Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

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

Dydd Llun, 31 Hydref 2011
Monday, 31 October 2011

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

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

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

Eraill yn bresennol
Others in attendance

Alan Trench	Yr Uned Gyfansoddiadol, Coleg Prifysgol Llundain The Constitution Unit, University College London

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
Olga Lewis	Dirprwy Glerc Deputy Clerk
Owain Roberts	Y Gwasanaeth Ymchwil The Research Service

Dechreuodd y cyfarfod am 2.29 p.m.
The meeting began at 2.29 p.m.

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

[1] **David Melding:** Good afternoon. Welcome to this meeting of the Constitutional and Legislative Affairs Committee. I will make the usual housekeeping announcements. We are not expecting a fire drill this afternoon, so if you hear the alarm please follow the instructions of the ushers, who will help us to leave the building safely. The proceedings will be conducted in Welsh and English. When Welsh is spoken, interpretation is available on channel 1 and headsets can also be used to amplify the sound on channel 0. Please switch off all electronic equipment completely, as even on the 'silent' setting it can interfere with our

recording system.

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:** There is one instrument to consider under this item, namely CLA47, the Marketing of Fresh Horticultural Produce (Wales) (Amendment) Regulations 2011. Are Members content with this? I see that you are.

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

[3] **David Melding:** There are no instruments to consider under this item.

Cynnig Cydsyniad Deddfwriaethol: Bil Senedd y DU ynghylch Addysg
Legislative Consent Motion: Education Bill

[4] **David Melding:** Members will know that this is a supplementary legislative consent motion that is being made in some haste, because of the parliamentary timetable. It raises what would normally be considered material issues for scrutiny, but it will not be referred to a committee in this instance. We have received a helpful paper from Gwyn. Perhaps it would be useful for him to outline some of those issues, before we have a discussion on this item.

[5] **Mr Griffiths:** Penderfynais ddrafftio'r papur hwn oherwydd ein bod wedi cael nid yn unig y memorandwm mewn cysylltiad â'r Bil Addysg ond hefyd, o fewn ychydig ddyddiau, ddatganiad ysgrifenedig gan Weinidog arall ynglŷn â gwelliannau pellach i'r Bil Lleoliaeth. Felly, yr oeddwn yn teimlo bod hwn yn gyfle da i edrych ar y gwahanol ffyrdd o wneud y ddau fath o ddatganiad a'r cyfleoedd a roddir i'r Cynulliad graffu ar y pwerau sy'n cael eu rhoi i Weinidogion Cymru.

Mr Griffiths: I decided to draft this paper because we received not only the memorandum on the Education Bill, but also, within a few days, a written statement from another Minister with regard to further amendments to the Localism Bill. Therefore, I felt that this would be a good opportunity to look at the different ways in which the two types of statement were made and the opportunities that these present to the Assembly to scrutinise the powers that are given to Welsh Ministers.

[6] Ni af drwy bopeth sydd yn y papur, ond hoffwn ychwanegu bod memorandwm arall wedi ei gyflwyno gan y Llywodraeth, a fydd yn cael ei drafod gan y Pwyllgor Busnes yfory, ynglŷn â Bil na chlywais erioed amdano o'r blaen, sef y *Public Services (Social Enterprise and Social Value) Bill*. Mae hwnnw yn Fesur Aelod preifat, felly nid yw wedi dod i sylw'r Cynulliad cyn hyn. Fel y gwyddoch, anaml mae Biliau o'r fath yn llwyddo i basio drwy'r Senedd, felly mae'r Rheolau Sefydlog yn darparu nad oes angen

I will not go through everything in the paper, but I would like to add that another memorandum has been issued by the Government, which will be discussed by the Business Committee tomorrow, regarding a Bill that I had not heard of previously—the Public Services (Social Enterprise and Social Value) Bill. That is a private Member's Bill, so it has not come to the attention of the Assembly until now. As you know, it is rare for such Bills to succeed in passing through Parliament, so the Standing Orders state that

hysbysu ynglŷn â materion sy'n effeithio ar Gymru i'r Cynulliad nes bod y Bil wedi cyrraedd y cyfnod cyntaf o graffu a diwygio yn y Senedd. Felly, mae'n rhaid iddo fynd heibio'r Ail Ddarlleniad, sef y cam pwysicaf, a chyrraedd y cyfnod trafod gwelliannau.

there is no need to provide notification to the Assembly regarding issues impacting on Wales until the Bill reaches the first stage of scrutiny and revision in Parliament. Therefore, it has to go through Second Reading, which is the most important step, and reach the discussion of amendments.

