



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

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

**Dydd Llun, 5 Mawrth 2012
Monday, 5 March 2012**

Cynnwys Contents

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

Offerynnau nad ydynt yn Cynnwys unrhyw Faterion i'w Codi o dan Reol Sefydlog Rhif 21.2
neu 21.3

Instruments that Raise no Reporting Issues under Standing Order No. 21.2 or 21.3

Offerynnau sy'n Cynnwys Materion i'w Codi gyda'r Cynulliad o dan Reol 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

Ymchwiliad i Sefydlu Awdurdodaeth ar Wahân i Gymru
Inquiry into the Establishment of a Separate Welsh Jurisdiction

Gohebiaeth y Pwyllgor
Committee Correspondence

Dyddiad y Cyfarfod Nesaf
Date of the Next Meeting

Cynnig Gweithrefnol
Procedural Motion

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

Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
Julie James	Llafur Labour
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
Eluned Parrott	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Simon Thomas	Plaid Cymru The Party of Wales

**Eraill yn bresennol
Others in attendance**

Yr Athro/Professor John Williams Athro'r Gyfraith, Adran y Gyfraith a Throsedddeg, Prifysgol Aberystwyth
Professor of Law, Department of Law and Criminology, Aberystwyth University

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

Stephen Davies	Cynghorydd Cyfreithiol Legal Adviser
Steve George	Clerc Clerk
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk
Alys Thomas	Y Gwasanaeth Ymchwil Research Service

*Dechreuodd y cyfarfod am 2.34 p.m.
The meeting began at 2.34 p.m.*

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

[1] **David Melding:** Good afternoon, and welcome 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 alarm test, so, should we hear the alarm, please follow the instructions of the ushers, who will help us to leave the building safely. Please note that these proceedings will be conducted in Welsh and English. When Welsh is spoken, translation is available on channel 1 of the headsets; channel 0 will amplify proceedings. Please switch off all mobile phones and other electronic devices completely. I am pleased to note that we are all in attendance.

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

[2] **David Melding:** There is nothing to raise on CLA96, The Special Educational Needs Tribunal for Wales Regulations 2012. On CLA97, The Education (Wales) Measure 2009 (Pilot) Regulations 2012, I will ask Steve Davies to talk about this, because it uses a slightly unusual device in terms of making pilot regulations that then become general regulations afterwards. I think that it is appropriate that we hear that explanation.

[3] **Mr Davies:** It is only a minor point. These pilot regulations are made under the Education (Wales) Measure 2009. The Measure sets out the right of children to make a special education needs appeal and claims of disability discrimination. The pilot regulations have been made under section 17 of the Measure and will be rolled out in Carmarthenshire

and Wrexham.

[4] One issue, which was raised with the drafting lawyer, is that it is stated that, on completion of the pilot period, which is 40 months, the system of the SEN appeals for children, giving children the right to make an appeal, would automatically roll out to the rest of Wales. I asked what would happen if any issues were raised or if any problems were to arise during the pilot period, because there is no explanation as to what would happen. What will happen is that, after 24 months of the pilot period, there will be an evaluation of the pilot system on an ongoing basis, and, if any problems do occur, amending regulations will be made before the end of the pilot period, so that there should be a smooth transition at the end of the pilot period. That is all, really; there is just that point.

[5] **David Melding:** Are Members content with that? I see that you are.

[6] The other items are CLA98, the Non-Domestic Rating (Deferred Payments) (Wales) Regulations 2012, CLA99, the Non-Domestic Rating (Demand Notices) (Wales) (Amendment) Regulations 2012, and CLA100, the Non-Domestic Rating (Small Business Relief) (Wales) (Amendment) Order 2012. I see that we are all content with those.

2:37 p.m.

**Offerynnau sy'n Cynnwys Materion i'w Codi gyda'r Cynulliad o dan Reol
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**

[7] **David Melding:** There are no instruments that require us to report under the relevant Standing Orders.

**Ymchwiliad i Sefydlu Awdurdodaeth ar Wahân i Gymru
Inquiry into the Establishment of a Separate Welsh Jurisdiction**

[8] **David Melding:** This is the first evidence session in this inquiry. You will have received a bundle of papers in written evidence. I think that we have had 30 responses to our request for written evidence. I am very pleased with that, and I put on record that I think that that is an excellent response. It indicates the need to have this inquiry. I know that you will be working your way steadily through that body of evidence. I have read a fair amount of it myself so far, and it is very high quality, with a good range of different views. That should provide a good basis for taking this inquiry forward.

[9] I am particularly pleased to welcome as our first witness Professor John Williams, professor of law at the department of law and criminology at Aberystwyth University. We have had a paper from Professor Williams, which it is not in the bundle of written evidence. It is a paper for this meeting, however, so it is on public record, as, indeed, is all the written evidence for anyone who wants to access it.

[10] I welcome you this afternoon, Professor Williams. We are very grateful indeed for your taking the trouble to submit a paper and now to answer our questions. I know that you come with a great pedigree, including having educated one of our chief legal advisers here, Gwyn. If that is not the highest of recommendations, I really do not know what is.

[11] **Professor Williams:** He has changed since he was a student. [*Laughter.*]

[12] **David Melding:** We have a range of questions that we want to put to you. The other

members of the committee will be involved in putting those questions to you and asking supplementary questions as the discussion goes forward. At the end, should we find that we have not covered everything that you think is pertinent to our inquiry, there will be a chance for you to add something. To use the prerogative of the Chair, I will start us off.

[13] There is a basic question that an intelligent layperson would perhaps ask, and that is: in what sense is it possible for a legislature, which we now are, with full primary law-making powers, not to have a jurisdiction? What is a jurisdiction, and in what sense do we not have it at the moment? That is perhaps a curious point at which to start, but I hope that it will lead us to shed some light on this particular question.

[14] **Professor Williams:** First, thank you very much for the invitation to come to meet you this afternoon. This is not an area of my speciality, but it is an area that interests me as an academic lawyer and also on behalf of the legal profession.

[15] With regard to your question as to whether it is possible to have a legislature without a jurisdiction, under the great unwritten British constitution, it is probably possible to have whatever we want. That is certainly one of the problems. In the short term, there is scope for saying—and, indeed, this is very much the system that we have now—that we have the political devolution and the law-making devolution in place, but, for the moment, the question of jurisdiction drags behind a little. What we need in order to be able to establish a jurisdiction is for all, or most, of the building blocks to be in place. So, it is possible, but it is far from ideal, because we will, essentially, have judges from the England-and-Wales jurisdiction deciding on matters that are purely Welsh. If you look at some aspects of social care law and education law, you have to ask whether that feels right, and I do not think that it does, certainly not in the longer term.

[16] The question of what makes a jurisdiction is a very difficult question to answer. There are numerous different types of jurisdictions: there is a personal jurisdiction, but I think that what we are talking about here is a territorial jurisdiction, where we have, if you like, the Jones and Williams population, territory and, very importantly, the judicial and the administration of justice infrastructure, so that there is an ability for that particular part of the UK to adjudicate on its own affairs—to a point, because we obviously have to take on board the question of where appeals are heard and whether a separate jurisdiction would mean a separate appeals court for Wales, which might be difficult. So, it is down to the ability of a country to decide on its law, and its interpretation and application of the law, for itself, through its own judicial system.

