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Inquiry on
THE UNION AND DEVOLUTION

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10.30 am

Witnesses: Rt Hon Carwyn Jones AM and Dr Hugh Rawlings

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Members present

Lord Lang of Monkton (Chairman)
 Lord Cullen of Whitekirk
 Baroness Dean of Thornton-le-Fylde
 Lord Judge
 Lord MacGregor of Pulham Market
 Lord Morgan
 Lord Norton of Louth

Examination of Witnesses

Rt Hon Carwyn Jones AM, First Minister of Wales, and **Dr Hugh Rawlings**, Director, Constitution Affairs and Inter-Governmental Relations

Q242 The Chairman: First Minister, we are very grateful to you for being available to talk to us as we start addressing the issue that we are inquiring into—the union and the devolved institutions. We are glad to have the chance to do it here in Wales and to gather quite a wide range of opinion over the day, which I think will be useful to our inquiry. We are also glad to welcome Dr Rawlings, who is welcome to contribute at his own discretion, or at your discretion, First Minister, in the course of the discussion.

To start with, let me ask you a broad, general question. What people mean by the union varies quite a lot. Some people talk about trade and security, others segment it into a social union, a political union and an economic union. What does it mean to you, and what do you think the important features of it are, particularly in a Welsh context?

Carwyn Jones AM: Thank you. I take the same view as the Prime Minister, to an extent: that this is a union of four nations, a voluntary union in that regard but a union with advantages, particularly for Wales. The economic union is important, given that it give us access to a far larger single market than Wales alone would be. We benefit from being part of what is seen as a stable environment for business and investment. The political union is of advantage to us. It gives us a voice on the world stage via the UK's representation in other countries that we would not otherwise have, of course. Then there is the social union. We know that we have much in common with others in the UK, and that is expressed through the solidarity that the union gives us. At the end of the day it is financially advantageous for us to be part of the UK. We benefit from significant fiscal transfers that would leave us otherwise with far less in the coffers. There are many advantages in that case. Some of the UK has changed a great deal over the years. It is more recognised now as a union of four nations, but I see that as a

strength rather than a weakness, because it recognises identity while also recognising the common purpose that we have within the state.

The Chairman: Are there any distinctive features of it that are particularly of interest in Wales that might have a less high priority in other parts of the United Kingdom?

Carwyn Jones AM: I suppose that it is the relationship between the devolved Government and the UK Government. We live in an age where, I would argue, the traditional concept of parliamentary sovereignty does not really apply. The idea that all power comes from Westminster and is allocated, for want of a better word, to the devolved Governments is not something that I think the public would understand. There are other models, such as the system of pooled sovereignty in Canada, which gives us the opportunity to look at models that were at one time suited to what the UK used to be but not what it is now. There is much to do in terms of the UK's constitution. I think that we are beyond the scenario where tinkering will work. We have had the asymmetric devolution since 1999. It is workable, but there needs to be a fundamental examination of how the UK can be made to work better.

The Chairman: Thank you very much. Perhaps we can now proceed to some of the detailed aspects of what we are talking about. I will bring in Lord Judge.

Q243 Lord Judge: Tinkering will not work. Sovereignty from Westminster is inappropriate nowadays. What constitutional arrangement, if you could summarise it, would provide the best, most stable settlement for the continuation of the United Kingdom? As a follow-up, is it federalism, and what aspects of federalism would appeal to you?

Carwyn Jones AM: Federalism has an appeal to us in Wales, but across the UK it is hamstrung by the fact that England is so big. Where you have a substantial percentage of the population in one of the four nations, it makes federalism more difficult to implement. In many ways the constitutional questions surrounding Scotland, Wales and Northern Ireland are easier to answer than the question that surrounds England. What do you do with a nation that is so big? Do you look to create regional government within England? It was tried in the north-east of England some years ago now. That did not prove to be popular. Do you create an English parliament, which in some ways is a very practical way of dealing with devolution to England, although again you have a parliament that is of itself very large? These are not easy questions to answer because of the situation in England. For me, federalism, if we were a state with a number of different entities within it that were not equal in size but did not have the disparity that we have in the UK, would be the way forward.

Q244 Lord Morgan: Bore da. As you know, the histories of Wales and Scotland are very different. The starting points for devolution were very different. Indeed, enthusiasm in the two

nations was very different. Nevertheless, there has been a growing tendency for Wales and Scotland to pursue the same kind of path, debating the implications, for example, of the Smith commission for Wales and so on. What do you feel is likely to happen? Do you think that Wales will continue to follow the same kind of direction prescribed for Scotland, or do you think there will remain fundamental differences between the two?

