



Cynulliad Cenedlaethol Cymru The National Assembly for Wales

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

**Dydd Llun, 16 Gorffennaf 2012
Monday, 16 July 2012**

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

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

Aelodau'r pwyllgor yn bresennol

Committee members in attendance

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

Theodore Huckle QC	Y Cwnsler Cyffredinol, Llywodraeth Cymru Counsel General, Welsh Government
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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 The Research Service
Adam Vaughan	Dirprwy Glerc Deputy Clerk

Dechreuodd y cyfarfod am 2.29 p.m.

The meeting began at 2.29 p.m.

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

[1] **David Melding:** Good afternoon. I welcome everyone to this meeting of the Constitutional and Legislative Affairs Committee. I start with the usual housekeeping announcements. We do not expect a routine fire drill, so if you hear the alarm please follow the instructions of the ushers, who will help us to leave the building safely. These proceedings will be conducted in Welsh and English. When Welsh is spoken, the translation is available on channel 1 of your headsets; if you are hard of hearing, channel 0 will amplify our proceedings. Please switch off all electronic equipment completely, because even on silent, they can interfere with our broadcasting equipment. There are no apologies.

2.30 p.m.

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

[2] **David Melding:** These instruments are listed. Do Members have any queries? I see that they 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 one negative resolution instrument, CLA166. As you can see, we are asked to agree a merit report. Are there any views?

[4] **Suzy Davies:** I want some reassurance. I read the Government's explanation but got a little lost with the dates. I seek reassurance that the replacement provisions will be up and running before the current provisions go. I can see here that there is an intention on the part of the Deputy Minister, as noted in paragraph 5,

[5] 'to ensure that the new arrangements were evaluated fully a year or so after implementation'.

[6] I am not clear on when they were implemented.

[7] **Mr George:** The regulations do not come into force until 1 January. I assume that the period between now and 1 January will be used for implementation and so on.

[8] **Suzy Davies:** That is all that I was looking for; thanks.

[9] **David Melding:** We are not doing anything in terms of procedure. We have noted that it is a negative procedure. Nevertheless, we want to issue a merits report, so that people realise the significance of safeguarding children boards and how they undertake serious case reviews and the fact that there have been changes to the system—as discussed extensively in the last Assembly. It is appropriate that we mark it as a matter of public interest and a significant policy in terms of safeguarding children. Therefore, we agree the merits report, thank you.

2.32 p.m.

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

[10] **David Melding:** This is the main item we are dealing with this afternoon. This is our twelfth oral evidence session in our inquiry into the establishment of a separate Welsh jurisdiction. It is with great pleasure that I welcome Mr Theo Huckle QC, who is the Counsel General of the Welsh Government.

[11] I am pleased that you have made time to be with us this afternoon, Counsel General. We have taken extensive evidence and we know that the Green Paper is being consulted on. You are, no doubt, in the process of going through those responses. What are likely to be the

milestones, as far as the Government is concerned, in responding to the consultation and possibly taking things forward? How might you look to us to play a part in that process, in terms of our evidence and report?

[12] **Theodore Huckle:** First, I thank you for the opportunity to come to give evidence. I do so with a certain reservation, because what matters in the process so far is the evidence that this committee and our consultation is obtaining. We are all in the process of considering and reviewing the material that is coming to hand—much of it thought provoking. I am grateful for the work already done by this committee, which we see as complementary to the Government’s consultation exercise. As far as that process is concerned and as everyone here will know, we are, to some extent, looking forward to Silk 2. The driver for deadlines and so on will be that coming process. As far as I am aware, no specific date has been given for a conclusion or analysis of the consultation results. As I understand is the case with this committee’s work, we also think that we will begin to draw conclusions in the autumn of this year.

[13] **David Melding:** That is a useful indication of the timescale. As you can imagine, we have a series of questions that we have shared among ourselves, but I will also ask Members to come in with supplementary questions if the area of questioning is particularly significant. I think that we will capture most of what we want to discuss in terms of our own evidence and reflect on that, but if you wish to add anything that we have not covered, we will give you an opportunity to do so at the end. I will ask Eluned to take us forward.

[14] **Eluned Parrott:** It will be interesting to see how your evidence and other evidence submitted to this committee will complement and differ from one another in terms of the body. One of the pieces of written evidence that we received from the Association of Judges of Wales looked at the idea that there is no rigid template for what a jurisdiction is. It discussed, rather than trying to recreate a jurisdiction from a model elsewhere, the idea of tailor-making a jurisdiction to the needs of Wales. Do you think that a tailor-made solution is the way in which we are likely to go? Do you think that that is what might emerge from the Welsh Government’s consultation at this point?

[15] **Theodore Huckle:** May I answer that in this way? The joy of the process is that we are able to look at the systems. This applies generally—if I can put it like this—to the development of the devolution settlement. We have the ability to look at the systems that would best serve the people of Wales, and I hope and believe that we are all engaged in that here. Insofar as the conclusion that we draw is that a system of legal jurisdiction can be put in place that will serve the people of Wales better than any template so far established, my view, frankly, is that that is what we should seek to do. I do not draw any conclusions about it yet, because we are still in the midst of a consultation process and in the process of analysing the responses. I do not have a formal view about that, but I certainly think that we should all consider this process as one of great opportunity to look again, if you like, at how things are arranged and how things could be arranged without being particularly bound by any existing model.

[16] **Eluned Parrott:** One interesting aspect of the evidence that we have received is the varied definition of what a jurisdiction actually is, with Lord Morris, on the one hand, giving us a list of the requirements of what a jurisdiction might be, and others suggesting that more flexibility was possible and, perhaps, desirable. Have you come to a view on what you believe a jurisdiction actually is?

[17] **Theodore Huckle:** The short answer is ‘no’. I think that there is a necessary reference to a defined territory, and I do not think, for my part, that there is a particular difficulty with that in relation to Wales. There might be slightly differing definitions of the territorial area, but I do not think that that causes great difficulties. One would have to decide

on the absolutely correct definition. That is one aspect. My view is that, in context, it is sensible to look at whether there is a body of law specifically applicable to the territory in question. I say 'in context' because, for example, when the Northern Ireland jurisdiction was established there was no body of law specifically applicable to Northern Ireland, as compared with England and Wales, in particular. Therefore, it seems to me that it is not necessarily a requirement that, to create a jurisdiction, one already has a body of law. As it happens, it seems to me that we do already have a body of law that is applicable in Wales.

[18] **Eluned Parrott:** So, you do have the two things in mind—a territory and, potentially, but not necessarily, a body of law that is already diverging from the body of English law, not only by what we do here in the Assembly but also, of course, by what Westminster does for England only.

[19] **Theodore Huckle:** I do not want to interrupt you, but you précis what I just said. You introduce the concept of the divergence aspect, because it is an important aspect. When I talk about the body of law that is applicable to Wales, it includes, of course, the law that is specifically made here by you as well as the rest of the body of law that is applicable to Wales. However, the totality of that body of law only applies to Wales.

