Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

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

Dydd Llun, 9 Gorffennaf 2012
Monday, 9 July 2012

Cynnwys
Contents

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

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Jocelyn Davies	Plaid Cymru (yn dirprwyo ar ran Simon Thomas) The Party of Wales (substitute for Simon Thomas)
Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
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
Eluned Parrott	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats

Eraill yn bresennol
Others in attendance

Alan Trench	Cymrawd Anrhydeddus, Ysgol y Gwyddorau Cymdeithasol a Gwleidyddol, Prifysgol Caeredin Honorary Fellow, School of Social and Political Science, University of Edinburgh

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

Steve George	Clerc Clerk
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Adam Vaughan	Dirprwy Glerc Deputy Clerk

Dechreuodd y cyfarfod am 2.28 p.m.
The meeting began at 2.28 p.m.

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

[1] **David Melding:** Good afternoon. 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 this afternoon, so if there is an alarm, please follow the instructions of the ushers, who will help us to leave the building safely. Headsets are available and these proceedings will be conducted in Welsh and English. When Welsh is spoken, there is interpretation on channel 1, and if you are hard of hearing, channel 0 will amplify our proceedings. Please switch off all electronic equipment completely, as even on silent, they can interfere with our broadcasting equipment. I have received apologies from Julie James and I welcome Mark Drakeford as her substitute; we are very grateful that you can take part this afternoon, Mark. Jocelyn Davies is substituting for Simon Thomas;

welcome Jocelyn. We are very grateful that we have substitutes who come here fairly regularly, and will be familiar with our proceedings.

2.29 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:** Does anyone have a point to raise on item 2? I see that you do not.

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:** There is nothing under item 3 on this occasion.

2.30 p.m.

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

[4] **David Melding:** Today's meeting is the eleventh oral evidence session. I am delighted to welcome an old friend of this committee, Mr Alan Trench, who is an honorary fellow at the School of Social and Political Science at the University of Edinburgh. I think that it is rather redundant for me to explain how we operate, Alan, as you are kind enough to help with our work frequently.

[5] I will launch into the first question and then we have a set of questions from other Members. We will give you an opportunity at the end, if you want, to add anything at that point. I think that it is fair to say that you have been watching our inquiry avidly in terms of your own interest and you participated in a conference that was held recently in Wales on the legal questions involved in this. By way of introduction, could you say why it seems the case, almost invariably, that when you have a legislature in a common law legal system, you then have a jurisdiction or you may have difficulties, and why that may be distinct from legal experience in civil law jurisdictions?

[6] **Mr Trench:** The way that you phrase that question, Mr Chairman, puts it in a way that I am not sure that I can answer. I could point to the phenomenon, but I am not sure that I could explain the phenomenon.

[7] **David Melding:** This is a good start. [*Laughter.*]

[8] **Mr Trench:** Looking around the world of federal and decentralised states, there is a very clear division between those that have a common law tradition and those that have a civil law tradition. Those with civil law traditions include Belgium, Germany, most notably, and Switzerland. I think that Spain also fits into this category, though I have recently had someone put to me a point that suggests that it does not fit quite perfectly. Countries like that can operate perfectly well with multiple legislatures that pass laws for different functionally divided and geographically divided parts of the country, while operating within a single legal

framework. There is such a thing as Swiss law. There is such a thing as German law. There is not such a thing as the law of Baden-Württemberg. There is not such a thing as the law of Zug or Zurich. There are laws that apply in Zug, some of which are passed by the cantonal Parliament of Zug, in the same way that there are laws that apply in Baden-Württemberg that are passed by the Landtag of Baden-Württemberg, which obviously do not apply anywhere else. Nonetheless, you have a body of something that is called German law, which says that, if you write a contract, you write it under German law and you do not write it under the law of Baden-Württemberg. There is then a slight tweak beyond that, which is that, mainly for reasons of administrative convenience, if you write a contract in Germany, you usually specify the courts where it is going to be litigated. That seems, as much as anything, to be, frankly, a protection racket for lawyers. However, that is a characteristic of how civil law systems work. They can be quite centralised federal systems like Germany or very decentralised federal systems like Switzerland. There is no material difficulty in having a single body of state-wide law that, nonetheless, varies from place to place according to the federal structure of the country.

[9] That is not how things work in common law federal systems. The common law seems to operate on the basis that, when you have an elected legislature, it has to have a geographically defined area in which the laws passed by that legislature operate. That jurisdiction may be a single, relatively small jurisdiction with a single legislature, like New Zealand, or it can be, as in the case of federal systems like Australia, the United States and Canada, a state jurisdiction that also operates with a federal jurisdiction around it. So, the federal jurisdiction embraces the sum of the state jurisdictions and it may extend further. You may have a distinction for the purposes of international law between the scope of powers of the federal legislature and the scope of powers of the sum of the state and territory legislatures. However, within the bulk of the state, you have a set of jurisdictions, like New York, California, Ontario and New South Wales, and you have a federal jurisdiction, such as that of the United States, Canada and the Commonwealth of Australia, that sits above it. So, you have two legislatures that act on the same territory but have different legal capacities in which to do so. If you try to write a contract under the law of Australia, you will find that there is no such thing. There is no such thing as Australian law, in the same way as there is no such thing as United Kingdom law. There is the law of New South Wales, there are the laws of England and Wales, and there are the laws of Scotland. You write your contract under those laws, and you define which jurisdiction you are going to use, according to its scope. I cannot explain why that is so, but it clearly is so.

