



Welsh Affairs Committee

In joint session with the Constitutional and Legislative Affairs Committee of the National Assembly for Wales

Oral evidence: [Pre-legislative scrutiny of the draft Wales Bill](#), HC 449

Monday 9 November 2015

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Members present:

Welsh Affairs Committee:

David T.C. Davies (Chair); Byron Davies; Chris Davies; Carolyn Harris; Gerald Jones; Christina Rees; Antoinette Sandbach; Liz Saville Roberts; Craig Williams; Mr Mark Williams

Constitutional and Legislative Affairs Committee, National Assembly for Wales:

Alun Davies, Suzy Davies, Dafydd Elis-Thomas, David Melding; William Powell

Examination of witnesses

Paragraphs 8 – 167

Witnesses: **Professor Thomas Glyn Watkin**, and **Emyr Lewis**

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

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

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

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

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

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

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

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

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

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

[17] **David T.C. Davies:** *[translation]* Do we have to have these references in the 2006 Act?

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

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

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

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

[22] **David T.C. Davies:** *[translation]* Thank you

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

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

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

[26] **Mr Lewis:** *[translation]* Well, necessity is just one part of tests as to whether the Assembly can legislate on certain specific issues. So, necessity is only one part of that. Therefore, if we look, for example, at Schedule 7B(3), which relates to private law—if I can find it; I do apologise—you will see,

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

[28] Okay? There is then a definition of ‘the private law’, and then it goes on to say:

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

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

[31] The first is that it will create some nervousness here in Cardiff, in Government, as to exactly how far they can take legislation, but also it’s going to be wonderful for my own profession, because every time a case comes before the courts where one, perhaps, is prosecuted for a crime that is made under Assembly legislation, then our Perry Masons here in Wales will look at this and will say, ‘Well, let’s have a look now. Is this within the competence—? Is this within competence? Is it necessary?’, and so on and so forth. Therefore, I am concerned that this ambiguity in this context is going to create some difficulty.

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

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

[34] **Mr Lewis:** Apologies

[35] **Mark Williams:** That’s very helpful, because there has been a characterisation, in the minimal debate we’ve had so far, that the necessity test operates in Scotland and therefore we have nothing to fear. But you’re clearly telling us they are operating, potentially, under a very different context.

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

[37] *[translation]* In a very limited context—that’s how it’s operated in Scotland, and I’m not aware that it has ever been before the courts in Scotland—it is possible that it has been,

but I'm not aware of that, and I would be willing to put money on these provisions in the draft Wales Bill being before a court of law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[56] **Mr Lewis:** [*translation*] Yes, I do; that's the intention, certainly.

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

[58] But also, paragraph 1 states

[59] 'the law on reserved matters'.

[60] One would assume that that could include criminal and private law matters that are specifically reserved—expressly reserved matters.

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

[62] That is my understanding.

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

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

[65] the modification must be

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

[67] and then

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

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

[70] **Antoinette Sandbach:** I accept that, but that distinction between private law and non-devolved function—was that not the concern in the referral of the asbestosis case on the recovery of medical costs?

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

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

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

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

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

[76] Fair enough.

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

[78] **Mr Lewis:** *[translation]* I’d remove them.

[79] I’d remove them.

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

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

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

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

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

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

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

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

[88] If I'm thinking back to the Control of Horses (Wales) Act 2014, for argument's sake, the clear, driving objective there was an animal welfare issue, but, in order to address that animal welfare issue, we had to address a series of issues in terms of human rights, and in

terms of property and the rest of it. It appears to me now that, looking at the barriers we had to cross in order to get that first of all to the Assembly and then onto the statute book, that would be more difficult, would mean that we would have to legislate in a more restricted way, and would mean—. I would have thought that the implication of that is that the statute book becomes more crowded, less clear and that we have a confusion of law in Wales, and that we don't also enable this place to have greater coherence in policy making and legislative competence. Is that the sort of assumption that you would agree with?