[20] **Eluned Parrott:** As that body of law that is specifically Welsh and applies in Wales more generally continues to develop, and as that divergence continues, have you already seen problems for the legal profession here in Wales, or do you expect those to emerge over the coming years, as that divergence continues?

[21] **Theodore Huckle:** No, I do not see a problem.

[22] **Eluned Parrott:** So, that was not specifically the impetus, if you like, for launching your own inquiry into this area.

[23] **Theodore Huckle:** No, not at all. As you know, this consultation was launched jointly by me and the First Minister and is very much resulting from expansion of the legislative powers accorded to Wales as the result of last year's developments. One of the respondents—I cannot remember now whether it was one of the respondents to our consultation or to your inquiry—used the expression 'balance' in relation to the Diceyan model, if I can put it that way, of the separation of powers between the legislature, the executive and the judiciary. We now have a fully-fledged legislature and executive, and that raises questions about what the legal side of that should be as a necessary part of that tripartite arrangement.

[24] **David Melding:** I prefer the classic model to the Diceyan model. Dicey is a bit too Victorian.

[25] **Theodore Huckle:** I will take the history lesson from the Chair. [*Laughter.*]

[26] **Eluned Parrott:** He is very good at them. [*Laughter.*] Moving on to talk about the judiciary, you were quoted in *The Guardian* in March talking about the need for a Welsh judge to be appointed to the Supreme Court. Why do you believe that to be necessary?

[27] **Theodore Huckle:** Again, it is all part of the same picture. I take the view that the way that the Constitutional Reform Act 2005 refers to membership of the panel of judges in the Supreme Court as reflecting every part of the UK—I am summarising—means that Wales should be recognised as a separate part of the UK. The counter argument is that it relates only to the strict definition of legal jurisdictions and therefore England and Wales is the relevant part. However, I think that we are right not to be particularly happy with that, particularly given that, as you know, one of the first things I did as Counsel General was to go to the

Supreme Court to argue about the constitutional issues that arose from the Scottish *Axa* case. It seems to me that, although we have not yet had a specific instance of that sort of argument based upon the principles of the Welsh devolution settlement, we are bound to pretty soon and, therefore, it is right that the court adjudicating upon that includes people who are familiar not only with Scottish law and the devolution settlement and Northern Irish law and the devolution settlement but also with the Welsh devolution settlement.

[28] **Eluned Parrott:** So, you would wish for the judiciary to reflect a federal model, if you like, with constituent parts of different parts of the UK—

[29] **David Melding:** Well, territorial at least—

[30] **Theodore Huckle:** Yes, I am not sure whether I am defining my position either territorially or in terms of federalism. I am just saying that it is built into the structure of the Supreme Court—and we are talking about the policy-level court, which is the one that has to decide constitutional issues—that it should reflect every part of the UK. When you have devolution settlements that allocate difference, if I can put it that way, to parts of the UK, as a matter of constitutional structure, it seems to me that that definition in the Constitutional Reform Act 2005 should be applied, including in relation to Wales. Forgive me if I am elaborating too much. That ought to be a relatively simple thing to say, but, in the end, it comes down to the fact that I think that we should have a judge on the Supreme Court panel who has sufficient knowledge of the Welsh devolution settlement and Welsh affairs.

[31] **Eluned Parrott:** That is very clear. The Crime and Courts Bill is currently before Parliament. It looks at the composition of the Supreme Court but does not include that provision. Have you made representations on this? Has the Government done so? What progress has been made?

[32] **Theodore Huckle:** I have made representations. At the end of that article in *The Guardian*, it said that someone at the Supreme Court was asked about this and they had said that they were well aware of the Counsel General's position on this and that we were in negotiations. That was how that article finished. The Welsh Government—not me in particular—has repeatedly made representations that there ought to be Welsh content in the Supreme Court.

[33] **Eluned Parrott:** What progress has been made?

[34] **Theodore Huckle:** Not much so far.

[35] **Eluned Parrott:** I take it that negotiations are ongoing, in that case.

[36] **Theodore Huckle:** Well, representations are being made and acknowledged.

2.45 p.m.

[37] **Simon Thomas:** You are getting acknowledgements for your e-mails then.

[38] **Theodore Huckle:** A bit more than that. I have personally discussed it with the president of the Supreme Court and the chief executive of the Supreme Court, but there is no current proposal to change. One of the things that are asked is, 'What is a Welsh judge?', and it is a fair point. On the other hand, my response has always been, 'We know one when we see one'. More than that, one of the things that we have been making representations about is that, at the very least, the application forms should require candidates for appointment to the Supreme Court to indicate what knowledge they do have of Wales and the Welsh devolution settlement. So far, that is not the case. So that, even if it was not a Welsh judge, it could at

least be a factor to be taken into account, that somebody knew a bit about Wales and the Welsh devolution settlement; let us put it that way.

[39] **Simon Thomas:** Diolch yn fawr. I was going to ask you a couple of questions—

[40] **David Melding:** Before that, Eluned just wants to finish her thoughts or questions.

[41] **Eluned Parrott:** My apologies, Simon. ‘We know one when we see one’ is a slightly flippant response, I hope you do not mind me saying. Surely, in your representations and negotiations, you are able to tell the UK Government what exactly it is that you want it to appoint, and there may surely be some kind of person specification or an idea of what that actually means.

[42] **Theodore Huckle:** I understand your point and it is a fair one. I am reluctant to spend much time quoting provisions in this meeting, but in this case, perhaps I ought to. The point is that the Constitutional Reform Act 2005, section 27(8), requires selection commissioners to ensure that, between them, the judges of the Supreme Court will have knowledge of and experience practising the law in each part of the United Kingdom. That is currently what is required, so it follows from that that what we have said is that the application process should allow and require candidates to demonstrate that with particular reference to Wales. Beyond that, it becomes a matter of the more general question of in what ways the devolution settlement should be extended and changed. I personally would like to see it as a requirement that there was somebody with a clear link to Wales on the panel of the Supreme Court justices, but it is not something that is currently required under the constitutional structure.

[43] **Simon Thomas:** Diolch yn fawr. O edrych ar y peth o bersbectif arall efallai, rydych chi wedi dweud y byddem yn adnabod barnwr Cymreig o’i weld, ond mae un peth yn bendant, y byddem yn adnabod achos Cymreig pan fyddem yn ei weld. Er bod datganoli, er enghraifft, o ran y Llys Gweinyddiaeth yng Nghymru, mae’r pwyllgor wedi derbyn llawer o dystiolaeth bod achosion yn dechrau yng Nghymru, ond yn teithio wedyn i Lundain i gael eu penderfynu yn y pen draw. A yw hwn yn bryder i chi? Ym mha ffordd y gwelwch hynny’n amharu â mynediad i gyfiawnder yma yng Nghymru?

Simon Thomas: Thank you very much. Looking at it from another perspective perhaps, you have said that we would know a Welsh judge when we saw one, but one thing is certain, that we would recognise a Welsh case when we saw it. Although there is devolution, for example, with regard to the Administrative Court in Wales, the committee has received a great deal of evidence that cases are commenced in Wales but then move to London for final resolution. Is that a concern for you? In what way do you see that impeding access to justice here in Wales?