Carwyn Jones AM: I think that for some time there will be differences. I do not see that asymmetry is of itself a problem. We see that asymmetry in Spain, for example, with different levels of powers and responsibilities. But I take the view that we should start from the position that if something is devolved in Scotland, why should it not be devolved in Wales? There may be reasons for that. I will give you an example. If it was recommended that the criminal justice system were to be devolved in the next year or two, we would struggle. It is a substantial cost and we would need to build up the expertise to deal with that system, whereas in Scotland of course it already existed. It is correct to say that support for devolution in Scotland built gradually over the years. In Wales the story was rather different, although arguably there was an enormous change between 1979 and 1997 in people's perception of devolution, but it was a wafer-thin yes vote. When we had the referendum in 2011 there was an overwhelming vote for powers that would have been seen as highly unlikely to be made available to the National Assembly even 10 years previously. So there has been an enormous sea change. All the opinion polls talk of people being in favour of devolution, at least of criminal justice. I think the fear that existed in 1997, that this was all a bit much and how would we manage, has gone and that level of confidence has been built. That said, of course, from our point of view we would not argue—I would not argue—that there needs to be complete symmetry, particularly in the short term.

Lord Morgan: Yes, I see. Some have argued that asymmetry can perhaps mean inequality; that some features may, for example, be conferred on Scotland and its Government that are not present in Wales.

Carwyn Jones AM: We see that already, for example with regard to taxation arrangements. One particular example is air passenger duty, where we are at a severe disadvantage compared to Scotland. It has been devolved to Scotland but not to Wales, for no logical reason that we can see. I think there is a tendency in the UK Government to view devolution still through the prism of Scotland and forget about the effects on Wales and Northern Ireland. The vow was a prime example of that at the time of the Scottish referendum. No thought was given to what that meant for Wales at all. When the devolution of air passenger duty was proposed for Scotland, we asked the inevitable question, “What about Wales?”, and it clearly had not been

thought about. “You can’t have it”. “Why?” “You just can’t”. That is the answer we get. We do not get reasoned answers that we can follow through, we just get, “No”. It is the same at the moment with the issue of a distinct jurisdiction. The reasons for not having a distinct jurisdiction have gone. They are not even being argued by the UK Government any more. It is simply a question of, “We just don’t like it”. From our point of view, I suppose the level of frustration that brings can be imagined.

Q245 The Chairman: There is a clear distinction between Scotland and Wales in the sense that in Scotland, the governing party at the moment, which had always been active since devolution, has the objective of independence, whereas in Wales, you are, as I read in speeches and comments made by you and the Government, and as you have indicated today, supportive of the United Kingdom. You reject federalism. Devolution has been demand-led over the last few years and it may be that Wales has been less demanding, which I personally would regard as a good thing, but it enables you to see what you think Wales particularly needs rather than what Scotland needs. Is that your view? Am I right?

Carwyn Jones AM: I think there has been a difference in the political climate in Scotland compared to Wales. I have made no bones as leader of my party that we are strongly devolutionist. We take the view that there needs to be more devolution to Wales, although of course we stop short of independence. The danger is that there is a feeling in Scotland and Wales that powers have to be wrestled out of Westminster rather than there being a rational discussion as to what the future of the UK as a whole should be. One of the suggestions that I have put forward for some time now is that of a constitutional convention. What does that mean? To my mind, it would involve the four Governments using the JMC to move forward with a process of putting a convention together and consulting the public, and for that convention to come forward with proposals, particularly with regard to the difficult issue of what happens to England. But I do not think that these issues can be resolved quickly. I fear that what we have seen over the past few years is a series of discussions about devolution that have taken place in different rooms. The UK is in one room with Scotland, in another room with Wales and in another room with Northern Ireland. We need to be in the same room to work out what the stable future of the UK should be.

Q246 Lord MacGregor of Pulham Market: I would like to ask you about the social union and fiscal issues. The Welsh Government have stated their belief in the importance of the sharing of risks and resources as part of the UK’s social union. Does increasing the level of fiscal responsibility for devolved Administrations—ie, you can increase the benefits in welfare and social benefits provided you also raise the additional taxes to pay for them—risk

increasing inequality by reducing the UK-wide redistribution that we achieve at the moment? I noticed your very interesting paper to us, where you make some criticisms of the Barnett formula, with which I would entirely agree, and say that it would be desirable to move to a needs-based system. You can do that if you have welfare provision—tax and welfare—on a UK-wide basis. I think it will be more difficult under the devolution proposals to see how you avoid the problem of disparity of welfare benefits, because of the requirement to raise taxes.

