



# **Cynulliad Cenedlaethol Cymru The National Assembly for Wales**

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

**Dydd Llun, 12 Mawrth 2012  
Monday, 12 March 2012**

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Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynndi yn y pwyllgor. Yn ogystal, cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

These proceedings are reported in the language in which they were spoken in the committee. In addition, an English translation of Welsh speeches is included

**Aelodau'r pwyllgor yn bresennol**

**Committee members in attendance**

Mark Drakeford	Llafur (yn dirprwyo ar ran Julie James) Labour (substitute for Julie James)
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
Simon Thomas	Plaid Cymru The Party of Wales

**Eraill yn bresennol**

**Others in attendance**

Michael Imperato	Cyfreithwyr NewLaw, Aelod o Bwyllgor Cymru, Cymdeithas y Cyfreithwyr NewLaw Solicitors, Member of the Wales Committee, The Law Society
Richard Owen	Dirprwy Bennaeth Ysgol y Gyfraith, Cyfrifeg a Chyllid, Prifysgol Morgannwg, Aelod o Bwyllgor Cymru, Cymdeithas y Cyfreithwyr Deputy Head of the School of Law, Accounting and Finance, University of Glamorgan, Member of the Wales Committee, The Law Society
Kay Powell	Cyfreithiwr LLM a Chynghorydd Polisi, Cymdeithas y Cyfreithwyr LLM Solicitor and Policy Adviser, The Law Society

**Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol**

**National Assembly for Wales officials in attendance**

Steve George	Clerc Clerc
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk
Dr Alys Thomas	Gwasanawth Ymchwil Research Service

*Dechreuodd y cyfarfod am 2.29 p.m.*

*The meeting began at 2.29 p.m.*

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

[1] **David Melding:** I welcome everyone to this meeting of the Constitutional and Legislative Affairs Committee. I will start with the usual housekeeping announcements. We do not expect a routine fire drill, so, if we hear the fire alarm, please follow the instructions of the ushers who will help us to leave the building safely. These proceedings will be conducted in Welsh and English. When Welsh is spoken, translation is available on channel 1; should you need to amplify proceedings, you can do that on channel 0. Please switch off all mobile

phones and other electronic equipment completely, as they can interfere with our broadcasting equipment. I have received apologies from Eluned Parrott and Julie James, and I welcome Mark Drakeford, who is substituting for Julie. Mark has already attended several times as a substitute, so we are pleased that he is able to attend today. Suzy Davies has also sent her apologies.

2.30 p.m.

**Offerynnau nad ydynt yn Cynnwys Unrhyw Faterion i'w Codi o dan Reolau  
Sefydlog Rhif 21.2 neu 21.3  
Instruments that Raise No Reporting Issues under Standing Order Nos. 21.2 or  
21.3**

[2] **David Melding:** The instruments that raise no reporting issues are listed on the agenda. Are Members content with them? I see that you are.

**Offerynnau sy'n Cynnwys Materion i'w Codi gyda'r Cynulliad o dan Reolau  
Sefydlog Rhif 21.2 neu 21.3  
Instruments that Raise Issues to be Reported to the Assembly under Standing  
Order Nos. 21.2 or 21.3**

[3] **David Melding:** The first instrument to raise issues to be reported is CLA105, the Abergavenny Improvement Act 1854 (Repeal) Order 2012. I think that this is the first use of the Minister's power to remove obsolete bye-laws. Are there any comments? I do not think that Gwyn would have said other than it is the first use of the power.

[4] **Mr Griffiths:** It is the first to come before this committee.

[5] **Simon Thomas:** Yr ydym wedi bod yn trafod Bil Is-ddeddfau Llywodraeth Leol (Cymru) gyda'r Gweinidog. A yw'r Bil yn mynd i newid y drefn sydd wedi ei gosod yn y fan hon? O'r hyn rwy'n ei ddeall, mae'r Gweinidog wedi adnabod is-ddeddf sydd angen ei diddymu yn ei farn ef. A fydd y Bil newydd yn newid y drefn hon, neu a yw'r grym hwn yn aros mewn grym?

**Simon Thomas:** We have been discussing the Local Government Byelaws (Wales) Bill with the Minister. Will the Bill change the procedure that has been set here? From what I understand, the Minister has identified a bye-law that needs to be repealed, in his opinion. Will the new Bill change this system, or will this power remain in place?

[6] **Mr Griffiths:** Mae'r Gorchymyn hwn yn ymwneud â Deddfau nad oes eu hangen bellach, yn hytrach nag is-ddeddfau.

**Mr Griffiths:** This Order relates to Acts that are no longer needed, rather than bye-laws.

[7] **Simon Thomas:** Felly, dyma Ddeddf gafodd ei phasio flynyddoedd yn ôl, drwy Ddeddfau gwella trefi—

**Simon Thomas:** So, this Act was passed years ago, through town improvement Acts—

[8] **Mr Griffiths:** Na, roedd Deddf Gwella'r Fenni yn Ddeddf benodol a oedd yn ymwneud a'r Fenni. Nid oes angen yr adran hon bellach, oherwydd newid yn yr amgylchiadau lleol. Mae'n adlewyrchu'r hyn ddywedodd y Gweinidog, sef y byddai'n gwneud Gorchymynion tebyg ar gais yr awdurdod lleol, yn hytrach nag o'i ben a'i

**Mr Griffiths:** No, the Abergavenny Improvement Act was a specific Act relating to Abergavenny. This section is no longer needed, because of changes in local circumstances. This reflects what the Minister said, which was that he would make similar Orders at the request of local authorities, rather than off his own bat.

bastwn ei hun.

[9] **Simon Thomas:** Felly, rwy'n deall mai ar gais yr awdurdod lleol y cafodd hwn ei wneud. **Simon Thomas:** So, I understand that this made at the request of the local authority.

[10] **Mr Griffiths:** Ie. **Mr Griffiths:** Yes.

[11] **Simon Thomas:** Rwy'n gwybod bod materion eraill ynghylch hyn nad ydynt yn faterion i'r pwyllgor hwn, efallai. **Simon Thomas:** I am aware that there are other matters around this issue that are not matters for this committee, perhaps.

[12] **David Melding:** The next instrument is CLA106, the Environmental Permitting (England and Wales) (Amendment) Regulations 2012. I see that no-one has any comments on it. The next is CLA109, the Local Election Survey (Wales) Regulations 2012. There is a point here about the personal nature of some of the information that would be gleaned in the surveys and, given the small number of people involved, that data could be identified. Do we need to say any more on that, Gwyn? It seems that we should be raising that issue in a merits report.

[13] **Mr Griffiths:** Mae'r cwestiynau yn rhai o natur personol o'r fath y byddai rhywun yn eu gweld mewn cyfrifiad, er enghraifft, felly mae hi'n bwysig nodi yma, fel yn y trafodaethau a gafwyd yn y pwyllgor ar Fesur Llywodraeth Leol (Cymru) 2009 yn y Cynulliad diwethaf, nad oes gorfodaeth ar gynghorwyr nac ymgeiswyr aflwyddiannus i gwblhau'r ddogfen hon, nac unrhyw ran ohoni. **Mr Griffiths:** The questions are of a personal nature of the type that one would see in a census, for example, therefore, it is important to note here, as in the discussions in the committee on the Local Government (Wales) Measure 2009 in the last Assembly, that there is no requirement for councillors or unsuccessful candidates to complete this document or any part of it.

[14] **David Melding:** Are we content? I see that you are. Finally, we have CLA110, the Isle of Anglesey Local Authorities (Change to the Years of Ordinary Elections) Order 2012. Again, we have identified a merits point. Are we content?