[44] **Theodore Huckle:** I am not sure whether I would describe it as a concern of mine. While we operate in the jurisdiction of England and Wales, that is what happens, and it is obvious that those in charge of the administration of justice will move cases around and reallocate them to different venues accordingly. I am a practising barrister, as you know, and I have spent my career going around to different courts in different parts of England and Wales, and in some cases, Northern Ireland, and I have never had a particular concern about that. So, in the role of Counsel General, I do not have a particular concern about it, but this partly comes back to a matter that is generally raised in this debate, which is what is necessary on the one hand—what we need to have and what we need to do—and what the situation should be, as a matter of principle, on the other. They may be overlapping, and to some extent conflicting, questions and I am sure that we will develop them a bit more later on.

[45] However, my starting point in the whole debate around devolution and a separate legal jurisdiction is whether there are ways in which we can arrange things better to serve the

people of Wales. It seems to me that the Administrative Court (Wales) provides a very good example of how that can be done because, generally speaking, as a matter of devolution and legal devolution, things Welsh generally need to be done in Wales, for Wales.

[46] **Simon Thomas:** Rwy'n derbyn, felly, nad ydych chi'n ystyried hynny'n bryder, ond a fydddech yn gweld bod y math o awdurdodaeth ar wahân sydd wedi cael ei drafod yn y dystiolaeth i'r pwyllgor hwn o gymorth i gadw rhai o'r achosion hyn yng Nghymru? A fyddai'n cryfhau'r tueddiad o glywed a barnu mwy o achosion Nghymru?

Simon Thomas: I accept, therefore, that you do not consider that a concern, but would you consider that the kind of separate jurisdiction that has been discussed in evidence to this committee would be of assistance in retaining some of these cases in Wales? Would it strengthen the trend of having more cases heard and judged in Wales?

[47] **Theodore Huckle:** Sorry, could I ask you to repeat the question, because I am not sure that I quite got that?

[48] **Simon Thomas:** Rwy'n derbyn nad ydych chi'n ystyried hyn yn bryder, fel y cyfryw, ond roeddwn yn gofyn a ydych yn gweld datblygiad awdurdodaeth gyfreithiol ar wahân fel rhywbeth a fyddai'n cryfhau'r tueddiad i ddatganoli mwy o achosion i Gymru ac a fyddai'n creu rhyw fath o, nid rhwystr, ond newid yn y ffordd y mae achosion ar hyn o bryd yn tueddu i deithio i lawr yr M4, tuag at Lundain yn benodol.

Simon Thomas: I accept that you do not consider this a concern, as such, but my question was whether you see the development of a separate legal jurisdiction as something that would strengthen the trend of devolving more cases to Wales and that would create some sort of, not barrier, but change in the way that cases currently tend to move down the M4, towards London specifically.

[49] **Theodore Huckle:** It is inevitable that, if there were a separation of the jurisdictions in a way that, for example, made the administration of justice generally in the court system Welsh-based and Welsh-controlled, that process of cases moving out of Wales would happen less frequently, just as a matter of reality. Does that answer your question?

[50] **Simon Thomas:** Rwy'n meddwl ei fod. Rwyf eisiau gofyn ychydig mwy am fynediad at gyfiawnder. Rwy'n meddwl i mi weld stori yn y wasg heddiw ynghylch eich datganiad chi am gostau tribiwnlysoedd, er enghraifft, a'ch pryder bod hynny'n arwain at rwystr o ran mynediad at gyfiawnder. Beth yw eich barn ynglŷn â datblygiadau parthed awdurdodaeth ar wahân? A fydd hyn yn cryfhau mynediad at gyfiawnder? A ydych yn gweld hwn fel rhywbeth a fyddai'n dod â'r gyfraith bach yn nes at bobl Cymru a gwneud iddynt deimlo bod y gyfraith yn perthyn yn fwy iddynt hwy, fel petai? A yw hyn yn ffitio i mewn i'r agenda sydd gennych chi, fel y Cwnsler Cyffredinol, o ddangos bod mynediad at gyfiawnder yn rhywbeth sy'n bwysig i'r Llywodraeth bresennol?

Simon Thomas: I think that it does. I want to ask a little more about access to justice. I think that I saw a story in the press today about your statement on the costs of tribunals, for example, and your concern that that would be a barrier in terms of access to justice. What is your opinion on developments in terms of a separate jurisdiction? Will this strengthen access to justice? Do you see this as something that would bring the law closer to the people of Wales and make them feel that they had more of an involvement with the law, so to say? Does this fit into the agenda that you have, as Counsel General, of demonstrating that access to justice is something that is important to the current Government?

[51] **Theodore Huckle:** The way that I see it is that choices would be made in Wales. The issues are not ones that we can escape. The reason why the Ministry of Justice is imposing the fees is because it costs quite a lot of money to run the employment tribunals. I have taken a position, which, I hope, is one of principle, against that—for reasons that I have explained and

developed—but I understand the financial imperatives and difficulties. So, it is not because I do not understand them, but it is a question of priorities and of allocating what moneys are available to certain things. So, the point is that what would happen is that the choices would be made in Wales and that is probably a good thing.

[52] **Julie James:** One of the points that has been made in evidence to us by a number of people is that we do not have any empirical data on how many cases are Welsh, so to speak. So, in terms of this conversation about where cases are heard, and whether they should all be held in Wales and so on, it seems that we do not know whether the Welsh courts could cope with that, or, if they were all they heard, whether they would not have enough business. We just do not have any empirical data, so, since we are on that subject, could you comment on that?

[53] **Theodore Huckle:** The difficulty is that, with very few exceptions, there is no such thing as a Welsh case at the moment at all. I am sorry to look through the pages in front of me, but, somewhere, I was given a few small bits of information about the Administrative Court. As we know, the Administrative Court is now run from an office in Cardiff and it is the nearest thing that we have to a template for a Welsh court, apart from the tribunals. The data that I have been given are that, for the two-year period to April last year, there were 307 claims to the Administrative Court in Cardiff, and a further 61 cases transferred from outside Wales. In the context of all the cases of a legal nature that are proceeding, that is probably quite a small number. So, I do not disagree; it is difficult to take a view as to what the impact is.

[54] It is probably right to say that private family disputes between people in Haverfordwest, say, are not being transferred to London to be heard. So, there is a necessary localisation of local types of matters. That is part of the point in a way; what we are talking about, as far as the administration of justice is concerned, is a transfer of control—it is a devolution of control, potentially, rather than an upheaval and a change to everything. There is no doubt that the same judges in Haverfordwest will determine the same issues as they currently do, whether we have a separate legal jurisdiction or not. However, I agree that it is difficult to identify what is a Welsh case, and how many of them there are. The area where it is being considered necessary to identify them is public law, which is what the Administrative Court has done.

[55] **Julie James:** I would like to come back on that point. The point about the Administrative Court is interesting. Although we now know which cases are issued in Cardiff and which cases have been transferred back to Cardiff, we still do not know how many Welsh cases are still being heard elsewhere. During the year before I became an Assembly Member, I know of at least three judicial reviews, issued and heard in London, that were to do entirely with Welsh public authorities. Therefore, are you considering asking for any data to be collected or to have a system put in place so that such data might be available, or do you think that it is just not very interesting and that it would not be one of the principles that you were considering?