Carwyn Jones AM: I agree. I am not in favour of the devolution of welfare benefits. I know they are devolved in Northern Ireland, but we see, of course, what has happened there until quite recently because of the difficulties of obtaining agreement on what the benefits system in Northern Ireland should look like in the future. The benefits system is one of those mechanisms that helps to ensure that money goes where it is most needed. We do not argue that the benefits system should be devolved. We have not argued that individual benefits should be devolved, but they have been devolved in the past despite us not wanting them to be. Council tax benefit was one example of where that happened. It was not something we wanted, but it was devolved to us anyway—but with only 90% of the budget, so we had to find £20 million in order to plug the gap. There is talk now of attendance allowance being devolved, which again is not something we would push for. We know that of the people who claim attendance allowance, 7.1% are from Wales. Our population share is 4.8% and our Barnett consequential will be 6.2%, so if we end up in a situation where attendance allowance is devolved and a Barnett consequential or Barnett share allocated, we will lose out. I am firmly of the view that there are some issues, and the benefits system is one of them, that should remain at a much wider level—the GB level, in effect. General taxation is in that category. There should be some flexibility, but I would not advocate devolving the entire tax system, because for us in Wales that would mean that we would not benefit from the fiscal transfers that we do now.

Lord MacGregor of Pulham Market: So there are parts of devolution in Scotland, in this area, that you do not want to see in Wales.

Carwyn Jones AM: That is correct. At the heart of the problem for us is Barnett. There are proposals to devolve elements of income tax to us in the future, but the difficulty is that even with that, a substantial amount of our funding—I think around 70%—would still come via Barnett. Barnett to our mind is flawed. Our fear is that as we take on income tax-varying powers, unless Barnett is dealt with we will basically lock in what for us is inequality in our funding. Barnett was devised in 1979. From our viewpoint it makes no sense to see it preserved for the future. I agree with what you said: a proper, updated, needs-based formula is

what is required. That would give us a much firmer base on which to build up our income tax-varying powers. I do not want to see a scenario where, because of the operation of Barnett, a future Government might feel that they have to raise taxes in order to fill the gap that is there because the proper amount of funding is not being made available to Wales because of a lack of an updated, needs-based formula.

Lord MacGregor of Pulham Market: You are clearly going to look for a different devolution from what is happening in Scotland under the Scotland Bill to try to solve this sort of problem.

Carwyn Jones AM: My view has always been that the structure of devolution should be the same in Scotland and in Wales. Northern Ireland is a little different, given its third category of deferred powers. The structure should essentially be the same, even if the powers are different. Now, the structure of devolution is different in Wales and Scotland. For me, once you establish the structure, you can look at what powers should be devolved, but the devolution of powers should be in the hands primarily of the people of Wales and Scotland and based on what they decide.

Q247 Lord Morgan: We have been talking quite a lot about the structure. Of course, service delivery and policies have inevitably varied considerably between the different nations—devolution of its essence means diversity—and areas such as health and education show very considerable variety in what has happened to them in the different nations. How would you assess this? Do you feel that there are risks in too divergent provision of policies in these and other areas, or that this is a beneficial tendency and you wish it to go further?

Carwyn Jones AM: It is an inevitable consequence of devolution that there will be difference. I do not think that is unhelpful in the sense that if, for example, one UK nation follows a certain path, it is possible for the others to see how that develops. Last month, for example, the Human Transplantation (Wales) Act came into force here in Wales, changing the consent regime for organ donation. It is being watched by other nations in the UK to see how it operates. We have not taken the view that those organs should be retained in Wales, as we want to make them available for those who need them across the UK. It is true that there will be other areas of policy developments in the nations of the UK that will take a different course. It is inevitable that that will happen, but I see it as a way of other nations seeing how particular policy develops to see whether it is appropriate to adopt that policy themselves.

Q248 Baroness Dean of Thornton-le-Fylde: Good morning, First Minister. We touched upon with Lord MacGregor the possibility of differing levels of welfare social benefits. The Scotland Bill going through the House of Lords at the moment provides the means to do that

if necessary. I read with interest your speech of October 2014, updated in June last year, where you were very clear—as you have been this morning—about not being supportive of the differential in benefits. Would you accept that the argument for going down that route may actually be unstoppable, particularly going back to the point you made at first about the regions in England having been rejected but now seeing the emergence of the northern powerhouse and possibly one to the east? If we see different areas of public policy set across the UK in the devolved Governments, who should set the benefits? Should there be a minimum benefit that people can receive? Who should set that?

Carwyn Jones AM: In some areas, such as welfare, I think that that is right; I accept that welfare should be a GB-wide matter. It should be a matter for the UK Government. I do not argue for the devolution of the benefits system because, bluntly, we would be in a more difficult financial position. I think that it is one of the bonds that holds the UK together. If you take the welfare system apart, you begin to unravel one of the UK's major common themes. I do not think that it is possible to have a minimum standard because, first, what would that mean? Secondly, it could not be right that the UK Government set it as that would undermine devolution itself. What do we mean by minimum standard? Do we mean, for example, that there should be council tax equalisation across the UK? Do we mean that there should be identical delivery of the health service across the UK—and, if so, whose rules apply?