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

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

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

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

[93] **Mr Lewis:** *[translation]* If I may deal with the first part of your question, the case in relation to agricultural wages had brought about what a number of people had forecast, which is that the current settlement offers possibilities and flexibility in terms of legislation that were wider than people had thought because of those silent subjects. If you look at the

implications of that, then they are very far reaching, at least in principle. For example, in principle, possibly—there are arguments, anyway—the Assembly could legislate on matters that are, from the point of view of the United Kingdom, things that should be legislated on in London, such as the army, defence of the state, and immigration.

[94] Because these are silent subjects, in theory those might be extended, and one can see, therefore, from the point of view of the union, why there is a need for reform to ensure that those matters that relate to the British state remain in Westminster, as happens with Scotland and as happens with Northern Ireland, although it could be argued, as Thomas Watkin does in his evidence, that the people of Wales had voted in favour of that. I think that's one part of the equation; that's right. What concerns me is that, on top of that, these new restrictions erode the Assembly's powers and that it's not fair—to use one of the criteria of the Secretary of State—to take those away, particularly in relation to private and criminal law. That extension of the principle, and also what Thomas has referred to again, which is the long list of matters that are excepted—those things seem put together in some kind of attempt to make up ground following the case that you've mentioned that goes too far. So, in other words, there's a justification in taking some of that ground back, but that's not a sufficient reason for clawing back so much ground.

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

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

[97] **Suzy Davies:** Thank you.

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

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

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

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

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

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

[104] **Mr Lewis:** *[translation]* Well, this is a new concept in this place, and it includes, of course, Ministers of the Crown. So, Ministers of the Crown and these other authorities that aren't Welsh authorities, Minister of the Crown consent is needed before legislating on them. It's interesting to compare with the situation in Scotland. In Scotland, there is a transfer of executive powers of Ministers of the Crown in their entirety to the Scottish Government and to Scottish Ministers under section 53, I believe, of the Scotland Act 2012. They all transfer unless they are specifically exempted. That hasn't happened in this draft, so we have this concept that any function, even if it is within the legislative scope of the Assembly and isn't reserved, any power that lies in London—and Thomas talked about the example of teachers' pay; it is not possible to legislate on that without the consent of London. So, that's a change in the current situation, where there is no means of legislating in relation to powers before May 2011—pre-commencement powers, as they're called.

[105] But then, of course, it also extends to new ground, and one example worth mentioning is the Human Tissue Authority. The Assembly legislated in relation to organ donation. It placed functions on the Human Tissue Authority. Consent was not required to do that. Consent will now be needed. I think that's one area where the First Minister and the Secretary of State are agreed that there would need to be consent for doing that. So, as Thomas has said, it has taken powers back from the current situation in Wales.

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

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

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

[109] **Mr Lewis:** *[translation]* That would make it much clearer.

[110] It would make it much clearer.

[111] It would be much clearer.

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

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

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

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

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

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

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

[119] **Mr Lewis:** *[translation]* Well, I believe that the legal situation is that the intention of Parliament is what is in the Act.

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

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

[122] **Antoinette Sandbach:** Sorry—

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

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

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

[126] **Mr Lewis:** *[translation]* I would agree.

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

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

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

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

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

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

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

[134] **William Powell:** I'm very grateful for that clarification. In the context of what you've both said, do you believe that the proposals that were set out recently in the Wales Governance Centre and the constitution unit's report, 'Delivering a Reserved Powers Model

of Devolution for Wales’, could actually have the desired effect and maybe draw on the kind of thinking that you’ve outlined?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[153] **Professor Watkin:** What I would like to be heard currently is not so much the voice of lawyers and those who study constitutional matters and politics, but what actually civic society thinks about the Bill—its clarity, its coherence, its complexity. I attended a meeting last Friday of a body that, on behalf of the churches in Wales, monitors legislation in both Cardiff and Westminster in order to see how they are affected by it, and to participate in consultation exercises. One of the things that was said to me afterwards was that they were terrified by the complexity of the Bill as they saw it, and they were relieved to know that the complexity was one of the issues on which they could comment. I think it's the voice of those who are going to be affected by it in that way, and those who'll be affected by the laws that will be made as a result of a complex structure, that needs to be heard. The only thing that I

think I would ask the Secretary of State to do with the Bill at this point is to listen to what is being said by civic society, listen to the calls of the Constitutional and Legislative Affairs Committee for a principled approach, and realise the benefits that would come in the long term, because I cannot see a settlement that is lacking in clarity, lacking in coherence and complex possibly being long-lasting or durable, and that must be the ultimate aim.