[17] **David Melding:** That sets out the parameters very nicely indeed. Suzy Davies will follow up on some of the very points that you raised at the end of your answer there to the first question.

[18] **Suzy Davies:** Thank you, Professor Williams, for your paper, which was very interesting. On the matter of the jurisdiction, you mentioned Tim Jones and Jane Williams's three common characteristics of the jurisdiction. Do you think that that is a comprehensive list, or are there additional aspects?

[19] **Professor Williams:** I think that there are additional aspects. One is a significant body of law in relation to which the jurisdiction can be exercised. One probably says that for mainly pragmatic reasons. Basically, there has to be enough work to keep the legal profession going and to keep the Welsh judiciary going. So, it is looking for the critical mass. If you look at the Isle of Man, for example, which is quite an interesting comparison, it is a very small country with a very small profession, but it has a significant corpus of law for which it is responsible. Otherwise, you get an occasional jurisdiction, as it were, where there is not enough work to keep it going. So, the points noted by Jones and Williams are prerequisites—

population, territory, although perhaps territory is a bit iffy, and the legal infrastructure—but also, very importantly, you need a significant body of law that is subject to this jurisdiction.

[20] **Suzy Davies:** Yes, it is not just a case of it being a distinct body of law; it must have a critical mass as well to warrant further discussion about administration and separate jurisdictions.

[21] **Professor Williams:** Yes, absolutely. There must be a critical mass, to make sense of it. One of the problems is that, if there is not enough work to go around, people look over to England, or concentrate on non-devolved matters, and we do not develop the expertise in Welsh law. That is part of the problem.

2.45 p.m.

[22] **Suzy Davies:** On that theme, the three criteria that were given by Jones and Williams include a defined territory and a distinct body of law, but when they speak of a court structure and legal institutions, they do not use the words ‘distinct’, ‘definite’, ‘separate’ or ‘independent’.

[23] **Professor Williams:** No, they do not, but I would see that as being a key component. You could take the view that Wales is a jurisdiction because it is part of the unitary jurisdiction of England and Wales, and we share courts and, more or less, a legal profession. However, I would think that, to be a true jurisdiction, we would need to be in control of the whole judicial system and the administration of justice process.

[24] **Suzy Davies:** Which is presumably why you have argued in your paper that now is not the time—is that right?

[25] **Professor Williams:** Yes, essentially. My apologies for referring to Ron Davies at the beginning, but I think that it is a superb summing up. As with political devolution, legal devolution has to evolve. We come to a moment when we say, ‘Yes, the time is right—there is enough going on here in Wales, both in terms of the body of law and the administrative jurisdiction of the judicial system, that we can say that the time is right to set up a jurisdiction’.

[26] **Suzy Davies:** Just to turn that on its head, apart from the possibility of having idle lawyers, what would be impractical about introducing a separate jurisdiction too soon?

[27] **Professor Williams:** This is not meant to be at all insulting, but there would not be enough to do. The danger is that it would just kind of—

[28] **Suzy Davies:** Peter out.

[29] **Professor Williams:** Well, it would muddle along, I think. It is perhaps part of this basic question of which comes first.

[30] **Suzy Davies:** Which you have addressed.

[31] **Professor Williams:** Maybe I trade a little bit on my distant knowledge of international law; to recognise a state there has to be a body of activity that makes it worthy of being recognised by the international community. Here, to recognise Wales as a jurisdiction, it has to gain the respect of the profession and it has to recruit good people; to recruit good people it has to be a very effective and busy jurisdiction or judicial system.

[32] **Suzy Davies:** So, there is a question of reputation here as well.

[33] **Professor Williams:** I think that there is. Again, if I could refer to the Isle of Man, it has a very well-established, distinguished legal profession, but it has only 250 people.

[34] **Suzy Davies:** It is also ancient, of course, so it has built up a corpus of law. Julie, did you want to come in on the question of practicalities?

[35] **David Melding:** Simon also wants to come in, but let us take Julie first; that is fine.

[36] **Suzy Davies:** I apologise, Chair.

[37] **David Melding:** That is quite all right. We will all get a crack, do not worry.

[38] **Julie James:** Following through on that point, since devolution, there have been a number of laws that are particularly Welsh, and I know that Welsh local authorities have had major problems in getting sufficient training for their in-house lawyers and so on in distinct areas of Welsh law. How would we begin to overcome that, and what effect do you think that that is having? Then I have another question, Chair, which is rather different.

[39] **Professor Williams:** This is essentially about building the capacity of the legal profession. That I see as a major challenge, and it is something that we really have to start now. In the law schools, we have made a modest start, but we need a step change if we are moving towards a separate jurisdiction. I can fully understand the concerns of, say, local authority lawyers in child protection. You have the Children Act 2004, which is an England and Wales piece of legislation, and then you have the Rights of Children and Young Persons (Wales) Measure 2011 and the United Nations Convention on the Rights of the Child; that is a different nuance—or more than a nuance—for the Welsh local authority lawyer.

[40] What we are not developing, which is a cause of some concern to me, is Welsh legal literature. We need that, and we need to develop a very concerted Welsh continuing professional development vision for lawyers in the public and private sectors. Again, those are some of the building blocks that we need to get to the point at which we can say that it is a jurisdiction. More and more, I think, we will see the two areas of law diverge. The social care proposals will be a good example, because, certainly in relation to safeguarding, Wales may do something different from England. We refer that to the England/Wales jurisdiction. So, it would be rather nice to get to the position of developing a Welsh jurisprudence on these matters. However, we need the trained workforce, as it were, to be able to do that.

[41] **Julie Morgan:** I think that we are going to develop that theme a little later on, but I would like to deal with a slightly different aspect of the same thing. I do not know whether you are familiar with the work of the administrative court since it was set up in Cardiff—

[42] **Professor Williams:** I am, yes.

[43] **Julie Morgan:** There are divergent views. At the moment, matters started in London can be transferred to it, although they do not necessarily have to be transferred to it. They are often started in London because people consult London-based barristers. My understanding—although, again, this is not an area with which I am all that familiar—is that that court is also sitting to hear cases from the south-west of England, the marches and so on in order to fill its court diaries and that, rather more bizarrely, not even all the Welsh administrative cases are being heard in it. That seems a bit strange to me. What would you think about forcing the issue by saying that Welsh matters must be heard in such a court? I am trying very carefully not to say which side I am inclined towards, but the argument has been put that a body of expertise would be forced to grow up around the court.