[56] **Theodore Huckle:** It is certainly not the case that I would not think that it was interesting. On any view of it, it would be interesting to know what the impact of possible changes might be. I should say though that I think, really, in the end, these issues need to be addressed as issues of principle.

[57] **David Melding:** Did you want to come in on this, Suzy?

[58] **Suzy Davies:** Yes—do I have time?

[59] **David Melding:** Yes. However, that last comment was pertinent. We need to look at

the strategic position, rather than at how well the Administrative Court is working, although it is an example of how things are adapting and how they are fit for purpose. However, I do not want questions to address only that point.

[60] **Suzy Davies:** No, of course. My point is on the Administrative Court, which I hope is okay. You mentioned that you saw the Administrative Court as a sort of template for what we could be looking at in the future. However, it is also fair to say that a huge majority of its work is public law, and that is the majority of the law that we make in the Assembly, particularly through secondary legislation. Therefore, inevitably, it already has a bigger workload than, let us say, private law cases. You mentioned that a private law case down in Haverfordwest will not be that different from a private law case elsewhere. Therefore, is it an appropriate template, if it deals so exclusively with Welsh law?

[61] **Theodore Huckle:** What I meant by ‘template’ is that it shows how the administration of the courts, in that particular field—and in a part of the High Court particularly—is now successfully dealt with from Wales. That is all I meant. It cannot be said that the High Court can only be administered from London.

[62] **David Melding:** Okay, let us get back onto the main line.

[63] **Simon Thomas:** I will return to where we were. I will say this in English, to assist matters, because I am going to quote from an English article. There was an article in *The Guardian* in March apparently—I do not believe that there was more than one article relating to Welsh jurisdiction in *The Guardian* in March, so I assume that it is the same article. That article contained a quote from Lord Justice Pill, who said that,

[64] ‘even under present arrangements, a surrogate Ministry of Justice for Wales should exist.’

[65] I take ‘present arrangements’ to mean the sort of thing that we have just been discussing. He seems to be suggesting a sort of interim house, between a full legal jurisdiction, and the sort of place where we are now, with an increasing level of some kind of devolution. I suppose that something similar happened in Northern Ireland until they got full judicial devolution: they had a judicial committee; they sort of shadowed the process. Is that attractive to you, or do you believe that—even if it were to happen—that is a sort of temporary state of being, and that we should either go for jurisdiction or just make better use of the England and Wales jurisdiction that we have?

[66] **Theodore Huckle:** I am well aware that, not only Lord Justice Pill, who obviously has a particular association with Wales, but also the Lord Chief Justice, are very much of the view that there should already be a Ministry of Justice in Wales. As I understand it—although I hesitate to describe their view in any detail—that is because, like it or not, what we do in Wales has elements that affect the judiciary, the system of justice and the law generally. Let me give you the—

3.00 p.m.

[67] **Simon Thomas:** Your views on tribunals, for example. It has an input into that, does it not?

[68] **Theodore Huckle:** It has, although I am very much acting with my independent hat on when I am doing that, because that is not a matter of Government policy, as I have tried to make clear. However, because of how devolution works, aspects of it necessarily engage legal, judicial and jurisdictional matters. The thinking, therefore, is that it would be sensible to have a single point of contact, if I can put it that way, in relation to those matters. From the

other side, it is difficult to justify setting up a ministry for something that, on the face of it, is not devolved. So, there are arguments on both sides.

[69] **Simon Thomas:** Briefly on that, without going back to the earlier discussion on the classical or other models of the separation of powers, does this proposal, as you understand it, albeit in a shadow form, seem to be a part of being clear about that separation of powers? Otherwise, for example, we could stumble into some judicial things in the way that we operate here.

[70] **Theodore Huckle:** I have not seen it in that way, I must say. I do not think that it is a stumbling problem, but a recognition by the judiciary that the activities of the Government and legislature in Wales necessarily have an impact on what the judiciary does, has to do and ought to do and so on. Therefore, I think that the members of the judiciary feel that it would be useful for them to have direct engagement in the same way as they have with the Ministry of Justice and so on in London.

[71] **Simon Thomas:** I know that there are practical concerns and also fiscal concerns about establishing something that would not be fully operational, as it were, but would still have some costs involved. Nevertheless, do you see any merit in that principle or do you see the consultation currently as going past that anyway?

[72] **Theodore Huckle:** The latter, I think. In relation to the former, I actually do not think that it is a matter for me, but the latter certainly applies. What happens in relation to the jurisdiction matter would not necessarily decide it one way or the other, but if we adopted a separate legal jurisdiction of some kind, the need for a ministry would become much more obvious, essentially.

[73] **Simon Thomas:** I have a final point on that as regards the profession as a whole. You mentioned earlier with your legal hat on that you practise in different parts of the United Kingdom anyway, but what is your general view of the breadth and depth of the legal profession in Wales to support the sorts of developments that have been sketched out in this inquiry and in the consultation that the Government has had on a separate jurisdiction? We have had different kinds of evidence on this matter.

[74] **Theodore Huckle:** Yes, I am aware of that. May I put it this way? I really do not see a problem, and the reason for that is because my experience of the legal profession is that it grows and develops to meet the need. Let me give you the example that I have always had in practice. I chose to practise in Cardiff for my whole life and I have regularly had discussions, let us say, with solicitor friends who would say things like, ‘What the bar in Cardiff needs is for people to set up as, say, a commercial specialist’ and I have seen a number of people try to do that, but, in the end, it is all down to whether the work is there to do. If people make the work available—and I am giving the bar as an example, but it applies to solicitors as well—or the work is available just as a matter of fact, the legal profession will pretty quickly develop to meet the demand.

[75] **Simon Thomas:** As it has in Northern Ireland, for example.

[76] **Theodore Huckle:** As it has in Northern Ireland, yes.

[77] **Suzy Davies:** We will revisit some areas, if that is okay. One question that was put to me when we embarked on this inquiry was, ‘What is the problem that you are trying to solve?’ and one problem that occurs to me is the question of bilingual law, particularly that which comes out of this institution—not just being able to hold your court cases through the medium of Welsh. You mentioned earlier that you were looking for Welsh content on the Supreme Court, but that you were not particularly exercised about where people went to have

their cases heard. Do you think that law that is made bilingually here and that needs to be interpreted with the Welsh and English side by side does require some special Welsh element?

[78] **Theodore Huckle:** Are you asking whether the law requires some special Welsh element, or the courts system?

[79] **Suzy Davies:** The courts system. Is it satisfactory to say that, in theory, you can hear these cases in Norwich? What is the genuine likelihood of having senior judges who are capable of dealing with bilingual legislation there?

