Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

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

Dydd Llun, 22 Mehefin 2015
Monday, 22 June 2015

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

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Peter Black	Democratiaid Rhyddfrydol Cymru (yn dirprwyo ar ran William Powell) Welsh Liberal Democrats (substitute for William Powell)
Alun Davies	Llafur Labour
Suzy Davies	Ceidwadwyr Cymreig (Cadeirydd Dros Dro) Welsh Conservatives (Temporary Chair)
Dafydd Elis-Thomas	Plaid Cymru The Party of Wales

Eraill yn bresennol
Others in attendance

Emyr Lewis	Blake Morgan LLP
Yr Athro/Professor Thomas Glyn Watkin	
Yr Athro/Professor Adam Tomkins	Prifysgol Glasgow University of Glasgow

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

Stephen Boyce	Y Gwasanaeth Ymchwil Research Service
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Naomi Stocks	Ail Glerc Second Clerk
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Gareth Williams	Clerc Clerk

Dechreuodd y cyfarfod am 14:31.
The meeting began at 14:31.

Ethol Cadeirydd Dros Dro
Election of a Temporary Chair

[1] **Ms Stocks:** Good afternoon, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. The committee Chair, David Melding AM, has submitted his apologies for today's meeting, and the first item of business is therefore the election of a temporary Chair. I invite nominations from committee members for a temporary Chair to be elected under Standing Order 17.22.

[2] **Peter Black:** Suzy Davies.

[3] **Alun Davies:** Suzy Davies.

[4] **Lord Elis-Thomas:** Suzy Davies.

[5] **Ms Stocks:** I see that there are no other nominations—

[6] **Lord Elis-Thomas:** Not today, anyway. [*Laughter.*]

[7] **Ms Stocks:** I declare Suzy Davies elected and invite her to take the chair.

Penodwyd Suzy Davies yn Gadeirydd dros dro.
Suzy Davies was appointed temporary Chair.

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

[8] **Suzy Davies:** Thank you very much. Croeso i bawb. Welcome, all Members. As you can probably see, William Powell, our usual Member, has sent his apologies today, and Peter Black is attending in his place.

Cynigion Llywodraeth y DU ar gyfer Datganoli Pellach i Gymru—Sesiwn Dystiolaeth (Panel)
UK Government's Proposals for Further Devolution to Wales—Evidence Session (Panel)

[9] **Suzy Davies:** Welcome to the witnesses, Professor Thomas Glyn Watkin, Emyr Lewis, and Professor Adam Tomkins via video link. I'll ask you to introduce yourselves shortly. In the meantime, just a bit of housekeeping, really: in the event of a fire alarm, Members should leave the room by the marked fire exits and follow instructions from the ushers and staff. We're not expecting a test today. I don't suppose this is going to worry Professor Adam Tomkins. All mobile devices are switched to silent, I hope. The National Assembly for Wales operates through both the medium of Welsh and English, and headphones are provided through which instantaneous translations may be received. For any who are hard of hearing, they may also be used to amplify sound. The microphones come on automatically whenever anybody is speaking, so there's no need to play around with the buttons. Interpretation is available on channel 1, and verbatim on channel 0.

[10] So, again, I welcome everyone to this first session of our short inquiry into the UK Government's proposals for further devolution to Wales. This is the first of two or three sessions. Welcome again to our witnesses. Perhaps I could ask you to introduce yourselves, starting with Thomas, please.

[11] **Professor Watkin:** Thomas Glyn Watkin.

[12] **Mr Lewis:** Emyr Lewis.

[13] **Professor Tomkins:** Hello. I'm Adam Tomkins, University of Glasgow.

[14] **Suzy Davies:** Thank you very much indeed. Chairman's privilege: I'll kick off with a couple of questions, if that's okay, but all Members will have questions for you, broadly in the area of reserved powers, the permanency of the Assembly, and the legislative consent procedure. Please feel free to add any other evidence that you want on that.

[15] Perhaps I can start just with a fairly straightforward question, really. The First Minister gave evidence in a conference recently in London and I think his words were—I'll see if I can find them. Well, certainly, he expressed concerns that any Bill coming through in Parliament should not limit the powers that we already have in this Assembly. There's no going back on existing powers. I just wondered whether any of you shared his concerns that any new Bill could go back on what's currently devolved. Do you think that's likely?

[16] **Professor Watkin:** I have been sceptical, certainly, of the benefits to Wales of moving to a reserved powers model—in practice rather than in theory. I think the idea that moving to a reserved powers model in itself would produce benefits is misplaced. I think a comparison has been made with Scotland, and the belief is that fewer cases have gone to the Supreme Court on subject matter competence from Scotland because of the form of the settlement. My own belief is that it's the quantity of powers that Scotland enjoys compared to Wales, which has meant that one can move more freely in a large room, without bumping up against the walls, if I can put it that way. Whereas, if you move in a small room, you're more likely to bump up against a wall. It's not the way the room is described from the outside or the inside that matters, but the room for manoeuvre that one has.

[17] My fear is that although there may well be advantages in the reserved powers model, what really matters in this context is: the quantity of matters that will be reserved; the manner of their reservation, in terms of whether or not it is going to be reservation on the scale that we saw in the third Assembly when exceptions were being introduced to matters that were being devolved, which could make for a very complex and, in my view, far from clear settlement; and, as important as that, the nature of the test that will be employed to determine whether or not provisions in Assembly legislation are caught by reserved matters, if I can put it like that, or not. I think the 'relates to' test, which is what is used in Scotland, and of course is what is used here with our conferred powers model, is advantageous if one does not have too many reserved matters, but the greater the number of reserved matters, the greater the risk that one's provisions will be found to relate to them.

[18] I think that's maybe enough for now. I would say that I think there has already been, in certain instances, some clawback, and perhaps we can return to that a little later. I think that there is certainly one thing in the Wales Act 2014, which has already started the process of clawback in relation to Wales.

[19] **Mr Lewis:** Rwy'n cytuno, yn fras, â'r hyn mae'r Athro Thomas Watkin wedi'i ddweud, ond rwy'n cymryd golwg ychydig yn fwy gobeithiol ynglŷn â'r hyn y gallasai model pwerau wedi'u cadw nôl ei gynnig. Mae'r mater yma ynghlwm wrth yr hyn sydd wedi dod i gael ei alw'n 'y materion distaw'—y gofodau o fewn y setliad Cymreig, fel y mae ar hyn o bryd. Mae'r gofodau hynny'n ymwneud â'r geiriau

Mr Lewis: Broadly speaking, I agree with what Professor Thomas Watkin has said, but I take a slightly more hopeful view of what a reserved powers model could actually offer us. This issue is connected to what has come to be called 'the silent matters'—those spaces within the Welsh settlement as it currently stands. Those spaces are connected to the words 'relates to', as Thomas has already said. We have seen, through the case law

‘*relates to*’ fel y dywedodd Thomas. Rydym ni wedi gweld, drwy’r achosion yn ymwneud â chyflogau yn y sector amaethyddol a hefyd yn ymwneud ag asbestosis, i raddau llai, sut y mae’r geiriau yma wedi ymbweru y Cynulliad y tu hwnt i’r hyn roedd y drafftwyr gwreiddiol, efallai, wedi ei ystyried, ond yn sicr nid y tu hwnt i’r hyn yr oedd nifer o sylwebyddion wedi meddwl.

relating to agricultural wages as well as relating to asbestosis, to a lesser extent, how those words have empowered the Assembly beyond what the original drafters, perhaps, had considered, but certainly not beyond what many commentators had thought.

[20] Mae’r ffordd mae cytundeb Dydd Gŵyl Dewi fel mae’n cael ei alw, yn delio â’r cwestiwn yma ychydig yn amwys. Oherwydd natur y gofodau, mae bylchau y byddai unrhyw un sy’n ystyried y peth o safbwynt unoliaethol yn eu gweld yn rhai anodd iawn i gredu, megis y maes amddiffyn, y lluoedd arfog, mewnfudo, ac ati. Nid yw’r rhain yn cael eu crybwyll o gwbl o fewn Atodlen 7. Felly, os dilynwn ni o leiaf un o achosion y Goruchaf Lys ar y mater, sef yr un yn ymwneud ag amaethyddiaeth, byddai deddfu, er enghraifft, i rwystro recriwtio plant i’r fyddin yn dod o dan amddiffyn plant, ac nid yw’r ffaith ei fod o’n ymwneud ag amddiffyn nac yma nac acw, oherwydd ei fod o i mewn. Mae’n eglur bod y perygl hwnnw wedi taro Llywodraeth Prydain, ac maen nhw’n delio â’r mater ym mharagraff 2.1.22 y cytundeb. Mae’n delio’n benodol ag amddiffyn. Yr anhawster yw ochr arall y geiniog. Oherwydd bod aneirif faterion, mae’r materion y gellir deddfu yn eu cylch, a dweud y gwir, y tu hwnt i’r gallu i’w cyfrif. Mae pob math o bethau y gellir deddfu yn eu cylch. Ni ellir categoreiddio pob dim i mewn i un rhestr o’r hyn sydd i mewn ac un arall o’r hyn sydd allan. Yr anhawster, rwy’n credu, yw’r hyn y mae Thomas Watkin wedi cyfeirio ato, sef y byddwn ni’n cael rhestr hirfaith iawn, iawn, iawn o faterion wedi’u cadw yn ôl.

The way in which the St David’s Day agreement, as it’s called, deals with this question is a little ambiguous. Given the nature of these spaces, anyone looking at this from a unionist point of view would see gaps that are very difficult to believe, such as defence, the armed forces, immigration and so on. Those aren’t mentioned at all within Schedule 7. Therefore, if we refer to at least one Supreme Court precedent on this issue, namely the one relating to agriculture, then legislating, for example, to prevent the recruitment of children to the army would fall under child protection, and the fact that it relates to defence is neither here nor there, because it is included. It is evident that that risk has occurred to the UK Government, and so they deal with the matter in paragraph 2.1.22 of the agreement. That deals specifically with defence. The difficulty is with the other side of the coin. Because there are innumerable matters, the matters that you can legislate for are immeasurable. There are all sorts of things that can be legislated on. You can’t categorise everything in one list in terms of what’s included and what’s excluded. The difficulty, I believe, is what Thomas Watkin has already referred to, namely that we would have a very, very, very lengthy list of the reserved matters.