[44] **Professor Williams:** It is probably a case of getting a balance between carrot and stick. We could do more to persuade the profession to initiate actions in Wales. It also requires the administrative structure to be based in Wales, with the idea that you access the administrative court in Wales through a Welsh administration, as it should be with all other courts. I think that, perhaps, it should not be forced, as such, but we might need to consider the possibility of a disincentive for starting these proceedings in London. It is interesting that you say that lots of people would go to London-based lawyers for Welsh matters. Again, that is disturbing. It is about building up the capacity of the profession in Wales. That would come with jurisdiction. However, in direct response to your question, there needs to be a benefit in some way to starting the proceedings in Wales. It makes sense. It is a Welsh matter and the Welsh administrative court sits in Wales, so should the whole thing not be run in Wales? If barristers want to come from London, they can do the journey, and they might be pleasantly surprised.

[45] **Julie James:** Indeed.

[46] **Simon Thomas:** I want to follow up something that you said earlier to do with the process of arriving at a Welsh jurisdiction, which I think your evidence suggests may be inevitable at some stage. 'Inevitable' might not be the right word—

[47] **Professor Williams:** I do not use the word in the pejorative sense at all, but it may be the end result.

[48] **Simon Thomas:** I think that you say that it may be necessary—

[49] **Professor Williams:** Absolutely, yes.

[50] **Simon Thomas:** We have had written evidence on this, and some of the things that you have said to us this afternoon are very much about the institutions, the capacity and the workload. Where do the democratic voice and the citizen come into this, so that he or she understands that laws being made now in Wales by a legislative parliament affect him or her and that he or she has redress through a court system that understands those laws and a legal system that is interpreting those laws in the way intended? As you have mentioned already, a rights-based children's agenda, for example, is very different to what is being developed in England. You talked about having a critical mass and so on. How big a part does the democratic demand play in moving the process forward? Or does it have no role at all? Is this merely an administrative view that you are taking?

[51] **Professor Williams:** No. There are certainly many administrative and political matters to be resolved, but you cannot divorce those from the democratic process. Clearly, if we are going to engage the public in a debate on a Welsh jurisdiction, people are probably not going to be queuing up at the village hall to hear us talk about it. We somehow need to find a way of engaging the public. There is no judgment either way here, but it will be taken as being a separatist discussion. There is scope for that argument, but there is also tremendous scope for it being misunderstood. A public information campaign to engage people will be crucial. We must take them forward. In one sense, that is the next step in devolution—we have Welsh laws, and now we have a Welsh jurisdiction that applies those laws.

[52] **Simon Thomas:** Is it possible for a Welsh citizen to understand the legislative process of making Welsh law without having, at the end of the day, a legal jurisdiction that reflects that process?

[53] **Professor Williams:** People would understand it, but it is probably not an everyday topic of conversation. People would understand that it goes to a court and they will probably not have much idea of the structure of the court other than that Harold Godwin, the county

court judge in Aberystwyth, is there, and he lives down in Pembrokeshire somewhere. That is probably as much as people would think at the moment. However, if you are saying that we need to engage the public, then I think that we do, but the challenge is trying to engage the public in something that is perhaps perceived to be rather dry. In fact, it is a very interesting and exciting matter. Just as we took the public along on primary law-making powers and on devolution itself, we need to take the public along on this.

[54] Going back to the idea of the body of law, people are increasingly aware that there is Welsh law, which is encouraging to see. The more Welsh law we see, the more the public will ask, ‘Why have you got a judge coming from London to do this—what is going on?’ That may seem rather odd to them. You could see something similar in Scotland with the use of the Supreme Court, which might decide to overrule the senior courts in Scotland; there would be indignation there. It takes time, but we can get there.

[55] **Julie James:** Could I ask a small question as a result of that reference to the Supreme Court and Scotland? Do you think that it is part of the constitutional conversation that we are yet to have on the nature of devolution and whether it leads to some sort of federal state in the UK?

[56] **David Melding:** That is not a small question. [*Laughter.*] It is an intriguing question, and I hope that the witness has a succinct answer to it.

[57] **Professor Williams:** The succinct answer would be ‘yes’; we need to have a discussion regardless of what happens in Scotland. I referred right at the beginning to this great muddle called the British constitution—the unwritten constitution that is not worth the paper that it is not written on, as they say. That is absolutely right. Devolution is probably testing the system. It tested it quite effectively in a very clear way in the police detention case in Scotland that went to the Supreme Court.

[58] I have looked at the Isle of Man, which is a small jurisdiction, so let us look at the United States, which is a clear, federal jurisdiction. There you have clear boundaries for federal law and clear boundaries for state law. At the top, you have the Supreme Court, which can declare anything unconstitutional. However, the short answer would be ‘yes’; we need to think it through and we are yet to do so.

[59] **David Melding:** I am keen to move on, and Simon will pursue some of the points about the implications—

3.00 p.m.

[60] **Suzy Davies:** I just wanted to pin Professor Williams down on one thing, finally, if that is okay, Chair. You talk about a clearly defined Welsh jurisdiction. Bearing in mind some of the tensions that you have already referred to, particularly that some of our law will inevitably be cross-border with England at least in the future, will ‘clearly defined’ mean the same as ‘separate’?

[61] **Professor Williams:** No, there is no doubt that, unless we leave the United Kingdom, there will be a dual system of law—you must also add to that European law, which is another jurisdiction issue. However, let us stick with devolved and non-devolved matters. I think that I alluded in my paper to the fact that there will be those cases that are clearly Welsh; Welsh education law is perhaps a good example. There will be issues that cross devolved and non-devolved matters—issues around youth justice and social care might be examples. There will be those that are clearly England and Wales—

[62] **Suzy Davies:** Teachers’ pay and education—[*Inaudible.*]

[63] **Professor Williams:** Absolutely. When I used the term ‘clearly defined’, I meant as part of a more complex system. It is certainly not a separatist argument, but there will be a body of law that is totally Welsh, and that will be within the remit of this Welsh jurisdiction.

[64] **David Melding:** Simon will follow this up by talking about what the implications may be for further devolution in the administration of justice.

[65] **Simon Thomas:** Yn gyntaf, rwyf eisiau bod yn glir ynglŷn â faint o waith sydd ar gyfer awdurdodaeth gyfreithiol ar hyn o bryd a faint a fydd yn y dyfodol agos. Wrth ateb Suzy Davies, dywedasoch efallai nad oedd digon o waith ar hyn o bryd, sy’n ddadleuol a dweud y lleiaf. Ar y llaw arall, roedd cwestiynau Julie James yn sôn am y ffaith bod cymaint o waith o hyd yn cychwyn yn Llundain. Dywedasoch mai dyna’r lle mae’r ymarferwyr, y bargyfreithwyr ac ati. Tybed a allwch fod yn gliriach, er mwyn imi allu deall, a fydd, yn ystod y Senedd hon—achos mae’r ymchwiliad yr ydym yn ei gynnal yn awr ar gyfer y Cynulliad hwn—ddigon o waith, gyda’r gwaith o natur Cymru sydd eisoes yn digwydd yn Lloegr, i gynnal awdurdodaeth ar wahân yng Nghymru?