[10] In the United Kingdom, we have something rather different going on. What I have described in relation to common law federal systems is predicated on what is known in academic literature as dual federalism. The consensus on dual federalism is that it is a very useful idea in practice, and that lawyers still seem to cling to it, but that it does not describe the practical or political reality—in most respects—of how places like Australia, the United States and Canada now work. The principle behind dual federalism is that you have two spheres of jurisdiction—of legal powers relating to a place or a person. You have the federal sphere and you have the state or provincial sphere. The two spheres are a bit like a Venn diagram in that they intersect because they cover the same territory. However, they are distinct spheres, at least in theory. Within one sphere or the other, you draw a pretty clear distinction between what is a federal matter and what is a state matter.

[11] In the UK, we have not done that. Ours is not a federal system in quite a lot of respects—very obviously so when it comes to legal matters. We do not have a jurisdiction of the United Kingdom. We do not have a body of United Kingdom law. We have a Scottish jurisdiction, a Northern Ireland jurisdiction, and an England and Wales jurisdiction. We have a Supreme Court that relates to all three jurisdictions. We have a Parliament at Westminster that can legislate for all three jurisdictions. On the legislative level, there is no attempt to draw a distinction between federal and non-federal matters. We have devolved and non-

devolved matters, and the exact way in which that arrangement is formulated varies from settlement to settlement. It is important to remember that, within that framework, all of the powers of devolved legislatures are concurrent with those of Westminster. No devolved legislature has any exclusive power. Devolution has not meant that Westminster has lost power to legislate; it has conferred an additional power to legislate on the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales.

[12] So, the legal structure is different because we do not have a separate federal jurisdiction or a quasi-federal jurisdiction. We have exclusive jurisdictions and bodies of law for the various territories of the UK. The law of Northern Ireland is determined partly by what is passed by the Assembly at Stormont and partly by what is passed by the UK Parliament sitting at Westminster. We regulate those relationships via the Sewel convention, which says that, in relation to devolved matters, Westminster would not normally legislate without the consent of the legislature affected. Nonetheless, we have these single jurisdictions, and this situation can lead one to the assumption, for example, that Scotland is more autonomous than it is. The Scottish Parliament has responsibility for the legal system and law reform in Scotland generally, and a huge amount of law reform legislation has been passed in the first couple of Parliaments. However, the Scottish Parliament does not have jurisdiction over banking, for example. Banking is clearly a reserved matter. I am told that there are areas in the laws of cheques where Scottish law does something that practitioners regard as slightly daft. This is not something that the law of England and Wales does any more; although common law provided for that, it was repealed by statute. No one ever extended the statute to apply to Scotland. If you wanted to fix it, that would have to be done at Westminster and you would have to find the legislative time in which to do it, and the pressures on legislative time are such that no time has ever been found to do it. I am afraid that I cannot remember exactly the detail of this point.

[13] **David Melding:** I think that Suzy Davies will take us on to develop the point about why there may be a problem with one jurisdiction having two legislatures.

[14] **Suzy Davies:** You say in the evidence that we have taken from your blog that you are not aware of any other part of the world where two primary law-making institutions exist within the same jurisdiction, passing laws in the same areas of responsibility. Is the UK unique then?

[15] **Mr Trench:** As far as I know, Wales's position is unique in the common law world. In the civil law world, it would be quite usual, and the issues that we are discussing would probably puzzle many lawyers from a civilian tradition. In the common law world, I cannot think of anywhere that has a legislature with clear and extensive law-making powers such as the National Assembly now has but does not have a clear jurisdiction within which it operates. The Assembly operates within a larger jurisdiction. A boundary is drawn along Offa's Dyke that determines the extent, geographically, to which National Assembly legislation applies. However, it still applies to the whole of England and Wales. You could not pass an Act or a Measure here that does not, strictly speaking, have as much legal validity in Norwich as it does in Wrexham. Obviously, it has no actual effect in Norwich, because that is out of your jurisdiction, but it is part of the laws of England and Wales nonetheless, and so it affects Norwich or Nantwich as much as it affects Wrexham or Nant-y-glo.

[16] **Suzy Davies:** Yes, it is a bit like European legislation, with direct applicability and direct effectiveness. Is that a parallel?

[17] **Mr Trench:** I am not sure that that is a terribly helpful parallel. Direct applicability would apply only in relation to a directive, when we are talking here about primary legislation. A directive is an instruction to member states to do certain things.

[18] **Suzy Davies:** To bring something into its own.

[19] **Mr Trench:** When we talk about National Assembly legislation, we are talking about stuff that directly bears on everybody within the powers of the National Assembly, that is, within the limits of the legislative competence set out in relation to Schedule 7 and within the geographical area of Wales. So, you are closer to a regulation in EU terms rather than a directive, and that is directly applicable without any more.

[20] **Suzy Davies:** Directly effective.

[21] **Mr Trench:** I cannot think of any case in which regulations have been passed that apply only in one or two member states. That would be the parallel.

[22] **Suzy Davies:** Right. That is helpful, actually. Thank you.

[23] **David Melding:** What you have just described about the jurisdiction including Norwich, although obviously Welsh Acts do not get applied in Norwich, is a bit like what you said about Baden-Württemberg law. It is a German law, although it is only, in effect, practical and applied in Baden-Württemberg. It seems to me as though these points meet at this stage.

[24] **Mr Trench:** Yes, that is right. However, the difference is that the common law tradition has an understanding of how jurisdictions impact on territorial scope in a way that seems to be different to the way in which civil law states work. That is why we get ourselves in this position of appreciable and increasing confusion.

[25] **David Melding:** Okay. That I do understand. [*Laughter.*]

[26] **Suzy Davies:** That is very well stated. It is an excellent point. A number of witnesses have said that, when we talk about jurisdiction it is more a point of constitutional principle than anything else, to make us consistent with other parts of the UK. However, you talk about this confused situation, and so, depending on decisions made here and at Westminster, we could become more common law style or more civil jurisdiction style. Which one would suit us better, do you think?