[21] Mae’r atodlen i’r cytundeb, sef Atodiad C, rwy’n credu—na, Atodiad B ac C gyda’i gilydd—yn rhyw fath o ragolwg o sut mae Llywodraeth Prydain yn debygol o edrych ar hyn. Mae’n peri pryderon i mi, mae’n rhaid imi ddweud, o weld y graddau y maent yn ystyried cadw pwerau nôl, yn arbennig pan fyddwn ni’n dod i sôn am bethau fel y gyfraith droseddol a’r gyfraith sifil, sydd i bob pwrpas yn gadael dim ond y gyfraith gyhoeddus—ac nid yn unig y graddau, ond hefyd y dull o wneud, am ein bod ni mewn perygl o gael setliad rhif

The schedule to the agreement, which is at Annex C, I think—sorry, Annex B and C together—is some kind of preview of how the UK Government is likely to view this. It is of great concern to me, I have to say, to see the extent to which they propose to reserve powers, particularly when we come to talk of such things as the criminal law and civil law, which to all intents and purposes leaves nothing left apart from public law—and it is not only the extent, but also the way in which it’s being done, because we are at risk of having settlement number four for Wales that

pedwar i Gymru a fydd hyd yn oed yn fwy cymhleth efo mwy o ffiordau cymhleth ynddo fo na'r un sydd gyda ni yn barod.

will be even more complex and with even more complex fjords in it than we already have.

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

Suzy Davies: Thank you very much.

[23] Professor Tomkins, have you anything to add or challenge to that?

[24] **Professor Tomkins:** Yes, thank you very much. I agree with most of what's been said so far, so if the committee is looking for significant disagreement amongst your witnesses, I think you're likely to be disappointed. I think that the move from a conferred powers model to a reserved powers model in and of itself should not be expected to lead to an increase in devolved power for the Assembly or the Welsh Assembly Government. I agree with the metaphor of the room that has been outlined by your previous witnesses, that what matters is how big the room is, rather than how it's described from the outside. I think that's a very apt way of putting it.

[25] There are two technical points about the drafting that the committee might want to bear in mind. The first, which hasn't so far been mentioned, is the importance of section 154(2) of the Government of Wales Act 2006—there's an equivalent in the Scotland Act 1998—where it is provided that a provision of an Act of the Assembly is to be read as narrowly as is required for it to be within competence, if such a reading is possible. This provision, which, as I say, has an analogue in the other devolution legislation elsewhere in the United Kingdom, is very important. The equivalent hasn't been used very widely in Scottish case law, but section 154(2) has been used, I think, to good effect by the Supreme Court in the agricultural wages reference of 2014, to which reference has already been made. It's quite striking that, in his leading judgment, in the more recent asbestos diseases case, Lord Mance didn't refer to section 154. The point for the committee, I think, is to ensure that, in any new Wales Bill or Wales Act, there is an equivalent of section 154. This is a provision that, to all intents and purposes, says that, in cases of doubt, the benefit of the doubt shall be given to the view that would hold the relevant legislation to be intra vires rather than ultra vires. That's the first point about the drafting that I would make.

[26] The second point about the drafting that I would make goes to this phrase, 'relates to', which your previous witnesses have already referred to. The case law of the Supreme Court illustrates that the way in which 'relates to' works, in the context of Schedule 7, sometimes benefits and sometimes disbenefits those who would like the Welsh Assembly's competence to be broadly, generously or amply interpreted. It helped in the agricultural wages reference, and it didn't help—it got in the way, because of the way in which Lord Mance and the majority interpreted it—in the more recent case about asbestos diseases.

[27] So, again, I'm just echoing really what's already been said on this. Of course, the statutory language—the text of the statute—matters, but what also matters are the techniques that the Supreme Court and other courts will use to interpret that legislation. There isn't very much, in my view, that a legislature of any description should do to instruct the courts as to how legislation passed by that legislature should be interpreted. These are just points, I think, to bear in mind.

[28] **Suzy Davies:** Thank you. On that last point about how specific the legislature needs to be, all of you—well, both of you—have commented on the potential effect of the two Supreme Court decisions on legal thinking as regards the reserved powers model. Really, how certain should the UK Parliament attempt to be in defining the list of what is actually meant by reserved powers? And how influential should the consultation that's been promised be on the final drafting? The UK Government has said that it will consult with Welsh Government, the Assembly and members of the public with an interest in this. Are you confident that such

a consultation is likely to produce useful guidance, shall we say, to the legislators? There were two questions together there. I don't mind who answers first.

14:45

[29] **Professor Watkin:** I think it's very important that the Welsh Government and the Assembly are involved in consultation prior to a Bill being presented to Parliament. What worries me is how long it would actually take to reach agreement in such a consultation process. One could characterise the negotiations that took place between the drafting of legislative competence Orders in the third Assembly and their eventual submission to the Assembly and to Parliament as being such a process of consultation and negotiation. There are in the public domain two instances where one can see the fruit of that—the environment LCO and the Welsh language LCO, where there were two versions published before the second one was approved. That did not, I don't think, produce what one might call clarity and freedom from complexity, and what really worries me is that I think we may be treading the same road but accumulating a great deal more in the way of matters, definitions and exceptions at the present time. So, while I would think that such consultation is important, I fear what the outcome of such a process will be.

[30] **Suzy Davies:** Diddorol.

Suzy Davies: Interesting.

[31] **Mr Lewis:** I ddelio gyda'ch cwestiwn cyntaf chi, wrth gwrs, mae deddfwriaeth yn Llundain yn gallu gosod y fframwaith ar gyfer dehongli, fel yn achos adran 154 sydd eisoes wedi cael ei chrybwyll. A po fwyaf o eglurder y gellir ei gael heb dresmasu ar annibyniaeth y farnwriaeth, po orau, wrth gwrs.

Mr Lewis: To deal with your first question, of course, legislation in London can put in place a framework for interpretation, such as in the case of section 154 which has already been mentioned. The greater the clarity one can have without interfering too much with the independence of the judiciary, the better, of course.

[32] I ddelio â'r ail bwynt, rwy'n credu bod angen sefydlu rhai egwyddorion yn gyntaf a cheisio cael cytundeb ar rai egwyddorion ynglŷn â beth rydym yn ceisio ei greu, achos nid yw deddfu am Gymru yn digwydd mewn gwagle llwyr; mae'n digwydd yn erbyn cyd-destun deddfu pellach mewn perthynas â'r Alban, a hefyd, o bosib, deddfu pellach mewn perthynas â deddfwrfa Lloegr. Ac, rwy'n credu, os oes yna neges i ddod o Gymru, un neges yw: mae angen i hyn fod yn broses o ymbweru ac egluro—bod yn eglur ac yn bwerus—yn hytrach na thynnu pwerau nôl a chreu amwysedd, ansicrwydd a phrosesau biwrocrataidd newydd rhwng gallu y ddeddfwrfa yma i ddeddfu a'i dymuniad i ddeddfu.

To deal with your second point, I do think that we need to establish some principles first of all and seek agreement on some principles as to what we are endeavouring to create, because legislating for Wales doesn't happen in a vacuum; it happens in the context of further legislating in relation to Scotland, and possibly in relation to the English legislature. And, I believe, if there is to be a message from Wales, then that message should be that this needs to be a process of empowerment and clarification—to be clear and powerful—rather than withdrawing powers and creating ambiguity, uncertainty and new bureaucratic processes between the ability of this legislature to legislate and its aspiration to do so.

[33] Jest i daro un nodyn arall, roeddem ni, yn sgil achos amaethyddiaeth, yn credu bod yma feini prawf go eglur ynglŷn â '*relates to*'. Yr anhawster yw bod yr ail achos—yr achos asbestosis—wedi creu ffordd newydd o edrych neu wedi gweithredu'r ymadrodd yna mewn ffordd

Just to mention one other thing, in light of the agricultural sector case, we did think that there were some quite clear criteria in terms of the 'relates to' test. The difficulty is that the second case, relating to asbestosis, has created a new way of looking at or has applied that phrase in a different way. It has

wahanol. Mae hefyd wedi awgrymu nifer o ffyrdd eraill o ddehongli deddfwriaeth, yn enwedig Atodlen 7, sydd ddim wedi cael eu crybwyll o'r blaen. Nid ydynt cweit yn rhan o benderfyniad y Goruchaf Lys, ond maen nhw'n awgrymu ffyrdd ymlaen a fyddai yn cyfyngu'n sylweddol. Felly, y pwynt yw ein bod ni'n ôl mewn sefyllfa o hyd yn oed fwy o ansicrwydd nag oeddem ni.

also suggested a number of different ways of interpreting legislation, particularly Schedule 7, which haven't been mentioned before. They're not quite part of the Supreme Court's decision, but they do suggest ways forward that would significantly restrict the Assembly. So, the point is that we are back in a situation where there is even greater uncertainty than there was before.

[34] **Suzy Davies:** Ie, rwy'n gweld hynny. Diolch.

Suzy Davies: Yes, I see that. Thank you.

[35] Professor Tomkins, do you think that this robust consultation that we're supposed to be having is likely to increase the wiggle room, shall I say, in the interpretation of the current section 154, particularly if it's reinvented in the new legislation? Or must that be put to one side in order for us to have more certainty on the interpretation in future? What I'm asking effectively is, if we ask too many people about how this new Bill should look and what a reserved powers model should look like, is that going to create uncertainty or encourage more uncertainty than we have at the moment, or should we be looking to tighten up the interpretation problems we already have? Well, not 'problems', but—

[36] **Professor Tomkins:** I think I would make a distinction here, if I may. I would distinguish on the one hand the drafting of the powers that are to be reserved to Westminster and Whitehall in the Schedules of the new legislation. That's one point, and I would distinguish from that the way in which courts and others then go about the task of interpreting the meaning and application of those reservations. It seems to me that one of the benefits of Wales moving from a conferred powers to a reserved powers model is that it will underscore the extent to which there are similarities between the three different devolution regimes in the United Kingdom. Of course, there will also remain differences, but it will underscore, it seems to me, the extent to which there are similarities. This has been quite important in the jurisprudence of the UK Supreme Court, where you can see deliberate attempts being made by the justices to read across from the Welsh settlement to the Scottish settlement and vice versa, so that, for example, we now have the beginnings—and it is just the beginning—of a kind of coherent body of devolution case law that says, for example, things like this: that devolution is intended to be a system of government that is coherent, stable and workable—you see that phrase being used both in Welsh cases and Scottish cases; that the devolved legislature has enjoyed plenary law-making powers; and that, within the limits of their competence, as set by Westminster, they possess what's been described by the courts as a generous grant of legislative authority. That's from a Scottish case, but, again, I'd suggest that it would be easier for the court to read that across into the Welsh context if the model is broadly the same, even if the detail of the reservations is different in the two cases.