[15] **Simon Thomas:** Mae *merits point*, fel yr ydych yn ei ddweud. Mae'r adroddiad hefyd yn dweud bod y ddeddfwriaeth alluogi yn caniatáu i hwn gael ei wneud drwy'r dull negyddol. Eto, mae'n taro rhywun ychydig yn od ein bod yn rhoi un rhan o Gymru mas o gam â gweddill Cymru, a hynny drwy broses negyddol. Mae hwnnw'n fater i'w godi yn y Siambr, fwy na thebyg, ond roeddwn eisiau nodi hynny, wrth basio. **Simon Thomas:** There is a merits point, as you say. The report also says that the enabling legislation allows this to be done via the negative procedure. Again, it seems to me to be a bit odd that we are putting one part of Wales out of step with the rest, and doing so by means of the negative procedure. That is a matter that should probably be raised in the Chamber, but I wanted to note it here, in passing.

[16] **Mr Griffiths:** Nid dewis y Gweinidog yw hwnnw; dyna'r broses sydd wedi'i phennu yn y Ddeddf Llywodraeth Leol. **Mr Griffiths:** That is not the Minister's choice; that is the process determined in the Local Government Act.

[17] **Simon Thomas:** Rwy'n derbyn hynny, ond mae proses o ddiwygio hynny, wrth gwrs. **Simon Thomas:** I accept that, but there is a process for amending that, of course.

[18] **David Melding:** I asked the same question in the pre-meeting that I had with the secretariat. It struck me as strange that it was the negative procedure, but that is what the legislation requires.

2.35 p.m.

**Ymchwiliadau'r Pwyllgor: Ymchwiliad i Sefydlu Awdurdodaeth ar Wahân i  
Gymru  
Committee Inquiries: Inquiry into the Establishment of a Separate Welsh  
Jurisdiction**

[19] **David Melding:** This is the second oral evidence session in our inquiry into the establishment of a separate Welsh jurisdiction. I am delighted to welcome the representatives from the Law Society who are joining us this afternoon. You are very welcome indeed.

[20] Kay Powell is a solicitor and policy adviser at the Law Society. Michael Imperato, from NewLaw Solicitors, is a member of the Wales committee and Richard Owen is deputy head of the School of Law, Accounting and Finance, University of Glamorgan, and is also a member of the Wales committee. So, there is a good range of experience there in the various aspects of the law that we are looking at this afternoon, in terms of how it might continue in a separate Welsh jurisdiction, should one emerge. So, I am very grateful indeed that you have made the time to join us this afternoon. We have read your written evidence and we have a series of questions that we want to put to you. I suspect that you have some experience of how these committees operate, but, if not, the procedure is that I will ask colleagues to put questions and I will ask some as well. I will permit supplementary questions where appropriate, but do not feel constrained: if you would like to add things, catch my eye and I will bring you in.

[21] I am not sure whether you are going to ask your colleagues to contribute, Kay, or whatever, but, as far as I am concerned, all three witnesses can participate fully in replying to our questions. Right at the end, if we have left anything out that you think is pertinent to the evidence that we are gathering, you will have a chance to mention that.

[22] I will start with a general question, which we are putting to witnesses: how would you define a separate Welsh jurisdiction?

[23] **Mr Owen:** 'Jurisdiction' is a term with multiple meanings. On many levels Wales is already a jurisdiction. In the broader sense it means a defined legal territory that is distinguished in some way in its laws and legal institutions. So, the competence for the legislative jurisdiction of Wales is exercised by the National Assembly, the UK Parliament and the European Union. When it comes to the enforcement and interpretation of laws, the competence rests with the courts of England and Wales. In certain formal senses, you could say that it is already a separate jurisdiction, because the tribunal system of Wales has been devolved to the Assembly. The courts system, although there has been no formal devolution, is seen by Her Majesty's Courts and Tribunals Services as a distinct administrative entity, and, by and large, increasingly so. However, recently, money claims in the county court have had to be listed in Salford, with Welsh-language support in Caernarfon.

[24] **David Melding:** Last week, Professor John Williams made a similar point that, given what has happened recently in the administration of justice, and also the fact that we now have Acts of the Assembly, or will do soon, there is an embryonic jurisdiction power there. However, Professor Williams said that there needs to be a sufficient body of separate law before you can really say in a functional way that there is a clear Welsh jurisdiction operating, and at that point, presumably, it just operates functionally whether politicians want it to be

called a separate Welsh jurisdiction or not. Do you feel that we are at that stage? I suspect that you feel that that we are not. When might it be reached if what I have described is a process that is going to occur naturally at some point?

[25] **Mr Owen:** Primary law-making powers were acquired relatively recently. Ministerial legislation goes back to 1999, but it only covers 20 devolved subject areas; there are still vast numbers of areas that are not devolved. At the moment, there is not the body of law to keep the administrative court going. The administrative court in Cardiff currently takes cases from the south-west of England. If we had a separated courts system, it would, presumably, no longer take those cases from the south-west of England. Its workload would, therefore, be quite small. You could do this in a number of ways. You could have a separate jurisdiction for the 20 devolved subject areas, while there would not be a separated jurisdiction for the England-and-Wales areas, which would probably create a greater body of work for the administrative court in Cardiff.

[26] **David Melding:** When do you think that legislative activity is likely to generate the need for clear separation, even if it is not absolute, in the form of a jurisdiction?

[27] **Mr Owen:** To a certain extent, it depends on how vigorously the Assembly is going to exercise its powers.

[28] **David Melding:** Would it happen within two, three or four terms of the Assembly, or would it be quicker?

[29] **Mr Owen:** My personal view is that it would be within two or three terms of the Assembly; however, that is not the view of the Law Society.

[30] **David Melding:** In the written evidence especially, quite a few people have made the point that whether there should be a Welsh jurisdiction is a political question as much as anything else. I note that you are very sceptical about the wisdom, at the moment at least, of devolving criminal law. Do you wish to expand on that point? In a way, it takes us to a political area. However, if it happens, we would instantly have a Welsh jurisdiction. Secondly, if, over the course of time, we have a Welsh jurisdiction over public law, is it then somewhat inelegant not to have criminal law devolved to that jurisdiction as well?

[31] **Mr Owen:** Certainly, it would ultimately be more coherent if you had criminal jurisdiction as well, because the Assembly creates criminal offences. In some respects, Wales as an administrative entity is lagging behind in criminal jurisdiction as compared with civil jurisdiction. The Court of Appeal's criminal division does not sit in Wales as often as the civil division. Also, if you were to have a criminal jurisdiction, the prison service would, presumably, have to be devolved, as would the probation and prosecution services and responsibility for policing; there would be a political judgment to make in that regard.

[32] However, criminal jurisdiction is interesting, because it is one area where there has been tension between the Welsh Government and the UK Government. I am thinking of bilingual juries, which the Welsh Government in the previous Assembly said that it supported, whereas the UK Government has said that it is not prepared to proceed with bilingual juries, because, in its view, they go contrary to the principle of random selection. On occasion, we have seen that the administration of criminal justice does not take into account the specific needs of Wales. I am thinking of the Libra information technology system that last year went over budget by some £400 million and still forgot a translation facility into Welsh, which had to be added for an additional sum, estimated at £4 million.

[33] It is probably worth starting to plan for a criminal jurisdiction already. I am thinking of the judicial visits to New Brunswick by Welsh judges, where there is a lot of bilingualism.

They were very much of view that, if the defendant wishes to be tried in a minority language, he or she should be understood in that language. The planning for bilingualism in a criminal jurisdiction should start now, even if we may not have it until some unspecified future date.

[34] **Ms Powell:** On the separate jurisdiction, the civil situation is currently far closer to being a separate jurisdiction than the criminal situation. Given the steer by the First Minister that the Welsh Government at the time did not see that looking to extend devolution to criminal justice would be a necessary precursor to a separate jurisdiction, the decision was made that we would consider the issue on that basis.

