



Cynulliad Cenedlaethol Cymru

The National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

The Constitutional and Legislative Affairs Committee

Dydd Llun, 29 Mehefin 2015
Monday, 29 June 2015

Cynnwys **Contents**

[Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datganiadau o Fuddiant](#)
[Introduction, Apologies, Substitutions and Declarations of Interest](#)

[Tystiolaeth mewn perthynas â Chynigion Llywodraeth y DU ar gyfer Datganoli Pellach i Gymru](#)
[Evidence in relation to UK Government's Proposals for Further Devolution to Wales](#)

[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](#)

[Tystiolaeth mewn perthynas â Chynigion Llywodraeth y DU ar gyfer Datganoli Pellach i Gymru](#)
[Evidence in relation to UK Government's Proposals for Further Devolution to Wales](#)

[Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o Weddill y Cyfarfod](#)
[Motion under Standing Order 17.42 to Resolve to Exclude the Public from the Remainder of the Meeting](#)

Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal, cynhwysir trawsgrifiad o'r cyfieithu ar y pryd.

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

Alun Davies	Llafur Labour
Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
Dafydd Elis-Thomas	Plaid Cymru The Party of Wales
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair

Eraill yn bresennol
Others in attendance

Y Fonesig / Dame Rosemary Butler	Aelod Cynulliad, Llafur (y Llywydd) Assembly Member, Labour (the Presiding Officer)
Adrian Crompton	Cyfarwyddwr Busnes y Cynulliad, Comisiwn y Cynulliad Director of Assembly Business, Assembly Commission
Carys Evans	Dirprwy Gyfarwyddwr, Is-adran Materion Cyfansoddiadol a Chysylltiadau Rhynglywodraethol, Llywodraeth Cymru Deputy Director, Constitutional Affairs and Inter-governmental Relations, Welsh Government
Y Gwir Anrhydeddus /the Rt.Hon Carwyn Jones	Aelod Cynulliad, Llafur (y Prif Weinidog) Assembly Member, Labour (the First Minister)
Elisabeth Jones	Cyfarwyddwr y Gwasanaethau Cyfreithiol, Comisiwn y Cynulliad Director of Legal Services, Assembly Commission

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	Clerc Clerk
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Gareth Williams	Dirprwy Glerc Deputy Clerk

Dechreuodd y cyfarfod am 13:29.
The meeting began at 13:29.

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

[1] **David Melding:** Good afternoon, everyone, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I'll just start very quickly with the usual housekeeping points. William Powell has apologised. We don't expect a routine fire drill today, so if we hear the bell, please follow the instructions of the staff, who'll help us leave the building safely.

[2] Please switch off, or put on silent, any electronic equipment. These proceedings will be conducted in Welsh and English. When Welsh is spoken, there is a translation on channel 1. Channel 0 will amplify our proceedings.

13:30

Tystiolaeth mewn perthynas â Chynigion Llywodraeth y DU ar gyfer Datganoli Pellach i Gymru Evidence in relation to UK Government's Proposals for Further Devolution to Wales

[3] **David Melding:** Item 2 is the UK Government's proposals for further devolution to Wales. This is our evidence session with the First Minister. Welcome this afternoon, First Minister. The First Minister is accompanied by Carys Evans, who is the deputy director of constitutional affairs and inter-governmental relations.

[4] First Minister, can I just start in a very general context? I think the way all this has been developing is that people across the spectrum, really, have been saying we need a settlement that is firm, clear and based on the reserved powers model, but as soon as that's announced by the UK Government as their intention, we hear all sorts of qualifications and reservations and concerns, not least some of the points that you've raised. So, why has there been this ambivalent reaction to what should be a clear statement of purpose from the UK Government?

[5] **The First Minister (Carwyn Jones):** Well, there is an argument that suggests that where we are now potentially gives us a breadth of devolution that's even wider than Scotland, because of the judgment in the Agricultural Sector (Wales) Bill case in the Supreme Court. But that is outweighed, in my view, by the need to get greater clarity. The reserved powers model will deliver that clarity, but, of course, with all these things, the devil's in the detail, and it's the scope of the reservations that will need careful examination in order for the reserved powers model to work.

[6] **David Melding:** Okay. I think we will go into a lot of this in detail now, and I'll ask Suzy Davies to take us forward.

[7] **Suzy Davies:** Thank you. Good afternoon, First Minister. You may have heard evidence that was given by Professor Watkin last week, in which he stated that he thought that recent legislation from the UK Government was actually resulting already in some sort of roll-back from the level of devolution that we already had. You said yourself that you thought perhaps the agricultural sector Bill, the Supreme Court judgment on that, surprised us a little bit in how far it went, and that clarity is more important. So, do you agree with his view that section 7(14)(b) of the Wales Act 2014 actually results in a roll-back in powers, or is it just a restating of original legislative intention in view of the Supreme Court judgment on the Act? I'm happy to read out what he said, if it helps.

[8] **The First Minister:** No, I think, on balance, it's helpful, because it provides clarification and confirmation of what we can do, with the Treasury's consent, in terms of amending HMRC functions in relation to devolved taxes. What we don't know yet is what the scope of the potential reservations will be, and that's where the real difficulties begin.

[9] **Suzy Davies:** Okay. So, you accept that what's in 'Powers for a Purpose' is merely illustrative? There's a series of annexes at the back there. It's an attempt to set out what already exists, but in reserved model form.

[10] **The First Minister:** It does several things. First of all, it tries to outline what the current devolution settlement is. Unfortunately, it provides a list in annex B of the areas where it is said that reservations would be needed. Some of them have been superseded, that much is true, but if all these reservations were put into place, we would be in a position that was where we were pre-1999, and even pre-Welsh Office. For example, if you reserve civil law and procedure and criminal law and procedure, you can pass no laws here. It would mean that we would be so restricted, it would effectively destroy the 2011 referendum result. Now, I think, in fairness, I have raised this issue with the Secretary of State, and he does understand. Obviously, this is something that he would not wish to see, nor me, but there are other issues here that are already devolved. Transport is reserved completely in this list. Movement of food, animals and plants within the UK—well, that is partially devolved. Development of land is a reservation. That would mean we could do nothing in terms, potentially, of planning.

[11] So, I think what we have here in annex A is a wish list from Whitehall departments of what they would love to see. I don't think the UK Government shares the same view, if I'm going to be fair about that, but it's unfortunate that this annex was published, because of course it's set many hares running.

[12] **Suzy Davies:** Well, that's right. It does say in the annexes as well that, even though this is an illustrative list, there are also exceptions to that list that would reflect the existing devolution settlement in terms of the powers we have and the powers that we don't. So, there were some caveats put in those lists, but I'm grateful to you for that clarification. It does raise a separate point about what kind of conversations are being had about what a reserved model could look like—not necessarily the specific reservations, or even exceptions to those reservations, but who is talking to who at the moment.

[13] **The First Minister:** The model is not in dispute; we've moved beyond that. It's a question now of looking at the reservations. I met with the Secretary of State last week. I expressed my concern that we would be presented with a list of reservations for consultation, and that would be it. He assured me that there would be a list prepared and there would be then discussions regarding those reservations. The unfortunate aspect of annex A is that it says that the list is not exhaustive, and further reservations—my word, 'further'—will also be needed in other areas. Well, it already restricts us to where we were pre-1999 as it is. I think it's moved on since then, but I think the strong message has to be said that annex B will be wholly unacceptable as a list of reservations in its current form.

[14] **Suzy Davies:** Well, as you said, the UK Government's unlikely to support it in its present form, either, but I am curious to know who you think should be involved in this process, if you want—as I think, perhaps, we all do—to avoid just a simple list that we say 'yes' or 'no' to.

[15] **The First Minister:** Well, a list has been prepared. It's not been shared with us. I am informed it'll be shared with us, we hope, next month. There will then be the opportunity for discussions to begin as to what the list of reservations should look like.

[16] **Suzy Davies:** Okay, so it's a starting point—we're hoping.

[17] **The First Minister:** It's a matter for the UK Government. We've not seen that list yet, but the Secretary of State has assured me that it will be a proper discussion, and not a fait accompli that's presented.

[18] **Suzy Davies:** Okay. Thank you very much.

[19] **David Melding:** Do you think it was inevitable that it would start by one side proposing a list, the UK Government, and then you responding, or could there have been a collaborative effort? The public will probably think most of the expertise on the constitution as it affects Wales is with the Welsh Government at the moment.

[20] **The First Minister:** What happened is that there was a write-around to all Whitehall departments asking them what they believed should be devolved and what should not be devolved, and that's how we have this list. So, for example, transport is on the list. It is a wish list from Whitehall departments. It's unfortunate that it was published. I have to say this now: if the proposed list of reservations looks like this, we will not accept them, for most areas. Time—are we looking to devolve time particularly? No. But there are some serious issues here in terms of civil law, criminal law, family law completely, which takes away our powers over adoption. So, this list is unacceptable as it stands at this moment in time.