[37] So, consulting about the way in which the court should interpret the legislation is probably, I would have thought, undesirable and unlikely to be particularly fruitful. But, consulting on the former issue—that's to say, what powers should be reserved to Westminster and how those reservations should be constructed in the light of the recommendations of the Silk report and last February's Government paper, and so on and so forth—might be helpful. But, goodness, there's already been an awful lot of consultation about this. I think what we need to see is some text. I don't know what the processes are that the Wales Office proposes to use, but I would have thought that a sensible process from here would be the publication of draft clauses that can be put to pre-legislative scrutiny both in the United Kingdom Parliament and in your Assembly, and that through the process of pre-legislative scrutiny of draft legislation, which doesn't need to take very long—it can take a few months; it certainly doesn't need to take years—improvements can then be made to a Bill that could be enacted

fairly rapidly through the United Kingdom Parliament next year. But I don't know if that is either the timetable or the procedure that the United Kingdom Government are envisaging.

[38] **Suzy Davies:** Thank you very much. Alun.

[39] **Alun Davies:** I certainly think that the level of pre-legislative scrutiny would be very welcome. Can I take this back to you, Professor Watkin? In your opening answer you talked about room and having room to move. My feeling has always been that the reserved powers model expressed properly, rather than as a straitjacket, provides that breathing space, if you like. You seem to be arguing that additional conferred powers would provide more breathing space. Is that a correct interpretation of that remark?

[40] **Professor Watkin:** No, I don't think so. My concern is that I don't think that either the reserved powers or conferred powers models, of themselves, produce a clear settlement or a settlement that is free of complication. I think what is needed is space in which to manoeuvre legislatively. You can give a large room and then clutter it with furniture, which is how I would characterise some of the exceptions that might be brought in, which you can't touch, or it can be a very confined space. But, I think what gives the Scottish settlement its advantage and what has made it appear attractive from Wales is the space that Scotland has to legislate. I certainly would not argue that conferred powers, or adding to conferred powers, would of themselves improve things, although it obviously would increase the competence that one has. But I worry that, when it's actually giving here another opportunity—another bite at the cherry—with regard to how you actually confine Wales's powers and that the outcome will be one that will not deliver the hopes that have been invested in this move.

[41] **Alun Davies:** Well, I certainly wouldn't trust this current UK Government to act in our best interests, but—

[42] **Professor Watkin:** My point wasn't party political, Mr Davies. I did mention that the previous settlement had its difficulties, when there was a different party in power.

[43] **Alun Davies:** Sure, but let me make this point: we've got to start from somewhere, and we either start, it appears to me, with a conferred powers model or a reserved powers model. So, which is it to be?

[44] **Professor Watkin:** If I had a completely free choice for a fresh start, I think I would opt for the reserved powers model.

[45] **Alun Davies:** And the reserved powers model then provides us with, as you say, the space in order to operate, and we then need to look at what those exceptions to those powers actually are.

[46] **Professor Watkin:** Yes, but the reason I would opt for the reserved powers model would be tied to something else: that is, I would want to see very limited reservations, because what would actually, for me, I think, govern the choice between the two models is the extent of what was being devolved. If I was sending somebody shopping, I would give them a shopping list telling them what I wanted them to buy, not what I did not want them to bring back. Likewise, if I was purchasing a whole warehouse of goods, I might say what I wanted to exclude. It would depend upon what I was actually trying to achieve.

[47] **Alun Davies:** Sure, I accept that, but we need to look here at—. So, if we accept that the reserved model—. I don't know, Mr Lewis, whether that would be your view as well. You seem to share some—.

[48] **Mr Lewis:** Rwyf i, fel y dywedais i, **Mr Lewis:** As I said, I'm more of an

yn fwy o optimist. Fel ffaith wleidyddol, rydym ni'n mynd i gael model o bwerau wedi eu cadw nôl. Mae hynny'n ffaith wleidyddol; dyna yw dymuniad y Llywodraeth yn Llundain, ac maen nhw wedi sôn am hynny, i bob pwrpas, o fewn araith y Frenhines. Felly, mae'n mynd i ddigwydd. A bwrw mai dyna'r lle ydym ni, mae'r sgwrs pa un ai a ddylem ni ei gael e ai peidio bron â bod yn sgwrs nad oes angen inni ei chael. Beth rwy'n bryderus yn ei gylch ydy a ydy'r gymdeithas sifig yng Nghymru ac a ydy'r gwleidyddion yng Nghymru yn mynd i ymarfogi i sicrhau nad ydy hwn yn mynd yn rhyw fath o ymarferiad *pettifogging* rhwng gweision sifil yng Nghaerdydd ac yn Llundain ynglŷn â phwy sy'n cael beth, ac ein bod ni'n edrych ar hwn fel ystafell ddigon cysurus i bawb fod ynddi.

optimist. As a matter of political fact, we are going to have a reserved powers model. That's just a political fact; that is the aspiration of the Government in London, and it was mentioned, to all intents and purposes, in the Queen's speech. So, it's going to happen. Given that is where we are, the conversation as to whether it should happen or not is a conversation we don't need to have. What I'm concerned about is whether civic society in Wales and politicians in Wales are going to empower themselves to ensure that this doesn't become some sort of exercise in pettifogging between civil servants in Cardiff and in London as to who gets what, and that we look at this as a room that is comfortable enough for everyone, if you like.

[49] I mi, mae yna elfennau o'n setliad presennol ni lle mae eu cymhlethdod, yn rhannol beth bynnag, i'w briodoli i'r ffaith ei fod yn etifedd setliad a oedd dim ond yn weithredol ac nid yn ddeddfwriaethol. Mewn sefyllfa lle rydych yn rhoi pwerau gweithredol i berson, wrth gwrs, rydych yn eu rhoi nhw damaid wrth damaid, fel arfer, er mwyn gallu sicrhau bod eu grymoedd nhw o fewn cyfyngiadau sy'n dderbyniol i chi. Rwy'n ofni y gallasai'r un meddylfryd fod ar waith mewn perthynas â diffinio'r setliad newydd. Un enghraifft i chi yw'r eithriad ar hyn o bryd o fewn Atodlen 7, Rhan 2, rwy'n credu, lle nad yw unrhyw rymoedd a oedd yn perthyn i Weinidogion y Goron cyn y refferendwm yn 2011 yn faterion y gall y Cynulliad hwn ddeddfu yn eu cylch oni bai eu bod nhw'n atodol, ac yn y blaen, ac yn y blaen. Rydym yn gwybod am achos yr is-ddeddfau, lle gwthiwyd y meddylfryd bychan, *pettifogging*, i'w eithaf er mwyn ceisio cwtogi grymoedd y Cynulliad hwn. Fy ngobaith i, beth bynnag, yw y byddwn ni'n gallu goresgyn hynny ac na fydd ein setliad ni, fel setliad yr Alban a Gogledd Iwerddon, yn cynnwys y math yna o eithriad.

For me, there are elements of our current settlement where the complexities can be attributed, in part at least, to the fact that it stems from a settlement that was only executive and not legislative. In a situation where you give executive powers to a person, of course, you give them piecemeal, generally speaking, in order to ensure that their powers are within limitations that are acceptable to you. I fear that the same mindset could be at work here in defining this new settlement. To give you one example, there is an exception at present within Schedule 7, Part 2, I think, where functions of Ministers of the Crown prior to the referendum in 2011 are not issues that this Assembly can legislate on, unless they are supplementary, and so on and so forth. We know of bye-laws case legislation, where that pettifogging mindset was pushed to its extremes in order to limit the powers of this Assembly. My hope, at least, is that we will be able to overcome that problem and that our settlement, like the Scottish and Northern Irish settlements, won't include those kinds of exceptions.

[50] **Alun Davies:** Rwy'n cytuno â hynny.

Alun Davies: I agree with that.

[51] Professor Watkin, you also expressed some concern about an issue in the 2014 Act, where powers have been taken back, which I presume would refer to some of the concerns that have just been expressed.

[52] **Professor Watkin:** It's exactly the point to which Emyr just referred; that is, the

issue in the Local Government Byelaws (Wales) Bill was whether or not the removal of the Secretary of State's power to confirm bye-laws was consequential or incidental upon what the president of the Supreme Court said was the modernisation of the method of making bye-laws in Wales—the streamlining, indeed, of the method of making bye-laws in Wales.

15:00

[53] Now, quite clearly, the Supreme Court judgment states that what is consequential or incidental is, according to Lord Neuberger, a matter of fact or degree, and according to Lord Hope a matter of comparison. Clearly, it's not something that can be exactly defined. Now, you can argue, if you like, that you would achieve much greater clarity, therefore, if you said that, whenever you wish to remove or modify a Minister of the Crown function, you must have consent. You have removed the doubt about what is consequential or incidental and replaced it with great clarity, but you have paid for that clarity with a loss of competence. You've paid the price in the currency of competence, and that's exactly what the 2014 Act has done when it has conferred powers upon the Welsh Assembly in a limited context to confer functions on HMRC or to remove or modify HMRC functions. That requires the consent of the Treasury, and there is no accommodation for consequential and incidental matters. You've got greater clarity—you've got to get consent—but you paid for that clarity with the loss of competence.

[54] **Alun Davies:** That's interesting.

[55] **Professor Tomkins:** That's a very insightful and important lesson. I think what we're considering here really are the limits of law. Law can help you only so far, and the more doubt there is the more suspicion there is on one side or the other that the other Government or the other Parliament won't act in good faith or however you want to describe it. But the more you want to enshrine these matters in law, the less room for manoeuvre you'll have. Law and rules limit discretion. So, if you want to maximise the room for manoeuvre, if you want to maximise the room for discretion, then the way to do that is by having a very good faith open and transparent relationship with other parties who are on the other side of it—with the Government.