[7] Mae hwn yn codi cwestiynau gwahanol ynglŷn â sut yr ydym yn craffu, ac yn wir, sut mae'r Cynulliad yn dod i wybod am Filiau Aelodau preifat a allai effeithio ar bwerau Gweinidogion Cymru. Nid yw hwn yn rhoi pwerau i Weinidogion Cymru—mae'r Mesur hwn yn delio â materion caffael yng nghyd-destun awdurdodau cyhoeddus. Yr oedd y drafft gwreiddiol yn ceisio eithrio cyrff Cymreig, ond newidiwyd y drafft yn sylweddol yn ystod y cyfnod diwygio, ac mae'n berthnasol bellach i gymhwysedd deddfwriaethol y Cynulliad gan ei fod yn cynnwys cyrff trawsffiniol, megis Asiantaeth yr Amgylchedd, y Comisiwn Coedwigaeth ac yn y blaen. Felly, mae'n codi cwestiynau ynglŷn â'r amserlen a'r broses. Yn yr achos hwn, deallaf y bydd y Llywodraeth yn argymell ei fod yn cael ei gyfeirio at bwyllgor, gan ei fod yn dal yn y Tŷ cyntaf. Felly, mae amser i graffu arno o fewn y terfyn amser er mwyn gwneud gwahaniaeth.

This raises different questions about the way in which we scrutinise, and how the Assembly comes to know about private Members' Bills that could affect the powers of Welsh Ministers. This does not give powers to Welsh Ministers—this Bill deals with procurement matters in the context of public authorities. The original draft attempted to exempt Welsh bodies, but the draft was significantly amended during the amendment stage, and it is now relevant to the legislative competence of the Assembly, as it will include cross-border bodies, such as the Environment Agency, the Forestry Commission and so on. Therefore, it raises questions regarding the timetable and the process. In this case, I understand that the Government will recommend that it be referred to a committee because it is still in the first House. Therefore, there is time for it to be scrutinised within the deadline in order to make a difference.

[8] I fynd yn ôl at y cynnig cydsyniad deddfwriaethol ynghylch addysg, nid yw hwn yn cael ei gyfeirio at bwyllgor; bydd yn mynd yn syth i'r Cyfarfod Llawn i'w drafod yfory. Mae hynny er bod y testun o ran diwygiadau yn un pwysig, sef ei fod yn rhoi pwerau i Weinidogion Cymru osod cosbau ariannol ar gorff cydnabyddedig sy'n gwobrwyo neu'n dilysu cymhwyster yn ogystal â darpariaethau cysylltiedig ynghylch apeliadau a chostau, sef cyrff sy'n gyfrifol am arholiadau. Mae hynny yn fater polisi o sylwedd y gellid bod wedi ei gyfeirio at y pwyllgor sy'n gyfrifol am addysg ysgol a'r un sy'n gyfrifol am addysg brifysgol.

To return to the legislative consent motion on education, this will not be referred to a committee; it will go directly to Plenary to be discussed tomorrow. That is despite the fact that the text with regard to the revisions is important, namely that it gives powers to Welsh Ministers to impose financial penalties on recognised bodies that award or verify qualifications as well as associated provisions regarding appeals and costs, namely bodies that are responsible for examinations. That is a significant policy issue that could have been referred to the committee responsible for school education and the one responsible for university education.

[9] Yn anffodus, nid oes amser, fel mae'r papur yn dangos. Mae'r Bil drafft hwnnw wedi mynd drwy'r Senedd fwy neu lai. Yr unig ffordd o'i newid yn awr fyddai cael Bil gerbron y Cynulliad i dynnu'r pwerau i ffwrdd, gan ei fod o fewn cymhwysedd deddfwriaethol y Cynulliad i allu gwneud hynny. Fodd bynnag, mae'n rhy hwyr i

Unfortunately, there is no time, as the paper demonstrates. This draft Bill has already gone through Parliament more or less. The only way to amend it now would be to have a Bill before the Assembly to take away those powers, because it is within the Assembly's legislative competence to do that. However, it is too late to influence what is happening in

ddylanwadu ar yr hyn sy'n mynd ymlaen yn San Steffan, ac eithrio'r cam olaf un, sef awgrymu ei bod yn pleidleisio yn erbyn y Bil i gyd ar y Trydydd Ddarlleniad, ac ni fyddwn yn argymhell ein bod yn awgrymu hynny. Felly, dyna rhai o'r prif bwyntiau sy'n dod allan o'r ddau femorandwm hyn a'r datganiad ysgrifenedig, sy'n dangos rhai o'r pethau y mae angen i'r pwyllgor ystyried fel rhan o'i ymchwiliad.