Simon Thomas: First, I want to be clear about how much work there is for a legal jurisdiction at present and how much there will be in the near future. In responding to Suzy Davies, you said that perhaps there was not enough work at present, which is debatable to say the least. On the other hand, Julie James’s questions mentioned the fact that so much work is still being initiated in London. You said that that is where the practitioners, the barristers and so on are. I wonder whether you could be clearer, in order for me to be able to understand whether, during this Senedd—because the inquiry that we are undertaking is for this Assembly—there will be enough work, given the work of a Welsh nature that is already going on in England, to maintain a separate jurisdiction in Wales.

[66] **Professor Williams:** Yes, it may well be that, at the end of this current programme of legislation, we can seriously look at whether the body of law is there to achieve the objectives in terms of the judiciary and the legal profession. To some extent, that is a challenge for the politicians to get it out there—

[67] **Simon Thomas:** I will not ask you about our speed at the moment.

[68] **Professor Williams:** I am of the opinion that you need more Assembly Members.

[69] **David Melding:** Okay, we will not go into that—[*Laughter.*]

[70] **Professor Williams:** It is probably not the most fashionable thing to say outside these walls.

[71] It is something that we need to monitor carefully, because there will come a point when it feels comfortable, when those of us in the law schools, for example, can say, ‘We can tailor our degrees to accommodate people who want to practice in Wales in Welsh and in English’ and there is enough law there for them to do it, particularly in the public sector. There was a question about local authority solicitors. It may well be that, when we come to the end of this session, there will be enough law.

[72] **Simon Thomas:** Un enghraifft o hynny, ac rydym wedi cael tystiolaeth ar wahân yn ymwneud â hyn, yw ein bod yn awr, fel Senedd, yn deddfu’n ddwyieithog ac mae gan y Deddfau hynny statws cyfartal yn y ddwy iaith. Felly, os codir cwestiwn ynglŷn

Simon Thomas: One example of that, and we have received separate evidence on this, is that we, as a Senedd, are legislating bilingually and those Acts have equal status in both languages. Therefore, if a question arises in relation to interpreting the National

â dehongli deddfwriaeth Cynulliad Cenedlaethol Cymru, bydd angen arnom system gyfiawnder sy'n gallu ymdrin â'r ddwy iaith. Mae'r dystiolaeth yr ydym wedi ei chael hyd yn hyn yn dueddol o awgrymu y dylai fod awdurdodaeth ar wahân i Gymru. A yw hyn yn rhywbeth yr ydych wedi'i ystyried?

Assembly of Wales's legislation, we will need a justice system that can deal with both languages. The evidence that we have received to date tends to suggest that there should be a separate jurisdiction for Wales. Is this something that you have considered?

[73] **Professor Williams:** By that you mean a separate jurisdiction now?

[74] **Simon Thomas:** Within this period, this parliament.

[75] **Professor Williams:** Probably, the answer to that question would be around what competence we have within the current judiciary to deal with matters that are either conducted through the medium of Welsh or involve an issue of interpretation.

[76] **Simon Thomas:** I was thinking in particular of interpretation.

[77] **Professor Williams:** My impression is that, at the moment, it is a bit hit and miss. Even within the England-and-Wales jurisdiction, we need to ensure that there is a level of competence within the judiciary at all levels to deal with these kinds of issues. I am not totally confident that it is there yet. I think that there is still quite a bit to do. Also, of course, that requires competence within the profession. With the profession, it is very often a matter of confidence, rather than competence. You will interview the client in Welsh, and then everything will go to English when it goes down on paper, and that is something that we have to change. On my journey to the jurisdiction, one of the things we need to build up, to get these building blocks in place, is a level of competence on that particular issue of interpretation and drafting in two languages, because it throws up some fascinating and complex issues.

[78] **Simon Thomas:** Felly, mae **Simon Thomas:** Therefore, there is a cwestiwn ynglŷn â hyfforddiant, onid oes? question about training, is there not?

[79] **Professor Williams:** Yes, there is a clear issue of training, both at the initial training stage, the sort of stuff that we do—the continuing professional development training—and with the judiciary. The judiciary, on the whole, is aware because it sees it on a day-to-day basis.

[80] **David Melding:** We will have an opportunity to discuss that specifically.

[81] **Simon Thomas:** Ynglŷn â datganoli'r system gyfiawnder yn gyffredinol yng Nghymru, dadl sydd wedi cael ei chyflwyno, ar wahân i'r ddadl ynglŷn ag awdurdodaeth gyfreithiol ar wahân, yw y dylid datganoli'r system gyfiawnder yng Nghymru beth bynnag, a bod hynny'n gam gweinyddol rhesymol i'w gymryd yn y broses ddatganoli, fel yr ydych wedi amlinellu. A ydych yn gweld hynny fel cam annatod tuag at sefydlu system awdurdodaeth ar wahân, neu a ydych yn gweld hynny fel rhywbeth a ddylai ddigwydd beth bynnag fel rhan o drefn naturiol datganoli?

Simon Thomas: With regard to the devolution of the justice system generally in Wales, an argument has been put forward, separate to the debate on a separate legal jurisdiction, that the justice system in Wales should be devolved in any case, and that that is a reasonable administrative step to take in the devolution process, as you have outlined. Do you see that as an integral step towards establishing a separate jurisdiction system, or do you see that as something that should happen in any case as part of the natural development of devolution?

[82] **Professor Williams:** I will answer ‘yes’ to both matters. Devolving the administration of justice is a pattern in England and Wales. Wales, in a sense, has benefitted from what is happening to the courts services across England and Wales. I think that it is absolutely right. Going back to the question earlier, we need to get in place some means of making people start the proceedings and finish them in Wales. At the same time, that is adding to the weight of the case for saying that Wales is now a jurisdiction.

[83] **Simon Thomas:** So, they are linked, but not necessarily consequential?

[84] **Professor Williams:** They are linked. You could just continue to devolve the administration of the administrative side of it and say, ‘We will carry on as normal’, but the offices would be based in Cardiff, the courts based in Wales and so on, and never take the next step. However, to have in place the political decision—and I think that it is a political decision—that needs to be taken as to whether Wales should be or is a separate jurisdiction, you can point and say, ‘We have a nice, neat, contained courts’ service and an administration of justice system that operates in Wales already, albeit as part of a unitary jurisdiction with England.’ So, probably, the answer to both questions is ‘yes’.

[85] **Simon Thomas:** Diolch am yr ateb hwnnw. Un peth arall sydd wedi dod allan o’ch tystiolaeth, sy’n sicr yn wahanol i’r hyn rwyf wedi’i weld yn y dystiolaeth i’r ymchwiliad hwn, yw’ch cynnig chi y dylid sefydlu rhyw fath o gomisiwn diwygio’r gyfraith ar gyfer Cymru, a chyfeiriasoch at ryw beth tebyg i Gomisiwn y Gyfraith ar gyfer Cymru a Lloegr. A allwch chi esbonio ychydig mwy ynghylch sut byddai comisiwn o’r fath yn gweithio? Pa angen fyddai’n ei gyflawni a sut y byddai’n ein helpu i ddatblygu’r gyfraith yng Nghymru?