[27] **Mr Trench:** Given the extent of the common law tradition and its remaining vigour, I suspect that, for various reasons, that route works better. It works better for a number of reasons, one of them being that it signals very clearly to all concerned with the law, whether practitioners, laypeople who may wish to enforce their rights, or governmental bodies, that Wales is different.

2.45 p.m.

[28] I have been told that there is an appreciable number of cases of alleged professional negligence against lawyers where a practitioner based in England has assumed that the same rules apply in Wales as in England because they are part of a shared jurisdiction. It may be that the Law Society has more detail on that and would be able to show that more clearly. It seems to me that having a separate jurisdiction would help you to deal with that problem, because it says very clearly, 'Hang on, you may not know what's going on the other side of the border because a different body of law now applies over the border'.

[29] **Suzy Davies:** That does not apply in Europe particularly because they would be aware of the Baden-Württemberg legislation.

[30] **Mr Trench:** Indeed, although Baden-Württemberg may not be the best example to use, necessarily, because of the homogeneity of German law generally.

[31] **Suzy Davies:** Well, the Swiss example then.

[32] **Mr Trench:** Yes, Switzerland would certainly give you that very clearly.

[33] **Suzy Davies:** Sorry, I do not want to take up other people's time, but would that not suggest that we should perhaps aim for a more European style of jurisdiction? I do not want to put words in anyone's mouth.

[34] **Mr Trench:** Well, I am not sure how you would get there from here. That would be my immediate response.

[35] **Suzy Davies:** It is a can of worms that this inquiry does not necessarily open.

[36] **Mr Trench:** The UK is a constitutional amalgam of all sorts of traditions, dominated by the doctrine of parliamentary sovereignty on the one hand and the traditions of the common law on the other—notwithstanding that, of course, one of the component parts of the UK emphatically does not embrace the common law in the way that England and Wales do. Scots law is very different. As an English lawyer who has worked in a Scottish university, I am very aware of this and of how little I know about what my colleagues are doing as a result. [*Laughter*.]

[37] **Eluned Parrott:** That brings to mind the old joke about asking for directions to Merthyr and being told, 'I wouldn't have started from here'. If that is not the destination that we want to get to, given the starting place that we cannot help but be in is, the question that that leads to in my mind is where do you want to get to?

[38] **Mr Trench:** Where you want to get to is a matter for the National Assembly to try to set out. The options before you are: to continue with the status quo, which you have decided to look at and which the Welsh Government has announced a review of; and to have a separate legal jurisdiction, which would address a number of these problems and put Wales in the same position as Scotland and Northern Ireland in relation to the rest of the UK. The question is whether Wales thinks that that is the appropriate direction in which to go. It is for Wales to make that judgment. To go back to a point that Ms Davies made a few moments ago, the question of how a jurisdiction might—excuse me, but I have lost my thread. You asked about jurisdictions and—

[39] **Suzy Davies:** I was talking about whether you can have two primary law-making bodies within one jurisdiction without causing problems and whether, given this hybrid between the two systems at the moment, that is the way to go.

[40] **Mr Trench:** Being a hybrid is not particularly the problem. The question is whether there is a principle that lurks here.

[41] **Suzy Davies:** Yes, it should be constitutionally consistent with other common law jurisdictions.

[42] **Mr Trench:** The one hallmark of devolution in the UK since 1999 has been the absence of any overarching principle. So, I am not sure that I would want to appeal to any principle on that very high level as something that says that one ought to have a jurisdiction and one ought not to because, with the whole set of arrangements that relates to devolution—whether constitutionally at UK level or within each of the devolved parts of the UK, whether it relates to finances or to administration—there is no general principle. To the extent that there is a general principle, it would seem to be that embodied in the Sewel convention, which is that matters that are devolved are indeed devolved and handed over to the devolved

legislatures and institutions concerned. That is about as close to an overarching principle as one can get, but I do not see that there is some sort of general principle that states that you could have a jurisdiction because you have a legislature.

[43] I think that the argument needs to be put in terms of practicality and of what is necessary to make devolution work effectively for Wales, Scotland and Northern Ireland. One of the lessons that one can draw is probably that the fact that separate legal jurisdictions pre-existed before devolution was put in place for Scotland and Northern Ireland has made the working of legislative devolution in each of those parts of the UK much easier to achieve, for several reasons. One reason is a point that I am sure we will come to in due course, which is the way that it enables you, if you wish, to move to the reserved powers model of conferring powers on the National Assembly.

[44] **David Melding:** We will look at that.

[45] **Mr Trench:** I am afraid that that was a rather circuitous answer, Ms Parrott. [*Laughter*.]

[46] **Eluned Parrott:** It was what the question deserved. In your blog piece, you state that

[47] 'The existence of a devolved legislature, and a distinct body of law, cause increasing strains within the body of the law of England and Wales.'

[48] Can you give us an idea of how those strains have manifested themselves, and any examples that you have seen of difficulties that have arisen with the system as it is now?

[49] **Mr Trench:** I am no longer the sort of practitioner who sees these sorts of things from day to day, and so I have a degree of difficulty in pointing you to a long list of practical examples where that appears. The key word in that, perhaps, is 'increasing'. It is quite obvious, from the point of view of an academic lawyer who is trying to make sense of the various bodies of law and the various statute books that exist, that there are increasing differences or incongruities between what applies on the English side of the border and what applies on the Welsh side of the border. They appear, in a number of cases, to be causing confusion for practitioners, for example. The reason I emphasise the word 'increasing' is because I think that the more the Assembly legislates, the more apparent this will become. Part of the reason why I think that your inquiry is very timely is that this is an opportunity to look at how the settlement works before it reaches a crisis point, a point of such strain that something needs to be done very acutely. It offers you the chance to get ahead of the game—to be a policy maker rather than a policy taker.