[21] **David Melding:** I think we understand that. Alun, before I move on, on these questions, did you want to—

[22] **Alun Davies:** You've just said you wouldn't accept that list. What does that mean?

[23] **The First Minister:** We would not recommend to the Assembly that a legislative consent memorandum should go forward supporting the reservations.

[24] **Alun Davies:** And you're confident that the UK Government would respect that.

[25] **The First Minister:** I can't answer for the UK Government as to how they would respond, but if they didn't respect that, there are not just consequences for Wales, but consequences in terms of the way they treat Scotland.

[26] **Alun Davies:** Okay, fair enough. In terms of where we are, you said you're expecting to see a proposal from, I presume, the Wales Office next month, outlining these exemptions. Do you believe that the command paper published on St David's Day provides a good starting point?

[27] **The First Minister:** Well, the St David's Day announcement provides examples of where there is agreement. It doesn't go as far as we would like. Nevertheless, there is something to work on. We see no reason why the Silk commission's full recommendations should not be taken forward. We see no reason why air passenger duty should be devolved to Scotland and not to Wales. It makes no sense. However, there are areas, such as the reserved powers model, the powers over energy, and powers over sewerage, which are areas that we'd welcome. So, I think what we heard on St David's Day was an announcement of what has been agreed for now, certainly not a full and comprehensive agreement. Does that mean that this will be a lasting settlement? No, not in its current form.

[28] **Alun Davies:** The Secretary of State last week, I felt, was quite generous in the language that he used—

[29] **David Melding:** Quickly now then, Alun; we need to move on.

[30] **Alun Davies:** —if not possibly some of the terminology. Do you believe that the St David's Day process, the announcement from the Wales Office, is one that is going to be subject to that level of negotiation? The Secretary of State seemed to say, 'Well, we've got this, and this is where we believe the agreement should be'.

[31] **The First Minister:** It's not an agreement. He uses the terminology 'agreement', but it's not correct to say that, because it's not an agreement between the four different parties. We certainly don't agree with it. We welcome parts of it, in terms of where devolution is proposed, but it's far from being a lasting settlement, and we hope that there will be opportunities over the course of the next few months to strengthen the durability of the settlement from the autumn onwards.

[32] **David Melding:** Dafydd.

[33] **Yr Arglwydd Elis-Thomas:** Diolch yn fawr, Gadeirydd. Ni fyddwch chi'n synnu, Brif Weinidog, fy mod i'n cytuno'n llwyr efo'r dadansoddiad ein bod ni mewn sefyllfa well ar ôl penderfyniad y Goruchaf Lys yn achos y Ddeddf amaethyddol enwog erbyn hyn nag y byddem ni pe byddai pwerau wedi'u cadw yn cael eu gweithredu yn y model yma. Ac felly, onid ydy hi'n amser bellach inni ddod i sefyllfa—a ydych chi'n cytuno—lle y dylai Llywodraeth San Steffan ddeddfu mewn ymateb i ddymuniad y Cynulliad ynglŷn â'i bwerau, yn hytrach na cheisio darparu rhestrau i'n cyfyngu ni?

Lord Elis-Thomas: Thank you very much, Chair. You won't be surprised, First Minister, that I agree entirely with the analysis that we're in a better position following the judgment of the Supreme Court in the now-renowned case of the agricultural Act than we would be if the reserved powers were implemented following this model. And so, isn't it now time for us to get to a position—would you agree—whereby the Westminster Government should legislate in response to the Assembly's wishes as regards its powers, rather than trying to provide lists that restrict us?

[34] **Y Prif Weinidog:** Ydw, ac mae'r Cynulliad hwn wedi siarad. Mae'n bwysig dros ben cofio, wrth ystyried y penderfyniad hwnnw, a hefyd, wrth gwrs, wrth ystyried beth sy'n digwydd yn yr Alban, nad oes modd dweud, 'Wel, mae hwnna ddim ond yn berthnasol i'r Alban.' Mae hynny'n naif, yn fy marn i. Ac mae'n bwysig dros ben, felly, fod gennym ni o leiaf restr o bwerau sydd wedi'u cadw sydd ddim yn torri ar draws y pwerau sydd gyda ni ar hyn o bryd, ac sy'n lledu'r pwerau hynny.

The First Minister: Yes, and this Assembly has spoken. It's very important to remember, in considering that decision, and also, of course, in considering what's going on in Scotland, that it's not possible to say, 'Well, that's only relevant to Scotland.' That's naïve, in my opinion. And it's very important, therefore, that we have at least a list of powers that are reserved which do not cut across the powers that we have currently, and that expands those powers.

[35] **Yr Arglwydd Elis-Thomas:** Fe fyddwch chi, fel minnau, yn cofio'r cyfnod, yn fuan yn eich swydd fel Prif Weinidog, pan oeddem yn gorfod delio gyda'r model o geisio caniatâd gan San Steffan i ddeddfu ar faterion cynradd. Onid ydy o'n sioc ac yn dristwch ein bod ni'n dal, mewn gwirionedd, yn yr un sefyllfa? Ac onid ydy hi'n bryd ceisio argyhoeddi o'r diwedd bod y Cynulliad yma, a Llywodraeth Cymru, yn gwbl abl i benderfynu ar ei bwerau o fewn strwythur pwerau wedi'u cadw sydd yn eang yn hytrach

Lord Elis-Thomas: You, like me, will recall the period early on in your tenure as First Minister when we had to deal with the legislative consent model, of having to seek permission from Westminster to legislate on primary issues. Isn't it a shock and a shame that we find ourselves still in the same position? And isn't it time to convince once and for all that this Assembly, and this Welsh Government, are perfectly able to decide on its own powers within a reserved powers model that is wide ranging rather than one

nag wedi'i gyfyngu gydag eithriadau?

that is limited by exceptions?

[36] **Y Prif Weinidog:** Wel, mae unrhyw setliad sydd yn gorfod cael llawer iawn o bwerau wedi'u cadw ddim yn setliad cynaliadwy yn fy marn i. Yn yr Alban, y rheswm pam mae pethau'n weddol o glir yn yr Alban yw'r ffaith bod y setliad yn glir ei hunan. Beth sydd gyda ni ar hyn o bryd yw'r posibilrwydd y bydd y rhestr yng Nghymru mor gymhleth y byddwn ni nôl yn yr un sefyllfa yr ydym ynnddi nawr. Nid wy'n credu bod hwnnw'n rhywbeth da i Gymru na hyd yn oed i'r Deyrnas Gyfunol. Yn fy marn i, dylai'r rhestr o bwerau cadw fod yn rhestr eithaf byr, ac wrth gwrs dylai'r rhestr yna sicrhau nad yw rhai o'r pwerau sydd yn mynd i gael eu cadw mor eang a fyddai'n meddwl y byddem yn ffael deddfu yn y pen draw.

The First Minister: Well, any settlement that has to have a lot of powers reserved is not a sustainable settlement, in my opinion. In Scotland, the reason why things are fairly clear in Scotland is the fact that the settlement itself is very clear. What we have at the moment is a real possibility that the list in Wales will be so complex that we'll find ourselves back in the same situation as we're in now. I don't think that that's a good thing for Wales or even for the United Kingdom. In my opinion, the list of reserved powers should be quite a short list, and of course it should be ensured that that list of the powers to be reserved is not so broad as to mean that that we wouldn't be able to legislate at the end of the day.

[37] **Yr Arglwydd Elis-Thomas:** Diolch.

Lord Elis-Thomas: Thank you.

[38] **David Melding:** Alun.

[39] **Alun Davies:** The evidence we received last week from Professor Adam Tomkins, in Glasgow I believe, discussed the clause in the Scotland Bill conferring permanence on the Scottish Parliament and devolved administrations. His view seemed to be that this clause had absolutely no legal standing at all but was more a recognition of political reality. Do you share that view?

[40] **The First Minister:** Yes. Strictly from a lawyer's point of view, that's correct. It has no legal standing because parliamentary sovereignty dictates that Westminster can do as it likes, and just as Westminster could pass an Act that contained a section that talked about the permanence of the Scottish Parliament, that only lasts as long as Westminster decides it's there. That's a flaw in the system that we have in terms of parliamentary sovereignty. Legally, it's true, but politically, I suspect, it's well-nigh impossible to abolish the Scottish Parliament, or, indeed, this place without the consent of the people of Scotland and Wales. But, from a strictly legal perspective, that's correct.

[41] **Alun Davies:** I'm not sure I wholly agree with you on the concept of parliamentary sovereignty, but that's probably not for this afternoon. In terms of how such a permanence clause could be drafted for this place, do you see the Scottish Bill as an example of how that could be drafted?