Simon Thomas: Thank you for that answer. One other thing that emerged from your evidence, which was certainly different from what I have seen in the evidence to this inquiry, is your suggestion that a Wales law reform commission should be established, and you mentioned similar to the Law Commission for England and Wales. Could you explain a little more how such a commission would work? What need would it fulfil and how would it help us to develop the law in Wales?

[86] **Professor Williams:** At the outset, in answering that question, I do not see such a commission as a precondition for a Welsh jurisdiction, but it would help.

[87] **Simon Thomas:** So, would it help the case?

[88] **Professor Williams:** It would certainly help the case. Scotland has the Scottish Law Commission, for example. I will rather upset the very nice people at the Law Commission for England and Wales by saying this, but it has not quite caught up with the current constitutional settlement. It might be better informed now than it used to be, and, strangely enough, that is probably a consequence of its UK-wide review of level crossings. That was a fascinating review, because it encountered devolution—different things in Wales and in Scotland—and UK stuff. So, I think that someone then thought, ‘My word, this is a bit more complex than we thought.’

[89] I do not think that we should move away from the idea of having a Law Commission for England and Wales, because there will be non-devolved matters that still need to be discussed, although it is important that, in such cases, Wales makes its voice heard. In one sense, it was encouraging that the Law Commission came down to Cardiff to hold a consultation meeting on the social care proposals. That was good, and it probably changed the reporting to say that Wales should be able to do it on its own if it wants to, given that, previously, it had suggested that it should not. So, there is a case for an ongoing relationship.

[90] However, within Wales, and within the areas of devolved responsibility, we need something to keep the form of law under review. That is not a policy-making body—and the Law Commission for England and Wales is quite adamant that it is not a policy-making body—but it could do a number of things. It could deal with the consolidation of law, and dare I suggest that education law would be a good subject for consolidation. It could look at areas of law, perhaps the legacy law that we have picked up from England—much of which you may say is okay, but you may want to give it a Welsh dimension. It could also look at the areas where we feel that there is a gap in our law.

[91] So, it would be a standing body—it need not be a commission; I am sure that there are many different ways that this could be done—that could advise the Government and the Assembly on areas that it considers appropriate. The Government and the Assembly could also say, ‘We’re quite interested in reforming the law on such and such. So, why don’t you go away, have a look at it and come back with a report or a consultation paper and we will go from there?’ That adds capacity to the law reform movement in Wales.

[92] **Simon Thomas:** You said to Suzy Davies earlier that it is debatable as to whether our body of law is sufficiently large enough yet. Would you see this law commission as adding, not necessarily to the body of law, but to the work of law making in Wales?

[93] **Professor Williams:** Yes, it would add to the law making.

[94] **Simon Thomas:** So, it would be part of the process?

[95] **Professor Williams:** It would be part of the process, and, because I appreciate that times are hard, it need not be the kind of expensive body that we have in the Law Commission for England and Wales, and it need not follow the model of that commission, which is essentially lawyers. However, it is important that it is law reform. One can imagine the ways in which that might be achieved. It would help. Although it is not crucial, it is a kind of hobby-horse.

3.15 p.m.

[96] **Simon Thomas:** You have ridden it a little today.

[97] **Professor Williams:** Not too much, I hope. [*Laughter.*]

[98] **David Melding:** I ask Eluned to finish off on the topic of the Law Commission and then we will move on to the issue that you raised about how, if we are not ready for jurisdiction, the current arrangements could best be adapted, or if they need to be adapted at all.

[99] **Eluned Parrott:** Professor Williams, in your paper and the evidence you have given today, you have said that we need not follow the model of the Law Commission of England and Wales if we are starting from scratch. I am trying to get clear in my mind what a law commission for Wales as such might ideally look like. Who would it be made up of? How would those people be appointed? To whom would it be accountable, and so on?

[100] **Professor Williams:** On its composition, the England and Wales Law Commission is made up of lawyers. This is not a special plea, but you would need lawyers on it because a lot of the discussion is technical and looks at the way in which the current law works in practice, and I think that you need that. Beyond that, we could make use of the law schools. There are good research bases in all the law schools in Wales. That is another plug, but I hope that they could be part of the solution. We could also form opportunistic links with particular groups. In looking at social care, for example, you would involve people who are in the business of

providing social care. It need not be the pure kind of legal model that the England and Wales commission has adopted; it could be much more diverse in its membership. It would not be a big commission, it could not be, but it would need resources and you could tap into the existing law schools for that research resource.

[101] **Eluned Parrott:** If it is a smaller and different kind of model, do you think that it is something that could and should be established in the short to medium term?

[102] **Professor Williams:** There might be a quick win on it. I mentioned education; it is all there, it is finding it that could be the problem. That may be an ideal consolidation exercise that could be undertaken. It is not so much the organisation that particularly worries me; it is the task and the job that has to be done. It needs to have some externality. Many of the issues are not necessarily political issues. Many are apolitical. There may be politics at the margin, but a lot of the reports that have gone through the England and Wales commission have ended up as legislation without too much controversy regarding the core principles.

[103] **Suzy Davies:** You mentioned including external bodies in a Welsh reform commission. Would there not be a risk, if they were from a lobbying background, that you might end up with a policy forum after all?

[104] **Professor Williams:** ‘Bodies’ is probably the wrong term. We are looking for expertise. We do not want a campaign body; we want people who know what is happening on the ground who can contribute to the discussion. It would not be a pressure group. We would be looking for expertise. Hopefully, it will be a de-politicised discussion of how to make the law work better that comes up with ideas to be presented to the politicians. It will certainly not be making the law.

[105] **Eluned Parrott:** Professor Williams, I would like to move on to look at some of the practical implications for the way in which the system operates at the moment. You say in your evidence that the way in which the current jurisdiction works in Wales has proved to be reasonably flexible in accommodating developments in devolution. We have had evidence from others that contradicts that statement. Could you explain to us in what ways you think that that has been the case?

[106] **Professor Williams:** Lawyers love the word ‘recently’ because it covers a multitude of sins. It is not perfect. I would consider it a success if there were greater awareness within Wales of ‘legal Wales’—a term that Sir John Thomas coined—in that there is a separate Welsh legal identity and that needs to speak with a louder voice.

[107] Some of the changes to the arrangements of the court system have been good—they are not perfect and we have seen some of the problems there. Within the profession, there is a much greater Welsh legal identity, but it is about translating that into competence and, as I say, a sufficient workload.

[108] I would argue that there are many faults, and I am sure that we could list them—we have discussed some of them today—however, it is a start, and it is much more flexible than I would have imagined 10 years ago when, for example, the idea that the higher level of court can now sit in Cardiff would have been an anathema. So, it has moved, and one of the first things that Lord Bingham did was to change the title to Lord Chief Justice of England and Wales, which shows recognition. My knowledge of quite senior members of the judiciary is that they do get it, and I do not see that in many other aspects of England and Wales, as London does not get devolution. I say that with regard to the public sector and my experience in the voluntary sector; they still do not get the idea of Wales being a separate entity within the UK. However, I have been reasonably impressed with what I have heard, and I have quoted some of the senior judiciary in my evidence. So, I would not say that it has been a total

failure—I would say that it has been reasonably flexible and accommodating.