Baroness Dean of Thornton-le-Fylde: I am thinking more of the benefit levels that individuals receive.

Carwyn Jones AM: No, I am firmly of the view that benefit levels should be the same across GB.

Baroness Dean of Thornton-le-Fylde: It is difficult to reconcile the two views because the Scottish Government Minister, Fiona Hyslop, said to us that to look at a minimum set of standards in benefits would be too bureaucratic and would go against the actual principle of devolvment, too. It is contained within the Scottish Bill at the moment and the view from Scotland is that—I do not demur from your point—it is all being driven by Scottish devolution. So it seems that we almost have an intractable view from Wales which is different from that of Scotland. How do we resolve that issue? Who will set the minimum?

Carwyn Jones AM: I come from a very different position from Fiona. She takes the view that there should be wholesale devolution in the form of independence, clearly. That would mean that the benefits system would not exist across GB. In devolved areas, I think that it is pretty much impossible to set minimum standards. Standards are supervised and enforced by the electorate to whom legislatures are answerable. When it comes to non-devolved areas, it is a

matter for the UK Government to set minimum standards. There is a risk in Scotland now that we are beginning to see the unravelling of one of those areas that made membership of the UK attractive to Scotland. That is not a position I take. I believe that there are a number of areas where a common approach across the UK is the right one. If you look at the welfare benefits system and general taxation, they are ways of reallocating money to areas of greatest need.

Q249 Lord Cullen of Whitekirk: Would the Welsh Government support a new charter or statute of union setting out the principles underlying the union and devolution, the voluntary nature of the union and the principles for relations between the Governments of the nations in the UK? That idea has had a mixed reception. Some have welcomed it; others have said that, assuming it is not rejected by one of the nations, it might not serve any practical purpose because of the differences between the different nations. What are your views?

Carwyn Jones AM: I think that it is important in principle. As ever, the devil is in the detail, but a recognition that this is an equal partnership of nations, which is what the Prime Minister said at the time of the Scottish referendum, would be welcome. Also, of course, we have memoranda of understanding with individual government departments in Whitehall. It is not a coherent system. If we were to have a coherent set of principles that governed the relationship between the UK Government and all the devolved Administrations—principles that were transparent, well understood and consistent—it would help immensely in terms of being able to form the UK that we need for the 21st century, based on those principles. We do not have them at the moment. We have a situation where devolution has taken place at different rates and speeds across different parts of the UK without really any thought being given to what it means for the UK as a whole.

Lord Cullen of Whitekirk: But if one of the principles was concerned, say, with social solidarity between nations, could that encounter some problems?

Carwyn Jones AM: It depends on how you look at it. First, it could be argued that that would mean some kind of minimum standard across the UK, which might be possible as long as it was agreed by all four Administrations. That is absolutely important; it cannot just be imposed by one on the other three. It might involve mutual recognition of benefits, but that takes us down the line of what we see within Europe. I am not sure that that is what we want to see as a model for the UK. So in principle, I think that it is right to say that you could get to a position where there is a charter of common rights and responsibilities, for want of better words, which is understood across the UK—but it would have to be agreed by the four Administrations for it to have any validity.

Q250 The Chairman: As I understand it, First Minister, the memorandum of understanding has principles embodied in it. Are you suggesting to us that that is not sufficient, or that the wording there is inadequate?

Carwyn Jones AM: There are several memoranda. From our point of view, we do not have a single memorandum of understanding with the UK Government.

The Chairman: I think that it was in the one that is at present extant, and presumably will be in the one that is being negotiated at the moment under intergovernmental relations discussions.

Carwyn Jones AM: This is the one via the JMC particularly, through that route. The memoranda in the past have tended to be with individual UK government departments and about the way that they deal with the Welsh Government. But it is correct to say that work is being done on how the JMC works more effectively. The JMC has tended to become a place of full and frank discussion, particularly the main plenary session when that takes place. So it does not really lead to anything. It is a place where grievances are aired. That is not really what the JMC was designed to be primarily, to my mind. The JMC is not truly a partnership of four Administrations. At the end of the day, it is still entirely within the hands of the UK Government. I will give one example. The dispute resolution process is laid out and we understand how it works, but the process ultimately leads to a dispute being resolved by the UK Government. If we are in dispute with the UK Government, there is a process by which the defendant is, as it were, also the judge. We suggested, for example, a situation where there might be an independent arbitration process, but that was not accepted. So, again, there are issues with the JMC in terms of how it works and having faith in the dispute resolution process in terms of it being truly objective.