[56] But look, as far as I understand it—please correct me if I'm wrong—no-one is going to force a conferred powers model on a National Assembly that doesn't want it. If, once you've seen the legislation, you think, 'Hang on, these reservations are so broadly drafted that this is a model that is not worth having. This will effectively curtail and limit our competence', then withhold your consent for the measure in question and the United Kingdom Parliament won't enact it—consistent with what, in Scotland, we call the Sewel convention—if the United Kingdom Parliament doesn't have the consent of the Welsh Assembly. So, this is not a process in which one side is forcing an outcome on another side. It is an iterative process, it is a consultative process, and it is a co-operative process, which is exactly what devolution was designed to be and what devolution is when it works best.

[57] **Alun Davies:** But, in terms of a collaborative approach, quite often, my experience tells me there's more collaboration when UK Government agrees with you and less collaboration when they don't. That's certainly what I've found in Government. In terms of where we are now, how would you foresee the consultation with the National Assembly on powers? You heard an example of where the powers of the National Assembly were potentially limited by Parliament acting without the consent of the National Assembly. Are we moving to a situation now, do you believe, where 'devolution' is perhaps an odd term to use because we are now moving perhaps to a position where the powers here are established powers, entrenched powers and powers that can and should only be amended with the consent of this place and not amended unilaterally?

[58] **Professor Tomkins:** I have to say I've come really to detest the term 'devolution' because it doesn't do any work, particularly it doesn't do any work on the doorstep, and it's become very jargonistic and people here, as you will know, abbreviate it to 'devo' and then add whatever word after that that they want to, so we've got 'devo plus' and 'devo less' 'devo more' and 'devo even more' and 'devo one day' and 'devo max' and all the rest of it. The language in Scotland is beginning to turn away from the language of devolution and towards the language of home rule. Now, no-one has ever defined home rule, and it would be, I think, a very profitable exercise to define it, but I certainly don't like the word 'devolution'. I'm not entirely sure what it means, and it has no resonance on the doorstep. It certainly has no resonance on the doorstep in Scotland. Whether it has resonance on the doorstep in Wales, I can't say, but I think we should start thinking about home rule and a federal or quasi-federal union rather than devolution. But that's an academic's point.

[59] **Suzy Davies:** Have you finished?

[60] **Alun Davies:** I just wondered if the witnesses here would wish to comment on that.

[61] **Professor Watkin:** My worries about what's been said about consultation and negotiation arise mainly from what the First Minister said in London, I think, a few weeks ago, where his comment was that

[62] 'neither I nor my officials have had sight of any draft clauses, and there has been no substantive discussion between the UK and Welsh Governments'.

[63] That doesn't augur well, unfortunately, for the sort of process that is being advocated and a process that, certainly, I think I would support, but it doesn't appear to be occurring.

[64] **Mr Lewis:** Fe ddywedodd Edmund Burke am y *holy Roman empire*:

Mr Lewis: Edmund Burke said of the holy Roman empire:

[65] 'It's neither holy, nor Roman, nor an Empire.'

[66] Fe ellid dweud am gytundeb Gŵyl Ddewi, rwy'n credu, nad ar Ŵyl Ddewi y'i gwnaed, ac nid yw'n gytundeb. Mae e'n dangos natur anghytundeb ac mae tipyn o waith cytuno i'w wneud.

One could say of the St David's Day agreement, I think, that it wasn't made on St David's Day and it's not an agreement. It shows lack of agreement and there's a great deal of agreeing to be done.

[67] **Suzy Davies:** Could I just ask very quickly: do any of the three of you conceive of the possibility of the UK Parliament proceeding with an arrangement that the Assembly didn't agree with? Can you foresee that as likely in any circumstances? Perhaps you'd care not to answer that; that's fine.

[68] **Professor Tomkins:** It's not likely at the moment, it seems to me. If the Assembly makes it clear that it's withholding its consent for the next round of Welsh devolution, then I think it's very unlikely indeed that the United Kingdom Parliament would wish to proceed.

[69] **Suzy Davies:** Okay. Thank you.

[70] **Professor Watkin:** If I could just add that what worries me about that is not so much would the UK Parliament legislate in the teeth of the Assembly's opposition, and I emphasise I'm not making a point that is party political in any sense, but I do worry that, if the Assembly turns down something where there was a consensus that it wanted it, much political mileage will be made out of the fact that, having asked for something, we then turned it down when offered it.

[71] **Alun Davies:** Do you have something in mind—

[72] **Professor Watkin:** Pardon?

[73] **Alun Davies:** Do you have something in mind when you said that?

[74] **Professor Watkin:** Do I have—?

[75] **Alun Davies:** Do you have something in mind when you said that?

[76] **Professor Watkin:** I just fear that it will be used as a way of saying basically that Wales doesn't know what it wants.

[77] **Suzy Davies:** Let's hope not. Dafydd Elis-Thomas.

[78] **Yr Arglwydd Elis-Thomas:** Diolch yn fawr, Gadeirydd. Rwy'n ymfalchïo yn y ffaith bod cytundeb ymhlith ein tystion heddiw bod y ddau lwybr o bwerau wedi'u cadw'n ôl ac o bwerau wedi'u gosod ar Gymru yn cyrraedd yn yr un man os ydym yn cael ein clymu gan eithriadau. Rwy'n meddwl ei bod yn bwysig iawn gwneud y pwynt yna yn gyhoeddus ac yn gyson a'i fod yn rhan o ddyletswydd y pwyllgor yma, fel pwyllgor cyfansoddiadol, i ddangos ble mae'r diffygion mewn cyfansoddiad yn arwain at dywyllu cyngor mewn disgwrs democrataidd. A hynny yw'r peth sylfaenol i mi. Fel un a fu â chyfrifoldeb ynglŷn â cheisio rhedeg y drefn ddiffygiol sydd wedi bod gyda ni bellach ers 1999, nid oeddwn erioed yn meddwl y byddem ni yn parhau i bentyrru eithriadau a chyfyngiadau yn yr adeg yma ond y byddem ni yn symud i sefyllfa o ddatganoli lle mae na eglurder ynglŷn â beth sydd yn briodol a beth sydd gan Gymru, a beth gall Cymru ei wneud, a beth na all Cymru ei wneud. A dyma fy nghwestiwn i, sef: a fyddech yn cytuno bod cyfansoddiad niwlog yn arwain at wleidyddiaeth ddiffrwyth? Nid pwynt gwleidyddol yw hwnnw yn yr ystyr pleidiol, ond pwynt cyffredinol am natur y cyfansoddiad rydym wedi gorfod byw gydag e.

Lord Elis-Thomas: Thank you very much, Chair. I am very pleased about the fact that there is agreement amongst our witnesses today that the two paths of reserved powers and conferred powers for Wales reach the same destination if we are bound by exceptions. I think it's very important to make that point publicly and consistently, and that it's part of the duties of this committee, as a constitutional committee, to show where the deficiencies in the constitution lead to a clouding of the advice in democratic discourse. And that's the fundamental issue for me. As someone who had responsibility for trying to run the deficient arrangement that we've had since 1999, I never thought that we would continue to pile up exceptions and restrictions at this time, but that we would rather move to a situation of devolution where there is clarity about what is appropriate and what Wales has, and what Wales can do, and what Wales can't do. And this is my question, namely: would you agree that a nebulous constitution leads to deficient politics? That's not a political point in the party political sense, but a general point about the nature of the constitution that we've had to live with.

[79] **Mr Lewis:** Po leiaf y sicrwydd ynglŷn ag ystod y grym yr ydych yn ei weithredu, po fwyaf o amser y byddwch yn treulio yn pryderu ac yn dadlau am hynny yn hytrach na gweithredu'r grym hwnnw. Os mai dyna oedd gyda chi mewn golwg, yna rwy'n cytuno, ond efallai eich bod eisiau traethawd 2,000 o eiriau; nid wyf yn siŵr,

Mr Lewis: The less certainty about the limit of the power that you can exercise, the more time you will spend worrying and arguing about that than actually exercising that power. If that's what you had in mind, then I agree, but you may want a 2,000 word essay; I'm not sure, but that's how I see it.

ond dyna sut rwyf i yn ei gweld hi.

[80] **Yr Athro Watkin:** Beth rwy'n ei ofni yw y bydd y setliad newydd gyda phwerau wedi'u cadw'n ôl—os oes yna nifer mawr iawn o bwerau sydd wedi cael eu cadw yn ôl—fel rwy'n credu y mae Emyr yn ei ddweud, y byddech chi'n gwastraffu lot o amser yn gofyn cwestiynau: 'A ydy hyn mewn; a ydy hyn y tu allan?', ac mae hynny, felly, yn rhwystro'r cyfle o ddatblygu polisïau ar gyfer Cymru. Byddech chi'n ofni mynd yn rhy agos at y ffin. Un peth da a ddaeth o'r Bil Sector Amaethyddol (Cymru) oedd yr hyder o wybod lle oedd y ffin, a mynd yr holl ffordd at y ffin wrth ddeddfu. Cyn hynny, rwy'n credu, roedd yna ryw fath o ofn a phryder ynglŷn â gwneud hynny. Rwy'n ofni, os byddwn ni'n cael setliad newydd gyda nifer mawr o faterion wedi'u cadw'n ôl, y bydd yr ofn a phryder yn dychwelyd i waith deddfu yng Nghymru, a byddwn ni'n colli'r hyder.

Professor Watkin: What I'm concerned about is that the new settlement with reserved powers—if there are a great many powers that have been reserved—as I believe Emyr says, you would be wasting a great deal of time asking questions: 'Is this in, or is this out?', and that then is a barrier to the opportunity to develop policies for Wales. You'd be too frightened to go to the boundary of what's possible. One good thing that arose from Agricultural Sector (Wales) Bill was the confidence of knowing where the threshold was, and you could go up to that threshold in legislating. Before then, I think there was some kind of concern and fear in relation to that. I am concerned, if we do have a new settlement with a great many matters being reserved, that fear and concern will return to haunt the work of legislating in Wales, and we'll lose that confidence.

[81] **Lord Elis-Thomas:** Can I also ask Professor Tomkins? You've given me now the academic authority I need never to use the word 'devolution' again.