[109] **Eluned Parrott:** Obviously, we have had the divorce from the Chester circuit and we now have our own circuit. What practical effect has that had on the profession and on the perception of the profession in Wales?

[110] **Professor Williams:** I think that there is probably a north-south divide here. A lot of work in the north is still going over the border, and a lot of practitioners still cross the border. That is a problem. This is probably an issue of inclusiveness for the profession. In north Wales, you get the case saying ‘Welsh service’ as you would in south Wales or mid Wales. So, again, it is an excellent idea, but there is a challenge there, mainly for solicitors, but also for barristers in terms of making that work. We need to look at the situation in the north. The worst case scenario would be to be in a position where the bulk of the work north of Machynlleth is hived off to England. That would defeat the whole object, and we need to avoid that.

[111] **Eluned Parrott:** Okay. We have our own circuit, but you have said in evidence now that you feel that the time is not quite here yet for a full separate jurisdiction. What steps might you take in our position, short of creating that separate jurisdiction, to further improve and devolve the administration of justice in Wales?

[112] **Professor Williams:** It goes back to the earlier question of getting more things started and finished in Wales, and we need to have a carrot to make that happen. A lot of the administrative side of the administration of justice needs to come over, so that you are not starting proceedings in some court over Offa’s Dyke, but starting and finishing it in Wales. That is the expectation: you will not be transferring it; it will be completely done and dusted in Wales.

[113] **Eluned Parrott:** Do you not think that the creation of a separate Welsh jurisdiction would give a clear indicative signal that legal practice should start and finish in Wales, which would not happen if we stopped short of that?

[114] **Professor Williams:** Again, this is about which comes first, I guess. I still think that we need things in place before we actually make the decision, and this is certainly one of them: we need the administration of justice to be based in Wales, and we need to change the culture. We need, from the law school’s perspective, to stop good graduates going over the border. We need to have something here that is attractive, exciting and dynamic, so that they want to stay in Wales. We lose a lot of good graduates to the big firms in England.

[115] **Eluned Parrott:** One of the things that I wanted to move on to now was to look at the student body in Wales’s law schools. Obviously, I realise that there is a big market for training students from England in Welsh law schools, and indeed international students. Can you give us an idea of the make-up of the student body? What kind of proportion of English students is going back, and what kind of proportion of Welsh students is crossing over the border? What kind of market is there for Welsh students seeking to practice law in Wales?

[116] **Professor Williams:** I can talk about Aberystwyth, where the split is probably 40% Welsh, 50% from the rest of the EU, and 10% from the rest, from further afield—they are mainly from Asia, although some are American and some Canadian. It is difficult to track the data as to what happens to students when they graduate, because they disappear. Perhaps all that I can say on an anecdotal basis, and based maybe on day-to-day experience, is that too few of our graduates see an exciting opportunity to practice in Wales, particularly in terms of the big commercial firms. They see commercial law as all taking place in London, which is not the case. That is a huge problem. Also, with the public sector, it is a case of showing them that a legal career in the public sector is exciting and interesting, which it is, and grabbing

their attention and keeping them here. There is a haemorrhaging—that is overstating it; it is a drift—of many good Welsh students to England, because that is where they see it as all happening. You may find, ironically, that many years later they come back to Wales. Again, this is anecdotal, but a number of graduates, going back as far as Gwyn—or perhaps not quite that far, but, say, 15 or 20 years—will say, ‘Yes, I was in London, but now I have moved to the Cardiff office’.

[117] **Eluned Parrott:** Just one quick follow-up question: it is my understanding, Professor Williams, that all universities are obliged to keep graduate destination information, and I wonder if you might be able to provide that for some of your graduates. I do not know if you keep those data for the ones who have done a postgraduate legal practice course or the bar professional training course.

[118] **Professor Williams:** For the LPC it will be quite easy—we have a relatively small LPC, and it will be no problem getting those data. We are more engaged with the outcomes, as it were, in their getting training contracts and so on, so we can pretty well map them out. The more difficult group is the undergraduates, because they go. Yes, we will keep in touch, and yes, they have an aber.ac.uk e-mail for life, but unless you adapt to Twitter, or something, they just do not keep up with it. What data we have I am sure we could make available to you.

[119] **Eluned Parrott:** Thank you; that would be very helpful. It is something that we should be tracking more carefully, because the legal profession is a huge industry in Wales.

3.30 p.m.

[120] **David Melding:** I will ask Julie James to take us into this area of the implications for legal education. We are very interested in this particular part of the question.

[121] **Julie James:** You touched on a huge variety of things in your last answer, which I am desperate to follow up, but I am sure the Chair will prevent me from doing so—

[122] **David Melding:** You can weave it into your set of questions.

[123] **Julie James:** I will do my best. On the narrow point of legal education, there is a whole series of issues that you mentioned about retaining good graduates, professional law schools, where they go and the perception of commercial law and so on. To what extent do you teach Welsh law at the moment in Aberystwyth?

[124] **Professor Williams:** To put a percentage figure on it would be rather difficult because a lot of it is pervasive. I teach family law and child law, and that is a combination of English and Welsh law, so it pervades. To look at Welsh-medium provision, all of our core modules and seminar programme are available through the medium of Welsh, and we have one Welsh-only module on healthcare law, mainly because the material is accessible through Government documents in Welsh. That would clearly not be the case with public law, constitutional law and European law, but beyond that, it is a pervasive trend that Welsh law is picked up in substantive issues if it is a devolved matter such as family law or social welfare law, constantly drawing on the Welsh dimension, or actually leading with the Welsh dimension at times.

[125] **Julie James:** When your graduates go back to England, do they have a good grounding in Welsh family law, but not in English family law?

[126] **Professor Williams:** No, they have a grounding in family law in England and Wales, and they appreciate that, on the whole, it is the same, but in Wales, the convention is a different issue. Again, one of the subjects I teach is social welfare law, and when we look at

older people, there are great differences and clear blue water between Wales and England, which is an exciting dynamic. It introduces to students the idea that it is not all the same.

[127] **Julie James:** Is that happening in any of the English law schools, or is that a specific—

[128] **Professor Williams:** No. I think I can say, almost hand on heart, that it will be at the constitutional public law level because obviously you cannot ignore the fact that it has happened. However, I doubt very much within the substantive topics, such as welfare and family law, that you are going to hear ‘and this is what they do in Wales.’ I think not. In a sense, if you are looking at legal education, maybe this is something that we have to look at on a UK-wide basis. We want to get some movement between the different components of the UK. At the moment, particularly with Scotland, that can be difficult in terms of the type of degree that people come out with. I think Dundee is alone in having a degree that is transferrable to England, Wales and Northern Ireland; that is very rare. There is a challenge there for the law schools and the professional bodies to look at that.