[50] The problems that I am particularly aware of arise from other aspects, and not simply from the fact that rules are different between England and Wales. Many of those differences are either fairly low level at the moment—for example, the Welsh position regarding safety belts in vehicles used for school transport and children, or sprinkler systems in houses—or are things that, essentially, concern the ordering of the public sector. The direct impact on people outside the public sector of how schools and their curricula are organised, for example, in Wales compared with England, is fairly limited. These are more or less intramural issues that concern how the public sector works. The more the Assembly legislates, the more impact those sorts of things will have on people. For example, I remember appearing before your predecessor committee when it was considering the very first proposed Measure before the Assembly, the NHS Redress (Wales) Measure 2008. As it happened, that Measure, for good or ill, was more or less a copy-out of the UK legislation—or the legislation applying in England, passed as a UK Act. If you start to have meaningful differences in those regimes between Wales and England, that is the point at which I think that you start to get those sorts of very practical strains. People will understandably be confused and uncertain about what

exactly things mean, for example if the consequence of the same medical error in a hospital could be very different on each side of the border. You would need a clear rationale to do that.

[51] **Eluned Parrott:** You have described some of the federal jurisdiction models, and some of them seem to have similar concerns to the one that we have here. What strains have you seen, or are apparent, in those kinds of jurisdictions where cases cross state boundaries or the federal jurisdiction goes beyond that of the state? Do those kinds of tensions also arise elsewhere?

[52] **Mr Trench:** It depends on quite what you mean by tensions. You do not have a problem of legal certainty, either in determining which body of laws applies, or in practitioners knowing which body of laws applies, because the signal is sent abundantly by the fact that you are deciding which geographical jurisdiction you are in and which sphere of jurisdiction you are in. One of the key courses that any law student takes in the first year of law school in the United States is on civil procedure, which is largely a course in working out exactly what federal jurisdiction is and what state jurisdiction is. You could almost call it a course in practical applied federalism. It becomes one of the key elements of the body of knowledge that anyone must apply at the beginning of their US legal education in order to become any sort of lawyer in the US—whether you practise or work in Government, or whatever you might do with your law degree there.

[53] So, learning your way around the mess is an axiomatic part of how federal systems work; everyone just does it and copes with it. In the UK, we are perhaps making more of a fuss about this than we might; it is part of where we are now politically.

[54] **Jocelyn Davies:** You mentioned three or four times the fact that the more the Assembly legislates, the greater the difference. However, surely, the more that the UK Parliament legislates and we do not, the more the gap widens.

[55] **Mr Trench:** Yes, that is absolutely right.

[56] **Jocelyn Davies:** So, the gap does not widen just when the Assembly legislates, but when we do not.

[57] **Mr Trench:** Indeed. What we now have—in general policy terms, not necessarily in direct legal terms—is a clear tendency for the devolved parts of the UK, namely Scotland, Wales and Northern Ireland, to retain an approach, particularly in relation to social policy and to areas such as education and health, that was in place at an UK level 10, 15 or 20 years ago, and to leave it in place and tweak it slightly at a time when the UK is going off in a fairly dramatically different direction. That will inevitably cause exactly the same strain. If you stay where you are while other people are going in a different direction, then that will inevitably cause exactly the same strain.

[58] **David Melding:** Mark, you have the next question, but I think that you might want to follow that up before you move on.

[59] **Mark Drakeford:** I have a question on what you just said about the way that, in the United States, for example, the cut between the state level and the federal level is not a matter of difficulty. Do you not then have places like Arizona coming along where the dispute is exactly between the two levels?

[60] **Mr Trench:** Indeed. I have just been in the United States and have had the pleasure of watching the end-of-term judgments coming out of the Supreme Court, which included a judgment about the Arizona immigration laws. The court struck down significant parts of

what had been enacted in Arizona, on the ground that it strayed into the federal matter of immigration. The court left intact certain aspects that, in its opinion, did not relate directly to immigration, which, in turn, has triggered a welter of comment about whether Arizona is able to, or should be able to, effectively, invent its own immigration policy. However, in such a decentralised system as the one in the US, which in quite a number of respects is far more decentralised than any part of the UK—notwithstanding the extent of decentralisation in Scotland—there is nothing parallel in Scotland, for example, to the sorts of powers that Arizona has.

[61] **Mark Drakeford:** Following your earlier suggestion that there is no general or overarching principle to which you can have recourse to decide when a separate jurisdiction would be necessary, some of our earlier witnesses offered more pragmatic tests, one of them being that you would know that you needed a separate jurisdiction when there was a sufficient body of Welsh-only law to require that. First, do you think that that is a sensible test? Secondly, if you do, have we reached that point already, and if we have not reached that point, do you think that we are hurrying towards it, or is it some distance away?

3.00 p.m.

[62] **Mr Trench:** It is a sensible test, but I do not know what it means. I do not know what would constitute 'sufficient' in these circumstances. One needs some sort of criterion to try to work out what a sufficient body of law might be. I suspect, depending partly on how much goes on at the UK level and partly on how much the Assembly legislates, that one is in the area where it is a meaningful question to ask. In the absence of having worked out your criteria for deciding what exactly that is, I do not know. On that level, it seems to me a somewhat subjective and woolly approach and I would like to be clearer about it than one is at the moment. However, we are in the territory of where the question is an appropriate one to discuss.

[63] **Jocelyn Davies:** Could 'sufficient' mean different things to different people?

[64] **Mr Trench:** Indeed.