2.45 p.m.

[35] **Simon Thomas:** I will ask two or three questions in Welsh in a moment, but I would like to follow this point up in the current language. You mentioned a criminal jurisdiction. It is possible, and quite conceivable politically, that we might see the devolution of policing without the devolution of the criminal justice system or criminal offences, is it not? It is a possibility in the next term, I would imagine; it has certainly been discussed, and chief constables have supported it, and so forth. What sort of impetus would it bring to the debate if we were to see policing devolved, but not the formal probation and court side? Does that move us more towards the devolution of jurisdiction anyway, even though the rest of it is not devolved?

[36] **Mr Owen:** Well, I would have thought that, when you have limited competence—you could think of the European Union as being a precedent here—once certain powers or partial aspects of criminal justice are devolved, pressure will build for further devolution. That is just in the nature of how the transfer of partial power works.

[37] **Simon Thomas:** The history of devolution here, generally, is that it proceeds bit by bit, is it not? The kind of devolution that we have here is not of the ‘big bang’ kind.

[38] **Mr Imperato:** In that scenario, there would also be an operational push from the police forces, which would ask, ‘Well, we would like to do this in a certain way, and could you not tweak your legislation to help us do that?’ This would come from the bottom up as well, in an operational sense, I think.

[39] **Simon Thomas:** Okay, thank you. I have some questions on your evidence, and I would like to ask them in Welsh.

[40] Efallai y byddwch am wisgo eich clustffonau. You may wish to wear your headsets.

[41] **David Melding:** Interpretation is available on channel 1. We will just check that you can hear it.

[42] **Simon Thomas:** A ydych yn gallu fy nghlywed? Gwelaf eich bod. **Simon Thomas:** Can you hear me? I see that you can.

[43] Symudaf ymlaen, felly, at rai o’r pethau a ddywedasoch yn eich tystiolaeth i’r pwyllgor. Un o’r pethau yr hoffwn eich holi yn eu cylch yw’r ffaith eich bod yn amlygu’n glir yn eich tystiolaeth y cysyniad o barhad o ran egwyddor gyfreithiol—hynny yw, yn y Saesneg gwreiddiol, ‘continuation of legal principle’. I move on, therefore, to some of the things that you said in your evidence to the committee. One of the things that I would like to ask you about is the fact that you highlight clearly in your evidence the concept of the ‘continuation of legal principle’—those are the words used in the evidence.

[44] **Gan eich bod wedi dewis tanlinellu'r cysyniad hwnnw yn eich tystiolaeth, a oes modd ichi ymhelaethu ychydig am yr hyn yr ydych yn ei olygu wrth sôn am yr egwyddor gyfreithiol hon?** Given that you have chosen to underline that concept in your evidence, could you elaborate a little on what you mean in mentioning this legal principle?

[45] **Mr Owen:** In the debate in Wales at the moment, we are assuming that there would be a high court of Wales and a court of appeal of Wales under a separate jurisdiction, but that the UK Supreme Court would retain overall jurisdiction.

[46] **Simon Thomas:** So, it would be a Scottish-style arrangement.

[47] **Mr Owen:** Yes. If the UK Supreme Court were to retain overall jurisdiction, decisions by the Welsh court of appeal would be a persuasive precedent in other parts of the United Kingdom. One would have thought that common law principles would continue on the same basis as they do at present. Perhaps there is nothing stopping the Assembly going for a no-fault system of compensation in negligence cases, based on the New Zealand model, which is a common law system, if it were to be devolved. However, in all likelihood, common law principles would stay the same as they are now. Principles derived from European Union law would remain the same as they are now, and principles derived from the UK's obligations under international human rights treaties would stay the same as they are now. There is talk of differentiation in respect of remedies, particularly in the administrative tribunals, where there is a lot of talk already of creating remedies that are suitable for the Welsh context. I could see differentiation occurring there.

[48] **Simon Thomas:** We might come on to tribunals a little later. Are you saying, therefore, that one of the hindrances to a distinct Welsh jurisdiction is a common law difficulty, namely that you cannot have two systems of common law within the same geographical area? It is possible to have that, is it not? It is possible in Canada, for example, is it not?

[49] **Mr Owen:** Yes, that situation already exists in respect of Northern Ireland. It is a common law jurisdiction, but it is a separate jurisdiction, separate to the overall jurisdiction of the UK Supreme Court. Ultimately, the fundamental principles would be brought in line by the UK Supreme Court, but differences could occur until that happens. You get different dialects, if you like, of the common law. The Commonwealth countries and the United States all have the same common law root, but with the UK's involvement in the European Union, the common law has taken on a slightly different hue in the UK to that in other parts of the Commonwealth. You would have differences of nuance if Wales was a jurisdiction separate to the overall jurisdiction of the UK Supreme Court.

[50] **Simon Thomas:** How does that interact with the other part of your evidence about vast areas of conterminous legislation? You can have a smaller jurisdiction next door to a very large jurisdiction—England and Wales represents a huge body and history of legislation. Is that a hindrance to developing a Welsh jurisdiction, or are you highlighting that as an issue to be aware of when reading across different parts of the common law—the United Kingdom jurisdiction?

[51] **Mr Owen:** There are only 20 devolved subject areas, so there are many subject areas that are not devolved. Whether it is easier, in terms of business attractiveness and so on, to keep in line with England in those areas and keep the law the same as it is in England is a matter of judgment.

[52] **Simon Thomas:** Are you suggesting that we are too small, or is it just easier that



way?

[53] **Mr Owen:** It is easier. As Professor Williams was telling you last week, there are many smaller jurisdictions than Wales.

[54] **Simon Thomas:** We have evidence of that.

[55] **Mr Owen:** There are jurisdictions that are considerably smaller than Wales.

[56] **Ms Powell:** We are trying to get to the crux of having a separate jurisdiction, and the necessity of separating the jurisdictions. The continuing basis, or legal principle, on which the law will be considered will be the same. Areas of law that could be considered in a separate jurisdiction in Wales could be a continuation of England and Wales legislation. It is about the extent to which there is a separation between the two, if you are not simply talking about separating the devolved areas and the administration of justice in relation to those.

[57] **Mr Owen:** If we are talking about separating the devolved areas, doing it on a thematic basis rather than a territorial basis would tend to create more jurisdictional problems.

[58] **Simon Thomas:** You mentioned the separation of the 20 areas earlier. Would it not be even more confusing for the average person to see it as a jurisdiction that only includes the devolved subject areas, rather than a case of, 'I live in Wales, therefore, it is a Welsh jurisdiction', however vaguely that is perceived by the person on the street? As lawyers, which one would you see, in the long term, as being the better way for people to understand the law?

[59] **Mr Owen:** In terms of transparency for the ordinary citizen, separating it on the basis of the 20 devolved subject areas would be more complex and harder to understand, to the extent that it would interfere with access to justice.

[60] **Simon Thomas:** You would enjoy that. [*Laughter.*]

[61] **Mr Owen:** Yes, I suppose that lawyers would have a field day. [*Laughter.*]

[62] **Mark Drakeford:** On the way that the system currently operates, the committee has heard evidence that higher courts, which have the ability to meet in Wales, often do not do so. They meet outside Wales and when a case is started outside Wales, it is difficult to persuade them to transfer it back into Wales. Is that a problem? Is there an issue with access to justice, or is that just how the system works?