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

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

[156] **Mr Lewis:** *[translation]* I would probably ask you, Dafydd.

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

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

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

[160] We've been looking at the small faults—well, some of them are quite significant faults, but on the details—but it's important to note that having that statement within a British parliamentary Bill is very valuable indeed.

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

[162] **Mr Lewis:** *[translation]* No, but it's there.

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

have been reserved with more exceptions. Therefore, where is the constitutional clarity in this situation?

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

[165] **Lord Elis-Thomas:** *[translation]* Such as Northern Ireland, for example.

[166] **Mr Lewis:** *[translation]* Well, maybe. It would be an improvement on the situation we currently have.

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

Examination of witnesses

Paragraphs 168 – 263

Witnesses: **Richard Wyn Jones**, Director, Wales Governance Centre and **Roger Scully**, Wales Governance Centre

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

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

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

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

[172] **Professor Jones:** *[translation]* In terms of responding to your question, the brief answer is 'No', but I do think it's important to understand why what is being recommended in the draft Bill doesn't provide the kind of settlement that the Secretary of State and each and every one of us aspires towards. And quite simply, I think the process that's led to the

draft Bill has created the ambiguity that we're currently dealing with. There were a number of questions this morning to the party leaders on the St David's Day process. There is something very important that I need to say about the St David's Day process, because I think it is at the heart of where we currently are.

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

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

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

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

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

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

[178] **Professor Jones:** *[translation]* No. Let me say as a word of preamble that many witnesses this morning have referred to the work that the Wales Governance Centre has been doing over the past few months. May I just say as a general point to the committees that the timetable set out for this process does make it extremely difficult for civic society

organisations such as universities to make a sensible response to what is going on? The timetable is so challenging. We are trying to provide a detailed report on the draft Bill, and essentially we have a month to draft that. We don't have a budget, we don't have staff. It's very, very difficult to respond so swiftly to legislation which—. As the Lord Chief Justice has said, this is the most complex devolution settlement of them all, and we are dealing with it in great haste, and that does make things very difficult indeed. I apologise for making that point, but I think that it's important that I did so.

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

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

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

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

[183] **Professor Jones:** [*translation*] In terms of the whole thing? Well, there is a point on process. If we want this debate to move beyond an argument between governments, then we have to delay the process, because, in a context where we have something which is so incredibly complex and the timetable is so brief, it is only governments that can participate in that discussion. So, to give you a specific example—. I'm sure someone at some point will ask me about the 260, or whatever it is, areas that are reserved, and what my view is on that. Well, we are trying to write a report on the draft Bill at present. The problem is that, in a month, which is essentially what we have available to us, then it isn't possible for anybody, even with the constitutional experts of the stature that we have supporting those people who are part of the small committee writing the report, to do the work. So, we can compare what's being reserved for Wales as compared with Scotland or Northern Ireland, and say 'Well, there is no precedent for this; there is no precedent for the other' but we can't take it any further than that in the time that is available. Therefore, the timetable makes it very, very difficult for people outwith the Governments. I'm sure that it must be a huge challenge for you, Mr Chairs, to deal with something as complex as this.

[184] In terms of the substance of the issue, beyond looking in detail at the reserved areas, I think that the two important things then are to look in earnest at the concept of creating a legal jurisdiction for Wales, in the restricted meaning that we have been discussing over the past few weeks. I think that would quite possibly assist with some of the problems around the necessity tests—those things that are included under that heading. And I think we must look again in very great detail at the issue of Minister of the Crown consents. There was a feeling in the Wales Office, as I understand it, that what they were doing was importing the system that exists in Scotland. That isn't the case, and I do think that that creates political problems that could be avoided. But, we need more time to do all of this.