[82] **Professor Tomkins:** I don't think you needed any academic authority for that, but you're welcome. It seems to me that what is happening in Scotland at the moment that is getting in the way of good policy—which is, I think, what you are driving towards—is that we're spending far too much time thinking about the constitution. Now, this is good for me, because I'm a constitutional lawyer, and I like thinking about the constitution, and I like the fact that the constitution is topical, and it's been very useful in supplementing my income stream, so I'm not arguing against it. But I don't think it's good politics, I don't think it's good for Scotland, I don't think it's good for the public, and I think the United Kingdom Government is also very clearly and firmly of this view. If you look at the language, both that the outgoing coalition and the incoming Conservative Government were using and are using, the word 'settlement' is there all the time. So, the Wales paper is called 'Towards a lasting devolution settlement', and the Scotland draft clauses were called, 'An enduring settlement', and this may very well be hope rather than expectation, but the hope is nonetheless there. I think there is a growing sense in Whitehall, and a growing sense, also, probably, in Westminster, that we have been fiddling with, changing, tinkering and adjusting the devolution settlements, which haven't been very settled, for both Scotland and for Wales for too long. There is a desire—and, again, I'm not naïve about how difficult it will be to realise this desire, but, nonetheless, there is a desire—to turn Ron Davies's famous aphorism on its head, and say that devolution is no longer an ongoing process, it is something that has been delivered: now get on and make it work.

[83] Now, I don't know whether either the current Scotland Bill or the next Wales Bill will be the final milestones in the journey towards Welsh and Scottish home rule. I don't know for the same reasons that no-one else knows. But I think that there is a desire in the United Kingdom Government that they are. This gives, I think, the Assembly, and indeed the Scottish Parliament, an opportunity, because it increases the leverage that the Welsh Assembly and the Scottish Parliament have with regard to the United Kingdom Government. The United Kingdom Government want this problem to go away—the problem being

arguments about the structure, architecture and the content of the devolution legislation. They want this to go away. They want this to be resolved. They want it to be settled. I think the Prime Minister wants it to be one of the aspects of his legacy that he has settled and fixed the union—saved the union, safeguarded the union, made the union more robust, and all of that. I don't think he wants that to be the entirety of his legacy, but I think that he wants that to be one of the things that he is remembered for. That gives you, I think—it gives your committee, it gives your Assembly, it gives the people of Wales—greater leverage than they would otherwise have, because there is a desire on, as it were, the other side, for this now to work, and this not just to be another staging post, another 'settlement' that lasts only three or four years, or a Parliament or two.

[84] **Lord Elis-Thomas:** Can I follow that up with another question for you

[85] ac yna i'r brodyr fan hyn, hefyd? and then to my colleagues here as well?

[86] There's been some discussion in Scotland and more generally about the attempt to legislate on the lines that the Scottish Parliament and the National Assembly and the Governments in both countries become permanent institutions, and whether the UK Parliament is capable of legislating for permanence. What's your view on that, Professor Tomkins?

15:15

[87] **Professor Tomkins:** My view on that is—. The committee may or may not have heard that I was a member of the Smith Commission, and the Smith Commission is the commission that is responsible for bringing this recommendation to the UK Parliament and the UK Government. What I can tell you is that the Smith Commission was not seeking to change UK law, not least because seeking to change UK law would have been well outside the terms of reference of the Smith Commission. What the Smith Commission was seeking to do was to have UK law recognise that which is already politically the case. It is already politically the case, as David Mundell put it when he was Parliamentary Under-Secretary of State for Scotland in the last coalition Government, that the continuance of the Scottish Parliament is a prerequisite of the United Kingdom. Were the United Kingdom unilaterally to act to dissolve, suspend or abolish the Scottish Parliament or the Scottish Government without the consent of the Scottish people, that would lead to an immediate and unilateral declaration of independence and the end of the United Kingdom, not just as we know it, but the end of the United Kingdom period, which obviously is not what the United Kingdom Government is trying to do.

[88] So, what the relevant clause of the Scotland Bill—I think it's clause 1 of the Scotland Bill—does is it seeks to write into law what the Smith Commission agreed, which was that our statute law should recognise that which is already constitutionally the case in terms of the force of, as it were, the political constitution, which is why the form of words that is used in clause 1 might strike one as slightly odd:

[89] 'A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements.'

[90] Those words, in my judgment, faithfully and fully implement the Smith Commission agreement on permanence, but, of course, it remains the case that the United Kingdom Parliament may as a matter of law make or unmake any law whatsoever, including repealing any or all of the Scotland Acts or Wales Acts, Government of Wales Acts, and the rest, but there will be political consequences to pay were the United Kingdom Parliament to do that.

[91] The UK Parliament cannot legislate to entrench in law anything, but the law here is

not important, and I say this as a constitutional lawyer. What the law says here isn't important. What's important—what matters, what bites—is the political reality, and the political reality is, as I've said, that continuing Scottish devolution is a prerequisite of the United Kingdom. I can't say whether the same is true in Wales or not—whether there would be a unilateral declaration of independence in Wales were Cardiff bay to be suspended. That's not a question for me; that's a question for you. But, what is intended in these provisions, and the same is true with the provision about the Sewel convention that you might want to come to in a few moments, is that statute faithfully and accurately reflects that which is already the case in the political constitution.

[92] **Lord Elis-Thomas:** I'm very grateful for that. Just finally on this—

[93] —cyn i mi ofyn i chi yr un peth— —before I ask you the same thing—

[94] —to me, the statement that 'there is to be an Assembly for Wales', which is where we started in 1998 and 2006, is of the same order of law-making as the statement, 'And it shall be in perpetuity for as long as we can make it', as it were. Those issues are about, as you say, the political and constitutional recognition of what is being created, and it's about giving that a formal basis in law, and I don't think that that is contrary to—. It may be unusual in UK law, but it is not unusual as—.

[95] Fel mae'r Athro Thomas Watkin yn gwybod—ni allaf siarad Saesneg efo'r Athro Thomas Watkin na gydag Emyr Lewis. Fel rydych chi'ch dau yn gwybod, mae trefn deddfu ar y tir mawr dipyn bach yn fwy athronyddol a dipyn bach yn fwy agored nag ydy'r traddodiad yn y Deyrnas Unedig. A fyddech chi'n cytuno â hynny?

As Professor Thomas Watkin knows—I can't speak English to him or to Emyr Lewis. As you both know, the legislative regime on the mainland is a little bit more philosophical and a bit more open than the tradition in the United Kingdom. Would you agree with that?

[96] **Yr Athro Watkin:** Rwyf yn cytuno, ac rwy'n falch eich bod wedi dweud hynny. Rwy'n falch hefyd fy mod wedi clywed oddi wrth yr Athro Tomkins o le mae'r geiriau '*is recognised*' wedi dod, oherwydd rwy'n credu eu bod yn eiriau pwysig. Maen nhw'n eiriau sydd yn hollol anghyffredin yn neddfwriaeth y Deyrnas Unedig, ond, fel rydych yn dweud, maen nhw'n gyffredin iawn yng nghyfansoddiadau gwledydd Ewrop a gwledydd ledled y byd. Beth mae'n ei adlewyrchu yw'r ffaith bod yr hyn sydd yn y cyfansoddiad yn cydnabod bod hawliau yn bodoli sydd yn bodoli eisoes, cyn i'r wladwriaeth ddeddfu. Yr enghreifftiau cliriach, efallai, yw lle rydych chi'n delio â hawliau dynol, lle rydych yn gweld y wladwriaeth yn cydnabod bod yna hawl gyda chi i ryddid, neu i fywyd, neu beth bynnag. Ond hefyd, mewn cyfansoddiadau, rydych chi'n gweld hawliau grwpiau, fel y teulu, cymdeithas, undebau llafur, neu grwpiau sydd yn cynrychioli cenhedloedd y tu fewn i'r wladwriaeth. A'r hyn sy'n digwydd yma, rwy'n credu—ac rwy'n meddwl ei bod yn

Professor Watkin: I do agree, and I'm pleased you said that. I was also pleased to have heard from Professor Tomkins where the words 'is recognised' have come from, because I believe that they are very important words. They are very unusual words in UK legislation, but, as you say, they are very common in the constitutions of the nations of Europe and nations across the globe. What they reflect is the fact that what is contained within the constitution does recognise that rights exist that existed already, prior to the state legislating for that. The clearest examples, perhaps, are where you would deal with human rights, where you see a state recognising a right to life, or a right to freedom, or whatever else it may be. But also, in constitutions, you see the rights of groups, such as the family, communities, trade unions, or groups representing nations within those states. And what's happening here, I think—and I think it's important that it doesn't say, 'The Scottish Parliament', it's, 'A Scottish Parliament'—and what this recognises, for me, is the fact that the people

bwysig nad ydynt yn dweud, ‘The Scottish Parliament’, ond, ‘A Scottish Parliament’—a beth mae hwn, i fi, yn ei gydnabod yw’r ffaith bod yna hawl gan bobl yr Alban i ryw fath o drefn lywodraethol ar eu cyfer. Mae hynny’n bwysig iawn.

of Scotland have a right to some sort of system of governance for them. That’s extremely important.

[97] A’r cwestiwn sy’n dod i fy meddwl i yw hwn: ai yn Neddf yr Alban yw’r lle iawn am y math yma o ddatganiad, neu a ddylai fod hwn yn un o’r hawliau mewn rhyw Fil hawliau Prydeinig, sydd yn dweud bod hawl gan bobl Cymru, a phobl yr Alban, i senedd, neu gynulliad, neu beth bynnag? Rwy’n cytuno, wrth gwrs, unwaith rydych chi’n ei roi e mewn Deddf seneddol yn y Deyrnas Unedig, o ran y gyfraith, mae’r sefyllfa yn un o natur barhaus, oherwydd, yn ôl y gyfraith, y mae. Ond, nid oes gan y ddarpariaeth ei hunan natur barhaus, oherwydd sofraniaeth y Senedd.

The question that springs to my mind is this: is the Scotland Act the right place for this kind of statement, or should this be one of the rights in some Bill of British rights, which states that the people of Wales, the people of Scotland, have a right to a parliament, or an assembly, or whatever else it may be? I agree, of course, that, once you do place it in an Act of Parliament in the UK, then, as a point of law, the position is permanent, because that’s what the law dictates. But the provision itself doesn’t have permanence, because of the sovereignty of Parliament.