[42] **The First Minister:** Yes, I do. I see no difference between Wales and Scotland in that regard, and it goes as far as it can in terms of ensuring that, in Scotland, the Parliament continues there according to the will of the people of Scotland, and the same thing should happen in Wales. It goes as far as it can, in terms of what the law will allow.

[43] **Alun Davies:** In terms of the wider aspects of the settlement, we've talked here about clarity and we've talked here about simplicity and the rest of it and the different model, but can you outline to us this afternoon, First Minister, whether you see that settlement lasting? The Secretary of State last week, I thought, was very generous in his approach—he wants a lasting settlement. You said previously that you want a lasting settlement. So, both of you want the same thing. Now, defining that 'thing' that you want, of course, is difficult, but what

are the powers that you believe, resting here in Cardiff, provide the framework and the foundations for a lasting settlement?

13:45

[44] **The First Minister:** Not the current powers that we have, clearly, but the powers contained in part 2 of Silk, and we also need to look at the powers that Scotland has had. There is a reluctance in Whitehall to accept that, if there is further devolution in Scotland, that somehow has no effect in Wales at all. Clearly, that isn't the reality of it. There are some areas, like alcohol licensing, for example, where there is no clear case as to why they should remain at Westminster. Policing is one example—it is devolved in England, Scotland and Northern Ireland, not in Wales. Of course, there are some areas of policing that we would not want to see devolved—counter-terrorism is one area, as are police training and the police inspectorate. Those are not issues that we would want to pursue. So, it doesn't go as far as, I think, we would want, and it doesn't go as far as what the opinion polls tell us the people of Wales would want. As a bare minimum, the recommendations of the Silk commission should have formed the basis of the Bill, as the recommendations of the Smith Commission are doing in Scotland. There is no reason why Scotland and Wales should be treated differently in that regard.

[45] **Alun Davies:** So, Silk is where you believe the lasting settlement lies.

[46] **The First Minister:** I think Silk is the minimum. There are two issues here. First is the issue of powers, and that will always be fluid in terms of powers, but, in terms of structure, I don't think that there can be a lasting settlement across the UK without there being a UK-based constitutional settlement. The conversations on devolution have taken place in different rooms—Scotland in one room, us in another and Northern Ireland in another. There is a need—and you've heard me say this before—to re-examine the UK constitution to make it fit for the twenty-first century. So, as to the issue of powers for Wales and the Welsh people, there is the broader issue of securing the stability of the UK's constitution for the future.

[47] **Alun Davies:** So, the policy of Welsh Government hasn't changed since its submission to Silk.

[48] **The First Minister:** No. Silk is the minimum.

[49] **Alun Davies:** Because there are issues in Silk, of course, where it is surprising that Silk has drawn a line where the Silk commission did. Energy is the obvious example.

[50] **The First Minister:** Yes, there is no particular reason why it should be 350 MW. We could easily take the powers for energy. Nuclear is trickier because of the regulatory regime. But, if it was put to us that 350 MW should be removed as the upper limit, then we would not argue with that, clearly.

[51] **Alun Davies:** But would you argue for it?

[52] **The First Minister:** I would. I see no reason why 350 MW should be an arbitrarily imposed limit. It's a start, and if that is part of the settlement, we accept that as going some of the way towards ensuring that the people of Wales have the same control over their resources as everybody else in the UK has. But, no, I wouldn't argue for 350 MW.

[53] **Alun Davies:** Do you think you can have a lasting settlement without a separate legal jurisdiction?

[54] **The First Minister:** In time, no. I think it's inevitable that there will be a separate jurisdiction. It's not going to happen overnight, but this is the only legal jurisdiction anywhere in the world where there are two legislatures in one jurisdiction. It doesn't happen anywhere else. I think it's manageable now, but inevitably, in time, as the body of Welsh law grows, so the case for a separate jurisdiction will grow as well.

[55] **Alun Davies:** Okay. Finally from me, you described, I think, the Secretary of State's words as a bold and proper use of the word 'parliament'. Does that reflect your thinking?

[56] **The First Minister:** Yes, it does. I know there are others who don't share my view, but I think the time will come, in the next few years, when this place will wish to call itself a parliament, just as in Scotland.

[57] **David Melding:** Would you like to see the draft Bill recognise that some further areas, at some point in the future, would possibly get devolved, like issues relating to legal jurisdiction, criminal law and the administration of justice, and even penal policy possibly? Should it formally list areas where there may be, at the request of the Assembly, presumably, further devolution?

[58] **The First Minister:** That's the model that's used in Northern Ireland, and it's like that for a particular reason—justice policy was devolved when it was deemed appropriate to do so given the security situation. I'm not personally in favour of that model because it makes it look as if, somehow, we have to beg for powers that are there on a list but we can't have them until we prove we're able to have them. I think that takes us back almost to the pre-2011 situation, and it doesn't help with clarity.

[59] The criminal law, of course, doesn't exist as a field. It's certainly not the case that the criminal law's not devolved, because we do have sentencing powers, and in fact quite substantial sentencing powers, in the areas at the moment that we have responsibility for. They are powers, rather, to create offences and then, of course, to create the penalties that go with those offences, I'm sorry. So, criminal law is an area that is at least partially devolved at the moment.

[60] Criminal procedure is not, and this is where I think annex B gets it wrong. What they're trying to do is to reserve civil and criminal procedure, which I understand, because what they're trying to do is to say that the court process should be the same in England as in Wales. I have no argument against that, but to reserve the civil and criminal law is a huge reservation that would make it very difficult for the Assembly to actually operate as a legislature. For example, the organ donation Bill wouldn't satisfy the test, to my mind. The violence against women and domestic abuse Bill—that wouldn't satisfy the test, to my mind. So, there are some real difficulties with the list as it is in annex B.

[61] **David Melding:** So, at the moment, you'd just want it to be silent, would you? They wouldn't be reserved but they're not currently devolved either. Is that how—

[62] **The First Minister:** Criminal law is quite a nebulous concept.

[63] **David Melding:** It is devolved to some extent, insofar as making it possible to implement the law making we do. I understand that. But in terms of the general debate, people do say, don't they, that criminal law isn't devolved, and you kind of know what they mean when they say that?

[64] **The First Minister:** Well, criminal justice isn't devolved, and criminal procedure isn't devolved. It's not correct to say that criminal law is wholly not devolved. If it were, then we wouldn't be able to impose penalties, for example, in terms of people smoking in cars

when there are children present. In its broadest definition, it would fall under that exception. So, that's certainly one proposed reservation that would cause great difficulty for the Assembly.

[65] **David Melding:** Just so I can get some grip on this, you need a principle on which to draft fundamental law, which is, in effect, what this Bill will be, so your Government's approach is that the UK Government should identify those areas that have to be reserved for the proper operation of central Government in the UK. Is that basically your position?

[66] **The First Minister:** No. We await to see what the UK Government's suggested list of reservations is as a starter, in terms of the negotiation and the discussion. What we wouldn't expect is for the list to be produced on a take-it-or-leave-it basis.

[67] **David Melding:** I still don't quite understand, though. Presumably, the UK Government does need to reserve certain powers to operate as a Government. People often mention what I think are silent at the moment but, I suppose by justified inference, they're strongly reserved, like defence, matters relating to macroeconomic policy, and some of the big areas of state level Government activity, then. So, the reserved powers model has to reserve some things, but what should it be reserving, then?

[68] **The First Minister:** Well, it's impossible to give an exhaustive list. Defence is clearly one area. The benefits system, to my mind, is another area. Road traffic law generally is another area, although I would say that speed limits should be devolved, and there's no reason why drink driving shouldn't be devolved. There's no reason, actually, why traffic signs shouldn't be devolved, if it's going to Scotland, given the fact that there are some areas there that I think would be beneficial.

[69] There are other areas that I personally wouldn't be in favour of devolving, such as misuse of drugs. It's not devolved in Scotland; there's no reason why it should be devolved in Wales. Firearms legislation—it would make no sense to have separate firearms legislation in Wales, given the fact that this is an island with open borders, and always will be. There are other areas, I think, where there are UK-wide issues that need to be resolved, in terms of regulation, where that's best done on a UK basis. Xenotransplantation is one area. On the regulation of professions, although that's not done on a UK-wide basis, you can see why there should be common regulation as much as possible. Personally, employment law, I think, is best done on the widest basis possible. Those are just some examples of where reservations might arise. What you then need to do, of course, is to define precisely where the boundary of employment law as a reservation lies. So, it brings us back, of course, to the agricultural sector wages Bill and what happened with that.

[70] **David Melding:** Okay, that goes into quite a lot of functional detail. It may be that it isn't possible to have a clear statement of the organisational principle behind what 'reserved powers' means, and implementing a full subsidiarity model where the maximum is devolved or whatever. Perhaps I'm after a will-o'-the-wisp, but anyway. Dafydd Elis-Thomas.