[80] **Theodore Huckle:** I should say that I consider the issue of bilingualism to be highly important—of the first importance—but I am not persuaded at all yet by the way in which those sorts of issues are put. The reason is this. Let us take for example, an extreme example perhaps but an example nonetheless, the law that emanates from the European Community. It is issued in a number of languages, and each of those languages has equal status. Therefore, in principle, if an issue arises in European law, it is necessary to consider the text in each of those languages. Of course, there are some fantastic linguists in Europe, but perhaps we can take it as read that, more often than not, the judges who have to decide on those issues will not be fluent in all those languages. It therefore follows that, when an issue of the proper interpretation of a text arises, it is necessary for there to be interpretation, and that will apply, it seems to me, according to the same principle, albeit on a smaller scale of the number of languages, as would apply to bilingual legislation emanating from Cardiff.

[81] I do not see it as a requirement for a judge to have both Welsh and English in order properly to apply the law emanating from the Assembly. I do see it as a requirement that a judge has the assistance of proper interpretation if he or she does not have one of those languages, which, I suppose, in practical terms is usually, or almost always, going to be Welsh rather than English.

[82] There is a problem with assuming that a judge who is bilingual has the necessary understanding of both languages to understand the textual nuances. I do not assume that. There are lots of people in Wales who have learned Welsh as adults and who have reached a very high standard, but I am not sure that I would necessarily accept that they were good enough to interpret the law without the assistance of proper interpretation. Now, I am just giving that as an example, and I am not criticising or pointing a finger at anybody's linguistic skills. I am saying that these are matters of proper evidence as to the meaning of a particular text, and courts are quite used to having assistance with those things. It does not seem to me that the principle is any different here from what it would be in, say, Europe.

[83] **Suzy Davies:** So, in and of itself, that is not a reason for having a Welsh-only judiciary.

[84] **Theodore Huckle:** No, I do not think that it is, if I am honest.

[85] **Suzy Davies:** Would you say that there are still some good reasons for a law that emanates from Wales to be heard in Wales, just for pragmatic reasons? It happens all the time in county courts, as I think you mentioned earlier. Is there a case for saying that that can be easily managed by practice direction rather than by having a separate statutory jurisdiction?

[86] **Theodore Huckle:** In answer to your first point, yes. My view is that the closer the practice and determination of the law is to the people whom it affects, the better—and I hope that that is a fairly uncontroversial proposition. As I said earlier, I am not particularly concerned about what we might call 'Welsh cases' going elsewhere, but I would rather they were determined in Wales, applying that simple principle, if you like.

[87] As to whether the whole thing can be dealt with by practice direction, I think that it probably can. I do not think that we are talking about necessity here. Again, we are talking about how we want things to be in Wales.

[88] **Suzy Davies:** Once again, that is not, in and of itself, a reason for having a separate Welsh jurisdiction.

[89] **Theodore Huckle:** I do not think that it is. Again, the Administrative Court practice direction illustrates quite well how you can make provision for cases to be transferred back and heard in the jurisdiction.

[90] **Suzy Davies:** Okay. Can I just ask you about the contrary position and what appears to be happening under fairly recent legislation? We have the Crime and Courts Bill coming in now, and we have had the Legal Services Act 2007 on the centralising of the administration of justice and the regionalising of its delivery. Do you think that that will be problematic as we continue to discuss a separate Welsh jurisdiction? Will it cause barriers to be set up in the thinking of administrators in the wider England-and-Wales judiciary, or is it quite okay to go side by side with this conversation?

[91] **Theodore Huckle:** I had anticipated that you might ask me about this, and it has taken a little bit of time because I have been waiting for some research to be undertaken, but I will shortly be making representations about those changes. I know that it is not just me, because I have taken some soundings about it in the legal community. I do not think that the county court should be organised across England and Wales, and I think that the division between England on the one hand and Wales on the other ought to be retained. I do not think that it is useful to have everything administered through a unit in Salford, as far as the issuing of claims is concerned.

[92] **Suzy Davies:** Was the Welsh Government consulted on that move?

[93] **Theodore Huckle:** There was a consultation process, but I do not think that anyone ever pointed out that what might be proposed was to concentrate everything in Salford. I think that there are two centres, actually, but the comment has focused on Salford.

[94] **Suzy Davies:** So, that was done just through public consultation, and there was no direct request, was there?

[95] **Theodore Huckle:** As I understand it, because it was before I came into post, there was a general consultation about the reorganisation of the courts structure, but I do not think that any specific proposal for what has happened was consulted upon. I hope that I am right about that, but I believe that to be the case.

[96] **Suzy Davies:** Thank you. Can I move on to another final—

[97] **David Melding:** Before that, I think that Simon wants to come in.

[98] **Simon Thomas:** I have just one follow-up question, if I may. You mentioned some things in answer to Suzy Davies, such as the Welsh-language issue, the use of practice directions and judge directions rather than a legal jurisdiction, and, in and of themselves, they do not individually justify a separate legal jurisdiction.

[99] **Theodore Huckle:** I said ‘require’.

[100] **Simon Thomas:** ‘Require’ is a better term, yes. I just wanted to ask you whether you

thought that putting all these together would build a case. In particular, because I do not think that we have asked this yet, how much do you think preparing for a separate Welsh jurisdiction is about preparing for the future, and not just about dealing with some of the issues that we have today?

[101] **Theodore Huckle:** I think that it absolutely is about dealing with the future. We operate perfectly well as things are at the moment. I do not think that there is any case to say that we have to change the situation as it is now. With respect, that is not really the point. The point is that, as the devolution settlement is developed, we have reached an appropriate time to consider it, but have we reached a time when we should seek to change the arrangements as far as legal jurisdiction is concerned?

[102] On your first point on whether the points made about not transferring cases, keeping them in Wales, and so on, cumulatively provide the basis for a case, it seems to me that they do. I am not saying that I have necessarily come to any conclusion either way on it, but, of course—

[103] **Simon Thomas:** It is justifiable.

[104] **Suzy Davies:** Though not required.

[105] **Theodore Huckle:** Well, exactly. I have to be careful what I say, obviously, but the point that I was trying to make was that it cannot be said that we need or have to have a separate legal jurisdiction, but that is not the same thing as considering whether it would be a good thing to have. For the future, it might be better to start from a position of principle and to create a structure into which the developments could filter, rather than always being reactive and trying to decide whether we have reached the point at which we absolutely have to change things.

[106] **Simon Thomas:** Specifically on that, where does principle come into this? For example, we had evidence from another witness that practice directives could work, as you have just responded, but it is still a judge-led directive rather than an issue of principle, in the sense of settling things for a period of time, rather than finding, not exactly a sticking plaster, but something that works now. That is how the British constitution is usually joggled along: by finding things that work now.

[107] **Theodore Huckle:** Rather like mission creep.

[108] **Simon Thomas:** Yes, but maybe we should be doing things a little more on the basis of principle and futureproofing. That is what I was trying to get at, really.

[109] **Theodore Huckle:** As I understand it, that is the point of this exercise. We are considering whether the system as a whole should be changed, if I can put it that way, consistent with the development that has already occurred in the devolution settlement.

3.15 p.m.

[110] **Suzy Davies:** I will move on to another subject now—the law reform commission. There seems to be a general consensus that we need something along those lines. Are you of the same opinion? What would it look like if we did consider that route?