[98] **Mr Lewis:** Mae’r gair ‘sofraniaeth’ yn allweddol yma, oherwydd mater o theori cyfansoddiadol Prydeinig ydy’r cysyniad o sofraniaeth y Senedd, sydd yn cael ei dderbyn yn y llysoedd fel bod y Senedd yn sofran dros bob dim. A’r hyn sy’n digwydd yn y fan hyn ydy, bron a bod, poenau geni math newydd o sofraniaeth. Mae yna ryw ystyriaeth bod sofraniaeth yn rhywbeth deuol. Os edrychwn ni ar y gwledydd a fu gynt yn rhan o’r Ymerodraeth Brydeinig, mae pob un wedi cael ei Deddf seneddol yn datgan ei hannibyniaeth, ac sydd, mewn ffordd, yn ildio sofraniaeth. Byddai modd, mae’n siŵr, mewn theori, i ddeddfu eto i ail ddod â Chanada o dan San Steffan, ond go brin y byddai hynny’n digwydd fel ffaith wleidyddol, ond, hefyd, mae yna gwestiwn a fyddai o’n weithredol yn gyfreithiol, oherwydd bod yna ildio sofraniaeth wedi digwydd. A rhywle yn y cysyniad yma y gallasai fod yna rywfaint o ildio sofraniaeth, rwy’n credu, y mae’r ffordd ymlaen.

Mr Lewis: The word ‘sovereignty’ is crucially important here, because the concept of the sovereignty of Parliament is a matter of British constitutional theory, which is accepted in the courts so that Parliament is sovereign over all. And what’s happening here is the birthing pains, almost, of a new kind of sovereignty. There is this consideration that sovereignty has a dual aspect. If we look at nations that were once part of the British Empire, all have had their own parliamentary Acts declaring their independence, and which, in a way cede sovereignty. So you could, in theory, legislate again to bring Canada back under the auspices of Westminster, but it is unlikely that that would happen in political fact, but there is also a question of whether it would be effective in law, because there’s been a ceding of sovereignty. And somewhere within this concept that there could be some ceding of sovereignty, I think, may be the way forward.

[99] **Yr Arglwydd Elis-Thomas:** Wrth gwrs, roeddwn i yno pan ddigwyddodd y mesur diweddaraf o basio sofraniaeth i Ganada, ac roedd hwnnw’n ymarferiad diddorol iawn, yn gyfansoddiadol. Diolch yn fawr, Gadeirydd; rwyf wedi cymryd gormod o amser.

Lord Elis-Thomas: Of course, I was there when the latest act of passing sovereignty to Canada took place, and that was a very interesting exercise, in constitutional terms. Thank you very much, Chair; I have taken up a great deal of time.

[100] **Suzy Davies:** Anyone else on this area? Otherwise, Peter.

[101] **Peter Black:** Thank you. The Silk 2 report recommended that the legislative consent—

[102] **Suzy Davies:** Sorry, Peter. Apologies.

[103] **Professor Tomkins:** Sorry, can I say one thing about sovereignty, before we leave it? It is, of course, true that the United Kingdom Parliament may make or unmake any law whatsoever, and this is sometimes called a doctrine of sovereignty, because that's what Dicey called it 150 years ago, or 140 years ago. That isn't, really, a doctrine of sovereignty; it's a doctrine of legislative supremacy. Sovereignty in Scotland rests with the Scottish people, and this has been recognised, not in statute, but in the Claim of Right for Scotland, which says that,

[104] 'the sovereign right of the Scottish people to determine the form of Government best suited to their needs',

[105] is fundamental to the Scottish people. That's the sovereignty claim—that's about constituent power, rather than constituted power—and there's no reflection of that, as such—not in so many words, anyway—in any of the Scotland legislation. But it is interesting, of course, that there is a sort of legal recognition of that in the context of Northern Ireland, in section 1 of the Northern Ireland Act 1998, which provides,

[106] 'that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll',

[107] et cetera, et cetera. That seems to me to be a legal statutory reflection of what's contained in the Claim of Right for Scotland extra legally, or extra statutorily, in the Scottish context.

[108] I would just want to underscore one point that was made—I'm afraid I didn't catch who made it—that it's not clear that provisions of this constitutional magnitude should be contained separately in the devolution legislation. It seems to me that one of the things that the United Kingdom needs is a new Act or statute or charter of union that sets out, among other things, the constituent power of the peoples, of the nations of the United Kingdom and explains that the union is exactly that—it is a union of four nations coming together to pool their resources and their risks for the better government of all of the people here.

[109] So, one of the things that I have argued for in my academic writing in very recent months is that we need to move beyond—unionists such as me need to move beyond—devolution and beyond thinking about home rule, in order to start thinking about the institutions and practices of shared rule that a fully functioning union would have. So, I think it's very important that the various different ways in which sovereignty is understood in the law and in the politics of the United Kingdom is reflected somewhere in this discussion.

[110] **Alun Davies:** I agree very much with what Professor Tomkins has said. I think it's a very persuasive argument for a settlement, if you like, between the peoples and the home rule Parliaments of the United Kingdom. Is this something, can I ask our two witnesses here, that we could see introduced for Wales?

[111] **Professor Watkin:** It's certainly something that I personally favour. The vision that Professor Tomkins has expressed is one that I would share and it does go to the nature of the union. That is why I think that a constitutional convention, along the lines that the First Minister has suggested repeatedly, is what is now needed within the United Kingdom. This is

reflected, I think I've said elsewhere—Emyr may have heard me say this—in the fact that, in Welsh, we have difficulty in translating the words 'United Kingdom'. Is it '*y Deyrnas Unedig*', which I've been using today, or '*y Deyrnas Gyfunol*'? The two meanings are not the same.

[112] **Lord Elis-Thomas:** It's not a comprehensive school union.

[113] **Yr Athro Watkin:** Na, ond y broblem yw, rwy'n credu, ei fod yn dangos persbectif ar wahân—mae pethau gwahanol yn hynny.

Professor Watkin: No, but the problem is, I think, that it shows a different perspective in that regard—there are different things in that.

[114] I was struck the other day when I applied for a passport for my daughter—her first adult passport—and I got a form to make the application in Welsh and it was an application form for *y Deyrnas Unedig*. But, when I got the passport back, it was called *y Deyrnas Gyfunol*. [*Laughter.*] There was disparity there. There are two perspectives. I think the perspective that we want is that of the *unedig*: four nations together, not three nations attached to one in the middle.

[115] **Yr Arglwydd Elis-Thomas:** Da iawn.

Lord Elis-Thomas: Very good.

[116] **Mr Lewis:** Mae hynny'n bwynt da iawn. Yn sicr, byddwn yn croesawu'r fath beth oherwydd byddai hynny, am y tro cyntaf, efallai, yn cydnabod math o sofraniaeth gan bobl Cymru drostyn nhw eu hunain, fel y mae'r Athro Tomkins wedi sôn amdani mewn perthynas â phobl yr Alban. Dyna pam rydym yn sôn am sofraniaeth Llundain yng nghyd-destun Cymru, oherwydd felly y mae.

Mr Lewis: That is a very good point. Certainly, I would welcome such a thing because that, for the first time perhaps, would recognise the sovereignty of the people of Wales over their own affairs, which Professor Tomkins talked about in relation to the people of Scotland. That's why we speak of the sovereignty of London in the context of Wales, because that's just how it is.

[117] **Alun Davies:** I've never thought of sovereignty as something resting with the cCown in Parliament; I've always felt it rests with the people. But, this process that we're discussing this afternoon seems very pale, in the sense that it doesn't seem to be quite rising to the challenge that is being described as part of this debate about creating a United Kingdom that's fit for the future—about creating relationships between a number of home rule Parliaments working together for the benefit of the people. This process, the St David's Day process that we're debating, doesn't seem to have risen to that challenge, does it?

[118] **Mr Lewis:** Yn fy marn i, mae angen edrych ar y setliad. Fel roeddwn yn dweud gynnau, mae angen edrych ar beth sy'n dod i Gymru yng nghyd-destun beth sy'n digwydd ar draws y Deyrnas Gyfunol. Un o'r problemau yw ein bod ni wedi bod yn edrych drwy ochr anghywir y telesgop. Yn hytrach nag edrych yn gyntaf ar yr undeb a gweld beth yw swyddogaethau'r undeb, ac i beth mae undeb yn dda yn yr oes hon, rydym wedi bod yn edrych o safbwynt beth allwn ni ganiatáu i Gymru ei gael. Rwy'n credu bod angen i'r newid meddylfryd yna ddigwydd a bydd pethau'n disgyn i'w lle—fy

Mr Lewis: In my view, we need to look at the settlement. As I said earlier, we need to look at what comes to Wales in the context of what's happening across the UK. One of the problems is that we have been looking through the wrong end of the telescope. Rather than looking first of all at the union and identifying the functions of the union, and what the union is for in contemporary times, we have been looking at this from the point of view of what we can allow Wales to have. I think that change of mindset needs to happen and then things will fall into place—that's my optimism coming to the surface

optimistiaeth i—yn llawer haws. here—far more easily.

[119] **Alun Davies:** It's always better to be an optimist.

[120] **Suzy Davies:** Okay, maybe this is why they're referring it to us in enduring rather than forever proposals. Peter, it's all yours.

[121] **Peter Black:** The Silk 2 report recommended that the legislative consent procedure should be formalised and applied as widely as the same procedure in Scotland. This is, of course, supported by all parties down here. What is the legal effect of placing the legislative consent procedure on a permanent basis in that way?