[71] **Yr Arglwydd Elis-Thomas:** Diolch yn fawr, Gadeirydd. Rydym ni'n cwrdd â'r Llywydd mewn ychydig funudau i drafod agweddau ar hyn, wrth reswm, ond fe garwn i godi'r cwestiwn ynglŷn ag agwedd Llywodraeth Cymru, a thithau fel arweinydd y brif blaid a Phrif Weinidog Cymru, tuag at y pwysigrwydd o ddatganoli'r cyfrifoldeb i'r Cynulliad hwn dros ei weithdrefnau ei hun ym mhob maes—etholiadau, aelodaeth, ac yn

Lord Elis-Thomas: Thank you very much, Chair. We will be speaking to the Presiding Officer in a few minutes' time to discuss aspects of this, of course, but I would like to raise a question on the Welsh Government's attitude, and your attitude as leader of the main party and the First Minister of Wales, on the importance of devolving responsibility to this Assembly for its own procedures in all areas—elections, membership, and so on and

y blaen. A ydy hi'n synhwyrol, tra bod yr Alban yn camu ymlaen yn bell, a Gogledd Iwerddon hefyd, o'u cymharu â ni, ein bod yn mynd i aros tan etholiad y Cynulliad ar ôl nesaf cyn y byddwn ni wedi gallu gweithredu trefniadaeth gyfansoddiadol ar ein cyfer ni'n hunain, a ni'n hunain yn gyfrifol amdani?

[72] **Y Prif Weinidog:** Wel, mae'n drueni. Nid oes rheswm pam y dylai Cymru fod ar gefn y ciw ar hwn. Rwy'n cytuno yn hollol y dylai'r sefydliad hwn fod yn hunanlywodraethol yn y ffordd honno, ac yn delio, wrth gwrs, ag etholiadau, delio â'r oedran mae pobl yn gallu pleidleisio, ac yn delio â pha fath o enw dylai'r sefydliad hwn ei gael. Mae'n bwysig, yn fy marn i, fod pobl Cymru yn cael y grym dros y sefydliad hwn a'r ffordd mae'r sefydliad hwn yn gweithio. Ni fyddwn o blaid cael system wahanol o ran yr etholiadau i Senedd y Deyrnas Unedig—mae'n rhaid cael system sydd yn gyfun yn fanna. Ac, i fod yn deg, beth mae Llywodraeth y Deyrnas Unedig wedi ei ddweud yn barod, rwy'n cefnogi'n fawr iawn ynglŷn â sicrhau ein bod yn gallu trefnu'r lle hwn yn y ffordd y byddai Aelodau a phobl Cymru ei eisiau.

[73] **Yr Arglwydd Elis-Thomas:** Ond mae yna gwestiwn, 'Pryd mae hyn yn debygol o ddigwydd?'

[74] **Y Prif Weinidog:** Wel, nid i fi, wrth gwrs, mae hwnnw i'w ateb, ond i Lywodraeth y Deyrnas Unedig. Nid yw hyn yn rhywbeth sydd tu fewn i fy mhwerau i na phwerau'r Llywodraeth, ond byddwn yn gobeithio gweld hwn yn digwydd cyn gynted â phosib. Nid wyf yn gweld rheswm pam na all hyn ddigwydd yng nghanol tymor nesaf y Cynulliad. Nid oes yn rhaid sefyll i etholiad, yn fy marn i.

[75] **Yr Arglwydd Elis-Thomas:** Diolch yn fawr.

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

[77] **Suzy Davies:** Yes. Just to go back to the Chair's question about the list of reservations, I just wanted to be clear in my mind. You made the distinction between this place's ability to create offences, criminal and civil, as distinct from the non-devolution of administration of justice. Do you think perhaps part of the concern in this general area of discussion is it's not clear on which side of the reservation things like principles and doctrines should stand—things like burdens of proof or equitable interests, that sort of thing? Would

so forth. Is it sensible that, while Scotland strides forward, as does Northern Ireland, compared to us, we are going to wait until the elections for the Assembly after next before we are able to implement new constitutional procedures for ourselves that we would be responsible for?

The First Minister: Well, it's a shame. There's no reason for Wales to be at the back of the line for this. I agree entirely that this institution should be self-governing in that way and deal, of course, with elections, deal with the voting age, and deal with what kind of name this institution should have. It is important, in my opinion, that the people of Wales have the power over this institution and the way that it operates. I wouldn't be in favour of having a different system for elections to the UK Parliament—we have to have a unified system there. But, to be fair, what the UK has said already I support greatly in terms of ensuring that we can make arrangements here in the way that the Members and the people of Wales would want.

Lord Elis-Thomas: But there is a question as to when this is likely to happen.

The First Minister: Well, that's not for me to answer, of course, but for the UK Government. This is not something that is within my power or the powers of the Government, but I hope to see this happening as soon as possible. I don't see why this can't happen during the next Assembly term. We don't have to wait for an election, in my opinion.

Lord Elis-Thomas: Thank you.

you want that devolved?

[78] **The First Minister:** That's the law of evidence. That's part of procedure, rather than the criminal law.

[79] **Suzy Davies:** And civil law.

[80] **The First Minister:** When we talk of the criminal law, we talk of offences. We talk of offences. The criminal law is generally—. It can include the laws of evidence, such as the burden and standard of proof, but there's a difference between—

[81] **Suzy Davies:** Those are just examples.

[82] **The First Minister:** —the creation of offences, laws of evidence, and procedure. Now, I think it's very difficult to separate evidence from procedure. To my mind, it's very difficult to separate procedure from everything else that comes with the criminal justice system, bar the police. My argument is that the police bring people to the door of the criminal justice system. Once they're through that door, they're in the hands of the courts, they're in the hands of the Crown Prosecution Service, they're in the hands of the probation service, they're in the hands of the prisons, young offenders institutions—all those things are connected. If, for example, you want to take control of the probation service, in order to control the flow of people through it, you have to control sentencing policy, and it brings you back to the courts. So, I think those things do come together as a package, but, if there's a general exception for criminal law and procedure, you take nearly all of the ability to create offences out of the hands of the Assembly, regardless of where those offences might be created. That's the difficulty with the breadth of the exception that exists within this document.

[83] If we look at the civil law, by its broadest definition, the civil law is everything that isn't criminal law, and so, by that definition, you end up not being able to change the law in terms of organ donation. You end up, for example, not even being able to pass the NHS Redress (Wales) Measure 2008, which passed in the previous Assembly, because that did alter the civil law by its broadest definition, which shows why it's so important to have a proper discussion about the reservations when they're published to make sure that we don't end up in a situation where we have fewer powers than we did in 1999.

[84] **Suzy Davies:** So, the objection is the sloppy drafting in the annex, rather than—

[85] **The First Minister:** I think it's a wish list.

[86] **Suzy Davies:** —the wider story about principles, which you didn't particularly address in that, but—

[87] **The First Minister:** What sort of principles are you talking about?

14:00

[88] **Suzy Davies:** Well, if you're talking about things like equitable principles, for example, which would have been derived through case law over many years, what kind of—

[89] **The First Minister:** Common law—

[90] **Suzy Davies:** The laws of equity, but let's not get into—

[91] **The First Minister:** There's common law and equity. Equity is a system that exists

in tandem with the common law.

[92] **Suzy Davies:** Yes, but you see where I am aiming here. Are we talking about the stuff that you learn about in law school?

[93] **The First Minister:** No; in terms of principles, no. I do not want to see Wales become anything other than a common law jurisdiction.

[94] **Suzy Davies:** Right, thank you.

[95] **The First Minister:** But, equity is a system that developed in parallel with the common law to make it more flexible, basically, but no-one wants a law lecture from me this afternoon. So, I would never want to see Wales in a position, for example, where we had a system that was so different so as to make us look like Scotland, which is not a common law jurisdiction and which is based on civil law, Roman law. Northern Ireland, however, is a parallel jurisdiction to England and Wales. It is a common law jurisdiction and there are very few barriers between practising in both jurisdictions. When I was in practice, you paid £70 a year and you could practise in Northern Ireland, and that was it; there were no other qualifications at all. Things should stay that way. Even with a separate jurisdiction, it has to stay that way. There should be no artificial barriers to working in Wales. The principles of the law should remain the same, to my mind.

[96] **Suzy Davies:** Thank you; that's what I was after.

[97] **The First Minister:** I'm sure you're relieved to not have more on the law.

[98] **Suzy Davies:** Slightly.

[99] **David Melding:** First Minister, the White Paper says that the Sewel convention will operate on—and I quote here—‘a substantively similar manner’ in Wales as to that in Scotland. Does that reassure you or not?