[111] **Theodore Huckle:** I think that it would look very much like the Law Commission that we have. Do you mean the question of whether we should have a separate commission in Wales? I think that it would look like what is already established.

[112] There are a number of aspects arising from this. First, we are fortunate that the incoming chairman of the Law Commission is one of our most eminent Welsh judges, David Lloyd Jones. He is about to take over that role, in August, I think. I do not have any particular concerns about the sympathy, if that is the right word, of the Law Commission to Welsh interests going forward. On the assumption that we engage in some form of separation of the jurisdiction, I do not believe that we need a Welsh law commission, although we could have one. These are options, it seems to me, as to how much you take in-house and how much you leave spread across what is currently the joint jurisdiction of England and Wales. As I said at the outset, one of the joys of the position is that the canvas is, to some extent, blank. We are not necessarily bound by any particular model or arrangement. There will be arguments on either side as to whether certain costs associated with setting up a separate law commission are worth it, or whether it would be better to persuade the law commission to set up a Welsh section, or however you decided to do it.

[113] There is another aspect that perhaps I could flag up. As you know, I am looking at questions of consolidation, and one of the functions of the current law commission is to consider those sorts of matters, although I think that I am right in saying that most of its work in recent years, since about 2002, has not concentrated on consolidation issues, but more on substantive law reform issues. I see it as important for us in Wales, in the Government and legislature, to look at issues of consolidation because there are real problems ahead, as the divergence happens, if we do not seek to bring the applicable laws into one place. To do that, it seems to me that there will have to be some form of a fast-tracking system to avoid the individual scrutiny by the Assembly of what are really just provisions being restated. We would have to have some form of commission, call it what you will—I am not trying to identify any kind of structure in saying that. There would have to be something akin to a commission to consider provisions applicable in Wales.

[114] **Suzy Davies:** Whether we have a separate one or not, is there a role for a commission, or the commission, in converting the kind of practical, pragmatic ways in which we deal with court administration at the moment, and where cases are to go—for example, into statute by way of recommendation—so that actually the impetus comes from the commission rather than from a committee like this?

[115] **Theodore Huckle:** I am sorry—I am not sure that I fully understand the question.

[116] **Suzy Davies:** To take one example, you said that there is a pragmatic response to where cases are to be heard, and that could be done by practice direction. Simon raised the question of whether that would not be better on the face of a statute somewhere. It is part of what we are considering and what, I dare say, you will be doing in considering the evidence. However, is there not a role for the Law Commission? Is it not much better if you do it that way, with the commission suggesting this, that and the other, rather than a committee like this making those recommendations? Alternatively, does it matter?

[117] **Theodore Huckle:** A law commission—or the Law Commission—looking at questions of law reform has a pretty broad brief, although usually it is invited to consider particular areas by Ministers.

[118] **Suzy Davies:** Does it matter? That is what I am asking, really.

[119] **Theodore Huckle:** Your question also comes back to the issue of formalisation of where cases are heard, for example.

[120] **Suzy Davies:** That was just an example.

[121] **Theodore Huckle:** The distinction is between having a joint jurisdiction and practice

direction dealing with where cases are heard on the one hand, and separating the jurisdiction so that the ordinary position would be that cases that fall within one jurisdiction would be heard within that jurisdiction. So, I am not sure that it would be a matter of legislative provisions setting out necessarily what cases were to be heard in particular places; it would just follow from the formalisation of the organisation of the administration of justice. However, I am probably not helping. I am sorry if I am not answering your questions properly.

[122] **Suzy Davies:** I was just trying to establish how wide you see the remit of a law commission for Wales going, really. Would it be purely advisory, or do you think that it should have more clout than that? In which case, who should its members be?

[123] **Theodore Huckle:** I think that law commissions, generally speaking, are bound to be advisory; they cannot be given powers to just do what they like. The powers are vested in the Assembly. So, I see the role of law commissions as being advisory. As we know from the Law Commission, quite a lot of what it has recommended has never been proceeded with.

[124] **Suzy Davies:** Who do you think should be in a law commission? Do you have any strong views about the mix?

[125] **Theodore Huckle:** I have no current views about who should be in a law commission.

[126] **Suzy Davies:** No, not individuals, but should it be a mixture of—

[127] **Theodore Huckle:** As a general proposition, a law commission should be comprised of people of eminence in the law, whether from the judiciary or from an academic background. That is what the Law Commission for England and Wales is usually made up of. I am just trying to think of recent members—there were former practising silks, the chair is a lord justice of appeal, there have been academic members, but all with a legal background of one form or another.

[128] **Julie James:** To develop that point, I was delighted by your announcement in Plenary the other day about the collaboration with Westlaw and the upcoming encyclopaedia of Welsh law, as someone who has certainly taken a lot of paracetamol while trying to figure out what was in force in Wales over the years. I was also very intrigued by your commentary on the development of case law and commentary. It seems to me that, while I entirely agree that, often, a barrister who has acted in a case of some merit might make a report on it, it is also frequently the case that cases of interest do not have commentary on them unless that commentary is procured. Also, they do not have unbiased commentary, because a barrister, whether winning or losing, tends to advance their own arguments and denigrate the arguments of the opposition. That is not necessarily the best way of getting a commentary on a developing body of law. Could you comment on that?

[129] You have talked about it being free of charge, because it would outline what is in force, to quote an encyclopaedia that used to exist. However, it seems to me that there is also a need for something that people practising in Wales might purchase, if they were lawyers, that had a great deal more wealth of detail in it than the average member of the public might want in terms of a passing interest. Could you comment on those aspects and what you said about that?

[130] **Theodore Huckle:** Yes. Of course, within the confines of making a statement, there are limits on the amount of detail that I can describe. I am happy to expand on that a bit. On your first point, you are quite right: if—and I have probably done it myself—you are characterising what happened in a case, you will probably start off from a fairly biased point

of view, one way or the other. So, there are difficulties with objectivity in relation to that. That is not what we have in mind at all. We are working towards having persons of well-established expertise in their different fields provide the commentary as they would if they were writing a book. So, it is not individual cases, but the whole area.

[131] Westlaw is doing this not just for us, but for the law of England and Wales as a whole. It has a number of books and the services to provide law reports and so on, and statutory provisions, but it has not hitherto had any form of encyclopaedic text, and it wants to develop that. So, if you like, it wants to compete with *Halsbury's Laws of England*. So, as I understand it, the way in which it is developing it is that it wants to have a tiered system of articles. So, there would be an introductory article to a particular field of law and then, branching off from that, more specialist treatment of different aspects of it.

[132] We see this working in a way in which they are content to provide higher level articles—the introductory material, if you like—free of charge, but that will run in tandem, as I understand it, with the paid-for services for lawyers, or indeed anyone. However, the business model mostly relates to lawyers, who will then have access to more detailed expositions of intricate and interesting points of law. Does that explain?

[133] **Julie James:** Yes, it does. I am in danger of being told off by David for descending into detail, but I am going to push my luck on this, just for a minute.

[134] **David Melding:** I am a very benign Chair.

[135] **Theodore Huckle:** I have noticed.

[136] **David Melding:** I am too kind, really.