The Chairman: We are broadly on the same page as you on this because you very kindly took part in our inquiry on intergovernmental relations. We submitted our report and published it. The Government have not yet responded to it after many months, but there is a good reason for that: a lot of work is going on within government. We hope that we will have a response soon, and we hope that some of your concerns and ours will be met at that time. So we are both waiting for that. Can I bring in Lord Norton?

Q251 Lord Norton of Louth: Perhaps we could look at this from a somewhat different perspective. The talks so far have been on intergovernmental relationships: that is, what can be agreed between the different Administrations. But of course we cannot leave the public out in terms of how they do it or indeed how they comprehend the changes that are taking place. Of course now you have difference between the UK Government, the Welsh Government

and—it flows from your written submission as well—there will be further changes. So it is about how the public keep abreast of what is happening and how they make sense of it. That is quite fundamental, because if they do not understand who is responsible for what, you can see that there will be big problems with regard to both Governments. So is there a mechanism by which one can address that so that the public are aware of who is responsible for what? It is a fundamental issue of accountability.

Carwyn Jones AM: It is; it is difficult. I do not think that people necessarily understand what the different levels of government actually do. In Wales, we have a particular issue in that most people get their news, particularly printed news, from newspapers that are not published here and that do not produce Welsh editions. In Scotland, there is a strong print media sector; the London papers produce Scottish editions, but they do not bother as far as Wales is concerned—for a lot of people they may as well be reading papers that are published in New York for all the coverage they give to Wales. Broadcasting is different. There is much greater penetration of broadcasting, particularly the BBC. Many people get their news from the BBC's Welsh programmes, which helps to plug the gap in that sense—but it can be difficult. The closer you get to the border, the more you will find that people have their aerials tuned in to transmitters from across the border, because geographically, it has been that way for many years even though the situation has improved in terms of Welsh transmitters. Some parts of the north-east of Wales could not get Welsh programming until quite recently. So there is that difficulty.

Social media can help to bridge that gap, but let us not pretend—it is a solution only in the short term. But it can be difficult for people to understand who does what. It has improved; there is no question about that. People tend to assume now that the Welsh Government are responsible, even in areas where we are not. Speaking personally about the people who come to my surgery as an elected AM, when I first began it was very sparsely populated, but now it is the exact opposite. People will come with all manner of issues that are not devolved, because they assume that they are. There will never be a perfect solution to this, because most people do not follow the constitutional niceties of the UK with any great interest. But we tend to find that in the main it works; most people have a relative understanding of who does what, but the level of understanding is not what I would want it to be.

Lord Norton of Louth: Is there anything that government or indeed Governments could do to help in terms of dissemination? Is there more that could be done that you are not already doing?

Carwyn Jones AM: The problem is that, if it is left to elected politicians—and I plead guilty in this regard—the issue of who does what would revolve around who is being blamed for what. So this would have to be done objectively. The debate around informing the public of who is responsible for what area of policy has tended to be around “Well, it’s your fault”. That is what we have seen. Again, it is not easy. You could teach the constitution in some way in schools—you might be able to do it that way—but you would not reach the adult population, and in Wales we have a particular difficulty with the way the media operates here.

Lord Norton of Louth: I completely endorse your point about education. Citizenship education is the way, but it will take time to work through, because it only gets those who are being taught.

Carwyn Jones AM: I tend to find that children know more than their parents, mainly because they have grown up with the idea of devolution—it is nothing new to them. Thousands of children have visited this place over the years, and that again helps to communicate the message of what the Assembly does. There is a Wales Bill, which I have not mentioned yet and which is fraught with problems, but one good thing about the Wales Bill—and it has some good aspects in its current form—is that it would allow the Assembly to change its name to a Parliament. Personally I am in favour of that, because people understand better what a Parliament does because they are used to the term. Certainly one thing that I want to see in the next Assembly term is that we move to a situation where we call ourselves a Welsh Parliament. That would help immensely in terms of people understanding what this institution is and what it does.

The Chairman: I think you wanted to ask a question about the Sewel convention.

Q252 Lord Norton of Louth: Yes. Moving on to an aspect you have just mentioned, the draft Wales Bill, the Sewel convention is in there but it is also in the present Scotland Bill going through Parliament. We had quite a long discussion on Clause 2 of the Scotland Bill and the Sewel convention, including one issue of whether it would be justiciable or not. Another issue is whether it effectively transposes the Sewel convention into statute as opposed to simply stating the Sewel convention. One of the Scottish Ministers said to the Committee, “You need to enact the convention rather than the quotation”—and, as I said, it is in the draft Wales Bill. Do you have a view on the Sewel convention being transposed into statute or the words of Lord Sewel being put in statute? The two things are somewhat different.