[100] **The First Minister:** It provides partial reassurance. Of course, what we do know is that the current system—the legislative consent motion system that we have—is not binding on the UK Government. There have been occasions when the UK Government has observed an LCM that's passed here and, at other times, it has ignored LCMs. Where the UK Government wishes to legislate on devolved matters, it should be required to have the consent of the Assembly. The second point, however, is that there's often a dispute at the moment as to whether something is devolved or not, and that's where we get into difficulties.

[101] **David Melding:** I think, in fairness to the UK Government, they've set aside the Assembly's refusal to grant a legislative consent motion when they didn't think there was a need for one. I know you've disputed that, but there has been—. This leads us on to the question of the finer points of the constitution even after this settlement. There obviously will be some areas where you suddenly—or not suddenly—or where you would think that some powers should rest now or be amended slightly so that the UK Government can pursue certain policies for the common good around the UK, and that flow goes the other way. This happens in federal states and is quite common. But, there's a constant discussion, really, between the different spheres of government, in the stabler federal states anyway. Would you like a similar mechanism in the UK, where these things really are just discussed thoroughly, and then there are no surprises and there's the maximum of consensus developed?

[102] **The First Minister:** We are not a federal state, and therein lies the problem. If we were to have a system where there was agreement—

[103] **David Melding:** We do have inter-governmental—

[104] **The First Minister:** Yes, but it's not federal. At the end of the day, Westminster has—

[105] **Lord Elis-Thomas:** We have a Supreme Court—

[106] **The First Minister:** We are a quasi-federal state, if possible. We are not a federal state. There is no formal mechanism of consent to transfer of powers away from the devolved administrations to UK Government. At the end of the day, the UK Government can do what it wants, and that's not a proper federal state. The Scots, I understand, did relinquish a power. Under the Smith Commission proposals, I understand that they relinquished jurisdictional parts of Antarctica, but nothing beyond that. I think that we're a long way from that position. Until we have a proper structured constitution with a formal mechanism for proper agreement, it's very difficult to say, 'Well, yes that's something that should exist at the moment', because the mechanism just isn't there.

[107] **David Melding:** Okay. This kinds of gets us into the area where the UK Government, or Westminster, should still have this notional power to legislate for any part of the UK, and that gives us the flexibility that, in federal states, you would get through negotiation at the moment, where there is agreement about taking a common approach. Could I tempt you to respond to whether you think that—

[108] **The First Minister:** Yes, I think that's fine. I think we can look at Canada as an example. It's been suggested to me that you must have parliamentary sovereignty or you get chaos. Well, Canada shows that that isn't the case. In Canada, there's a system of pooled sovereignty. It's accepted that the federal Parliament can't just do what it wants in any circumstances. Canada is a stable state, but it requires a proper, structured constitution to be able to do that. So, it doesn't necessarily follow, to my mind, that you must have one source of power that must have an unlimited ability to override every other centre of democratic legitimacy elsewhere in the UK. It can be done. It's just it's not the way that things have always been done in the UK.

[109] **David Melding:** Okay. I think we'll get too technical and abstract if I go on, so, Alun, do you wish to clarify something else?

[110] **Alun Davies:** I might be too abstract, as well. My view is that parliamentary sovereignty is dead, but in terms of—

[111] **The First Minister:** And mine. I thought we were in a different place, but I agree with you.

[112] **Alun Davies:** Okay, fair enough.

[113] **The First Minister:** I've said it, in fact.

[114] **Lord Elis-Thomas:** I don't agree.

[115] **Alun Davies:** You don't accept that. Okay. We're all in different places.

[116] **David Melding:** But the UK Government and Parliament do, so I think we should just be—

[117] **Alun Davies:** Yes, they do, but they've always been 40 years behind the rest of the world. But anyway, in terms of where we are today, if we are to create that stable, lasting

settlement, which everybody seems to want and nobody can quite describe, one of the mechanisms that makes a lasting, stable settlement is a means of resolving disputes. At the moment, the only way we have of resolving disputes is through the Supreme Court, essentially—and that is somewhere where both Parliament and the UK Government recognise the limits of their sovereignty, in fact, but there we go. So, they recognise the Supreme Court. Would there be as part of that structured constitution you described in an answer earlier a dispute resolution process that focused both on a dispute as to ‘Is this devolved or is this not devolved?’, and also in terms of funding? One of the things we haven’t discussed this afternoon, I think very deliberately, is mechanisms of funding. The powers that might or might not be held in this place are dependent on having the funds to deliver policies as a consequence of holding those powers. At the moment, the Treasury is judge and jury when it comes to determinations over funding. So, is it possible to have that lasting settlement without a means—without going to the courts—of resolving disputes between the different Parliaments of the United Kingdom, and different Governments of the United Kingdom, in both policy and financial terms?

[118] **The First Minister:** ‘No’ is the short answer. First of all, of course, there is the Supreme Court route, but the difficulty with that route is that it only becomes engaged once a Bill has gone through the Assembly. There’s no way, for example, to my mind, of being able to obtain, as it were, a pre-judgment beforehand. Okay, lawyers will tell you that you need to look at the detail of some legislation, and that’s fair, but if, for example, there is a principle over whether something is devolved or not, there’s no way of testing whether it is devolved until you actually go through this place with a Bill and then, at the end of the process, it ends up in the Supreme Court. I think that needs to be examined.

[119] Where there are inter-governmental disputes, the Joint Ministerial Committee (Domestic) provides the mechanism for that, but, as you rightly say, where there’s a financial dispute between a devolved administration and the Treasury, that dispute is escalated through several stages until, finally, it comes to a final judgment, which is done by the Treasury. So, in reality, there’s no independence to the process. I’ve suggested, as have the others, that we should have an independent body that would, effectively, arbitrate in disputes such as these. That was not acceptable to the UK Government, and certainly not acceptable to the Treasury. So, that system does need to change.

[120] It’s only been tested once thoroughly, and that was over the consequential from the Olympics, where we did obtain a consequential, and it didn’t go to the final stages, but, ultimately, if you are in dispute with the Treasury and you are a devolved administration, then the Treasury is both your opponent and your judge. That doesn’t work in terms of transparency or natural justice, I’d suggest.

[121] **Alun Davies:** No, it clearly doesn’t, I think. I think only the Treasury would agree that it does work. In terms of what that structure would look like, could you describe it to the committee? I’m not convinced that JMCs do work, except where the UK Government is willing to give in on an issue. Could you describe how you would see that dispute resolution structure?

[122] **The First Minister:** Yes. I think there’s much to commend the current structure until it gets to the end of the process, where there is no independent mechanism for adjudging disputes between devolved administrations and the UK Government. If you do that, and parties are happy to be bound by that decision, I think the system could work, then, actually. I think the system can work in those circumstances. I think the problem lies at the end of the process when there’s no genuine independence that gives us the succour of knowing that the dispute will be properly handled in an objective way.

[123] **David Melding:** Do Members have any other questions for the First Minister? Do

you wish to add anything or is there something that you want to bring to our attention, First Minister?

[124] **The First Minister:** I think I've waxed forth on this subject on many, many occasions in the past few months. I think it's fair to say that I have discussed—I've mentioned I've discussed—this issue with the Secretary of State and he certainly gives me the impression that this is a discussion that will take place freely and openly. I welcome that and we'll see what happens in the autumn with regard to the proposed reservations.

[125] **David Melding:** Of course, we've not spent very much time on the areas where the approach has been quite expansive on behalf of the UK Government, over devolving electoral procedures, for instance. There obviously have been areas where the approach has been really quite a generous one, one could possibly say.

[126] **The First Minister:** I think it's fair to say that I've never detected, from the Prime Minister, a strong centralising instinct. Whenever I've discussed these issues with him, he has been more than happy to contemplate further devolution. I don't think that's true of all in Government in Whitehall, but I think it's fair to say that there is a desire in Whitehall to achieve a lasting settlement—I think that's true. What doesn't exist at the moment is the amount of proper thinking that's required in order to get there. So, there's no thought about how to have a constitutional process that gets us to a more stable settlement across the UK. It's still being done in terms of devolution being seen as a wholly separate issue for Scotland, Wales and Northern Ireland, without there being any resonance towards the rest of the UK.

[127] **David Melding:** Thank you, and that concludes the session with you. I think that's very helpful and very clear, and has greatly assisted the piece of work that we intend to do. So, thank you very much, First Minister, and thank you to your official.

[128] We expect the Presiding Officer at 2.30 p.m., so, with your permission, I'll take item 4 next.

14:12

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

[129] **David Melding:** This is instruments that raise no reporting issues. They are listed there for us. Are we content? Thank you very much. That does exhaust what we can do now, so we'll adjourn now until 2.30 p.m.