[65] **Jocelyn Davies:** Perhaps lawyers are thinking, 'I am being sued for professional neglect, so it is sufficient', but perhaps for other people it might not make any difference at the moment, and so it is insufficient.

[66] **Mr Trench:** Lawyers may well get more anxious about legal matters than the lay public; I can quite see that that is the case. Ultimately, this is not an issue for lawyers or directly for laypeople, but an issue for politicians to decide. Having heard from all those involved, and I am sure that you have or will be taking evidence from the judiciary about the issues that are presented—I suspect that from the point of view of people on the day-to-day level there is an expectation that things like schools will be run differently as a result of devolution. That will not particularly shock members of the public at large. What I suspect will bear much more directly on them will be matters that relate to property and the environment. It is quite understandable that, in the interests of dealing with devolved matters relating to the environment—the built environment, the natural environment and environmental protection—the legislation that will be passed will affect how people use their property from day to day and what they can do in their homes and how their homes are built. That will, perhaps, cause a more practical difference, because they will be acutely aware that what goes on in relation to property is different on the English and Welsh sides of the border.

[67] **Suzy Davies:** On this area, you say in your evidence that a second key feature of a separate jurisdiction would be a distinct set of courts, and yet you go on to say, more or less, that all it will take is a different sign above the doors saying 'court of Wales' instead of 'court

of England and Wales'. Bearing in mind what you have just said about how these laws can or are likely to diverge in future, do you think that that is a strong enough position or should we be considering, if not an entirely separate court system, a separately administered one?

[68] **Mr Trench:** There are certainly good reasons to consider a separate administration for the courts and to consider at what level that needs to operate, because it could operate only in relation to civil courts or criminal court as well—

[69] **Suzy Davies:** I think that another question is coming up on that.

[70] **Mr Trench:** —and whether it will apply at the level of the county court or the level of the High Court.

[71] **David Melding:** Shall we pick some of these issues up at the end, because I think that we will have time? I would like to go back to Mark, who has some rather crucial next questions.

[72] **Mark Drakeford:** When I was last at this committee, we heard evidence from a distinguished former Counsel General of the Assembly, Winston Roddick. He reminded us that he now sits, part time, as a member of the judiciary, and I do not think that I would be misrepresenting him by saying that his view was that the creation of a separate jurisdiction went hand-in-hand with the devolution of criminal justice and that you really could not have one without the other. Your view is clearly different to that. I wonder whether you could explain how you came to your conclusion.

[73] **Mr Trench:** My view is that the two need not go hand in hand. There are arguments for the devolution of criminal justice, but you then have to decide what exactly you mean by criminal justice. However, if you wanted to establish a separate legal jurisdiction, it could be done in a relatively bare-bones manner, to quote the phrase I used in my blog post. You could have a relatively stripped, bare-bones form of a legal jurisdiction, which would deal with the tangled question of deciding what the legal as well as geographic boundary of Wales is. That need not involve the devolution of matters relating to the criminal law. In other words, there is an argument for a legal jurisdiction, and there is then another argument about the devolution of criminal law. The two are not the same. You can then, in the course of deciding whether you want to devolve criminal law, reach a conclusion about that, but the existence of a legal jurisdiction need not drive the devolution of criminal law.

[74] When it comes to working out what criminal law is, again, it is far from clear to me what this means. I genuinely do not understand what 'criminal justice devolution' means. You have to decide whether it means the devolution of the statutory power to set criminal offences, which, to a limited extent, the National Assembly already has in relation to the enforcement of functions that are devolved to it—there is a power in Schedule 7 that enables you to do it for enforcement purposes, but not otherwise. So, is the National Assembly to have the power to enact legislation relating to the law of theft, or the law of assault on another person? That might mean that you would have different offences on either side of the border. There may be arguments for doing that, but it could also lead to confusion, and I can imagine that it would also lead to a good degree of political resistance. Are you talking about the devolution of policing? Are you talking about the devolution of sentencing, or judicial appointments, or matters relating to the criminal court system generally? Are you talking about the devolution of the operation of prisons, and what we now call offender management, or probation? I think that you need to unpack the question of what 'criminal justice' means.

[75] I indicated earlier that I wanted to talk a little about Canada, because Canada strikes me as a very interesting parallel in this context. I have brought with me a copy of the Canadian constitution, which is something that I recommend as bedtime reading to

everybody. [*Laughter.*]

[76] **David Melding:** Please do not quote too extensively from it. [*Laughter.*]

[77] **Mr Trench:** I will quote from it very briefly. Sections 91 and 92 of what is now called Canada's Constitution Act 1867, originally passed as the British North America Act 1867, deal with the powers of the federal Parliament and of provincial Parliaments. What the constitution provides in section 91 is that:

[78] 'The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in Criminal Matters',

[79] is a federal matter. Section 92 provides that:

[80] 'The Administration of Justice in the Province, including the Constitution, Maintenance and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts',

[81] is a provincial matter.

[82] So, you have a clear division there with the substantive criminal law, which is a federal matter, but you have the same federal law applying, with certain exceptions, because, again, there is similar provision in Canada for enforcement offences. However, the criminal law is the same wherever you are in Canada. A murder is the same murder as a matter of law whether you commit it in Montreal or Vancouver, but the courts that try it, and the sentencing policies that go with that, are going to be different from province to province, because each province is setting up its own court system. This is in part to do with significant legal differences between Quebec and the common-law provinces, because Quebec, as a French-speaking province, also has a legal structure that relates to French law, and therefore is very different to the common-law tradition of the other provinces and territories.