Carwyn Jones AM: I do. The convention should be stronger. Of course, if the proposal is to enshrine the convention in law to make it justiciable, that of course undermines parliamentary

sovereignty, so we move on then to the debate about parliamentary sovereignty and what it means in the 21st century. The same should apply to Wales. Practically, however, our devolution settlement is vaguer and will be even more vague if the Bill in its current form goes through; we may as well book a permanent seat in the Supreme Court in that regard. So it helps to resolve the issue in terms of the convention being taken seriously, but you will still have arguments as to whether something is devolved or not. Because of the nature of the current settlement, what would happen with the new settlement is a constant argument in Wales.

I will give one example of where there is a dispute at this moment in time. The Trade Union Bill—much of which is not devolved; we do not like it but we accept that it is not devolved—seeks to impose new duties and conditions in devolved public services. We take the view, based on the Agricultural Wages Board judgment, that because this is partially devolved, it rests within our powers. The view of the UK Government is that it does not and that it rests firmly in the field of employment—that is exactly the argument we had over the Bill in the Supreme Court—and so it is not devolved. Next week we will produce our equivalent of a Sewel Motion—a legislative consent Motion—where we will object to the UK Government legislating in what we regard as a devolved area. I have no doubt that they will ignore it. They will then proceed to legislate. We will then in the Assembly introduce a Bill to repeal those sections of the Act that we feel are devolved, and we will end up back in the Supreme Court. We know that. So it is not simply a question of embedding the convention in law; from the Welsh perspective, there is a huge amount of work to be done in terms of avoiding a situation where—at the moment this is what will happen—almost every Bill ends up in the Supreme Court.

Lord Norton of Louth: So Clause 2 of the draft Bill at the moment is, shall we say, not the ideal. What would be the ideal?

Carwyn Jones AM: In terms of the convention?

Lord Norton of Louth: Yes. Should it be left out? Should the Bill be redrafted?

Carwyn Jones AM: No. I am firmly in favour of enshrining in law the need to obtain consent to legislate in devolved areas. Again, that undermines parliamentary sovereignty, which is not something I would defend anyway in its current form. It also removes what is already there in Scottish and Welsh devolution legislation, where the UK Government can if they wish legislate in devolved areas. Should we worry about that? I would argue that we should not, as it provides greater clarity. But simply having the convention enshrined in law for Scotland is not good enough—it has to be there for Wales as well. That is one part of the discussion. The

other part is defining what is and is not devolved. So we find ourselves in the situation with the Trade Union Bill where the argument that it is devolved in Wales is stronger than the argument in Scotland—which for us is a uniquely amusing situation.

Lord Norton of Louth: Yes, there is an argument about the drafting of the Bill in terms of what the convention actually means, because there is the convention and what Lord Sewel said, and they are different. What flows from that is defining what is actually devolved for the purpose of the application.

Carwyn Jones AM: Then, of course, it ceases to become a convention.

Lord Norton of Louth: Yes. The Government are trying to say that it is still a convention in statute, and that is part of the problem.

Dr Hugh Rawlings: Perhaps I could add a word on that. The Wales Bill is very interesting in that respect because it replicates Lord Sewel's convention, as does the Scotland Bill. From our point of view, what is as important in terms of intergovernmental practice is that the Assembly's consent is required for legislation which amends its powers. That is not written into the version that is in front of the House of Lords at the moment in the Scotland Bill. Yet, paradoxically, although the Wales Bill repeats what is in the Scotland Bill, in the Explanatory Notes to the Wales Bill it is asserted correctly by the UK Government that, because this Bill amends the Assembly's powers, the Assembly's consent must be required, which is not what is said in either the Scotland Bill or the Wales Bill. The statement in the Scotland Bill, replicated in the Wales Bill, about the limitations on Parliament's powers to legislate in respect of devolved matters is clearly inadequate and incomplete.

The Chairman: We spent quite a lot of heated time on this in the Committee stage of the Scotland Bill, as you will know, and we got precisely nowhere, so I will move on if I may.

Q253 Lord Morgan: Could I raise the legal aspects which you referred to, First Minister, bearing in mind not only that you are First Minister but that you are also a barrister?

Carwyn Jones AM: I am not insured.

Lord Morgan: I think that you trained in Aberystwyth. You were on record as saying that there should be separate jurisdictions for England and Wales and that this would aid the devolution process. I wonder whether you would like to explain to us what the advantages of that would be.