*Gohiriwyd y cyfarfod rhwng 14:13 a 14:29.
The meeting adjourned between 14:13 and 14:29.*

Tystiolaeth mewn perthynas â Chynigion Llywodraeth y DU ar gyfer Datganoli Pellach i Gymru

Evidence in relation to UK Government's Proposals for Further Devolution to Wales

[130] **David Melding:** Good afternoon, again, and welcome back to this meeting of the Constitutional and Legislative Affairs Committee. We now move to item 3 and I'm delighted to welcome Dame Rosemary Butler, our Presiding Officer, and also your colleagues from the Commission, Elisabeth Jones and Adrian Crompton, to take further evidence on the proposed draft Wales Bill. Presiding Officer, can I just start by asking you to outline why you've been

persuaded that the best model for us would be a reserved powers model?

[131] **The Presiding Officer (Dame Rosemary Butler):** I'm sorry, can you—?

[132] **David Melding:** What persuaded you that the reserved powers model would be the best option for the Assembly?

[133] **The Presiding Officer:** Can I just say a couple of things before I move into that, Chair? Thank you very much. It is very good to be here this afternoon and I think it's a very fascinating topic that we're all discussing.

[134] The St David's Day announcement was a welcome step for me in terms of our future devolution path. I am pleased that the United Kingdom Government has committed to introducing a draft Bill and, subsequently, the Wales Bill within the first year of this Parliament. My priority is a settlement that delivers for the people of Wales and I have focused on three key issues for the institution—that's capacity, sovereignty and reserved powers. I'm pleased to see that the proposals for a Wales Bill will allow all of these issues to be addressed.

[135] I want to see the resulting Wales Bill implemented at the earliest opportunity. This will allow us to start the process of reforming the Assembly to enable it to become a stronger institution. It is crucial, however, that there is sufficient time for detailed scrutiny of the draft Bill and the Bill, both in the Assembly and at Westminster. The issues we need to address are not just simple matters. I welcome the Secretary of State's commitment to establishing a clear devolution settlement for Wales that will stand the test of time. We therefore need to make sure we have enough time to get it right.

[136] Finally, I would like to make what I think is a very important point. Our constitution is developing in a piecemeal fashion. Devolution and constitutional change in Scotland are being negotiated in parallel to the future devolution for Wales. A form of devolution in England is happening at a remarkable rate compared with the pace of devolution to Wales. This is really not a satisfactory way of proceeding and the provisions in the Scotland Bill, which is currently going through Parliament, will set a precedent for Wales. It underlines, again, why a coherent, pan-UK approach is required. The UK Government needs to think differently about Wales and its whole approach to constitutional reform. There needs to be a consensus and joint discussions, so that every part of the United Kingdom has an opportunity to contribute, and the resulting outcome will be better constitutional arrangements and a settlement that works for all parts of the United Kingdom.

[137] So, you wanted to know why I'm convinced by the reserved powers model. Well, I mean, the Assembly's conferred powers model of legislative competence is unclear and has caused problems for us all. I've long advocated, along with my predecessor, Dafydd Elis-Thomas, that the move to reserved powers is the answer and I welcome the Secretary of State's commitment to deliver this. However, it is not a guarantee of improvement. Based on past experience with the Government of Wales Act 2006, and looking at the approach proposed in the St David's Day command paper, there is a danger of this becoming a piecemeal exercise with lots of reservations resulting in a more complex settlement than we have now.

[138] My support for the new model will be dependent on its meeting three criteria—clarity: the people need to understand the laws they live by; workability, which is legal certainty to help us avoid the Supreme Court; and no row-back on current competence. I think the Supreme Court ruling on the Agricultural Sector (Wales) Bill should be the benchmark.

[139] **David Melding:** We'll now start to look at some of these issues that you've

highlighted there, and I'll ask Suzy Davies to start us off, please.

[140] **Suzy Davies:** Thank you very much. Can I just start with that last comment, then, about the agricultural sector Bill? When that judgment was made, it was of great interest to everybody, because, of course, it dealt with the issue of what is silent in the current Government of Wales Act, and obviously there were different views on how those silent issues should be dealt with, but even to those who thought silence worked in favour of Welsh Government, there was still a bit of surprise at the extent of it. Do you think that the more recent Wales Bill, which, actually, was cited in evidence last week as rolling back from our existing powers, is just trying to reflect more accurately the original legislative intention of the Government of Wales Act in order to make it clear that the Supreme Court ruling might have just gone a bit too far?

[141] **The Presiding Officer:** Well, it's interesting you talk about it as a silent topic, and I think that's really worth preserving. I think the main thing is we need to preserve the current level of competence—there must not be any roll-back at all. And my main concern relates to the treatment of what you call the silent subjects. For example, for those subjects that were not listed, there are no exceptions. Some of these silent subjects could properly be reserved for the UK Government—no argument with that—such as constitution or defence, but if other silent subjects, such as employment law, to which you were referring, or, crucially, civil and criminal law, are reserved without strong caveats, this would represent a significant roll-back from the view of the Supreme Court in the case of the agricultural sector Act, and I don't think it went too far, I really don't. Do you want to add anything to that, Elisabeth?

[142] **Ms Jones:** Only really to say, obviously, it wouldn't be appropriate for either the Presiding Officer or officials to comment on the coherence, shall we say, of the Supreme Court's case law on these questions? But, of course, the asbestos judgment didn't specifically deal with silent subjects—it was about the 'relates to' test and the human rights aspect. And whereas we do have strong views about how the 'relates to' test should be modified if we move to a reserved powers model, I think that that case law will not survive that change, so to speak, because the test will have to change anyway. Whereas the agricultural sector Bill judgment, which was an extremely clear and coherent judgment, does have, I think, lessons for the next phase of the settlement.

[143] **Suzy Davies:** One of the advantages of the reserved model is, of course, that it should limit the opportunities for silent subjects; we'd hope that there'd be very few that would slip through the net on that. We're hoping to hear from the Secretary of State next month, I think, with the potential starting point for what should be reserved and what's not. Obviously, what's in here is just an illustrative list of the existing position. What sort of conversations do you think are appropriate around what should be reserved and what shouldn't be reserved now? How do you think that process is best managed?

[144] **The Presiding Officer:** Well, I have discussed this with the Secretary of State at a meeting on 24 June, and officials are involved in constructive discussions with the Wales Office and the Welsh Government. But, it's early days, I think, in terms of substantive discussions, but I will expect more detailed discussion to come later in the year, and so it's really work in progress. But when you ask about what's appropriate, I think we should be discussing everything and anything related to this.

[145] **Suzy Davies:** You mentioned in your written evidence your underlying principles, and you've referred to them in evidence already today. Presumably, the Secretary of State knows about those. Has this been a fruitful area for discussion?

[146] **The Presiding Officer:** I think it has; he certainly knows what I think about it, and we will obviously be continuing it in the future. He's been very receptive; he listens very

well. And certainly before the election, it was very fruitful and we'll wait and see what happens after the election.

[147] **Suzy Davies:** So, generally, you're quite pleased with the way the conversations are going.

[148] **The Presiding Officer:** Generally, but I am concerned about how they're going to come up with what should be the silent subjects, what could be—what's the word I'm looking for?—and what caveats are going to be put in to make sure we don't get this long list. I mean, what's happening in Scotland with the Scotland Act, there's a huge long list of caveats and silent subjects, and I think if that comes to us then we're going to be in more difficulty than we have been in the past.

[149] **Suzy Davies:** Well, I wouldn't disagree with that. Thank you very much.

[150] **David Melding:** Dafydd.

[151] **Yr Arglwydd Elis-Thomas:** Wel, Mr Gadeirydd, gan fod y prif gyfreithiwr yn gwisgo *lanyard* dysgwr, mae'n well imi ofyn y cwestiwn yma yn Gymraeg. Roeddwn yn croesawu'n fawr y datganiad ynglŷn â'r meini prawf am bwerau a gedwir, a'r sicrwydd bod yn rhaid i'r drefn newydd fod yn well na beth oedd gyda ni, gyda'r pwyslais ar eglurder, ymarferoldeb ac, yn bwysig iawn, peidio â thynnu cymwyseddau presennol y Cynulliad yn ôl. Ond, i ba raddau y mae'r Llywydd a'i chynghorwyr yn teimlo bod y ffordd y mae'r drafodaeth yma yn digwydd rhwng Llywodraeth y Deyrnas Unedig a Llywodraeth Cymru, sy'n effeithio yn uniongyrchol ar bwerau'r Cynulliad Cenedlaethol, yn cymryd sylw mewn gwirionedd o'i egwyddor sybsidiaredd, a bod perygl mawr inni greu cyfundrefn fwy cymhleth nag oedd gyda ni hyd yn oed cyn 2006?

Lord Elis-Thomas: Well, Chair, as the chief lawyer is wearing a *dysgwr* lanyard, I should ask this question in Welsh. I warmly welcomed the statement on the criteria for reserved powers, and the assurance that the new system should be an improvement on what we currently have, with an emphasis on clarity, workability and, very importantly, not rolling back the current powers of the Assembly. But, to what extent does the Presiding Officer and her advisers feel that the way in which this discussion is happening between the UK Government and the Welsh Government, which has a direct impact on the powers of the National Assembly, is diverting attention from its principle of subsidiarity, and that there is a great risk that we're creating an even more complex system than we had even before 2006?