[129] **Julie James:** You mentioned public law in particular. My background has been local authority law for, tragically, very nearly 30 years. I followed the classic pattern of practising in England for the first 10 years of my career before coming back to Wales, which is a very common characteristic. We went to great lengths to try to recruit directly out of the law schools into public sector law and were not terribly successful, for a large number of the reasons that you mentioned. However, we increasingly found, towards the end of my career in local government—I left local government some seven years ago, so it is a little while now—that it was more and more difficult to recruit people across Offa’s Dyke from England as well because the old perception that once you were in the local government network you could move around was already being lost for Wales because we were already diverging. How will the law schools react to that as a perceived difficulty, or opportunity, or whatever you want to call it?

[130] **Professor Williams:** I think that they have to be fairly smart—and I am talking about all of the law schools in the four nations. Moving around is good: it encourages vibrancy and brings new ideas. Bringing Scottish lawyers down to Wales and taking Welsh lawyers to Scotland, and so on, is quite exciting. We need to avoid setting up artificial barriers to that, because it works all ways. The exciting thing about devolution and the new constitutional set-up is that there is a dynamic there. There is an irritation in the system that allows us to develop. It would be a shame if we put up a barrier between England and Wales, because it is healthy that there is movement around. People then get a better understanding of the nature of the UK now.

[131] **Julie James:** You mentioned America in passing in part of your evidence. I know that it is commonplace in America to be qualified at the bar of more than one state and to be able to practise federal law. Do you think that it will develop in that way here?

[132] **Professor Williams:** We need to allow that to happen. Obviously, in the United States, it is much more complicated. I have an American colleague over here at the moment, who says that each state has its own different regulatory and insurance arrangement. It can take a month of your time organising all of that. However, I think that that is a good model. We would need to ensure that there is a level of competence to practise in Wales, as there is a level of competence to practise in England. Scotland is slightly different with its civil law background, but across England and Wales, there is a common law approach to things.

[133] **Julie James:** As a personal aside, I found nothing more irritating than paying many hundreds of pounds to go on a training course, only to find that the Welsh dimension was entirely absent from it.

[134] **Professor Williams:** Yes, and that is unforgiveable. It comes back to the point that they do not get it. At training events organised in Birmingham or London, they just do not get the devolution aspect at all. It is unforgiveable.

[135] **Julie James:** Indeed. I would like to return to that in a moment, if I may, to ask another question on the legal education point. The other issue in terms of recruiting to the public sector, which is the only area that I know much about, was the different between barristers and solicitors. Frankly, there is no difference at all once you are inside the public sector. I understand that Northern Ireland does not make the separation until the point of professional qualification. In terms of the critical mass of students, might we look at doing something similar for our law schools in Wales? So, someone could make the decision as to whether to be a barrister or a solicitor after their professional law course rather than before.

[136] **Professor Williams:** To me, that makes perfect sense, because solicitors need to be as good at advocacy as barristers are, and barristers need to be as good at working with clients and the paperwork side of things. There is also the broader question of whether a fused profession would be the answer, but that might be for another day. Yes, I think that, across England and Wales, a common professional qualification would make a lot of sense. It would offer greater flexibility between the two professions.

[137] **Julie James:** Yes, that is the flexibility that we were talking about.

[138] **Professor Williams:** Undergraduates come to me and say that they want to go to the bar, and I think they have a rather romantic view of what life at the bar is like. I would say that it is based on *Rumpole of the Bailey*, but I am sure that there is something more up to date that they base it on nowadays.

[139] **Julie James:** It was *A Tale of Two Cities* in my case.

[140] **Professor Williams:** I think that it is more *Ally McBeal* now. It is more about wandering around eyeballing the jury.

[141] In a sense, perhaps they could delay that until they have done a few placements with barristers and solicitors, and they see solicitor advocates and solicitor judges.

[142] **Julie James:** Once again, from my own perspective in public law, it makes not a jot of difference which you are once you are inside.

[143] **Professor Williams:** No, not once you are there.

[144] **Julie James:** Indeed. I would like to go back to some of your other evidence—and I am jumping around all over the place—about some people not getting it, and so on. You talked about the tensions in the current system of England and Wales jurisdictions, and we have explored some of that. You also talked about the business of the administration of justice, with regard to which one of the other contributors to our evidence expressed the same frustration I have felt in the public sector about getting a Welsh case listed in Wales and the length of time that takes because of what is perceived to be the total lack of understanding of Wales in the administration in London. It can take months to get it transferred, which is deeply frustrating. Is that the sort of tension you see escalating?

[145] **Professor Williams:** Yes. There may have been a time when people thought that it was okay wherever it was—if it was in Shrewsbury, it was only a 70-mile journey from Aberystwyth. However, more and more, I think that people will say, ‘No, it is a Welsh case, Welsh law, why not Wales?’.

[146] **Julie James:** In passing, you mentioned the issue I know we are all aware of to do with the court being in Cardiff and that being a north-south difficulty. Do you see the administration of justice just in terms of the mechanics of it, the listing of cases and so on transferring to Wales and then being able to be listed in the north Wales courts at the same time? Is that what you imagine?

[147] **Professor Williams:** Yes, I think that that would be a sensible way forward. It is all very well having the Welsh circuit, so to speak, but if it cannot have control of the way it lists its cases and where they are heard, it makes a nonsense of the whole thing.

[148] **Julie James:** That crosses into the issue of the ability to use Welsh in the proceedings as well, which you have a right to in Wales—

[149] **Professor Williams:** Absolutely and to have the facilities there and all the other things. However, there is still a disincentive in the system.

[150] **Julie James:** My understanding is that, once the case is listed in England, you do not have that right—

[151] **Professor Williams:** Yes, it locks into that administrative framework, and that is bad.

[152] **Julie James:** Yes, indeed. Thank you very much.

[153] **David Melding:** Thank you, Professor Williams. We come back to a broad question to finish. From your evidence, I have the impression that you see an evolutionary approach as best. You are pretty sure that we will end up with a Welsh jurisdiction, but you are not quite sure when that is likely to be. I sense that your expectations are that it is a medium-term thing. So, I want to put a slightly provocative question to you. The Government of Ireland Act 1920 created Northern Ireland overnight. There was no legal tradition or political traditions in terms of political institutions, and they coped with half our population three or four generations ago. So, why on earth mess about with the process when we could have a definitive constitutional event? Would that not be a better way forward?

[154] **Professor Williams:** Actually, that is the one question I anticipated. The politics of Northern Ireland must be factored into the answer. Also, one must not assume that that was an easy transition. We can look back now and say that it has worked. Yes, it has worked. However, I feel sure that, at the time, there must have been a great deal of pain and grief. The important thing for us is that we get it right so that, on day one of the new jurisdiction, we are ready, up and running and it actually works, so that we do not have to reinvent or reconfigure courts or train up a profession. It will all be there. That is where the timing comes into it. Do not read my evidence as saying that we should kick this into the long grass, because I actually want it to happen. It is the timing that is going to be important when the political decision comes that now is the time.

