers? I don't see that. I am answering it myself, as a very happy, even proud, Welshman.

We have clearly said on that—I understand where you are coming from with independent scrutiny—that we have to realise up to now we would be following various other Governments' devolved nations that would have governance from within. Last week we heard Dame Rosemary Butler saying that we should have 100 AMs. I asked the question to Paul Silk in the Assembly a few weeks ago. He thought there should be somewhere between 80 and 120 AMs in total, so that is possibly another 60 AMs. I asked the leaders, Andrew RT and Leanne Wood, who gave a figure of 80 further AMs, and I could not get any more information out of any other leader. We are looking at more AMs. It is the same budget going from Westminster to Cardiff Bay, so people do not realise that the extra AMs will be coming out of the money that should be going to health, education or something else. Being realistic, where do you see the number of AMs? I agree that if there are more powers handed to Wales, I quite clearly see that we need more scrutiny. Do we need more AMs?

Roger Cracknell: One thing that has happened that I regret very much is that the Welsh Assembly Government have tried to emasculate local government throughout Wales. I speak particularly for north Wales, because I live in north-east Wales and see what is happening in Flintshire with draconian cuts to the budget. There is currently a consultation going where they cannot cut anymore, and they are going around schools and getting public meetings and just begging community groups to just take on public services because there is no money left. The situation is largely the same in Denbighshire. One thing that has happened is that Cardiff thinks it knows how local authorities should spend their own money. If you look at the hypothecation of grants to local government, it is far more hypothecated in Wales than it is in England. In England local authorities are trusted to spend their own money but in Wales, for some reason, they are not. Denbighshire have recently called for the de-hypothecation—if there is such a word—of something like £34 million of Welsh Government spending. If devolution occurs at the right level to people who can make a difference, and that is community and county councils, there should not be so much for the Welsh Assembly to do if they trust the people of Wales.

Chair: Okay, thanks. Both my Labour colleagues would like to come in.

Chris Davies: Can I put something on record, Chairman, because it has not been mentioned so far in all of this inquiry? We cannot simply say that the Welsh Assembly is constantly in turmoil and upset with the British Government here in Westminster, because what we never seem to acknowledge—I was a local authority member before coming into Parliament—is

that the 23 local authorities of Wales are constantly in dispute with the Welsh Assembly. That should be noted because we seem to overlook that constantly and just have the wrangling between here and Cardiff Bay.

Chair: I have a question as well on that but, first, Christina.

Q268 Christina Rees: Rachel, you said that MPs would fill the gap in the scrutiny area. Could you just explain a little bit how that would work? Also, how does it fit in with EVEL?

Rachel Banner: Okay. When we had the LCO system, MPs were fully involved in pre-legislative scrutiny and we argued that there would be a problem if MPs were taken out of the equation from a numbers viewpoint—not having enough people to scrutinise legislation. It appears that it is. Politicians promised that the number of politicians would not go up in Cardiff Bay. The problem with that is that the money will be taken from local authorities, so they will be cutting the number of councillors who are the more direct representatives to fund more AMs on the new pay rate, so in my view that works against devolution.

As far as EVEL is concerned, it is very unfortunate that this has come about, but you can understand why English MPs feel that the current system is unfair. If you are a border MP you have a serious problem, because you may have constituents who get their health service provision from Wales if you are an English MP, or from England if you are a Welsh MP. Yes, it seems to me is a crazy situation. You should be able to have a say on your constituents' wellbeing wherever they go for their health treatment. One of the things I would suggest—I think this could be used to alleviate the problem with EVEL for us in Wales—is to remove some of the barriers between England and Wales and let patients move across the border as if it is invisible. Let MPs have a say on what is going on for their constituents in Wales or in England. Make it more flexible.

Roger Cracknell: To add to that, the Countess of Chester hospital in Flintshire has a third of its patients coming in from Deeside in North Wales—indeed, that was the whole idea. But now with the well documented financial problems and other problems at Betsi Cadwaladr, it is very hard for people in Deeside to be able to go to their local hospital. How do you scrutinise that particular problem, given that it is a cross-border problem? Because you get places in Flintshire—there is a place called Boundary lane in Flintshire—where one side of the road is in England and one side of the road is in Wales. How do you manage that situation where there is such a level of interdependence between different services on either side of the border?

Q269 Christina Rees: Specifically on the scrutiny point, what I was trying to tease out was: how do you think it would work? Would MPs, say, on the Education Committee, a peer group, scrutinise education in the Bay? Is that how you see it working?

Rachel Banner: No, it could be a two-way traffic—MPs in the Bay sometimes and AMs here; whatever works best for the scrutiny process.

Annie Mulholland: I worked in the recruitment sector of Cardiff University for many years and the problem is that the data returned by the Governments does not match up. You had some wonderful UK-wide initiatives to get children into university and I could not get the data from the Welsh Government because they refused to give it to us, in the

same way as Scotland, Northern Ireland and England did, so you just need the same data sets so we can look at that.

Q270 Chair: Just before we hear from Gerald, can I just throw out my own suggestion? If we are looking for more scrutiny—it would be politically very difficult to do it with MPs, frankly—is it not the answer perhaps local government? We have a second chamber made up of councillors drawn from across Wales, proportionate to those who are elected from the 22 authorities, and use them in the same way that the House of Lords is used in Parliament.