[83] You then get certain further distinctions—for example, there is a distinction between penitentiaries, which are federally run, and prisons, which are provincially run. Essentially, if you are sentenced to more than two years, you are in a penitentiary, and therefore you are federal, and if it is less than two years it is a prison, and you are provincial. That is the sort of difference in practical terms that you get being drawn within Canada. You can have appreciable differences in criminal justice policy from province to province even though the criminal law remains a federal matter.

[84] **Mark Drakeford:** By the time we got to the end of Mr Roddick's evidence, I was not completely sure whether what he was telling us was that you could not have a separate jurisdiction without criminal justice or whether he was saying that it would not be worth having without criminal justice. And so, if we were to think of a stripped-down, bare-bones approach, such as you have outlined, what would be the point of it? Why bother?

[85] **Mr Trench:** It would make it very clear that law in Wales was, in a significant respect, different to the law in England. It is taking an existing difference and making it very much more manifest.

[86] **Mark Drakeford:** Do you need a separate jurisdiction to do that?

[87] **Mr Trench:** That is where we come back to this question about sufficient difference in the body of law. There are certainly quite a few lawyers who would say that it would be very helpful. You would then be creating a basis possibly for further extensions of devolution into other areas, if that were what Wales wanted and if it were considered appropriate at UK

level.

[88] Also, you would be opening the door—this is an issue that I know you want to raise later—to having at least the option of moving to the reserved powers model of conferring powers on the National Assembly. That would have significant benefits, because it would again make it clear whether devolved legislation was within competence or not. To my mind, that would be probably the biggest advantage if you were to move towards even a stripped-down jurisdiction, in that it would open the door to getting to the model of legislative devolution that applies in Scotland and, in a slightly modified form, in Northern Ireland, where it is clearly understood. At the margins, it probably ensures that devolved legislation is within competence rather than not.

[89] One of the things that you emphatically want to avoid is the risk that a devolved legislature cannot legislate for things that people think are devolved. Politically, that seems to me to be a very dangerous place to get to, because that means that you have effectively undermined the legitimacy of devolution as a project.

[90] **Mark Drakeford:** Chair, we may want to come back to this later, but I will just ask this question now. Is that a danger that you think is apparent in the organ donation field?

[91] **Mr Trench:** It is a risk that I think may arise in relation to organ donation.

[92] **Jocelyn Davies:** In your paper, you mentioned that part of the bare-bones approach is about a choice, and you say that the direct and necessary implications of a separate legal jurisdiction are very limited. What do you mean by 'very limited'?

[93] **Mr Trench:** I mean that a separate jurisdiction need not necessarily involve the devolution of criminal justice. It need not involve a step down a slippery slope to Welsh independence, which appears to be said by some who are opposed to it. I do not understand what Cheryl Gillan means when she talks of the glaringly obvious risks, because I simply cannot see that, at one end of this continuum of what a jurisdiction might mean, it would involve anything that drastic at all. I do not see glaringly obvious risks in this. I see potential hazards, which we need to think about, but you need to understand what exactly it is you are doing as part of creating a jurisdiction.

[94] **Jocelyn Davies:** So, this would not be very slippery, and it would not be much of a slope.

[95] **Mr Trench:** Well—[*Laughter.*] It need not be.

[96] **David Melding:** You can still trip up on a gentle incline, though.

[97] **Jocelyn Davies:** You could.

[98] Mr Roddick made it sound as if it was a very simple process that would make eminent good sense and would actually be an economic boost to Wales. Do you agree with that?

[99] **Mr Trench:** I would love to see how you reach that conclusion. I am always hesitant about any economic boosts that involve giving yet more work to lawyers. I am not sure that it is that productive an activity.

[100] **David Melding:** To put it the other way, would it be ruinously expensive?

[101] **Mr Trench:** Equally, I do not see why it need be ruinously expensive. It depends on

how you do it. If you were suddenly to create a vast panoply of a Welsh judiciary that had to have a grandiose building built for it and the most spectacular robes designed for it, and you compelled everybody who wished to practise in Wales as a lawyer to undergo a new set of examinations in order to re-qualify as a Welsh lawyer, that—

3.15 p.m.

[102] **Jocelyn Davies:** You could create an industry.

[103] **Mr Trench:** You could certainly create an industry. I am not sure that that would be an economic boost, but you could certainly create that if you wished.

[104] **Jocelyn Davies:** I am sure that it would be a boost for some; it sounds lucrative for some, does it not?

[105] **Mr Trench:** Equally, if you try to manage a transition so that it has the least impact as is practicable, I cannot see how it would have very much cost at all. It would not be much more than the cost of stationery and signs outside buildings.

[106] **Suzy Davies:** Other witnesses have suggested to us that if we are serious about a Welsh jurisdiction, it is not just a question of sticking a new sign over the door; we are talking about a Welsh court of appeal, for example, which would be a bit more ruinously expensive. Would you accept that the whole idea of what constitutes a change in this jurisdiction is anything on a really wide spectrum?

[107] **Mr Trench:** It is certainly any of a number of points on a very wide spectrum; I absolutely agree with that. My view would be that if you are going to create a Welsh jurisdiction, you probably want to have what are, at least in name, distinct courts up to and including the level of a court of appeal.

[108] **David Melding:** You need higher courts.

[109] **Mr Trench:** Yes, you need higher courts. The model that applies in relation to Scotland and Northern Ireland, and indeed to England and Wales as matters stand, is that there are distinctive court structures up to the level of an appellate court, and then a further appeal to the Supreme Court, which sits equally above all three jurisdictions. You would be altering that relationship of sitting above three jurisdictions to sitting above four jurisdictions. That strikes me as being a fairly straightforward place to get to.