[63] **Mr Imperato:** On the issue of access to justice, on 19 March all money claims in England and Wales, namely personal injury claims, contract claims, and those types of civil claims—not administrative law or family law, but virtually everything else in the civil world; and personal injury is my speciality—must be issued out of Salford county court. I am also president of the Cardiff and District Law Society and, speaking on its behalf, it was disappointed with that position. One is concerned about Salford's ability to deal with matters that are uniquely Welsh, particularly matters to do with the Welsh language. Therefore, it is not something that was widely consulted on or considered. It is a big issue, which is affecting us at this moment.

[64] With regard to other cases, in theory, a civil case can be commenced anywhere in England and Wales, but the courts should consider which is the correct court to hear the case at the end of the day. You could have a case starting off in Birmingham but being transferred to south Wales if it was felt that that was best because of the parties or witnesses. That is a process within the court system at the moment. I have had experience recently of a judicial

review case with regard to a Welsh school closure. We were dealing with the interpretation of Welsh guidance, and the final part of that hearing was heard in the Royal Courts of Justice in London, but the majority of the case had been heard in Cardiff, and I think that that was right. We had QCs with a Welsh background. However, that was almost by way of coincidence—you could certainly have had London-based QCs and London-based lawyers involved in hearing that case. So, there is an issue with regard to how we deal with access to justice.

[65] I would suggest that there should be a way for cases with a unique Welsh element—particularly where they deal with Welsh guidance or Welsh law—to be dealt with in Wales, by judges and lawyers who are familiar with Welsh guidance, laws and so on. With regard to how you do that, I will, in answer to questions that I think will come later on, develop how that could be done almost immediately. I can deal with that now if you wish or I can deal with it later.

[66] **David Melding:** I think that it is more elegant for us to proceed immediately as we have raised the issue.

[67] **Mr Imperato:** It is interesting. The court rules that govern how we deal with cases procedurally are called the civil procedure rules. They set out how you have to issue proceedings—how many days you have to do this, how many copies of this you have to file at court and so on. Some of it is very mechanical in its way. You could have what they call a practice direction. For example, the rules could say that, no matter where it was issued in the country, if a case—and I am talking about a commercial or personal injury claim, not an administrative law case—had a particular Welsh hue and dealt with Welsh law generated in Wales, it should be transferred to Wales and looked at by a Welsh judge who had a qualification or extra training to deal with such cases. You could also have some Welsh procedures attached to it—a provision for there to be translation or to include in court bundles reference to Welsh guidance and previous Welsh decisions on that area of law. That already exists in particular types of law. For example, with mercantile law, commercial law, there is a practice direction that says that you should issue it in the mercantile courts and that it should be dealt with by a mercantile judge. That is a possible way forward so that, now, we could have Welsh-element cases looked at in the Welsh context. It would be a purely administrative measure to put into effect, and it would be very simple.

[68] **Mark Drakeford:** Thanks very much for that. Thinking about that in the north Wales context, there is a discrete north Wales circuit and yet the committee has heard evidence that a great deal of the actual work flows east across the border and happens outside Wales. First, does it matter? Is it something that we should be concerned about? Secondly, if so, what sort of cases give rise to concern? Thirdly, what can be done about it if it is a problem?

[69] **Ms Powell:** I wish to add that, as the Law Society, we do not have evidence of this happening specifically in north Wales. Our anecdotal evidence is that no business, as it were, was going over the border and that, particularly in Chester, matters are quietening down as a consequence of cases remaining in north Wales.

3.00 p.m.

[70] **Mr Owen:** Anecdotally, it is also tied up with prestige; it is not seen as good in terms of career development to be involved in a case in Wales, as opposed to a case in the Royal Courts of Justice, which is seen as better in terms of career development. There is also a point of principle in that the right to use Welsh exists in courts in Wales, but not in England. So, it would infringe on the rights of those who wanted to speak in the Welsh language if they were transferred to England.

[71] **Mark Drakeford:** My last question is on the capacity of the legal profession in

Wales. Does the creation of a Welsh jurisdiction require, as a prerequisite, a legal profession capable of operating within such a jurisdiction?

[72] **Mr Owen:** It requires people who have competence in Welsh law. There are different ways of achieving that; it could be achieved through continuing professional development, through accreditation as a Welsh lawyer, or through a separate legal profession.

[73] **Mark Drakeford:** If that competence does not exist already, does that mean that a Welsh jurisdiction cannot exist?

[74] **Mr Imperato:** I want to mention at this point—again, taking this in a different context—the thorny issue of the codification of Welsh law. That is a major practical issue for practitioners, because, in my experience, it is difficult to find a single coherent book or website that contains everything. It is not just about having the statutes or the guidance contained in one place, but the commentaries on those are also important. That is a problem for the profession in dealing with the Welsh element of cases. For example, my school closure case, which is currently under appeal, dealt with the test of what constitutes a popular school in Wales. The Lord Justice made a judgment on that, which, in a way, has become Welsh case law. However, if someone, in a year's time, had a similar case, where would they be able to get their hands on that exact case and that point, cross-referenced to the specific part of the guidance? That is a practical difficulty for us. So, when we talk about professionals being able to run cases in Wales and to develop that practice, it would be difficult without the starting block of having a readily accessible codification of Welsh law.

[75] **David Melding:** We noted that point in your written evidence. The committee is overwhelmingly of the view that a Welsh statute book, or whatever it gets called, would be of huge significance and of great benefit to all concerned. So, we may not linger too much on this, simply because it is not an area where we feel we need to explore in order to identify our opinion on it. So many witnesses have said that it is necessary, although not terribly easy and certainly not inexpensive, to do. Simon, did you want to say something novel on that?

[76] **Simon Thomas:** I agree completely with what you said about the committee's view; indeed, there have been debates in the Chamber on this as well. However, is a Welsh statute book a prerequisite to establishing a Welsh jurisdiction, or is it simply part of the process of establishing a jurisdiction, albeit that we have a certain jurisdiction anyway?

[77] **Ms Powell:** It is not a prerequisite, but it is a complete necessity currently.

[78] **Simon Thomas:** Okay. So, it is something that we need to have anyway, and to have tomorrow.

[79] **Ms Powell:** Yes, absolutely. We have been suggesting this for some time now. As the years pass by, the gap is continuing, both in relation to having it in one place and in having some sort of area where we can bring together the commentaries as well.

[80] **David Melding:** It is apposite that you raise this now and we note it. Simon, are you ready to take us onto the next set of questions?

[81] **Simon Thomas:** Mae gennyf gwestiynau ar dri phrif faes. Hoffwn ddechrau gyda'r ffaith bod cryn dipyn o'ch tystiolaeth yn trafod sut byddech yn delio gydag anghydfodau sy'n codi o dan gyfraith breifat. Pe byddai awdurdodaeth ar wahân i Gymru, sut byddech yn datrys materion

**Simon Thomas:** I have questions relating to three main areas. I would like to start with the fact that a lot of your evidence discusses how you would deal with disputes that arise under private law. If there was a separate jurisdiction for Wales, how would you resolve such private issues—under Scottish

preifat o'r fath—o dan gyfraith yr Alban, cyfraith Cymru, cyfraith Lloegr neu beth bynnag? Yn gyntaf oll, a oes gennych enghreifftiau o sut y byddai hwn yn rhwystr neu'n broblem y tu mewn i'r system ar hyn o bryd? Rydych yn cymryd cryn dipyn o le yn y dystiolaeth i drafod hyn. Beth yw eich ofnau? Pa bethau sy'n achosi pryder i chi yn hyn o beth?

law, Welsh law, English law or whatever? First of all, do you have any examples of how this would be a barrier or a problem within the current system? A fair amount of your evidence has been taken up by this. What are your fears? What things give you cause for concern in this matter?