[152] **The Presiding Officer:** I agree. I genuinely feel the fundamental organising principle for a devolved settlement should be subsidiarity. I think Westminster, whether it be the UK Government or the UK Parliament, should only reserve matters that cannot effectively be devolved at national level. I think in the European context, subsidiarity works and it's understood, and I think subsidiarity would also help explain why matters are reserved and can provide a sustainable basis for settlement. I think, absolutely, that is the way forward. Did you want to add anything to that one?

[153] **Mr Crompton:** Could I?

[154] **The Presiding Officer:** Yes, certainly.

[155] **Mr Crompton:** Just to say that Elizabeth and I, at official level, have regular conversations with senior officials in Welsh Government and in the Wales Office, which is great. We've left them in no doubt as to the views of the Presiding Officer, expressed in her submission to you. What would strengthen our position even more is when we get a statement

from the Assembly itself as to its position. So, I think this committee's inquiry, and also how the Assembly engages with the draft Bill as and when it comes out, is critical so that we're speaking very clearly on behalf of the Assembly itself.

[156] **Lord Elis-Thomas:** I have some difficulty because I live on the 125 and occasionally visit another Parliament, and I don't think they still understand that to legislate for an existing National Assembly, with its own developing constitution, is different from inter-governmental or inter-departmental discussions in Whitehall and I don't know how to get this message across. Because I do think there should be a way in which we could deal with this in an inter-parliamentary way, or a Parliament-to-Assembly way, and not through, bless them, the Welsh Affairs Select Committee, which is something else. I don't know whether you've got an answer to that, but if you can think of one, I'd be very grateful. I know you can, but—

[157] **The Presiding Officer:** I think you're absolutely right; it's what's inter-governmental and what's inter-parliamentary. What I would like to see—I'm going to ask you if you would look at it later on—is how we actually deal with the Bill and the draft Bill when they come through. I intend to make sure that we're on the front foot and that we're not waiting for Parliament to come to us; we need to be going to them. It is difficult and my concern is that if the Government in Westminster is asking the departments what should be reserved and what shouldn't be reserved, then that's my concern, because there are some departments that still don't really understand devolution. Some are fine, but others aren't, and if that's the case, then we can have this long list, even longer than one they've got coming in Scotland, which would be almost impossible to try and work our way around.

[158] The legislative consent procedure is a bigger issue for us than it is for Scotland because, at the moment, England and Wales's constitution is a single legal jurisdiction, whereas the Scottish one is separate. That means there are more parliamentary Bills that relate to us than to Scotland and I don't think that is quite understood at the other end of the M4 and we just have to make sure that it is understood. It's going to be quite a tough—I won't say battle, but a long discussion to make sure they do understand.

[159] **Lord Elis-Thomas:** Thank you.

[160] **David Melding:** Alun.

[161] **Alun Davies:** I'm interested in what you've been saying, Presiding Officer, in terms of the place of the National Assembly in terms of the wider UK constitution. One of the proposals in the St David's Day process, in the command paper, is to make this place permanent. Is that something you agree with or believe is achievable?

[162] **The Presiding Officer:** Well, obviously I agree it should be permanent, but what we have to do is make sure that it's permanent in the psyche of the people of the United Kingdom, because you can always change the law, but you wouldn't want to change a law, which is going to be against what everybody else's feeling of it is. And it's something that's happening now for Scotland. I think that should be the same for us. I don't know whether my legal experts want to highlight that more.

[163] **Ms Jones:** I think that's exactly right, Presiding Officer. The law needs to encapsulate the constitutional feeling in the country. The only question then is: to what extent do you want that provision to be itself subject to the courts, and to what extent do you want it to be a declaration, a political declaration?

[164] **Alun Davies:** You can question, within the current system, how valuable it actually is in law, such a statement. But, in terms of the direction of travel, without getting into a very long discussion of individual powers and where those powers are best held and exercised, one

of the key issues we've found over the last few years is that we're only able to resolve disputes by the Supreme Court. We don't have inter-parliamentary processes in place that actually are able to resolve difficulties when they arise. Many Members, and I think the First Minister and others, are more generous in terms of legislative consent motions. My view is very much that the UK Government accept them when they want to and doesn't accept them when they don't want to. Clearly, if there is a dispute over where competence lies, whether it's in this place or in Westminster, how do you believe that those disputes can be resolved without recourse to courts?

[165] **The Presiding Officer:** Well, I hope we don't get into that position. That's where we've got a huge task ahead of us now over a few months to try and make sure that the settlement is absolutely clear. To go back to the point about whether they could do away with us or not, I think it should obviously be after a decision of this Assembly and also after the decision of the people of Wales; I don't think they can just decide willy-nilly to do away with us. This is why I'm concerned about the way the whole business of devolution has been—it's almost ad hoc. There's just no coherence to it. It would be lovely if we could sit down with a blank sheet of paper and look at how the UK should be governed as a whole. That's not happening. In response to the election in—not the election, what was it? What did they have in Scotland? I've forgotten the word for it.

[166] **Mr Crompton:** The referendum.

[167] **The Presiding Officer:** Thank you very much—referendum. Obviously, the UK Government have reacted to that. They're also giving now more powers to some of the English regions and English cities and that is actually moving along at a much faster pace than Welsh devolution, which has been around some time. So, I think we need—. It's probably not answering your question, Alun, but the point is we need to make sure that we're not in that situation where we're continuing to go to the Supreme Court. That's why these negotiations are going to be crucial. Did anybody want to mention the Supreme Court? Yes, certainly, please.

[168] **Ms Jones:** I absolutely agree with the Presiding Officer, of course. Accepting, I suppose, unfortunately, that there always will be disputes, what I do think is crucial, as you heard I think last week from several of your expert witnesses, is that the playing field should be level. So, at the moment, the United Kingdom can effectively challenge the use of the National Assembly's legislative competence; the National Assembly cannot challenge the United Kingdom where it legislates in an area the Assembly considers to be within its legislative competence. I know that any attempt to put in place such a mechanism butts straight up against the doctrine of parliamentary sovereignty. I think it's a new world and we need to look at everything anew—all concepts anew. Parliamentary sovereignty in itself is extremely important, but cannot parliamentary sovereignty be looked at in a new way as a sovereignty perhaps shared between the four legislatures of the United Kingdom, for instance? So, whether it's a judicial mechanism, with both sides able to go to the Supreme Court, or a special, fast-track court, or whether it's an independent authority, such as Professor Tomkins suggested last week, obviously with equal representation from all of the parts of the UK, appointed by the legislatures in each of those parts of the UK, then I think there does need to be a mechanism and I think that it needs to be equal.

[169] **Mr Crompton:** Can I just add that Westminster itself is going to have to grapple with this from the other perspective? It's focusing on English votes for English laws. So the question of what provisions they're dealing with that are English only, and therefore subject to whatever new procedures they introduce for that, is going to be the reverse, or the inverse, of our LCM process. Again, I don't have a solution for what the dispute mechanism could be, but the need for it is very clear.

[170] **Alun Davies:** Do you take a view on the powers that need to be held here? Do you take a view on what the reservations need to be, or do you believe that that's not a matter for the Commission or the Assembly itself?

[171] **Mr Crompton:** There are some areas, in terms of our competence, where I think we can legitimately, as the Assembly Commission, take a standpoint. So, most obviously, the internal operation of the Assembly itself, and also issues around the electoral system and the size and make-up of the Assembly. Generally speaking, I certainly wouldn't feel mandated to take a position on behalf of the Presiding Officer or the Assembly Commission on the ins and out of other policy areas, whereas it is legitimate, I think, for us to have a position on the shape and design of the model overall, so that it's workable and useable by the Members.

[172] **Alun Davies:** So, the franchise rather than energy consents.

[173] **Mr Crompton:** Exactly.

[174] **Alun Davies:** Okay. Are you content with what has been proposed in the command paper?

[175] **The Presiding Officer:** Well, it's a basis for discussion, isn't it?

[176] **Alun Davies:** So, no.

[177] **The Presiding Officer:** I didn't say that; I just said it is a basis for discussion.

[178] **Alun Davies:** So, you think it's a good starting point and not a good finish point.

[179] **The Presiding Officer:** Yes, it's certainly a good starting point, but I think, hopefully, we will move quite a way away from some of the starting points on some of the issues.

[180] **Alun Davies:** I think the committee would tend to agree with that position. Do you have any specific views on where movement needs to take place more rapidly?