[155] **David Melding:** I think that when the public watches our proceedings, if it does, it will look at the whole issue of jurisdiction and the first thing it will think about is criminal law, which we have not mentioned. In what sense would it be coherent to have a clear Welsh jurisdiction as a response to statute law in Wales and not have criminal law devolved? Does a jurisdiction inevitably mean that the criminal side will have to be devolved?

[156] **Professor Williams:** No, because, as I said earlier, we could have a dual system of devolved and non-devolved law. So, it is not inevitable.

[157] **David Melding:** Would it be inelegant?

[158] **Professor Williams:** Yes, it would be inelegant, because one would like the full package, as it were. There are probably difficulties. It is more difficult to devolve criminal law than civil law. A starting point would be devolved policing. I am a very firm believer that, for a whole host of reasons, policing is something that we should devolve.

3.45 p.m.

[159] On criminal law, there may be scope for some kind of partnership—it would be useful if the Assembly had some competence in the area of criminal law, because many of the things that it does perhaps presuppose the need for a criminal sanction. At the moment, you are rather restricted in what you can do in those terms. So, there may be scope for a shared kind of criminal jurisdiction, but a discrete Welsh criminal jurisdiction could maybe pick up things that are consequential to some of the public law and the developments that are taking place. Again, I go back to social care, where there might be some scope in some of the issues around safeguarding and protection. For example, if there were to be a duty to report and someone did not report, what would the sanction be? You are rather restricted in what you can do.

[160] However, devolving the police, which is part of the administration of justice in one sense, is to my mind essential.

[161] **David Melding:** The final point that I would want to put to you as Chair is that we have discussed issues of the body of law needing to generate a suitable or adequate amount of work and the professional resources available to us in terms of how many people need legal training and want to practice in Wales and so forth. Would it be fair to say that these are largely technical matters? As a potential jurisdiction, Wales is a lot bigger than many in the world; it probably would not be in the bottom 20%, I suspect. So, in a way, we feel that they are cultural, rather than capacity issues. At the minute, people perhaps do not see specialist careers being available in Wales because of the way our legal administration is carried out, but that would change, would it not? And we would only have a fairly temporary time of dislocation between two systems.

[162] **Professor Williams:** Yes, that would be the ideal. I entirely agree that, to a large extent, it is a question of confidence. Does Wales have the confidence to say that it is a jurisdiction, and does its legal profession have the confidence to do it? When the time is right, I think that we should do it. We should be confident that we can do it. The Isle of Man has 81,000 people, and it works very effectively.

[163] **David Melding:** That completes the questions that we want to put to you. Is there anything that you wish to bring to our attention at this stage? I think that we have had a very comprehensive discussion, but there may be something that you feel you would like to add that this stage.

[164] **Professor Williams:** No, but thank you very much. It has been a very interesting discussion, certainly for me. I would just add that it is really good news that you are conducting this investigation, because it needs to be done. We need to be ready.

[165] **David Melding:** I thank you again, Professor Williams, for getting us off to such a splendid start. I think that it is fair to say that you have combined clarity and erudition, and even to the non-lawyers—nearly half the committee are lawyers, so we have a lot of in-built expertise—I think that you have been able to give evidence on very complicated matters with admirable clarity. You have been the perfect first witness, if I can put it that way, because you see both sides of the question before us. We have already taken a look at some of the written evidence, and some submissions went more clearly one way or the other, so it is really useful

to have a witness who has such a balanced approach and, I might add, is willing to answer very direct questions clearly, such as those towards the end. So, thank you very much. We look forward to taking our inquiry forward and emulating the start that you have given us.

3.50 p.m.

Gohebiaeth y Pwyllgor Committee Correspondence

[166] **David Melding:** We have a letter in reply to my letter to the Counsel General commending him for giving us a list of criteria regarding the way in which the various methods of scrutiny for statutory instruments are chosen. I do not particularly want to get into ping-pong with the Counsel General to say that perhaps he should answer the final two points, and so on.

[167] **Simon Thomas:** You are lucky that he is playing ping-pong with you.

[168] **David Melding:** I think that it is best to leave it at that. We have commended what they have done in setting out the use of the various procedures. Perhaps we could return to this at an appropriate time, perhaps in 12 months' time, when we have seen a bit more evidence about how these things are being conducted and what they are doing. Perhaps we can then return to some of our points about when the superaffirmative procedure might be appropriate.

[169] **Eluned Parrott:** May I ask a quick question on that point, Chair? Did anyone else feel that the guidance, such as it was, was somewhat vague in its drafting and allowed a number of different interpretations in some cases? Are there any thoughts on that?

[170] **Simon Thomas:** A piece of Welsh Government guidance allowed that? [*Laughter.*]

[171] **David Melding:** I think that that adds to the need to return to this.

[172] **Simon Thomas:** This is the sort of thing into which we could do a very short investigation in a year's time to see how it is working, is it not?

[173] **David Melding:** Yes. I think that we need a bit more experience of how things are operating during the fourth Assembly before we can valuably do that.

[174] There is another item of business that is not listed. We need to refer something under the Public Bodies Act 2011. Someone is going to talk about this. In particular, the draft British Waterways Board (Transfer of Functions) Order 2012. I was going to say that it sounds dry, but, as it relates to waterways, that would not be a terribly elegant way of describing it. There is an issue about what governance and ownership model there will be. I think that the England and Wales proposals are different from what might prevail in Scotland. So, I think that this needs to be referred pretty quickly to the relevant committees—and there may be more than one, I suspect. Who will advise us? Steve?

[175] **Mr George:** The Orders are made under the Public Bodies Act. We have discussed this, and you will recall that the Business Committee has agreed procedure whereby this committee will scrutinise them. We have 35 days to do so. Two Orders are coming forward and were laid last week. The first is the draft Advisory Committee on Hazardous Substances (Abolition) Order 2012. Gwyn can speak about that, but he has advised initially that there do not seem to be too many wider issues involved with that. The second Order on the British Waterways Board seems to involve issues of policy. The idea is that Gwyn will look at that and advise this committee on the legal and technical issues, but that we invite the relevant

committees that have policy responsibility for this to also have a look at it and to report to the Assembly within the same deadline, which is 25 April. However, that includes the Easter recess.

[176] **David Melding:** We need to get going. We have to concentrate on the legal and technical issues, but on the policy stuff, which we think could be fairly substantial, we now need to form a view that that is referred to probably more than one committee. We think that it may cut across a couple. However, that is the decision that we need to make. I see that Members agree that we should do that. Time is fairly short, so we can go ahead and do that.

3.54 p.m.

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

[177] **David Melding:** The date of the next meeting is 12 March.

**Cynnig Gweithrefnol
Procedural Motion**

[178] **David Melding:** I now resolve to meet in private. I therefore move that

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

[179] I see that the committee is in agreement.

*Derbyniwyd y cynnig.
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 3.54 p.m.
The public part of the meeting ended at 3.54 p.m.*