Carwyn Jones AM: The argument that I am making now is for distinct rather than separate jurisdictions, and I shall explain what I mean by that. It has been the norm in the past that where a legislature is established, so a jurisdiction follows—Northern Ireland was an example of that in 1920. It is regarded as normal that that should happen. In that sense, the current

England and Wales jurisdiction is abnormal because it has two legislatures within it that pass laws in the same policy areas. I do not know of anywhere else in the world where that happens; there is usually a distinction between what legislatures do. The difficulty that we have is that the current Wales Bill is predicated—this has been confirmed to us by Ministry of Justice officials—on the idea that there should be minimal divergence in the law between England and Wales. That cuts across the 2011 referendum result; it is not what the people of Wales voted for. The idea that somehow the creation of law for England and Wales that applies only in Wales should be an aberration—that laws that are different in Wales should in some way be unusual—is not what the people voted for in 2011.

For me, a separate jurisdiction means the Northern Ireland-style jurisdiction—or indeed that of Scotland, although it is based on separate principles in Scotland—where you have a physically separate court system, a separate court of appeal, a separate justice system and a separate penal system. All those things attract cost. For example, setting up our own self-contained prison system would be hugely expensive. Another example is that we do not have a women's prison in Wales. In that sense, it is not an attractive option.

I had previously taken the view that a jurisdiction was not necessary to make sure that we had a robust devolution settlement but, given that it is at the very heart of the current Wales Bill, it is difficult to see how it would work without there being some separation of the jurisdictions.

It is said that we are moving in the Wales Bill towards a reserved powers model, but the model itself, as expressed in the Bill, states that in effect the law in its entirety is reserved. That means that any powers in terms of changing the law that the Assembly might have are conferred powers. To me, it is not a reserved powers model if an enormous area like the entire legal system and the law—which is what it says in effect—is reserved.

A separate jurisdiction would of course mean separate professions. It would mean the administrative separation of the courts, which carries disadvantages. The Lord Chief Justice has said that, to his mind, it is possible to have a distinction in the jurisdictions but with a shared court system and a shared penal system. I am immensely attracted to that idea. So in effect we would have a distinct jurisdiction. There would be, formally, Welsh courts and a Welsh jurisdiction, but the court system would be common, as would the legal professions, and so you would avoid the need to set up an expensive framework around the justice system. You then create, properly, Welsh law and not England and Wales law that applies in Wales. We have a bizarre scenario where we can change the law in England but we cannot apply it there because England and Wales is a jurisdiction. If you look at the prefaces to legislation, they say, "This changes the law of England and Wales but only in England". A more

complicated way of doing things I cannot begin to imagine. And it confuses the public. Last week, Simon Thomas, an Assembly Member here, raised the issue of a constituent of his. The constituent had referred to legislation that had gone through Westminster. The preface said, “This changes the law of England and Wales” but the constituent had not realised that it applied only in England. It causes needless confusion, to my mind. So, for me, a distinct jurisdiction would mean a shared court system and shared legal professions—there is no difficulty there; it makes perfect sense for us to do that—but with a formal separation of the jurisdictions so that there would be the courts of Wales and the Welsh jurisdiction. That is the norm everywhere else in the world, certainly in Commonwealth jurisdictions.

Lord Morgan: Thank you. Presumably you think that the case for that is becoming more urgent in the sense that more and more Welsh legislation is coming through.

Carwyn Jones AM: It is the case now that judges who wish to sit in Wales increasingly need to be trained in the law of Wales, particularly, for example, in areas such as housing—the law of landlord and tenant, where there are now significant differences in the law. It is not difficult. Lawyers are used to operating on a set of principles but with different laws in different common law jurisdictions. That is not a problem. I have spoken to senior judges who have offered me examples of counsel coming to Welsh courts and arguing the wrong law, because they assume that because the jurisdiction is the same, the law must be the same as well. I have suggested that perhaps these people should have wasted costs orders made against them but that might be too harsh. However, it is an issue.

If you are a London-based barrister and you are not familiar with the legal situation in Wales, you will assume, because England and Wales is a single jurisdiction, that the law must be the same in that jurisdiction. It is no good for the professions and in particular it is no good for the clients. It would be far clearer if it was understood that Wales was a jurisdiction, that it had a court system that was shared, and that Wales was a common law jurisdiction where there were no barriers to entry at all for those who practise. We see this in Northern Ireland. There are now many London-based legal firms which have moved into Northern Ireland since the peace process. They see no difficulty in operating in what is a common law jurisdiction with some different laws. That is exactly what Wales would be.

Lord Morgan: That was very clear. Thank you very much.

The Chairman: We are running short of time, First Minister. I hope you will allow us another two minutes so that Lord MacGregor can ask his question.

Q254 Lord MacGregor of Pulham Market: Very quickly, what effect could English laws for English votes have on the union?