[110] What exactly you need to have to have a Welsh court of appeal is going to be quite a big question. Do you need to have a court that is capable of sitting pretty much all the time in both civil and criminal branches in Cardiff? Is there enough business to keep such a court busy? Are you running the risk of having a large number of judges who will not be fully occupied if you do that? Equally, if you do that in a relatively small jurisdiction such as Wales, do you run the risk of having judges who lack the necessary expertise in all the areas that may well come before them? That may be an argument, at least initially, to have your judiciary appointed from the existing Court of Appeal of England and Wales, so that anyone who is presently qualified to sit in the Court of Appeal of England and Wales will also be able to sit in the court of appeal in Wales, as in England. In due course, you might want to alter the tradition of there being dual appointments in that way, but, in the first instance, that is a relatively straightforward way that ensures that you have access to a huge pool of legal expertise.

[111] **Jocelyn Davies:** Moving on to reserved powers, why do you argue that it would be very hard, if not impossible, to create the reserved powers model without having a separate

jurisdiction?

[112] **Mr Trench:** It depends on what you regard as being the parameters within which a reserved powers model would operate. If you were to operate on the basis that the heart of the common law ought to remain the same between England and Wales—with things such as the law of contract and the law of tort remaining the same—I cannot see how you could create the reserved powers model without creating something verging on complete legal confusion, if you were to reserve the law of contract and the law of tort and so on. If you create a Welsh jurisdiction and you say, 'The common law of contract, tort, and so on, shall remain the same in Wales as it is in England', it is relatively straightforward to put in place the reserved powers model, because you have said, 'The common law is reserved, but, equally, the generality of law-making powers are in the hands of the National Assembly'.

[113] Let me give you an example of how my thinking about this has reached where it has. What happens if the National Assembly wants to pass distinctive legislation about the use of PFI-type arrangements in the national health service? As matters stand, the National Assembly has extensive powers to regulate that sort of thing, if it wanted to, because health is one of the devolved subjects. It is pretty clear, if you look at subject 9 in Schedule 7 to the 2006 Act, that there is a power to do all sorts of things that relate to the framing of PFI contracts. So, you could decide that you are going to permit certain sorts of contracts and prohibit others, and that you are going to use a regulatory framework to try to govern how PFI works. Now, as matters stand, you can do that because you attach your legislation to the powers that are set out in subject 9 of Schedule 7. If you tried to use the reserved powers model within this framework, you would create quite serious uncertainty because—

[114] **Jocelyn Davies:** Because contract is based on common law and PFI is a contract.

[115] **Mr Trench:** Indeed. So, your power to regulate a particular sort of contract that part of the public sector may enter into would then start to get into areas of quite significant legal uncertainty, and you might very well actually end up having no power to do anything at all because no-one quite knows what the extent of that reservation of the common law is. If you have a separate legal jurisdiction and say, 'The National Assembly can do anything except things that are expressly reserved', you are going to be able to say, 'We have a general power to legislate; we are not legislating for the law of contract, but for a particular class of contracts that relate to things that the public sector does, and therefore we have the power to do this'. So, it is hugely easier.

[116] **Jocelyn Davies:** So, in the same way as if you set up a system of regulations about compensation for medical negligence, you would not be interfering with the law of tort, which is based on common law—

[117] **Mr Trench:** Indeed. If it were enacted now, it would appear that the NHS Redress (Wales) Measure 2008 would probably fall within subject 9. There is always going to be an issue in relation to something like that about compliance with the European convention on human rights; however, that legislation is fine as matters stand. If you were to try to graft on a reserved powers model within a shared jurisdiction, if becomes very difficult. It you have a separate legal jurisdiction for Wales, where the presumption is that the rules of the common law are the same except where they are statutorily properly altered, I think you would be able to do that quite neatly. It enables you then to move to that reserved powers model with the appreciable advantages that I think it would offer.

[118] **David Melding:** I am happy to extend the session to around 3.45 p.m. Going beyond that would presume a bit too much on the generosity of our witness and the time he has set aside to help us with our inquiry. However, I said that there are a few other areas that Members want to pursue, and should there be time at the end—and there is—we would do

that. I am assuming that you do not want to introduce anything else at this stage.

[119] **Mr Trench:** I do not think so, no.

[120] **Mark Drakeford:** My point follows on from the last question. In Scotland, you have a separate jurisdiction and a reserved model. Yet, your evidence suggests that the Sewel convention continues to provide anxieties or difficulties, a result you say of being uncertain as to how seriously it is taken in Whitehall.

[121] **Mr Trench:** There continues to be concerns about how effectively the Sewel convention works, and there always will be. I think that it would be a wise thing to do at UK level to reinforce the status of the Sewel convention because, at the moment, it is simply a combination of a declaration in Parliament by a Government Minister during proceedings on the Scotland Bill in 1998 and its restatement in an inter-governmental agreement. I would rather see it have a higher status than that, to the extent that one could make that happen. Those are issues of practice and they are driven by what Whitehall does.

[122] I hear conflicting accounts, when I talk to people in Whitehall, of how seriously the convention is taken and by which parts. I do not know whether you have noticed, but I had an earlier post on the blog where I had a quick look at the Queen's Speech. It is obvious that the most recent Queen's Speech is an awful lot better than the coalition's first one in addressing devolution issues. I am sure that that is simply a matter of timing. The first Queen's Speech, for the 2010 to 2012 session, was prepared in great haste after the 2010 election and things did not happen that ideally would have happened. This year's Queen's Speech was prepared with much greater time and control of the process. Therefore, considerably more thought was given to what the devolution questions are and how to address them. I am not sure whether that is always entirely satisfactory. With regard to the draft Bill on water in particular, there will be some serious differences between Westminster and this place, and I suspect that there may be regarding Scotland as well.

[123] **Jocelyn Davies:** Is it okay to ask a question about bilingual legislation?