[82] **Mr Imperato:** How does one choose an area of jurisdiction as a lawyer? There are some areas that have geographical limits already. For example, in personal injury, one would normally issue where the accident occurred. In a judicial review, you would be looking at the body that is to be challenged. However, one very fluid area is contract law, and it would be interesting to try to work out practice in that area—I hasten to say that I am not a contract lawyer—as a lot of contracts contain a clause stating which jurisdiction is to deal with a dispute in the contract. Of course, they normally say that it is the law of England and Wales, so it would be interesting to see how that develops.

[83] Lawyers tend to want to have cases heard in courts where they think that they will get the best service. In a way, courts provide a service to members of the public and to their lawyers, and so, anecdotally, one tends to think that a particular court deals with cases more quickly and more efficiently, and it may have more claimant friendly judges or defendant friendly judges. Anecdotally, people tend to look at that as well. These are all factors that influence choices for lawyers as regards where they want to litigate cases.

[84] If Wales was able to have a system in which its courts were seen to be very consumer friendly and efficient, and able to deal with Welsh issues in a particularly robust and just way, it would be an attraction for lawyers, in actual fact.

[85] **Simon Thomas:** Un o'r enghreifftiau yn fy mhen i yw cyfraith tai. Mae'n bosibl iawn y byddai'r gyfraith honno'n ymwneud â landlordiaid preifat yn wahanol yng Nghymru nag y byddai yn Lloegr, gan ein bod wedi cael Mesur tai yma, a fydd o bosibl yn gosod dyletswyddau ar landlordiaid preifat nas ceir yn Lloegr. A ydych yn dweud bod y system bresennol i bob pwrpas yn caniatáu i bobl ddewis awdurdodaeth? Rwy'n gyfarwydd â llofnodi dogfennau sy'n dweud:

**Simon Thomas:** One of the examples that I have in mind is housing law. It is very likely that such legislation will affect private landlords differently in Wales from legislation in England, because we have passed a housing Measure here, which will possibly impose duties on private landlords that will not operate in England. Are you saying that the current system in effect allows people to choose a jurisdiction? I am familiar with signing documents that state:

[86] 'The law of England and Wales will apply'.

[87] A oes dewis o gwbl yn hynny o beth ar hyn o bryd, ynteu a ydych yn sôn am yr hyn sy'n digwydd ar ôl i anghytuno godi, sef dewis y system llysoedd wedyn i weithredu'r gyfraith? Yr hyn rwyf yn ei ofyn—mewn ffordd anuniongyrchol, mae'n ddrwg gennyf—yw: a yw pobl yn dewis yr awdurdodaeth yn gyntaf, ynteu a ydynt yn dewis yr awdurdodaeth i ddelio â'r mater wedi i'r anghydfod godi yn y system bresennol?

Is there currently any choice whatsoever in this regard, or are you referring to what happens after a dispute has arisen, in that someone subsequently chooses a court system to implement the law? What I am asking—in a roundabout way, I am sorry—is: do people choose the jurisdiction first, or do they choose a jurisdiction to deal with the matter after the dispute has arisen under the present system?

[88] **Mr Imperato:** Going back to contract law, you are in effect choosing your forum first if you specify the law of somewhere or other—you could specify the law of the Cayman Islands or somewhere like that if you wanted to. That is your choice at the moment. In those areas where Wales has had law-making powers devolved to it, such as in housing and education, my personal view is that measures should be considered for driving those cases towards Wales. That is what I meant earlier on about the possibility of what I call practice directions, because I think that it would be in the interests of the consumer, and I personally think that it would be in the interests of all concerned, for those cases to be driven towards Wales. So, there may not be anything stopping somebody from having an educational dispute or a housing dispute heard in English courts involving Welsh issues, but it would be useful to try to avoid that by driving them towards the Welsh courts, where, hopefully, there would be a more informed view of the Welsh laws that govern those disputes.

[89] **Simon Thomas:** To pursue that example, I am a Welsh tenant, but I make a contract with a landlord who is based in England, but the contract is for a property in Wales that I am renting, so you would expect Welsh law to apply. Where is the clarity there? When do we choose which law applies? Is this done during the drawing up of the contract? How do we ensure that that clarity is maintained in the system, so that—going back to an earlier point about the statute book, perhaps—people are aware which law applies to their circumstances?

[90] **Mr Imperato:** The question regarding the way in which you educate people generally is very difficult. Educating people on their rights or on what the forum would be is extremely difficult. That is always a challenge for all Governments and administrations. So, that is a difficult question to answer. However, ultimately, it comes down to the question of what is the most appropriate forum. If you are talking about a Welsh housing dispute, where there are clearly Welsh issues there and Welsh laws are engaged, my view is that we should be looking to drive that to Wales. There are ways now to do that. It is in the power of the Court Rules Committee, which sets the common procedure rules.

[91] **Simon Thomas:** So, these issues, which you raise in your evidence, are things that we should consider, but they are not in and of themselves obstacles; they are just aspects of the law that we have to consider within the United Kingdom anyway, really, because we already have such a jurisdiction.

[92] **Mr Imperato:** Yes, absolutely. These are things that are in the power of the Court Rules Committee now.

[93] **Ms Powell:** I would like to add that there is an overlap. In contract law, you can effectively decide where something will take place. If there is a new housing Bill and a new housing Act, where would be the most appropriate place to consider that? It would be Wales, but if it is the jurisdiction of England and Wales, that case could be heard anywhere. We could have a lawyer from anywhere in England and Wales advising on that, because they would be an expert on the law, and it could be heard by any judge anywhere in the country, across England and Wales. So, it is just a question, as we move forward, of how we move them into Wales. For areas that are totally non-devolved and which will not be devolved in the future, we have to consider where such issues and claims will be considered.

[94] **David Melding:** This is what some people call the need for a clearer Welsh legal system, is it not, to consider systematically how these matters are dealt with? Indeed, the judiciary has been pushing hard for this. We are progressing in that direction now, are we not?

[95] **Ms Powell:** As we have said, we are progressing, but in the response of the Welsh committee of the judges' council, it is suggested that a system for determining the choice of

jurisdiction between England and Wales in terms of witnesses and also transferring cases could be developed. There does not seem to be a reason why that cannot be developed now.

[96] **David Melding:** I understand.

[97] **Simon Thomas:** May I add my personal view to that? There is also the choice of language to consider. If I was a client and wanted to contribute in Welsh, then that matter can be dealt with only in Wales, within the physical limits of Wales. That is correct, is it not? I cannot have a case heard in Welsh in Birmingham or Newcastle.

[98] **Mr Imperato:** That is why we were so concerned about the Salford move, of course. If you wanted to telephone Salford and speak in Welsh to find out what has happened to your claim form—

[99] **David Melding:** It does not fit in with the things that we have just been discussing—the move to a more streamlined, Welsh legal system.

[100] **Mr Owen:** It causes delay if you use the Welsh language, which seems unfair.

[101] **Simon Thomas:** However, a wholly integrated court system in Wales might get used to using both languages and might, therefore, get rid of that delay. We shall see.

[102] Hoffwn droi at fater arall yn awr, sef y syniad o gomisiwn y gyfraith. Clywsom yr wythnos diwethaf yr Athro Williams o Aberystwyth yn cynnig y dylai comisiwn diwygio'r gyfraith fod yn rhan o awdurdodaeth gyfreithiol yng Nghymru. Awgrymodd bod modd cael hynny unrhyw bryd ac nad yw'n hanfodol sefydlu hwnnw yn gyntaf; mae'n rhywbeth y dylid ei chael yn awr, hyd yn oed, gyda'r math o gyfreithiau sydd gennym ar hyn o bryd. Nid wyf yn siŵr os ydych wedi cael cyfle i edrych ar ei dystiolaeth, ond, yn eich tystiolaeth, rydych hefyd yn codi'r angen hwn. Felly, pryd fyddai'r amser gorau i sefydlu'r fath gorff? A oes gennym ddigon o gorff o gyfreithiau yn awr yng Nghymru i sefydlu corff o'r fath, ynteu a ddylem aros am ddau neu dri thymor eto er mwyn i'r corff o gyfreithiau ddatblygu?