Westminster, apart from the very last step, which is to suggest that it vote against the whole Bill on the Third Reading, and I would not recommend that we suggest that. So, those are some of the main points that arise from these two memoranda and the written statement, which shows some of the things that this committee needs to consider as part of its inquiry.

[10] **David Melding:** Do Members have any comments?

[11] **Simon Thomas:** Gofynnaf i Gwyn fod yn glir ynglŷn â'r pwynt olaf ynglŷn â lle mae'r cynnig hwn yn ffitio mewn i'r Bil presennol. Yn ôl yr hyn a ddeallaf o'r nodyn, dyma enghraifft o faes lle mae gan y Cynulliad yr holl bwerau i ddeddfu ynddo. Felly, yr ydym yn gofyn i San Steffan ddeddfu ar ein rhan ni, ond heb unrhyw graffu ar broses sydd, er enghraifft, yn gosod dirwyon ar gyrff. Byddech yn disgwyl cael rhywfaint o drafodaeth gyhoeddus ar hynny ac ymgynghoriad o'r cyrff ac ati, felly mae proses ar goll yma.

Simon Thomas: I ask Gwyn to be clear about that final point with regard to where this motion fits into the current Bill. From what I understand from the note, this is an example of a field in which the Assembly has all the powers to legislate. So, we are asking Westminster to legislate on our behalf, but without any scrutiny of a process that, for example, imposes fines on bodies. You would expect to have some public discussion on that, as well as consultation of the bodies and so on, so there is a missing process here.

[12] O ran y cam nesaf, a oeddech chi'n dweud ei bod hi'n rhy hwyr i'r Cynulliad wneud unrhyw beth ynglŷn â hwn, hyd yn oed pe byddai well gan Aelodau'r Cynulliad weld hwn yn cael ei wneud drwy Fil Cynulliad yn hytrach na drwy San Steffan?

In terms of the next step, were you saying that it was too late for the Assembly to do anything about this, even if Assembly Members would prefer to see this done through an Assembly Bill rather than through Westminster?

[13] **Mr Griffiths:** Fe gofiwch ein bod wedi cael un enghraifft hyd yn hyn lle pleidleisiodd y Cynulliad yn erbyn cynnig o'r fath, ac fe arweiniodd hynny, yn achos newidiadau i awdurdodau heddlu a'r pwyllgorau a ddilynodd hynny, at ddiwygio'r Bil. Mae hi'n rhy hwyr i wneud hynny yn yr achos hwn, gan ein bod ni wedi pasio'r cyfnod adrodd yn yr ail Dŷ. Felly, yr unig gyfle i ddiwygio bellach byddai pe bai 'ping pong' rhwng y ddau Dŷ. Nid wyf yn rhagweld y bydd hynny'n digwydd yn yr achos hwn, ac felly nid oes cyfle i ddylanwadu ar gynnwys y Bil Addysg ar y pwnc hwn, er ei fod yn bwnc y gellid bod wedi deddfu arno yn y Cynulliad. Ymateb y Llywodraeth, ac mae'n swnio'n rhesymol, yw ei bod am gael yr yn pŵerau gorfodi ag sydd gan y Swyddfa Rheoleiddio Cymwysterau ac Arholiadau yn Lloegr.

Mr Griffiths: You will recall that we have had one example to date where the Assembly voted against such a motion, and that led, in the case of changes to police authorities and the committees that followed that, to the amendment of the Bill. It is too late to do that now, because we have passed the report stage in the second House. Therefore, the only further opportunity for amendment would be if there were to be a 'ping pong' between the two Houses. I do not anticipate that that will happen in this case, and so there is no opportunity to influence the contents of the Education Bill on this subject, although it is a subject that we could have legislated upon in the Assembly. The Government's response, and it sounds reasonable, is that it wants the same enforcement powers as the Office of Qualifications and Examinations Regulation in England.