Rachel Banner: Excellent idea and that means more local accountability as well.

Annie Mulholland: We have to do it in education because children do those at universities in England and the best universities in the UK are in England, so you have to allow this.

Roger Cracknell: Unfortunately, there seems to be an insistence on trying to have a top-down reorganisation of local government, so what do you do?

Q271 Gerald Jones: The majority of people in Wales support devolution. The majority of people in Wales do not support separation or independence, and that is quite clear. Generally, people will support devolution and we can all point to areas of the Assembly that are not working so well but, equally, we can point to areas that the Assembly does where things are working well. Jobs Growth Wales is a good example of something that is operated in Wales well. Obviously in the health service, you have the Nuffield report that pointed to the various aspects of the health service across the UK where it was better in some parts of the UK than others, and that worked vice versa. The Assembly is there. It is about the people of Wales having a choice over areas of devolved matters where they can influence from a Cardiff level.

One of the things for me is how we engage ordinary people. Rachel, you mentioned earlier the various commissions such as Silk that have gone around Wales and had very little input from ordinary people in Wales. One of the things I want to ask is in terms of this Bill, and one of the criticisms is that there has been very little public engagement in the Bill, a rushed timescale and various other things. One of the things that have been suggested a little while ago—not just specifically on Wales, but across the UK—is to have a proper constitutional convention to look at devolution in all parts of the UK because of the link. It is fair to say that we have had a number of areas, and there have been five attempts at doing this. We need something that is sustainable and lasting. It seems to me that one way of doing that is to have proper engagement with ordinary people. I wonder what your view would be on that.

Rachel Banner: I don't think ordinary people will be interested in a constitutional convention, but they might be interested in having a say about what is going on at their local hospital. The fact that there are so many popular movements now does suggest that people do engage when they feel it directly affects them. The problem with dry constitutional matters is that many people feel they do not affect them, which of course they do. I just do not think that having a constitutional convention would solve that problem. The problem is that they tend to be filled with people who are like minded. We saw it with the Silk Commission and the All Wales Convention. People on those commissions were all of one mind, more or less, with little gradations of difference.

Chair: We are perhaps straying a little far from the Bill that we are here to discuss.

Q272 Mr Mark Williams: Going back to Christina Rees, who was asking you about scrutiny, I want to dispel one thing. You mentioned the LCO process. The Chairman and I are veterans of the LCO process on this Committee. Let me just remind you that our job was not to scrutinise the detail of the legislation as presented before us. Some of us are quite interested in those matters, which is not unreasonable, given that we are elected representatives, but our only job in the LCO process was to look at the applicability to the devolution settlement. I don't think that was a vehicle for us to go into any more detail.

I want to go back to the original question. My colleague, Chris Davies, mentioned the questioning of the Assembly party leaders on the size. It is a very, very straight question and so a straight answer. Do you believe it is appropriate for the National Assembly for Wales, as presently constituted, to determine its own electoral arrangements and the size of its National Assembly? However animated our discussions might be here about the size, do you believe that it is the role of the National Assembly to determine its size and then, consequently, to be held to account to the Welsh people on that last year?

Roger Cracknell: I would go one step back and maybe address Gerald Jones's questions around a convention, because the people where I live in Flintshire look to the great northern cities of Liverpool and Manchester, rather than to Cardiff. A lot of people I speak to are intrigued by the devolution of power to Manchester. That is often more meaningful to them than the Assembly is. We need a root and branch re-examination of how power is devolved in England and Wales.

Mr Mark Williams: With respect, we have to look at the draft Bill—

Roger Cracknell: Okay, but I am just giving you my honest answer.

Q273 Mr Mark Williams: Do you believe it is appropriate for our National Assembly to determine its size and its own electoral arrangements?

Roger Cracknell: That could be a yes or no.

Mr Mark Williams: Yes, exactly.

Annie Mulholland: Based on incompetence to date, no.

Rachel Banner: On size, no, I don't, because it will just burgeon out of all control. It is mushrooming—

Roger Cracknell: It is important to say I am not being anti-devolution. You just have to have devolution at the right level in the right regions to allow people to make decisions that affect them.

Q274 Chair: Here is another quick one. We have had lots of people giving us written and oral evidence. We have had eminent Welsh lawyers, academics, people from the various Welsh language associations, a group calling itself Eminent Citizens and so on. All of them said that we should not support this Bill because it is going to hamper the Assembly and tie its hands. Therefore, should I support this Bill and should we four at least—and perhaps Chris as well—as people who are a bit more sceptical? Should we be supporting it? If they are against it, should we be for it?

Rachel Banner: We need to go in a different direction towards local devolution and look to devolution to the cities as well, although I am pleased that this Bill has not included the devolution of policing, because at this time when we have problems with terrorism we need to be united. We need to have a united police force that communicates properly across the country. Also, I am pleased that it does not suggest a separate legal jurisdiction, but I suspect that the momentum will gather. I suspect that if this Bill goes through, pressures will be created to push us in that direction.

Roger Cracknell: Having read some of the reports from the Constitution Unit at Cardiff University, I am persuaded that any reserved powers model will ultimately lead to unstoppable pressure for a separate legal jurisdiction. We need to say no now.

Annie Mulholland: Yes, the argument was very compelling not to have a separate legal jurisdiction, because we will have a mass exodus from Wales.

Chair: Any further final questions? If not, thank you very much indeed for coming in.