I would now like to turn to another matter, namely the idea of a law commission. Last week, we heard Professor Williams from Aberystwyth suggest that a law reform commission should be part of a legal jurisdiction in Wales. He suggested that it is possible to have that at any time and that it is not essential to establish that first; it is something that we should have now, even with the kind of laws that we have at present. I am not sure whether you have had a chance to look at his evidence, but, in your evidence, you also raise this need. So, when would the best time be to establish such a body? Do we have enough of a body of laws now to create such a body, or should we wait for two or three terms yet in order to allow the body of laws to develop?

3.15 p.m.

[103] **Mr Imperato:** The Law Society does not have a view on the timing of this, but, personally, I think that there would be a need for something like this in due course. There is definitely a body of Welsh law, but the issue at the moment is that it is spread over several areas of law. Law commissions tend to look at particular specialisms. I certainly think, as I keep returning to, that the rules committee should definitely have a Welsh sub-committee. It is difficult to take a view on the timing of law commissions. My experience of devolved law is in the field of education law, and there is already a substantial body of guidance, law and case law on that.

[104] **Mr Owen:** There is no lacuna in the sense that the current law commission is the

Law Commission for England and Wales.

[105] **Simon Thomas:** Does that commission look at Welsh law? For example, it strikes me that with regard to the education field, consolidation would be a wonderful thing in Wales. Has that been looked at?

[106] **Mr Owen:** To the law commission, Welsh law has two meanings: the law of England and Wales, which may have particular impact in Wales and which may be distinguished from England even though the law is the same, and the distinctive body of Welsh law. It had a concordat with the Welsh Government, which goes back to 2004—I know that it is trying to update that in the light of—

[107] **Simon Thomas:** That pre-dates the referendum and even the separation of executive and corporate powers.

[108] **Mr Owen:** It is in need of updating, and progress is slow towards achieving that, but that is what we need. The funding of Welsh-specific work will, presumably, fall on the Welsh Government or the Assembly, and that might be another issue. In terms of answering your question, codification and consolidation would be the immediate need as well as keeping the body of Welsh-specific law as it develops and to review it as well.

[109] **Simon Thomas:** Are you saying that you see this as something that could happen whenever, and that it is not related to a separate jurisdiction as such? Is it just a piece of work that should happen? I see that you agree. Do you have any views on whether a commission for Wales should be similar to the current England and Wales commission, or do you have any strong views on a different way of doing it?

[110] **Mr Owen:** My personal view is that it should be different, because the context is different in Wales. You will need academic and practising lawyers, but it should also pull in other people. The Government of Wales Act 2006 had an inclusive approach to the Welsh Government's functions by pulling in the voluntary sector, business, and local government and so on into the decision making. The equality of opportunity obligation on the Assembly and the Government is wider than that under the Equality Act 2010, because it is equality of opportunity for all people, rather than on the basis of prohibited characteristics. This is one area where innovation would be called for. The universities would have a role; they would have the role that you would expect, which is to carry out research to inform the role of a specific law commission for Wales, but there are also more creative and inventive ways that you could also look at. What we call clinical legal education is on the increase, where you use real-life clients for pedagogical purposes. So far, the experience of this in this country has been to give advice, assistance and possibly even representation on the basis of individual cases. Federal jurisdictions all over the world use clinical education by universities to inform and drive law reform as well. So, you could almost involve the students in this, as an extra resource. If you were to look at a law commission for Wales, the capacity would be more limited, because Wales is a smaller place; there will be fewer civil servants and fewer people, so you will need to get extra resources from somewhere else.

[111] **Simon Thomas:** It seems to me that a final aspect of jurisdiction at this stage is where people practise, how they are trained to practise and whether they can transfer from one jurisdiction to another. The First Minister has often referred to Northern Ireland as an example, where my understanding is that English and Welsh lawyers can practise in Northern Ireland and vice versa. There is a transfer scheme, of course, to allow that to happen. How does that work at the moment in the UK? We have three jurisdictions in the United Kingdom and of course more than three in the British Isles. How does it happen at the moment? Are there examples from the Isle of Man or the Channel Islands that might also have a bearing on a possible Welsh development?

[112] **Ms Powell:** The Solicitors Regulation Authority now oversees the transfer into the jurisdiction. It operates the qualified lawyers transfer scheme, so it is open to anyone to make a request to come into the jurisdiction effectively to practice. In the Northern Ireland example, the education aspect is usually accepted, so that the level of educational knowledge is usually accepted as sufficient—

[113] **Simon Thomas:** So, there are no additional requirements.

[114] **Ms Powell:** There are usually not in terms of education. I am advised that there tends to be a period of training to ensure that the individual is aware of the different situation in which they are working. It varies from person to person. I am also told that another aspect is how many people are coming into the jurisdiction of England and Wales, where they are coming from and what sort of qualifications they are arriving with. There are no specific statistics on Scotland and Northern Ireland that I could share with you, so I am not aware of the numbers.

[115] **Simon Thomas:** Are you able to give an impression of what transfer there might be between Scotland and England and Wales?

[116] **Ms Powell:** I do not have one, I am afraid. I could make more inquiries—

[117] **David Melding:** If you could submit that as further written evidence to us, that would be helpful.

[118] **Mr Owen:** To approach the question indirectly, the law schools in Scotland and Northern Ireland are very much producing lawyers for Scotland and Northern Ireland. They can obviously qualify to transfer, but the assumption seems to be that they will remain in those jurisdictions.

[119] **Simon Thomas:** You have talked about possible training, but have you any idea of what period of time it might take to transfer from one jurisdiction to another? Once transferred, does that mean that the lawyer is able to undertake work in both jurisdictions equally at any time, switching between the two as it happens?

[120] **Ms Powell:** In terms of moving between jurisdictions, there would be a consideration of the individual, what their educational ability is and what their practice background is. If they were coming from one jurisdiction simply to practice in one practice area, that would also be relevant. However, there would then be ongoing issues, so they would be subject to the Solicitors Regulation Authority, and their regulation would relate to continuing professional development. That would be how they would report back on their continuing ability. The other issue that is a concern for us is that if we are talking about England and Wales being separate, we can deal with the transfer backwards and forwards, but if you were transferring and you were in two jurisdictions, and if separate regulatory systems, fees and so on flowed from that, there would be concerns, particularly for our members who are working on cross-border issues or on the border, that there would be a requirement for them to be doubly regulated, effectively, although they would possibly be undertaking work for the same clients.

[121] **Simon Thomas:** What about understanding the nature of developing jurisdictions? I was struck by some evidence that we had about Gibraltar, where the evidence was that for the purposes of appeals in Gibraltar, England-and-Wales-trained lawyers go there, but it was suggested that they did not always understand the different approach that was being taken in Gibraltar law. For example, in the field of children's law in Wales, we take a rights-based approach that is different from the approach being taken in England, so there is a possibility



that people might be trained and highly educated, but still not quite understand the take that legislators in Wales have put into legislation for Wales. Therefore, they might be bringing in a different interpretation of that. Is that an issue that arises now, and how can you guard against that if you change between jurisdictions as a lawyer?