[124] **David Melding:** It may not be Alan's speciality, but I am sure that he will reply if he can.

[125] **Jocelyn Davies:** As you know, we produce our legislation bilingually here. I am given to understand that many cases that go to the higher courts are about the meaning and interpretation of words, and, if you produce legislation bilingually, I suppose that there is more room for arguments and disputes.

[126] **Mr Trench:** Anyone who has had anything to do with European Union legislation will know that consideration of legislation in multiple language versions is one of the fundamental approaches of the European Court of Justice.

[127] **Jocelyn Davies:** I am just wondering, when we talk about a separate jurisdiction and when it comes to cases about the interpretation of what the legislation actually means, if it is bilingual, whether a monolingual judge would be able to do that.

[128] **Mr Trench:** That is a good question. I am not sure that I can answer it. That is a strong argument for bilingual judges, but it is also, at its root, an argument for ensuring that there is consistency in the legal meaning of terms that are used in the two languages of Welsh legislation. That project, as I understand it, has been under way since 1999, more or less, within what is now the Welsh Government's legal services division. Ensuring that you have a common glossary, to enable you to render legal terms with the same substantive meaning in both languages, strikes me as being a necessary part of creating a bilingual statute book.

[129] **Suzy Davies:** You commented on jobs for lawyers earlier on; how about jobs for academics? Do you think that we would need a Law Commission in Wales? How would you like it to look, if we did have one?

[130] **Mr Trench:** I suspect that the need for a Law Commission would depend on the exact scope of the things devolved to Wales. I know more, slightly oddly, about the Scottish Law Commission than about the Law Commission for England and Wales.

[131] **Suzy Davies:** Are you happy with how that looks?

[132] **Mr Trench:** Well, the Scottish Law Commission has had a bumper time in the last few years because many of the things that it has been recommending for many years have suddenly been enacted. That is part of the devolution bonus of having a devolved parliament. That relates to the fact that Scots law is a distinct body of law. It has a different set of legal roots from that of the laws of England and Wales. Those need to be looked at. The Scottish Law Commission has to look at the law of murder in the same way that the Law Commission for England and Wales looks at the law of murder. The word is the same. The offence is the same. The *actus reus* involved is the same—a person has been killed. However, aspects of the law of murder in Scotland are different from the law of murder in England, not least because how Scots law works when it comes to criminal law is very different. The same applies to a lot of private laws. On laws relating to land rights, Scotland has only relatively recently abolished the last remnants of feudal tenure in land. That is one of the pieces of legislation passed by the Scottish Parliament.

3.30 p.m.

[133] Other aspects of private rights can also be significantly different in Scotland. A separate Scottish Law Commission is necessary, understandably, to deal with the fact that there is an ancient and extensive body of law that needs to be looked at. You might need a separate law commission for Wales, or you might wish to contract the Law Commission for England and Wales to continue to provide services in relation to Wales. That might be an option open to you. I noted that, some time ago, Kenny MacAskill, now the Scottish Cabinet Secretary for Justice, suggested that an independent Scotland would not need to create its own Driver and Vehicle Licensing Agency as it could contract the DVLA of the UK to provide such services.

[134] **David Melding:** I wish to take you back to the issue of Canada. I think that we will look at this ourselves, but it would be helpful if you could add to this at this stage. I suppose that one of the great problems, if you have a legal jurisdiction that is quite distinct over civil matters but that does not capture much of criminal law—perhaps a little bit but not substantially—is that you end up with two sets of courts to administer the laws in a particular territory, which is a bit ungainly. The Canadians get around that, do they?

[135] **Mr Trench:** Most legal systems have two sets of courts. The question of whether an offence is a federal offence or a state offence is a particularly important one in the United States, as any watcher of almost any cop show can tell you.

[136] **David Melding:** Yes, but it would be even more substantially the case in the UK, because there are relatively few federal criminal cases in the United States. There are not that many federal crimes that relate to criminal law; most of it is state law. I just wonder whether the Canadians get around this—if I understood you correctly—by having the provinces administer the court system.

[137] **Mr Trench:** Yes, the provinces administer the court system. If I commit theft in

Quebec, in Montréal, I will find myself before the court of the province of Quebec—

[138] **David Melding:** Even if the law applied to you is a federal law.

[139] **Mr Trench:** Yes. The definition of the offence and the penalty will be defined in federal law, but I would be tried for it before the Quebec court, and that can affect the sentencing policy, which is quite an important issue that has been a meaningful source of tension between governments in the past.

[140] **David Melding:** Okay, but it seems to me that that could be a model for us if we see a civil jurisdiction emerging more quickly or if a jurisdiction in Wales related only to civil matters.

[141] **Mr Trench:** Indeed.

[142] **David Melding:** It would also not be so confusing for the public. I think that that is the extent of our questions to you, Alan. We are really grateful for your help, again, with the work of the committee and, indeed, for your general interest in matters relating to Welsh devolution. You have shed a lot of light this afternoon and given us quite a lot to think about in terms of how the future legal personality of Wales might look in a practical sense. Many thanks and a safe journey home.

[143] **Mr Trench:** Thank you.

3.33 p.m.

Papur i'w Nodi
Paper to Note

[144] **David Melding:** We have a paper to note, which is the report of the meeting we held last week on 2 July. The next meeting will be on 16 July. That is our last meeting of this term.

3.34 p.m.

Cynnig o dan Reol Sefydlog Rhif 17.42 i Benderfynu Gwahardd y Cyhoedd o'r Cyfarfod
Motion under Standing Order No. 17.42 to Resolve to Exclude the Public From the Meeting

[145] **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).

[146] **David Melding:** I see that the committee is in agreement.

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 3.34 a.m.
The public part of the meeting ended at 3.34 a.m.