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

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

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

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

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

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

[191] **Professor Jones:** *[translation]* I assume that what my colleague, Craig Williams, was referring to was that there will be opportunities later in the process. Many people have regretted this morning—I think it was Byron Davies who was regretting the two Governments going head-to-head on this issue. Part of the way of avoiding that is to have a wider discussion, isn't it, and it's going to be very difficult to have that discussion given such a tight timescale? And I do accept, of course that there are opportunities to amend, as you go through the process in the House of Lords, and so on and so forth. But I do think that there are such fundamental questions regarding the architecture.

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

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

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

[195] **Professor Jones:** *[translation]* To be very positive about the context here, the St David's Day process emerged from a statement made by the Prime Minister, David Cameron, and said, 'Look, we've had the Scottish referendum, and we now want to provide a more sensible settlement for the whole of Britain.' And that includes English votes for English laws, and I am, perhaps, in a minority of one around this table in believing that that's a good idea—*[Laughter.]* Okay, a small minority around this table. But, it was David Cameron's intention to say, 'Look at the constitution of Britain, and let's have something that's more stable'. That's clearly what the Welsh Government wants, and I think that that's what the parties in the Assembly all want to see.

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

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

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

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

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

[201] **Professor Jones:** *[translation]* As we both are following Professor Thomas Watkin and Emyr Lewis, I think I'm very confident in referring you back to their very wise comments on this point. What I would want to draw your attention to is why this necessity test is there in the first place, because, from my reading of the necessity test, as I tried to explain in my previous response, it stems from that decision that maintaining a united legal jurisdiction for England and Wales means reserving to Westminster criminal and private law. Someone, somewhere, has decided that that is what stems from the desire to maintain a single jurisdiction. There was no discussion at all on that. Once you've made the decision that you're reserving this, as you can't have a legislature that doesn't make laws relating to crime and civil law, then a space has to be created for the National Assembly to be able to operate.

It's that effort to restrict the extent of that space that is at the root of all of these discussions on the necessity test.

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

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

[204] **David Melding:** I'd like to ask our co-Chair just to test out this issue, or the consequences of it, of Crown consent.

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

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

[207] The only point that I would make, and this is a political point rather than a legal point, is that I believe that everyone feels that moving to a situation where there is less foolish conflict between Cardiff bay and the banks of the T2ames would be very beneficial. I think that everybody would see that that's something that we all aspire to. But the way that these concepts have been set out—they're so comprehensive that it's very difficult to foresee that they lead to anything but conflict. Co-chair, you will remember as well as I do the LCO period and the discussion about that period before the implementation of the 2006 Act when people said, 'Well, this will work very well because there'll be goodwill on both sides and there won't be any problem', and that didn't turn out to be the case. So, after that experience, I think we should all be very careful before pursuing advice that says 'Goodwill exists and this won't be a problem'.

[208] **David T.C. Davies:** *[translation]* I do feel better that you are finding this whole process very difficult because I can't understand it all either—in English or in Welsh if truth be told. But it appears to me that if Ministers of the Crown can't change roles of Ministers in the Assembly, then it doesn't seem fair that Assembly Ministers can change the roles of UK

Government Ministers, or deal with non-devolved issues. So, it may be possible to say that the Bill makes things fairer on all sides—would you agree with that?

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

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

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

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

[213] **Antoinette Sandbach:** You spoke about the conflict between the Welsh Assembly and the UK Government, in effect. There was a recommendation in the Silk report of an arbitration mechanism to be laid out by statutory instrument; a code of practice, effectively. Do you think that would be a useful addition to the Bill in order to take some of the heat out of it? I note your recommendation to slow things down, but if we do slow things down, then we're taking it right into the heart of an Assembly election where there may be much more polarised views in the run up to May coming from the three parties. Really, from that point of view, I'm concerned that slowing down the whole process will actually lead to a worse outcome than sticking with the current timetable, albeit that it causes problems for civil society—and I'm sure that's not the intention.

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

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

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

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

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

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

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

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

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

you to, at some point, have a political agreement that policing should be devolved within Wales, then that reservation should be removed. But given where we are politically on that general issue of devolving policing, I don't think it would make sense to do anything other than keep Police and Crime Commissioner elections reserved.