[122] **Ms Powell:** As we have been discussing, there is a growing body of law in Wales that is different from that in England. So, it is incumbent on the individual lawyers to ensure that they are up to date with the law and also with the interpretation of the legislation, where issues arise. In terms of their continuing professional development, there are specialist sections within the Law Society and there are specialist associations for lawyers. It is when people come to specialise and become aware of their peers that they develop the knowledge base. The profession operates from day to day with changing legislation and changing interpretations, so the individual should not have any difficulty with that. It is a matter of knowledge and information, and, again, in certain circumstances there may be concerns that would track back to the availability of this information, which harks back to the statute book and commentaries and so on. We need to ensure that there is more and more available to our practitioners.

[123] **Simon Thomas:** Does that hark back to a law society for Wales, at the end of the day?

[124] **Ms Powell:** I could not comment.

[125] **David Melding:** Mark will take us through the next set of questions.

[126] **Mark Drakeford:** Chair, I will go straight to questions about the tribunal system, which you started with.

[127] **David Melding:** Yes, I think that we covered the earlier point.

[128] **Mark Drakeford:** You say in your evidence that tribunals are demonstrating the pros and cons of a separate system. Could you help us by identifying two or three of each? What are the pros that it is demonstrating, and what are the cons?

[129] **Mr Imperato:** In terms of pros, it means the ability of Wales to react to create its own means of redress for people based on its own legislation, community needs and perceived social needs. Therefore, if Wales considers that it needs a particular tribunal to deal with a particular issue for its citizens, it has the power to create such a tribunal and give its citizens that redress. I would say that that should be seen as a major advantage for Wales. However, with that come the cons, which are well set out in the evidence that is before the committee, such as issues of resources, and not just purely financial resources, but resources in terms of the quality of members of tribunals and the quality of the clerking. I was struck by that point in the evidence. That is an issue and, in my respectful opinion, there is no point having a brilliant tribunal system if you have not got enough specialist members and particularly good clerking facilities, which is something that I have a big bugbear about. You would also need the ability to house these tribunals in places that are consumer friendly and independent of the local authority, which may be one of the parties involved. These kinds of things involve big resource issues. I have had a lot of experience with the special needs tribunal in Wales and I think that it has made great strides, but the number of cases that it gets coming through is still relatively small compared to England, so it is a question of cost and whether you can justify having it.

[130] One thing that I would like to touch on is what I would call the unintended consequences of tribunals. Speaking as somebody who has been involved in special needs tribunals, I must say that they can be incredibly complicated cases. I have had simpler High

Court cases than special needs tribunals. A big issue has always been how to fund an advocate to represent you or help you in those kinds of cases. If Wales had an enhanced system of tribunals, with new tribunals and extra tribunals for this area and that—and that may well be the case as social law may develop in Wales separately and differently from England—then the point is that, you might have all that, but how do you then represent, fund and give assistance to the lay people who want to use those tribunals? Does it drive you down into this idea of almost having a separate legal aid system for Wales? These are the kinds of issues that, if you shine the light on this, you might be driven towards. That is an interesting point to me, as somebody who is concerned at the lack of legal aid, and how that has withered on the vine over the last few years. That is something that we will have to think carefully about in Wales.

[131] **Mark Drakeford:** I wonder if you could help me with this point, Mike, because I am failing to understand it completely. If you had a separate tribunal system and it developed in different ways, so that there was greater reliance on it and it did more work and so on, I could see how that would mean that you would have to be able to draw on a wider base of potential members, and places for it to meet, and that sort of stuff. However, if you assume for the moment that it has not gone in that direction, and it is just a separate system in Wales, how would separation by itself have an effect on the quality of the people who sit on it, or the quality of clerking, or whether you can meet in a particular office? Would that not be the same as with an England and Wales system? You would still have to have good people to sit on it, and you would still have to meet in the right kind of office. What is the jurisdictional difference? That is what I am trying to understand.

3.30 p.m.

[132] **Mr Imperato:** I have concentrated purely on the practical consequences of that. It is vital to overcome these problems. Jurisdictionally, to a large extent, tribunals tend to plough their own furrows, if you like, in that a tribunal will deal with a particular area of law. I think that we have 16 Wales-based tribunals, so they might plough their own furrow in that respect. So, yes, you could have someone who is well trained-up to be on the Wales valuation tribunal and a good clerk for that, so that would not necessarily be a problem.

[133] I know that tribunals are concerned about ensuring that they have a consistent approach to procedures and the way in which decisions are made. Again, that is something that can be a problem; if you have a proliferation of tribunals, consistency and decision making can be problematic in terms of the administration of justice.

[134] **Mr Owen:** In terms of democratic principles, it is the role of democracy to hold the executive to account. The tribunal system in Wales is devolved and is therefore coterminous with the Welsh Assembly. So, you could argue that it is therefore easier to hold the Assembly to account.

[135] **Mark Drakeford:** Diolch. I droi at rai cwestiynau eraill i Mr Owen i ddechrau, rwyf am ofyn am y broses hyfforddi. A allwch roi rhai manylion i ni am natur y cyrff o fyfyrwyr yn yr adran ym Mhrifysgol Morgannwg ar hyn o bryd? O ble maent yn dod? A ydynt yn dod o Gymru neu tu fas i Gymru? Ble maent yn meddwl y byddant yn gweithio ar ôl y cwrs? A ydynt yn dod ar y cwrs gyda'r bwriad o ymarfer yng Nghymru, neu a ydynt yn meddwl, 'Dyma'r cwrs a fydd yn gallu ein helpu i ymarfer dros Gymru a

**Mark Drakeford:** Thank you. Turning to some other questions for Mr Owen to begin, I want to ask about the training process. Can you give us some details about the nature of the student body currently at the department in the University of Glamorgan? Where do they come from? Do they come from Wales or from further afield? Where do they think that they will practice after the course? Do they come on the course with the intention of practising in Wales, or do they think, 'This is the course that can help us to practice across

Lloegr’?

England and Wales’?

[136] **Mr Owen:** Sixty per cent of students at the University of Glamorgan are not only from Wales, but are local from within a 30-mile radius of the institution. Thirty per cent are from England, although I understand that the number is decreasing, in line with other Welsh law schools, and 10 per cent are international students or from the European Union. Where they want to practice very much depends on their area of interest. Those with an interest in commercial law will see themselves heading for London. Those who see themselves pursuing some sort of social justice agenda are more likely to identify with legal Wales.

[137] **Mark Drakeford:** Sut mae’r cwrs yn helpu pobl sydd eisiau ymarfer yng Nghymru? A oes cwrs ar gael ar *Welsh law* neu rywbeth felly, neu a yw myfyrwyr yn cael gwybod am gyfraith Cymru yn gyffredinol ymhob cwrs maent yn ei ddilyn? **Mark Drakeford:** How does the course help people who wish to practice in Wales? Is there a course on Welsh law or something of that nature, or do students learn about Welsh law in general as part of every course that they follow?

[138] **Mr Owen:** Currently, they study the powers and processes of Welsh law and the institutions of Welsh law as part of the legal system. However, as devolution has developed, we have found that we have had to break out of those boundaries. From September, we are delivering a specific Welsh public law module, because the content has increased sufficiently.

[139] There are other things that go with legal Wales. When teaching law through the medium of Welsh, it need not necessarily be the module specifically on Welsh law, but it goes to the heart of building bilingual capacity, which is necessary when you are able to use Welsh in the courts. The University of Glamorgan and other universities are finding a lack of tutors who are sufficiently proficient in the Welsh language, and the result has been to deliver teaching on a collaborative basis where institutions come together. You do not just teach Welsh law, because legal Wales has a much stronger identity than legal west midlands, for example. Certain things flow from that as well. For example, I teach European Union law; I probably spend a greater amount of time than my English counterparts teaching things like the Committee of the Regions. I also assess work-based learning, which means that you become much more aware of the social and economic agenda of Wales and encourage the students in their reflections to think a lot about unmet legal need in Wales for example, which is probably not so strong in England.