[14] **Simon Thomas:** Mae'r Llywodraeth yn dweud hynny, ond nid wyf wedi gweld unrhyw beth yn yr esboniad gan Leighton Andrews sy'n esbonio pam ei fod wedi dewis y trywydd hwn. Gwn fod yr amcan yr un peth, ond a oes esboniad ynglŷn â pam ei fod wedi dewis y dull hwn? Byddai mynd drwy'r Cynulliad yn arwain at oedi, mae'n debyg. Ai dyna'r unig gyfiawnhâd, sef yr amseru?

Simon Thomas: The Government is saying that, but I have not seen anything in the explanation from Leighton Andrews that explains why he has chosen this route. I can see that the objective is the same, but is there an explanation as to why he has chosen this method? Going through the Assembly would probably lead to delay. Is that the only justification, namely the timing?

[15] **Mr Griffiths:** Ie. Mae'r cyfiawnhâd ym mharagraffau 11 a 12 o femorandwm y Llywodraeth, sef bod y Llywodraeth am gael y pŵerau yng Nghymru ar y cyfle cyntaf sydd ar gael.

Mr Griffiths: Yes. The justification is in paragraphs 11 and 12 of the Government's memorandum, namely that the Government wishes to have the powers in Wales at the first possible opportunity.

[16] **Simon Thomas:** Yr oeddwn yn edrych ar yr un anghywir. Felly, yr oedi yw e—ni fyddai'r pŵerau ganddi am gyfnod. Diolch.

Simon Thomas: I was looking at the wrong one. So, it is the delay—it would not have the powers for a while. Thank you.

[17] **Julie James:** I just wanted to ask another question in order to understand this. We have been provided with the timetable in Scotland. Would that path have been open to us?

[18] **Mr Griffiths:** On this occasion, it would not. I included that merely because it illustrates the sort of timescale that is desirable, because it provides sufficient time for committee scrutiny of the issue. It was possible to consider it in Scotland at an earlier stage because it has this process, which no doubt Alan will tell us about, whereby all the Bills that may require legislative consent motions are identified very soon after the Queen's Speech, rather than piecemeal, as we go through. It is not possible in every case, because, as in this case, LCMs may arise from amendments made as a Bill is passing through Parliament. However, there are lessons to be learned regarding early notification and the Government considering at an early stage which amendments or provisions it wants to insert in Westminster Bills, rather than, as has happened here, their being inserted late in the process in the second House.

[19] **Julie James:** That illustrates perfectly the point of the inquiry that we are doing, does it not? I do not have much to say about this particular Bill. I understand where we are. However, it underlines the necessity for our inquiry, and perhaps some recommendations about behaving slightly differently. It is a perfect example of the Assembly lacking the power to scrutinise something that the Ministers clearly want for legitimate reasons.

[20] **Eluned Parrott:** I am not content on two grounds. First, I have a query about the information in front of us. The powers here are not being transferred to a Welsh equivalent of Ofqual, but are to go straight to the Minister and that could be politically contentious. I do not want to disparage any individual, but that could be politically contentious, as it is a different mechanism. It seems like an afterthought to me; I cannot see any evidence that the process has been carefully thought through in order to come to this solution. Secondly, I cannot believe that we are being held hostage and told that we cannot object and cannot do anything about this as it is too late in the process. In what way is it democratic that we are not able to say that we are not content or that we need to scrutinise this properly? I do not understand why it has come to this and why we are being told that it is too late. How has that come to pass?

[21] **David Melding:** I will sum up to indicate what we can do at this stage and what

recourse there is for us. Suzy, would you like to contribute first?

[22] **Suzy Davies:** I want to underline what Julie said. We should use this as an example of the type of problem that can arise and that perhaps we have not been over conscious of before, and have dismissed things as technicalities that do not really matter. However, this is a pretty serious case and it is a shame that it has come to us so late. It is not just an amendment, but a new insertion into the Bill.