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

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

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

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

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

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

[228] **Professor Jones:** [*translation*] While I agree with everything that my interesting colleague has said, I would also like to say that one of the things that we, as a centre, have been doing is to try to consider what the implications of the size of the Assembly, as it currently stands, if you like, are in terms of the quality of democracy in Wales. One of the things that is very striking—and I return to a point that I made on the power of the executive—is that, at present, we have some 42 backbench Members in the Assembly holding a relatively powerful Government to account, and, in our view, have difficulty in holding that Government to account.

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

[230] From looking at the international evidence on what the size of a body similar to the Assembly with similar powers to those of the Assembly, would be and how large it would be, you are looking at around 100 Members. That, of course, moved the discussion, which has been about 60 versus 80; 80, as far as I can see, isn't based on any evidence base. Now, I know that this is very contentious, but it is worth noting that the number of MPs from Wales is likely to reduce and it's likely that the number of councillors in Wales will be reduced. At the moment, we have a number of MPs and councillors per capita—

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

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

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

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

[235] **David T.C. Davies:** [*translation*] Very briefly, what countries have you looked at?

[236] **Professor Jones:** [*translation*] I'm very happy to send you a copy of that report, but it's Commonwealth nations and the nations of Europe, so, that's. But I'm more than happy to send you a copy.

[237] **Professor Scully:** If I could just add to the comments of my colleague there two very short points, firstly is that, given the relative weakness of the media environment in Wales, which I won't need to explain, I think, to anyone in this room, frankly, effective scrutiny of the Government isn't likely to come from the media outside the Assembly and the Welsh Government. If you're going to get really effective scrutiny of the Welsh Government, it's

probably going to have to come, largely, from within the Chamber, and I think that's one of the arguments that, for me, most underpins the broad arguments we've made in favour of increasing the size of the Assembly.

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

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

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

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

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

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

[244] I believe that Emyr Lewis expressed this very well in the previous session, where he said that this is a matter of acknowledging that Welsh law does exist. Therefore, it is about

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

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

[246-7] **Professor Jones:** *[translation]* I'm sorry, I was slow to understand the question. Yes, I agree, in the sense that this is a matter of the constitution catching up with the legislative reality. I understand that point. What I would say is that, because this has not been acknowledged formally, what you get is the necessity test and that sort of thing. So, yes, the reality is that this place is creating Welsh law, but because the constitution doesn't acknowledge that, we now face a situation where there is a draft Bill in front of us that offers ideas that I think will be extremely complicated in order to maintain the ideology, as far as I know, of England and Wales.

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

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

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

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

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

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

[254] **Professor Jones:** *[translation]* I have some sympathy with that, Alun, and we're not seeking to suggest that a distinct jurisdiction is a panacea. I did say that there were three sets of problems with the draft Bill. One is the reservations, plus the 'relates to', which expands them further. The second is the outcomes of reserving criminal law and private law to London, and the third is Minister of the Crown consents. Those are the problematic areas. I think a distinct jurisdiction would help you deal with the second. It wouldn't help with the first. The creation of a separate jurisdiction would help you with that first problem, because if you look at that list of 267 reservations, many of them relate to justice. But, as far as I can see, there is no cross-party desire to devolve justice, and therefore the concept of creating a separate jurisdiction is a non-starter in that sense. But a separate jurisdiction along with the devolution of justice would significantly reduce the number of reservations, but I don't see any cross-party desire to do that. What I do hope is that the cross-party desire will be in place to look at the second of those questions, and I do think that a distinct jurisdiction would be of great assistance in looking at that. But it's not a panacea—I'm not claiming that it is—but it does help with one specific problem where there could be cross-party agreement to move forward.

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

[256] **David Melding:** I think we've covered this rather a lot, and that view stands on the record. I've got Byron Davies. Chris Davies, were you trying to attract my eye? I'm losing count now of people.

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

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

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

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

[261] **Professor Jones:** *[translation]* Yes, but I would also warn that that isn't a simple process. I think Professor Thomas Watkin made a point that, in looking at reservations, there's a need to speak to not just constitutional experts such as him, or those who take an interest in the politics of the constitution such as myself, but policy experts in certain areas, and when there are 267 areas, that's very challenging indeed. You need an exercise of that sort, but it's going to be impossible to do it given the timescales available to us.

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

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