15:30

[122] **Professor Tomkins:** Well, in the way that it's been done in the Scotland Bill, if there is a read-across from the drafting of the—. Well, No. 1, if the Scotland Bill is not amended during its passage through the United Kingdom Parliament, and, No. 2, if there is then a read-across from the drafting of the Scotland Bill into any new future Wales Bill, the short answer to your question of what the legal effect is is that there isn't any legal effect because the language, again, is the language of recognising in law that it is a constitutional convention that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the relevant devolved legislature, whether in Holyrood or Cardiff bay. Again, I would like to say for the record: that is exactly what the Smith Commission envisaged. Clause 2 of the Scotland Bill, as introduced into the House of Commons last month, faithfully and fully reflects what the Smith Commission had in mind with regard to putting Sewel on a statutory basis. There was no sense in the Smith Commission that what we were trying to do was to turn that rule into a justiciable rule of law in respect of which you could go to a court and say, 'In this legislation, passed by the United Kingdom Parliament, is invalid because it has failed to comply with the Sewel convention'. That was not the intention at all. The intention was, as with the permanence issue, to have the law faithfully reflect that which is already politically true. That's the easy bit with Sewel. The difficult bit is: what is the scope of the rule?

[123] There are two different interpretations of what the Sewel convention entails. The first, which is what Lord Sewel actually said in the House of Lords all those years ago, in July 1998, is that the UK Parliament will not normally legislate on a matter that is devolved to one of the devolved parliaments without that devolved parliament's consent. But, the Sewel convention has been understood since 1998 to extend beyond that also to entail that the United Kingdom Parliament will, likewise, not alter the competence of—in Scotland's case—the Scottish Parliament or the Scottish Government without Holyrood's consent. There is both the possibility of there being some argument about whether clause 2 of the current Scotland Bill should be extended so that it applies not only to what one might call lesser Sewel, the narrower formulation, but also greater Sewel, the broader definition. At the moment, the drafting relates only to the narrower formulation, but that's an answer to a question that you didn't ask me. The answer to the question that you did ask me—'What is the legal effect of this?'—is that the legal effect of this is to have statute to reflect that which is already the case in our constitutional conventions, and not to turn this into a justiciable rule of law.

[124] **Peter Black:** And yet here in Wales we've had two legislative consent motions that have been rejected by this Assembly, and yet the Government has gone ahead and legislated anyway. And, of course, we've also had disputes over whether or not a matter needs a legislative consent motion, when the UK Government have argued 'This matter is not devolved', and when the view of the Welsh Government is that it is devolved. So, the question, really, is: is that going to be tackled if we do put this on a legal permanent basis, or are those sorts of issues still going to arise?

[125] **Professor Tomkins:** Well, the issues will still arise, and as far as I understand it, the issues will still be resolved in the same way that they're resolved now, insofar as they are resolved, if that's the right word, at all, which is to say that they are resolved politically, inter-governmentally, or perhaps even through inter-parliamentary dialogue—I don't know—and not in the courts of law. The critical point here is whether you want to make this a rule of law that will be judicially enforceable. The difficulty with doing that is that it runs directly into questions of parliamentary privilege with regard to the United Kingdom Parliament. It seems to me, if I may say so, it is preferable to continue to understand this rule as one that is politically enforced rather than judicially enforced, but—and this is the big 'but'—it goes without saying that our system of inter-governmental relations, including the dispute resolution aspect of that system, is not fit for purpose. Anybody who has ever looked at this has come to that conclusion. The Silk commission came to that conclusion, the Calman commission came to that conclusion, the Smith Commission came to that conclusion. One of the matters that it seems to me is imperative to get right is the reformulation of our inter-governmental relations, under the memorandum of understanding, which is being rewritten, as I understand it, as we speak, and the dispute resolution procedures embraced by the memorandum of understanding need to be revised so that, when there are disputes such as these—and it is inevitable that there will be; we cannot legislate these disputes away; different Governments will disagree with one another about where the boundaries of devolved competence lie, no matter how those boundaries are enshrined in legislation—those disputes need to be resolved expeditiously, fairly and independently, it seems to me.

[126] **Peter Black:** Do you want to—?

[127] **Mr Lewis:** Na—dim i'w ychwanegu ar hyn o bryd.

Mr Lewis: No—nothing to add at the moment.

[128] **Professor Watkin:** I'm very glad you've heard what Professor Tomkins has said about this. Looking at the clause on the Sewel convention, the draft clause, there are two things that strike me there: the word 'normally' and the reference to having regard to devolved matters. 'Devolved matters' is an odd expression in the context of a reserved powers model in Scotland, because there is no definition of what is a devolved matter; it's the reserved matters that are listed, and I don't quite know why there's that disparity between the nature of the settlement and the nature of this clause. But the key questions are: who decides what are the devolved matters and who decides what is 'normally'?

[129] As far as the devolved legislatures are concerned, where they seek to say that something is devolved, then their decisions are reviewable in the courts, but where the UK Parliament makes a decision that something is not devolved, that's the end of the story because, once it's legislated, that is law and it has the sovereignty of the UK Parliament behind it. That is an extremely un-level playing field, and it's poised to become even less level, because, if we move in the UK Parliament to a system of English votes for English laws, and a decision as to what is an English matter or what is an England-and-Wales matter is a matter solely to be determined under the standing orders of the House of Commons or by the Speaker, that, in effect, means that, on one side of the boundary, Parliament, protected by parliamentary privilege and sovereignty, decides the issue on a case-by-case basis, whereas, on the other side, it is a matter for judicial determination. Now that strikes me as being something that can only lead to very serious conflict.

[130] And it worries me greatly that, at the end of the command paper, there is a suggestion in one of the bullet points for things to be considered that matters other than statutory matters, which occur within the legislature, can be used to determine what is or is not reserved or devolved. And if that were carried forward into arrangements after the next Wales Bill becomes law, it would virtually give the UK Parliament the right to adjust the boundary each

and every time it made a decision on English votes for English laws, whether in relation to Scotland or Wales, and it troubles me that we are on that road rather than introducing some mechanism—. That's what's wanted to accompany this draft clause on the Sewel convention—some mechanism for providing what Professor Tomkins has said is needed: an expeditious and independent method of dealing with these disputes.

[131] Mr Davies will know—his Bill was passed and then sent to the Supreme Court. In a situation such as this, it strikes me that what is needed is that the Scottish Ministers or the Welsh Ministers should be given the power to state in a case of doubt that the legislation passed does not extend to Scotland or does not apply in Wales respectively and to do that by Order presented to the devolved legislature, which, if approved in the legislature, could then be challenged by the UK Government, giving you a more expeditious method of dealing with the challenge than having to repeal the Act using the whole process of Bill procedure.

[132] **Peter Black:** So, are we likely to end up in the Supreme Court a lot more if we go along this route, or do you think the UK Parliament will just assert its authority?

[133] **Professor Watkin:** As I understand what's currently here in the draft clause, you don't go to the Supreme Court at all—it's all decided by the UK Parliament. The discretion is wholly theirs.

[134] **Suzy Davies:** Are you finished Peter?

[135] **Peter Black:** Yes.

[136] **Suzy Davies:** Alun.

[137] **Alun Davies:** Can I come in? I think many people would agree that that prospect is quite frightening. You referred to the Agricultural Sector (Wales) Act 2014, as it is now. There was, of course, a process that preceded the introduction of that Bill, where I negotiated at the time with, I think it was five different UK Ministers, and there was no means of resolving that dispute except to go down the process that we were eventually forced to go down. It appears to me, and it appeared to me then, that there is one means at the moment of resolving differences between two Governments, and that is the joint ministerial committees. And the joint ministerial committees that exist at the moment, I think, work very well, as it happens, and it probably is one area that does work better under the current political arrangements in the United Kingdom than in previous times. I think that's a fair comment to make. But there isn't any means by which a Minister in Wales can sit down opposite their counterpart in the UK Government and say, 'You have this interpretation. I have this interpretation; we need a referee to help us reach a satisfactory conclusion.' And I'm not entirely sure how you would reach towards that model under our current arrangements.

[138] **Mr Lewis:** Heb eich bod chi'n symud i drefn ffederal o fath, gyda'r cysyniad o lys cyfansoddiadol, gydag awdurdod, a fyddai wedyn goruwch awdurdod yr holl ddeddfwrfeydd i farnu ar y materion yma, mae'n anodd gweld sut fedrwch chi gyrraedd ato fo, ac eithrio drwy'r math o fecanwaith traddodiadol Prydeinig o drafod, cytuno, datrys anghydfodau yn hytrach na'u dwyn nhw i'r llys. Mae'n anodd iawn gweld.

Mr Lewis: Unless you move to some kind of federal system, with the concept of a constitutional court, which would have authority, which would then transcend the authority of all legislatures to make decisions on these issues, it's difficult to see how that could be attained, except through the traditional British mechanisms of discussing, agreeing and resolving disputes rather than bringing them to court. It's very difficult to see.

[139] **Alun Davies:** This is actually a very important element of this.

[140] **Professor Tomkins:** The model, I think, would merit some investigation and I'm not committed to this at all; I'm just suggesting that it would merit some investigation as a model, not along the lines of turning all of these disputes into judicial disputes that should go directly to the Supreme Court, but thinking about independent agencies in Government. And the two examples that I would suggest might provide useful sources for us to draw on would be the monetary policy committee of the Bank of England and the Office for Budget Responsibility in the Treasury. These are independent, arm's-length bodies that are, as I understand it, constructed by statute to make independent adjudications on matters. Something like that might be the sort of structure that we would need if we were to be given the task of, as has been put by other witnesses, levelling the playing field between the UK Government on the one hand and the devolved administrations on the other in terms of dispute resolutions between the Governments.

[141] **Suzy Davies:** Thank you. I'm very conscious of the time and I'm very grateful to our three witnesses for giving us additional time this afternoon actually, but I'm more than happy to ask you whether you've any other points you want to raise, perhaps, on the command paper or the way things are looking at the moment for us to consider. Are we all happy? Anything from Members? In which case, I'll just take this opportunity to say 'diolch yn fawr iawn i chi', and 'thank you very much' to you up in Scotland there. The video link seems to have worked pretty well today for a change. Thank you very much indeed.

[142] **Professor Tomkins:** It's been a pleasure talking to you. Thank you very much.

[143] **Suzy Davies:** We'll be sending you a transcript at some point fairly soon for you to check for factual accuracy. That will be with you as soon as possible. Diolch yn fawr iawn.

15:43

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

[144] **Suzy Davies:** Okay. We move on to the other items on our agenda today. I think we've got seven instruments that raise no reporting issues, four of which are introduced through the affirmative procedure, so they'll be back before us in Plenary at some point. Any comments on those or any points to be raised? That's good.