[137] **Julie James:** One thing that is very irritating indeed if you practise law in Wales and use one of the big loose-leaf encyclopaedias—and there are a number available in different areas—is that it is frequently stated at the end of a very intricate chapter on something or other, ‘This is not in force in Wales’. It fails entirely to tell you what is, in fact, in force in Wales. I can think of at least three major encyclopaedias where that happens. Is there any way of addressing that? The excuse given when you ring up and complain is that it is not economically viable to produce it for the small number of practices that purchase it in Wales, but, nevertheless, it is an area of some concern. The same could be said of many of the CPD-type of courses that are run and so on. Have you given any thought to that? No-one will be a specialist on something called Welsh law; they are going to be a planning lawyer in Wales or whatever.

[138] **Theodore Huckle:** Yes, sure.

[139] **Julie James:** You still have to be able to keep abreast of the whole thing.

[140] **Theodore Huckle:** You must understand that what I have in mind is an encyclopaedia that covers the different fields of law and describes what the law applicable in Wales is under those different fields of law so that, for example, as I said earlier, the top-level introductory article will be one that introduces planning law as it applies in Wales. That is the idea. As I understand it, that would be part of a structure, within the greater Westlaw development, of planning law full stop. Then there will be sub-articles for the laws that apply in Wales and those that apply in England. It will be the Welsh bits that we will seek to bring together in one place for Wales.

[141] **Julie James:** Okay. I think that the devil will be in the detail.

[142] **Theodore Huckle:** Of course.

[143] **Julie James:** It is just that the planning encyclopaedia, for example, is 12 volumes.

[144] **Theodore Huckle:** I do understand.

[145] **Julie James:** The article from Westlaw might be quite limp in places.

[146] **Theodore Huckle:** Of course, it might be, but, on the other hand, a lot of those 12 volumes of material will be, in some cases, generalised or will be the stuff that does not apply in Wales and concentration must be had on the stuff that does apply in Wales. I understand the point that you make.

[147] **Julie James:** Turning to the hypotheticals of what we might be looking at if we are going towards a jurisdiction—and I think that you have already mentioned this in passing—are you considering how that might be administered? Winston Roddick, in his evidence to this committee, said that he thought that the administration of justice devolution to Wales could be done by a ministerial Order. Do you think that we would be looking at setting it out nicely so that we could fill it in afterwards because we have a masterplan? How might that work?

[148] **Theodore Huckle:** This is my personal view, but I think that it will be unlikely, in the way that things are developing now, for changes of the type that we are discussing, which are constitutional changes within the UK, to be done by ministerial Order. We are moving towards part 2 of the Silk commission, the whole point of which is to consider the structure of devolution within the United Kingdom. I find it very difficult to believe that anything that emerges from that will simply be done by way of ministerial Order. I think that it will be much more likely that there will be a third Government of Wales Act.

[149] **Julie James:** Indeed. That is interesting to hear. We have had a number of other witnesses arguing whether or not it is possible to have a completely separate jurisdiction with or without criminal law involved. Do you have a view on that?

[150] **Theodore Huckle:** Again, I go back to my blank canvas point, in a way. I do not see that you must have criminal law devolved or not, but I should enter my immediate caveat, which is that I am in the camp that does not accept that criminal law is not already devolved. You, as legislators, make criminal provisions all the time. I do not really understand this point that criminal law is not devolved, because the criminal law is devolved insofar as it falls within the purview of the subjects in Schedule 7.

3.30 p.m.

[151] **David Melding:** In fairness, that has been emphasised to us by a variety of witnesses. However, when most people talk about criminal law, they know it when they see it and they are talking about something slightly different.

[152] **Theodore Huckle:** I believe that when people use expressions like that they are talking about criminal justice and the running of the criminal courts, which we are talking about and we are looking at the possibility of devolution of that area. To answer the question, one could take what one wanted. It is not an all-or-nothing situation, as far as I am concerned. I do not see any requirement to devolve criminal justice or not to devolve it. It is a question of what the political will and imperatives are on both sides.

[153] **Julie James:** That is really interesting to hear, because we have had all kinds of evidence in front of the committee and quite a lot of non-lawyers confuse the issues around which court does what. To me, it seems very impractical to have the administration of civil

courts in Wales but not criminal law. Would you then have the magistrates' and crown courts, because of the various appeals from public bodies and so on? I am in the camp that says that you have to have the administration of all the courts or none of them. To separate it might be—well, I suppose that everything is possible, but it might be an interesting piece of legislation.

[154] **Theodore Huckle:** All I am saying is that, from a legal point of view, there are no requirements. I understand the practical issues you raise, and they are important.

[155] **David Melding:** Does this come up in your consultation as a major consideration?

[156] **Theodore Huckle:** There are certainly references to the issues.

[157] **Julie James:** That is a very interesting point. The committee undertook a visit to Northern Ireland to look at some of what is being done there. One of the very interesting meetings that we had was a conversation around the administration of courts and the Northern Ireland model of keeping many courts open, which have been closed here under the various provisions of England and Wales, on the basis of access to justice locally and so on. Was that also of interest? We have had a fair swathe cut through some of the courts in Wales.

[158] **Theodore Huckle:** It is of interest and it comes back to the point that I was making. The whole point of considering whether you devolve the administration of justice is to consider whether you could arrange the administration of justice in a way that better suited the needs of the people of Wales. That might well include considering what the courts' coverage and availability would be. Let me give you an example in relation to the issue of Salford business centre. A knock-on effect of that has been a reduction in the opening hours of court offices in county courts in Wales. A potential knock-on effect of that is that, sooner or later, somebody might begin to say that a particular office is not worth keeping open and it will be closed. Those are decisions that have to be made in relation to resource allocation and availability. What we are talking about is who makes those decisions and who exercises those choices.

[159] **Julie James:** That is very interesting. One of the other developments from the Salford thing is that a lot of small county court actions are now done online. You can submit your defence online and so on. So, if you are defending yourself in a county court against, you know—

[160] **Theodore Huckle:** You can make a claim online; I have done it myself.

[161] **Julie James:** Absolutely. You can do the whole thing online. Although, I have to sound a note of caution in that it is quite difficult to attach evidential documents. I recommend strongly to anybody who is listening to this committee that they also post a hard copy. That is beside the point, but it raises the issue of digital inclusion, because, if we going to increasingly rely on centralisation, with the justification that you can do it digitally at 2 a.m. if it suits you, there are issues with digital inclusion right across Wales that would exacerbate some of the access-to-justice issues that we know exist with regard to the availability of legal advice and so on.

[162] **Theodore Huckle:** Absolutely.

[163] **Julie James:** In that administrative sphere, we have been told that a separate appeal court would be required if we had a separate jurisdiction, and we have also been told that it is not required—as seems to be the case in this inquiry. Do you have a view on that?

[164] **Simon Thomas:** You could go to appeal on it. [*Laughter.*]

[165] **Julie James:** Absolutely.

[166] **Theodore Huckle:** My view is that it is not required. To go back to my blank canvas point, I can envisage the sharing of judiciary. It is pretty uncontroversial to suggest that it would be appropriate to continue to share judiciary at the Supreme Court level. However, below that, one could arrange it as one wanted. You could share judiciary or not at the Court of Appeal, or you could share it at the Court of Appeal and the High Court.