Carwyn Jones AM: I do not think it works. For example, going back to the point I made earlier, where legislation alters the law of England and Wales but applies only in England, who votes? Do Welsh MPs get a vote in those circumstances because it alters the law of England and Wales, or is it only English MPs because it applies only in England? That is a problem. It is very difficult to have an institution where members are allowed to vote only in certain circumstances—it is either a UK Parliament or it is not. Even when there was substantial devolution in Northern Ireland in the days of Stormont, Northern Ireland MPs could still vote. There were fewer of them in those days as a proportion of the population, but there was no suggestion of, “You can’t vote in particular areas, I’m afraid, because you are not really MPs along the same lines as everybody else”. From our point of view, we are concerned that we may see a situation where legislation is produced that affects only England, so the logic is that English MPs would vote but that legislation would have an effect on the Barnett consequential that go to Scotland, Wales and Northern Ireland, which apparently would mean that Scottish, Welsh and Northern Irish MPs would not be able to vote even though there is a financial effect of that legislation going through.

Let us say, for example, that legislation went through the UK Parliament that changed the nature of the health service in England. This is not on the table—I am not offering a hypothesis here—but let us say that a Government came to power and said, “We are going to move towards a model of co-financing. We are going to say to people that we will pay some but you have to pay 20%”—the kind of model that exists in France. That could mean that the Department of Health’s budget was reduced. Even though that affects only England and the way in which the NHS is financed in England, because the budget of the department would be reduced, obviously, there would be a consequential Barnett reduction in the budgets of the devolved Administrations. So what appears to be an English law that affects only England actually affects to the whole of the UK.

Lord MacGregor of Pulham Market: That is possibly another reason for getting rid of the Barnett formula.

The Chairman: We are all on the same page there.

Lord MacGregor of Pulham Market: You can see a situation in which in the UK Parliament it is the Scottish MPs who, because of their numbers, may have the decisive vote on an issue that affects only England, whereas there are no other MPs able to affect that vote in Scotland, if you see what I mean. I can see a situation in which this becomes more and more of an issue and irritates more and more of one’s constituents—although a Scot, I was formerly an English Member of Parliament—and there will be increasing pressure. If you do

not think English votes for English laws are the right answer, what is the right answer to this English question?

Carwyn Jones AM: It is difficult to see beyond the establishment of an English parliament or regional assemblies in England. None of these solutions is easy, but if you create a physically separate institution, you do not have the problem of English votes for English laws, or indeed the converse, which is fair, that votes from other nations in the UK affect the law in England. An English parliament is one idea. It is not ideal but it would certainly help to create the separation that would be required.

There is another issue with English votes for English laws. If MPs from Scotland and Wales cannot vote on substantial areas of legislation, do we then move to a situation where it is not really possible to be Prime Minister if you are from a Scottish or Welsh constituency because you would have a programme for government that you could not actually vote on yourself? There are issues as to what that means for the union in that regard as well.

Lord MacGregor of Pulham Market: That suggests an interesting solution. Just to finish on this, the way in which this is constructed now, where the Speaker specifies that this is purely English legislation without the impacts that you are suggesting some other things might have on Wales or Scotland, is that not a sensible solution, and if not, what is?

Carwyn Jones AM: It depends on how that is applied. In principle it sounds attractive, but I am not sure that in practice it works very well. For example, a housing Bill went through Westminster last week or the week before, and I think that Welsh MPs voted even though it does not affect Wales. Because there are clauses in the Bill that give powers to Welsh Ministers, Welsh MPs voted even though we have no intention at all of implementing those clauses. Another example is that there are occasions when legislation will pass through Westminster that offers a vehicle for changing the law in Wales more quickly than passing our own legislation in the Assembly. So we pass legislative consent Motions and then we see Welsh clauses incorporated, usually into England and Wales Bills. It is not something that we would do normally, but there are occasions when that would happen. Should Welsh MPs be able to vote on those clauses, given that all they do is transfer power to the Assembly? We do have areas where we have executive responsibility but not legislative responsibility. What happens then? If the law is changed, for example in an area where we have executive responsibility, do Welsh MPs get the vote then, even though the reality is that the power that would be exercised entirely at the discretion of Welsh Ministers? It is never easy. It is clearer in Scotland, because that junction of executive and legislative powers is clearer than it is in Wales. But what do you do when you have a scenario where you have legislation that seeks to

change the law in Wales but the law in Wales cannot be changed without the consent of Welsh Ministers anyway?

The Chairman: First Minister, we are extremely grateful to you for giving us so much time. We knew we had a difficult task ahead of us and you have confirmed that because some of your answers do not make our lives any easier. It has been enormously educational, extremely useful and very informative, and we very much appreciate it. Thank you, First Minister, and thank you, Dr Rawlings.