15:44

Memoranda Cydsyniad Offeryn Statudol (SICM) 5—Rheoliadau Gwastraff Peryglus (Diwygiadau Amrywiol) 2015
Statutory Instrument Consent Memorandum (SICM) 5—the Hazardous Waste (Miscellaneous Amendments) Regulations 2015

[145] **Suzy Davies:** Item 4, then, is the statutory instrument consent memorandum—SICM. As far as I can tell, this is the first negative SCIM that we've had during this Assembly. I don't know, Gwyn, if you want to say a few words to the committee on the importance of this.

[146] **Mr Griffiths:** Diolch, Gadeirydd. Nid yw'r offeryn yma, ynddo'i hun, yn bwysig o gwbl mewn cyd-destun cyhoeddus, er ei fod yn bwysig o safbwynt cyfreithiol

Mr Griffiths: Thank you, Chair. This instrument, in itself, isn't significant at all in a public context, even though it is important from a legal point of view because references

oherwydd bod angen diweddaru cyfeiriadau mewn deddfwriaeth ddomestig at ddeddfwriaeth Ewropeaidd, ac mae'n bwysig, wrth gwrs, bod hynny'n gywir.

in domestic legislation to European legislation need to be updated, and it's important, of course, that that's done correctly.

15:45

[147] Ond mae'r newidiadau sy'n berthnasol i Gymru o ran cymhwyster deddfwriaethol yn gyfyng dros ben. Maen nhw yn newid y cyfeiriad at 'gyfarwyddeb Ewropeaidd' i gyfeiriad pellach at yr un gyfarwyddeb, ac yn newid cyfeiriad at 'benderfyniad Ewropeaidd' i'r un penderfyniad 'fel y'i diwygir o dro i dro'. Felly, maen nhw'n bethau efallai—. Rwy'n gwybod nad ydy'r pwyllgor yma ddim yn leicio cyfeirio at ddeddfwriaeth fel 'deddfwriaeth dechnegol', ond os oes y fath beth, dyna fo. Felly, rwy'n cytuno â'r hyn mae'r Gweinidog yn ei ddweud, nad oes dim yma sy'n werth ei drafod fel y cyfryw. Yr unig beth sy'n bwysig, efallai, ydy'r hyn y mae o'n ei ddweud yn ei lythyr:

But the changes relating to Wales in terms of legislative competence are extremely restricted. They change the reference to 'a European directive' to a further reference, to the same directive, and changing reference to 'a European decision' to the same decision 'as amended from time to time'. So, they are things that are perhaps—. I know this committee does not like to refer to legislation as 'technical legislation', but if such a thing were to exist, this would be it. And so, I agree with what the Minister has said, in that there is nothing here that is worth discussing to all intents and purposes. What is important, perhaps, is what he says in his letter:

[148] 'Nid wyf yn credu bod gwerth mewn cynnal dadl yn y Cynulliad ynghylch a ddylid rhoi caniatâd i ddarpariaeth mewn Rheoliadau sydd eisoes wedi'u gwneud'.

'I do not think there is merit in holding an Assembly debate on whether consent should be given to provision in Regulations which have already been made'.

[149] Gallaf weld pam ei fod o'n dweud hynny mewn perthynas â'r rheoliadau yma, ond fuaswn i ddim yn leicio meddwl bod hynny'n gosod cynsail ar gyfer peidio â chael trafodaeth yn y Cynulliad mewn achosion yn y dyfodol petai yna anghytundeb ynglŷn â'r hyn sydd yn yr is-ddeddfwriaeth.

I can see why he would say that in relation to these regulations, but I wouldn't like to think that that sets a precedent for not holding a debate in the Assembly in such cases in the future if there were to be any disagreement about what is contained in the subordinate legislation.

[150] **Suzy Davies:** Diolch. I think there is an interesting point in this, because the regulations, as far as I can see, do amend primary legislation, albeit primary legislation of the UK, and they were introduced in the UK Parliament via the negative procedure as well, so we've got an instance in the UK Parliament of primary legislation being changed via negative procedure regulations. I just thought that was worth mentioning.

[151] **Mr Griffiths:** Ie, mae hynny'n ddiddorol oherwydd mae'r rheoliadau yma'n cael eu gwneud o dan adran 2(2) o Ddeddf Cymunedau Ewropeaidd 1972, ac mae honno'n enghraifft anghyffredin lle mae'r pŵer yn cael ei roi i'r Llywodraeth i benderfynu beth ddylai fod y broses. Yn yr achos yma, oherwydd, rwy'n meddwl, fod y newidiadau mor fychan, maen nhw wedi penderfynu bod y broses negyddol yn gymwys.

Mr Griffiths: Yes, that is interesting, because these regulations are being made under section 2(2) of the European Communities Act 1972, and that is an unusual example in which the power is bestowed on the Government in order for it to decide what the process should be. In this case, because, I think, the changes are so minor, they have decided that the negative procedure should apply.

[152] **Suzy Davies:** Thank you very much. Anyone have any further comments on that?

[153] **Alun Davies:** Nothing, except to say that it shouldn't be seen as establishing a precedent.

[154] **Suzy Davies:** No. I think we'd agree that, bearing in mind the kind of conversations we have in this committee frequently.

15:47

Cynnig am Reoliad Ewropeaidd ar Organebau a Addaswyd yn Enetig
Proposal for European Regulation on Genetically Modified Organisms

[155] **Suzy Davies:** Item 5: proposal for European regulation on GMOs—genetically modified food, et cetera. Gwyn, have you got anything to excite us with on this?

[156] **Mr Griffiths:** Wel, rwyf wedi paratoi papur ar gyfer y pwyllgor. Fel y gwelwch chi, rwyf wedi awgrymu ar y diwedd bod y pwyllgor yn gofyn i'r Llywodraeth am sylwadau yn sgil, yn gyntaf, lle mae'r pŵer yn gorwedd rhwng y Cynulliad a San Steffan, a hefyd i gyfeirio at y pryderon a fynegwyd gan Senedd Thüringen.

Mr Griffiths: Well, I have prepared a paper for the committee. As you can see, I have suggested at the end of that paper that the committee ask the Government for its comments in light of, first of all, where the power lies between the Assembly and Westminster, and also to refer to the concerns expressed by the Parliament of Thüringen.

[157] Gallaf i ddweud wrthych chi fy mod i, y bore yma, wedi cael y pleser annisgwyl o geisio dehongli barn Senedd Rwmania ar yr un pwnc, ac maen nhw'n unfrydol wedi dweud nad ydy'r awgrym yma yn derbyn yr egwyddor o sybsidiaredd. Felly, mae'n ddiddorol eu bod nhw wedi cymryd y farn yna, ac mae barn debyg wedi cael ei rhoi gan y Cortes Generales ym Madrid, a hefyd gan ail siambr Senedd yr Iseldiroedd. Felly, nid wy'n gwybod pa mor bell mae'r syniad yma'n mynd i fynd, gan fod seneddau yn mynegi pryder, ond o safbwynt y pwyntiau a godwyd, rwy'n meddwl eu bod nhw'n parhau'n ddilys, ond bod pryderon Thüringen bellach wedi cael eu hadlewyrchu gan y seneddau eraill.

I can tell you that, this morning, I had the unexpected pleasure of trying to interpret the opinion of the Romanian Parliament on this very issue, and they have stated unanimously that this suggestion is not an acceptable of the principle of subsidiarity. So, it's interesting that they've come to that view, and a similar view has been expressed by the Cortes Generales in Madrid, and also by the second chamber of the Netherlands Parliament. So, I'm not sure how far this idea is going to go, given that parliaments are now expressing their concerns, but in terms of the points raised, I think that they remain valid, except that the Thüringen concerns have now been reflected by the other parliaments also.

[158] **Suzy Davies:** Diolch yn fawr. Any strong views on this?

[159] **Alun Davies:** My view is that this clearly is a matter for the Welsh Government and the National Assembly for Wales. There's been clear acceptance by both the Department for Environment, Food and Rural Affairs and the UK Government, and the Commission as well, for that matter, that any legal texts that are agreed by the decision-making structures of the European Union that refer to member states should be interpreted as referring to the internal constitutional architecture of a member state. So, where it refers to member states in terms of agriculture, that should refer to the Welsh Government, and not to DEFRA. For me, it's very, very clear that this is a matter for the National Assembly for Wales, and not a matter for the

UK Parliament.

[160] **Suzy Davies:** Dafydd, unrhyw sylw?

Suzy Davies: Dafydd, any comments?

[161] **Yr Arglwydd Elis-Thomas:** A gaf i ddweud fy mod i'n cytuno â hynny? Rhag ofn ei fod o o ddiddordeb i unrhyw un, rwyf wedi newid fy marn bersonol ynglŷn â'r mater yma, oherwydd y sefyllfa fyd-eang a'r dadleuon ynglŷn â chynhyrchu bwyd, ond rwy'n dal i gredu mai mater i ni benderfynu yma yng Nghymru ydy'r mater hwn.

Lord Elis-Thomas: May I say that I agree with that? In case it's of any interest to anyone, I have changed my personal opinion on this matter, because of the global situation and the debate about food production, but I still think that this is a matter for us to decide in Wales.

[162] **Suzy Davies:** Well, perhaps we can agree, then, to write to Welsh Government for confirmation that they're intending to deal with this themselves without any wasting of time going between the two Governments. Is everyone happy with that?

15:50

Papur i'w Nodi
Paper to Note

[163] **Suzy Davies:** Item 6: we've got a paper to note here from the Minister for Natural Resources in connection with the Environment (Wales) Bill, which I think we've all had an opportunity to read. I don't know whether there are any observations on that that you wanted us to act upon? No.

Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o'r Cyfarfod
Motion under Standing Order 17.42 to Resolve to Exclude the Public from the Meeting

Cynnig:

bod y pwyllgor yn penderfynu gwahardd y cyhoedd o weddill y cyfarfod yn unol â Rheol Sefydlog 17.42(vi).

Motion

that the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order 17.42(vi).

Cynigiwyd y cynnig.
Motion moved.

[164] **Suzy Davies:** In accordance with Standing Order 17.42(vi), I invite the committee to resolve to exclude the public from the remainder of the meeting. I don't see anyone objecting, so we'll now go into private session. Thank you.

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 15:51.
The public part of the meeting ended at 15:51.