[167] At one stage, I thought that the point about judicial ability, if I can put it that way, in Wales was a point well made, namely that some people say that we do not have sufficient quality of judiciary to run a High Court and a Court of Appeal. I had thought that there was something in that, just because of the way that London has sometimes historically attracted the greatest and the best—present company, including me, excepted, obviously. However, without forming any final view on it, I see the other arguments to that now. For example, the High Court, as it is currently arranged, no longer spends its time deciding or trying murder cases or high-value personal injury claims in the way it once did. Those cases—although they are ostensibly in the High Court—are dealt with by what we call section 9 judges, deputy High Court judges, who are esteemed local circuit judges given the ‘ticket’, as it is called. Therefore, a question that arises from that situation is: if we have sufficient judges with sufficient ability to do the High Court work and to sit as deputy High Court judges, why might they not be promoted to being High Court judges?

[168] That is one aspect of the issue. One should look at the whole picture, decide how one wants to develop the system and do it accordingly. I do not think that any of these decisions about what level of sharing of the judiciary one adopts are forced upon us.

[169] **Julie James:** Continuing with that theme, you have said a little bit about this in your answer to Suzy Davies earlier, but do you think that there would be a requirement for some kind of Welsh law qualification or diploma, or some evidence that you are up to speed on the law of Wales?

[170] **Theodore Huckle:** Frankly, I am really against that idea and I do not see the necessity for it. If I may put it this way, the legal professions have very rarely imposed or agreed to impose any sort of testing of that type upon practitioners to demonstrate their competence in particular fields or situations of the practice of law. I can think of one example, which is very controversial. In the 1990s, when I was on the Bar Council, both our sister profession and the Bar Council introduced accreditation requirements, particularly for immigration practitioners, because there was seen to be a real problem with the quality of people providing immigration advice and so on. That was very controversial and that was because the starting point is that, if you are qualified as a common law lawyer in England or Wales, or for that matter in Northern Ireland, or for that matter in Scotland—although it is a bit different in Scotland, I know—you are considered to be capable of practising and getting yourself up to speed in whatever field of law you need to be acquainted with. I do not see any reason why that cannot apply. Yes, the law will diverge as it applies in Wales, but it will do so whether we have a separate jurisdiction or not, and lawyers can be expected and required—and they are required—to know about it and practise accordingly.

[171] The difficulty I have with the idea of a qualification specifically addressed to supposed accreditation to practise in Wales, say, is that isolation of the professions in Wales cannot be seen to be a good thing for the professions in Wales. That seems to me to introduce barriers to trade. That is the last thing we want to do to our lawyers, for perhaps obvious reasons.

[172] **Julie James:** Thank you.

[173] **David Melding:** Thank you, Counsel General. The last question is a very practical one. Are you or the Welsh Government doing anything to assess the potential cost of the different models of a Welsh jurisdiction to see what may be viable? A few witnesses have asked us about the nature of the work that has been done on costs when we are trying to make judgments about access to justice and having something that is going to serve the public in a more efficient and effective local way. Do you have any thoughts on this?

[174] **Mr Huckle:** I do have thoughts and I had a meeting today which partly discussed this. It is difficult because it is a bit like asking, 'How long is a piece of string?' When someone asks what the models are, at the moment, we have not even begun to think about what the models should be. Clearly, a view will need to be taken as to what the costs of undertaking particular aspects related to jurisdiction devolution would be. The general point that I would make is that most of what we are talking about here, particularly in terms of administration of justice, for example, is already being done. It is not as if we are proposing to build a completely new set of courts across Wales; we would not propose to do that. Clearly, there are certain issues about economies of scale being removed, in that if you have things that are organised across England and Wales at the moment, and you decide to split them up and have them separately, like the Law Commission, for example—I can think of other examples—there are bound to be costs associated with that. However, a lot of what we are talking about does not necessarily have that implication, or not to a huge extent anyway. The one area where we think, inevitably, a separate jurisdiction does involve cost is that there would probably have to be a Ministry of Justice to deal with that aspect of activity within Wales. Therefore, there are certain governmental resource implications associated with that.

[175] Do not get me wrong; I am not saying that there would not be costs whatever was decided, if changes of this type were made. It is difficult to estimate them, but we would have to do work on it, and I understand that.

[176] **Suzy Davies:** You started your submission this afternoon on the basis that any changes we make here to the jurisdiction do not have to look like changes elsewhere in the UK, for example. You also said that the whole drive of your consultation, and indeed our work, is about arranging things differently to better suit the needs of Wales. If you are talking about a potential model, which we have today, that amounts to just changing the signs above the doors of the courts system, and not changing the nature of the judiciary, why do we need to go to the expense of a separate Ministry of Justice?

[177] **Mr Huckle:** That is a good question. I am not sure that I have been contemplating simply changing the signs above the doors; I am not sure how that would happen. If there were to be a reorganisation of the administration of justice on a Welsh basis, it seems to me that, running alongside the divergence of the laws emanating from this Assembly, there would necessarily be a process of divergence and difference anyway. So, I am not sure I agree that it would simply be a question of changing the signs. As to whether a Ministry of Justice is required, it remains an open question, as far as I am concerned. I am not saying that it is required. From what I have seen, the consensus of opinion is that it probably would be; perhaps I should have included the word 'probably' earlier, but nothing, as far as I am concerned, is closed to discussion or debate.

[178] **Suzy Davies:** Thank you. I was looking for reassurance that everything is decided on the basis of pragmatism rather than according to some sort of overarching principle.

[179] **Mr Huckle:** Absolutely. Well, I used the word 'principle' earlier with a view to address what, in principle, would better serve the needs of people in Wales and the population of Wales. You are using the word 'principle' in the way that I would reject, as ideology, if you like.

[180] **Suzy Davies:** I was, yes.

[181] **Mr Huckle:** It should not be a matter of ideology, I agree. I am not interested in ideology; I am interested in practical change, if appropriate.

3.45 p.m.

[182] **David Melding:** Thank you, Counsel General. I think that I speak for all members of the committee when I say that that was interesting and helpful. If you want to add anything that will help our inquiry, now is the time to do so, although I think that we have had a fairly wide-ranging session. If you have any further comments, please make them now.

[183] **Theodore Huckle:** I do not think that I want to add anything other than to thank the committee, once again, for inviting me here to give evidence. I very much look forward to seeing your report.

[184] **David Melding:** Thank you, and we were delighted that you could give evidence to us this afternoon.

Dyddiad y Cyfarfod Nesaf Date of the Next Meeting

[185] **David Melding:** We are now going into summer recess, so, provisionally, the next meeting is scheduled for 24 September.

Papurau i'w Nodi Papers to Note

[186] **David Melding:** There is a paper to note, which is a report of the meeting that was held last week, on 9 July.

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

[187] **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).

[188] I do not see any Member objecting, so I ask that the public gallery be cleared and the broadcasting equipment switched off.

*Derbyniwyd y cynnig.
Motion agreed.*

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