[181] **The Presiding Officer:** Yes. I think, from my point of view as the Presiding Officer, we need to be able to decide how we run our own institution internally. Size of committees is an example, and I think we need to look at that, because it's quite obvious we need more Members, but, until we get more Members, we need to have a mechanism to allow us to run this place in an appropriate manner. We do well at the moment, but I think, with more legislation coming through, the pressures on Members are going to be huge, and we have to make sure that we're not only delivering good legislation, but we call the Government to account. I'm concerned that might slip. It's very important that the Government are called to account by the Members here. That's the one thing that I'd like to see us look at very early on.

[182] **Alun Davies:** Thank you.

[183] **David Melding:** Suzy, did you want to follow up?

[184] **Suzy Davies:** Thank you. I certainly wouldn't disagree with what you just said there, Presiding Officer, but I want to take you back to comments you made about the Scottish referendum effectively—which it did—setting the agenda for the current stage of Scottish devolution. It's not clear whether a similar referendum held here would reach the same conclusion. In other words, I don't think the people of Wales are in the same place as the people of Scotland when it comes to what they want from devolution at the moment. How do we best reflect what people in Wales want from this—well, let's call it a lasting stage of

devolution—if we don't have a referendum? I'm not suggesting we do have one, but how do we best reflect that, rather than saying, 'Oh, we must just have the same as Scotland'?

[185] **The Presiding Officer:** No, I haven't said we must have the same as Scotland.

[186] **Suzy Davies:** Oh, good.

[187] **The Presiding Officer:** And it's not Scotland that's getting more devolution, it's England, on the back of the results of the Scottish referendum, you know—

[188] **Suzy Davies:** But Scotland is too.

[189] **The Presiding Officer:** Pardon?

[190] **Suzy Davies:** Scotland is too, isn't it?

[191] **The Presiding Officer:** Yes, but the English scenario, I think, has moved on incredibly quickly as a result of what's happened in Scotland. Now, the Scottish people—I don't understand everything that's happening there, but they're not content with what they've been given anyway, so that's a big issue, but what we've been asking for is nothing new. There's nothing that the people of Wales are not already aware of, because, when the last referendum came, I think the people of Wales understood what they were actually voting for, and, I think, if there are major issues that the Assembly comes up with that are going to take us in a big direction away from that which the people of Wales might have wanted, then obviously we need to ask them what they think. But, at the moment, I don't think we're in that position.

[192] **Suzy Davies:** What I was trying to get to, really, is the gap between the St David's Day consensus and, let's say, Silk 2. There is a gap there. Is that—

[193] **Alun Davies:** 'The St David's Day consensus'?

[194] **The Presiding Officer:** Let me say it was a document. I don't think there was a consensus or an agreement.

[195] **Suzy Davies:** Well, the word 'consensus' is used a lot, and—

[196] **The Presiding Officer:** It's a document—'a command document', I think they're calling it now.

[197] **Suzy Davies:** Document, then. But, on the substantive point, does it worry you that there is such a big— Well, there is quite a big gap between the two documents.

[198] **The Presiding Officer:** Well, we'll see where we go. I don't want to make any big statements at this point. We are where we are. I am concerned that we are not going to get what the people of Wales would want, which is a clear settlement so that everybody understands what laws we can make here without having to refer to the Supreme Court. I think that's what we have to start with. It's a negotiation. We, as an Assembly, need to decide. Once we've got this Bill or the draft Bill in front of us and have seen what's being offered, then the serious work will start. Until that happens, it's all conjecture, isn't it?

[199] **Suzy Davies:** Okay. Thank you. Thank you, Chair.

[200] **David Melding:** Whatever we call it, a White Paper or command document, 'Powers for a Purpose'—it's an interesting title, for a start—faces two ways, it seems to me. It's very

generous and expansive in some areas, like over electoral arrangements, and then it introduces a test, and I quote here, ‘a clear purpose’, to devolve. That’s its test. Is that the wrong way round, as far as you’re concerned? Should there be a clear purpose to reserve? Is that the balance you would like to see?

[201] **The Presiding Officer:** I think it probably is, yes, because ‘devolution’ is a grand word, but, as you say, until you actually know what you’re going to be absolutely responsible for—. My concern is that you have, as I said earlier, all these different departments coming up with reservations that they would like to see as a department, but the rest of the UK Government wouldn’t. There are some things that obviously should be reserved, but I am concerned in civil legislation and jurisdiction that we might end up worse off than we are now and not able to do things we’d like to do—you know, smoking in cars and speed limits; there’s a whole range of things. But it is concerning that there was a 21-page document—21 pages?

[202] **Ms Jones:** In Scotland.

[203] **The Presiding Officer:** In Scotland. Twenty-one pages of reservations, and that’s—. If we got the same legislation as they’ve got in Westminster, ours could be much, much longer. I think they’ve got to be brave in Westminster and say, ‘Okay, you’re competent. The people of Wales have had two referenda saying they want more powers for the Welsh Assembly.’ We need a bigger Assembly. Let’s just make sure that we’re not going to be in a worse position than we are now.

[204] **David Melding:** You said, Presiding Officer, this process has been started well, but obviously it’s just initiated a discussion and there needs to be a lot of work on the proposals if they’re to get to the maximum level of consensus. So, we expect a draft Bill in the early autumn—I’m not quite sure, but, anyway, the autumn. How would you like to see the Assembly conduct its scrutiny of that draft Bill? Presumably, you do think that it would need to be scrutinised here. How might that work be undertaken?

[205] **The Presiding Officer:** Well, as Chair of the Business Committee, I will ensure that the Assembly scrutinises the draft Bill robustly. I think that’s the best way of putting it. We have to leave the UK Government in no doubt of the views of this Assembly, but I would be interested in the committee’s views about how that could be conducted. I’ve got some views of my own, which I don’t want to share at the moment, but I would be interested to know what this committee thinks and how this committee thinks that we could actually scrutinise—how that scrutiny should be conducted.

[206] **David Melding:** Dafydd—

[207] **The Presiding Officer:** Sorry, I just wanted to say I’m not going to wait for Westminster to come to us; we need to be going to Westminster first, upfront.

[208] **Lord Elis-Thomas:** I’m very amused at the prospect that, if there’s a draft Bill, could not a committee of this Assembly construct some draft amendments for approval by the committee and by the Assembly, and presentation, without any obligation, in Westminster? I’m sure they would be—. Certainly, one of the Houses in Westminster would be very happy to take them up, if the Government wouldn’t. For example.

[209] **The Presiding Officer:** Are you going to give me an example?

[210] **Lord Elis-Thomas:** Well, no, I won’t give you, but—

[211] **The Presiding Officer:** Absolutely. I think this is new, it’s innovative, the whole

thing, so we need to be innovative. If there are ways that we don't think we are being heard, then we have to find other ways around it. But I think we need serious, serious consideration. It needs to be discussed in the Assembly; we need to talk to any select committee of the House of Commons and the House of Lords. Now, whether we do that jointly or tripartitely, we'll have discussion, but I hope—. We need to come to a conclusion on how we're going to do that this term so that we're ready for the autumn, when the Bill comes through. We need to get whatever committee is formed well informed before we actually move into the process, because it's not going to be that long a process, I don't think.

15:00

[212] **David Melding:** Do Members have any further questions? I think we've covered most of the points we wanted to raise with you, Presiding Officer, but if there are issues that you want to bring to our attention, further to what we've drawn out in our oral evidence—

[213] **The Presiding Officer:** I don't think so. I think it was making the point about how we're going to scrutinise it. How we are going to scrutinise that Bill is what I'm interested in. I think the point is—and I will repeat it; I've said it several times—I am concerned about the number of things that we won't be allowed to do that we can do now, unless we're very careful.

[214] **David Melding:** Thank you very much. We found that very helpful, and we'll reflect on that. Obviously, we note your invitation for us to make some recommendations or any views known on how we may scrutinise the whole process from the point of the draft Bill being published in Westminster.

[215] **The Presiding Officer:** Sorry, Chair. If you could do that quite soon, because we've only got two weeks left.

[216] **David Melding:** I suspect we'll do it as soon as you've gone, in the private session. *[Laughter.]*

[217] **The Presiding Officer:** If you haven't already done it.

[218] **David Melding:** Thank you very much for your time, and that of your officials. Thank you.

[219] **The Presiding Officer:** Thank you very much.

15:01

**Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o Weddill
y Cyfarfod**
**Motion under Standing Order 17.42 to Resolve to Exclude the Public from the
Remainder of the Meeting**

Cynnig:

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

*Cynigiwyd y cynnig.
Motion moved.*

Motion:

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

[220] **David Melding:** I now move the relevant Standing Order that we conduct the rest of the meeting in private, unless I see any Member objecting. I don't see any Member objecting, so please clear the public gallery and switch off the broadcasting equipment.

*Derbyniwyd y cynnig.
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 15:01.
The public part of the meeting ended at 15:01.*