[140] **Mark Drakeford:** Lastly on this, with regard to the interesting development in Glamorgan from September onwards, is that a reflection of a direction of travel across other law schools in Wales? Is that something that is happening generally?

[141] **Mr Owen:** Yes, I know that Cardiff has had a devolution module for some time, and Bangor is very strong on this. It is probably about finding that there is the need to increase the amount of time devoted to it—the subject matter is expanding, therefore more time needs to be devoted to it. Welsh law also depends, to a certain extent, on the options you teach and the specialisms of your staff. We do not teach planning law, where it is estimated that 40% of the law is different. I would have thought that you would need to follow the model of Northern Ireland, where the Law of Property Act 1925 does not apply. So, the law schools there have Irish land law and English land law, and students can study both. For some of that planning law, the differences are sufficiently large to require a specific module if you are teaching in that area.

[142] In areas like family law, where the differences are not so great, you can teach it on a comparative basis and seek to develop the students’ skills more generally. Obviously, we live in a world where the law is internationalising very rapidly, and we see that comparative legal skills are very useful legal skills to acquire.

[143] **Mark Drakeford:** This may not be a question that you can answer, but if students who have been trained in planning law in an English university then get a job in Wales, will it come as a surprise to them to find that 40% of the law here might be different? Will that have been hinted to them anywhere during their training?

[144] **Mr Owen:** Yes. I have had experience of delivering conference papers to someone in England about the differences in the law in Wales. It tends to come as a surprise to tutors and you would assume that would percolate down to the students as well. I also find that when you have tutors from English institutions locked in a room, they are very interested in the developments in Wales, but they tend not to engage with it unless they have to. I think it is seen as an additional element that they have to take on and they do not have the time to do it.

[145] **David Melding:** I will just conclude on this point of what is likely to happen if there are four jurisdictions and there is a Welsh one joining Northern Ireland, Scotland and England. Do you see it as a challenge for legal education should English students tend to go to England, and Welsh students to Wales, as is the case at the moment with Scottish and Northern Ireland students who tend to train in their own nations? I do not think that that would explain how some federal countries operate. In the United States, people will go to law schools pretty much based on the prestige and expertise of a particular law school and then they will just do the local qualifications afterwards. So, could that sort of model emerge? Also, for institutions in Wales providing legal education, what sort of model would be the best outcome? We are going to have more Welsh law regardless, as you have already outlined.

[146] **Mr Owen:** English students are increasingly going to England and that is a completely separate development from devolution. That is more for financial reasons.

[147] **David Melding:** That is because fewer students now go from the parental home when they go to university. So, that is a sociological change, is it not?

[148] **Mr Owen:** That is right. In terms of transferability, it very much depends on the degree of difference. There are only two legal providers in Northern Ireland—that is the University of Ulster and Queen's University. Both their degrees satisfy the academic stage of training for England and Wales, so it is only the professional training that is differentiated. That must make transfer easier. Obviously, Scotland has a bijural system with both civil law and common law elements, so that makes transfer a little more difficult. However, the approach to legal education has differed in Northern Ireland and Scotland. Professional training places are limited, so you have to undergo a competitive examination to get in, whereas there has been a surfeit of places in recent years on the legal practice course in England and Wales. In Northern Ireland you have to work for a barrister or a solicitor, and that goes hand in hand with your professional training, whereas here you do the legal practice course, and if you are doing it full time you then get the training contract following that, but there have not been enough training contracts to go around in recent years. So, there are other differences between the systems as well.

[149] **David Melding:** That concludes the questions that we want to put to you, but there may be points that you wish to emphasise if they have not been drawn out. There is one partial exception. I note in your written evidence that you point us to the operation of the Children and Family Court Advisory and Support Services. Do you have any thoughts that you want to leave with us in terms of that? It is an important area, and one that has controversial issues related to it. However, from the point of view of casework, it was probably the biggest area in terms of devolved practice and administration that suddenly got us involved as politicians that did not have much contact with the law previously.

[150] **Ms Powell:** CAF/CASS Cymru has had a number of problems, but it now has a new strategic plan in place. We have had a recent problem with the way that CAF/CASS Cymru was approaching the lodging of reports with the courts and so on. We have discussed practice directions, and the problem flowed from the fact that CAF/CASS Cymru was putting in place a system that worked for them but was not a system that was acceptable within the court structure. CAF/CASS Cymru has now apologised for that and is changing its approach. However, there will always be issues with different court services. That is a useful example; it is a devolved area and one that overlaps with a huge area of private family law.

[151] **David Melding:** You are giving us a tactful warning, which is not to try to conceive a perfect system and then apply it to something as established and traditional, if I dare use that word, as a legal system and jurisdiction that, for many hundreds of years, has been England and Wales.

[152] **Ms Powell:** There will always be issues, and concerns will always arise. On moving forward and looking at development, we are hoping that everyone learns all the lessons of what has gone before, and it hopefully gives us another opportunity now to plug the gaps that have arisen with devolution in terms of legal Wales. As you mention, the commentators and the people involved are aware of the issues. There is not an awful lot of movement in terms of practical application of solutions to a lot of the problems that are arising.

[153] **David Melding:** Okay. Is there anything else that you would like to mention?

[154] **Mr Owen:** We have mentioned the lack of text to support practitioners, and the problem as far as law schools are concerned is that writing these texts does not contribute towards their research ratings, so it works as something of a disincentive.

[155] **David Melding:** We will make a note of that too.

[156] Thank you for taking the time to help us with our inquiry. I will try to speak for everyone in saying that I have certainly found your evidence lucid, clear and hugely helpful to us. We will reflect on it and it undoubtedly will influence our report. So, I hope that you will regard the sacrifice of time and struggling through a heavy cold worth it. I regret that you have had some discomfort with that, Kay. However, we are very grateful indeed, so thank you very much.

[157] **Ms Powell:** I would simply like to add that as you are taking evidence from person to person and from week to week, if anything does arise that we can help you with then do get in touch and we will supply whatever information or statistics you need.

[158] **David Melding:** We appreciate your offer of continuing help, and I am sure that we will take you up on that. Thank you.

3.44 p.m.

### **Gohebiaeth y Pwyllgor Committee Correspondence**

[159] **David Melding:** You will see the exchange of correspondence that I have had with the chair of the European Scrutiny Committee at Westminster, William Cash MP. We have also been referred to in the parliamentary debate that followed Mr Cash's committee's report, and it seems to demonstrate that this way of dealing with European subsidiarity issues has had some impact. We note that in passing.

3.45 p.m.

[160] **Mr Griffiths:** There is another point, which is that, as a result of that debate, the House of Commons submitted a recent opinion to the Commission in relation to the proposed directive, and it is only the fifth time that it has done so in relation to any subject; the others related to financial matters, which were clearly not matters within the competence of the Assembly. The other matter is that the Swedish Parliament has taken a similar attitude to precisely the same aspect of the proposed directive.

[161] **David Melding:** At any rate, it is a serious outcome and demonstrates the value of the work.

3.46 p.m.

### **Dyddiad y Cyfarfod Nesaf Date of the Next Meeting**

[162] **David Melding:** The next meeting will be on 26 March. We shall continue with the practice of not meeting unless I feel that we have a full agenda. I sense that Members prefer longer but fewer meetings.

3.46 p.m.

### **Cynnig Gweithdrefnol Procedural Motion**

[163] **David Melding:** I move that

*the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order No. 17.42(vi).*

[164] I do not see any Member objecting, so we will now meet in private. Please clear the public gallery and switch off the broadcasting equipment. Thank you.

*Daeth rhan gyhoeddus y cyfarfod i ben am 3.46 p.m.  
The public part of the meeting ended at 3.46 p.m.*