[23] **Simon Thomas:** Yr wyf am bwysleisio fy mod yn rhannu rhai o bryderon Eluned, ond nid gwaith y pwyllgor hwn yw edrych ar bolisi'r Llywodraeth. Fodd bynnag, mae'r egwyddor o beidio â chyflwyno rhywbeth sylweddol drwy welliant yn San Steffan wedi cael ei waethygu gan y ffaith nad oes gennym amser i'w newid pe baem yn dymuno gwneud hynny fel corff deddfu. Mae'r ddau beth yn dod gyda'i gilydd yma, sy'n arbennig o anffodus ar gyfer y Cynulliad fel corff deddfu newydd. Mater i'r Cyfarfod Llawn yw hwnnw, ond yr wyf yn cytuno gyda fy nghyd-Aelodau bod materion o bwys wedi cael eu codi yn gysylltiedig â'n hymchwiliad ar hyn o bryd.

Simon Thomas: I wish to emphasise that I share some of Eluned's concerns, but it is not this committee's role to look at Government policy. However, the principle of not introducing something substantial through an amendment in Westminster has been made worse by the fact that we do not have the time to change it if we wished to do so as a legislative body. The two things come together here, which is especially unfortunate for the Assembly as a new legislative body. That is an issue for Plenary, but I agree with my fellow Members that substantial issues have been raised in relation to our current inquiry.

[24] **David Melding:** To summarise, in response to Eluned's frustration with regard to what practical recourse there is, given this great haste, even if you were not minded to vote against the legislative consent motion tomorrow in Plenary, you could make a speech outlining your concerns about how it has operated in this instance. If you felt that it was important enough, you and your group could vote against it, as could other groups. There are issues there, as the only way that the Welsh Government could move forward on that policy, if the motion were to be rejected, would be to bring in a Bill of its own. That might be burdensome, and it might be thought that that is not in the public interest; there would be a debate on that. So, the Assembly still has some control, as it can refuse to give its consent. However, in terms of practical politics, the secretariat has advised me that, even at this late stage, it would be possible for me to send a letter on behalf of the committee to the Minister and to have it laid as a paper tomorrow for Plenary. It would have to be done quickly, but we could do it after this meeting.

2.45 p.m.

[25] I think that that letter needs to say that in a situation where something material is going to be achieved through UK legislation or England-and-Wales legislation, there needs to be some form of scrutiny here in the Assembly, which means that a committee needs to look at it. In this case, the Government may feel that it did not have the ability to control things. This has come very late, and, therefore, provision in an area that we could have legislated on but in which we had previously asked Westminster to legislate, is now, in effect, not going to have full parliamentary scrutiny. That is an unsatisfactory position and there needs to be more effective timetabling and perhaps anticipation. I am not quite sure what you do when important amendments are brought in very late, but it is a challenge in how we use LCMs.

[26] If the committee is content with that approach, we can at least put something before our fellow Assembly Members tomorrow for that Plenary debate so that they will know that we have had a look at the constitutional proprieties—obviously, we have not been able to scrutinise the Bill and look at its policy implications, as that is not our role. That should have

been done, if appropriate time had been given. You could argue that, in all but an emergency situation, material issues should receive that scrutiny. We can at least issue that advice in terms of what we have found in this committee. I see that Members are content for us to proceed in that manner, so we will send a letter, which will be published tomorrow as part of the Plenary papers.

2.46 p.m.

Gohebiaeth y Pwyllgor
Committee Correspondence

[27] **David Melding:** We have two items of correspondence. It seems to me that we have come to the end of persuasion by means of correspondence on these matters, unless Members feel otherwise. I see that you do not.

2.47 p.m.

Ymchwiliadau'r Pwyllgor: Ymchwiliad i roi Pwerau i Weinidogion Cymru yn Neddfau'r DU
Committee Inquiries: Inquiry into the Granting of Powers to Welsh Ministers in UK Laws

[28] **David Melding:** This is our fourth oral evidence session, and it is a great pleasure to welcome Alan Trench, honorary senior research fellow at the constitution unit of University College London. He has been generous in the way that he has helped various Assembly committees, including our predecessor committee. I am delighted to welcome you here, Alan, and we look forward to hearing your evidence. Thank you for your written evidence, which was admirably clear, succinct and contained many practical suggestions, which is not always a combination that we find in written or oral evidence.

[29] I will start off with a general question. In your paper, you state that you note that there is quite a difference between Wales and Scotland in the way that devolved powers are acquired, and you argue that this difference leads to a weakness in the Assembly's control over the Welsh Government compared with the situation that pertains in Scotland. Would you like to add to that, and, if it is more coherent, how much more coherent is the practice in Scotland?

[30] **Mr Trench:** Before I do that, it may help Members if I move back a step and explain some of the background to my work in this area. I have a slightly unusual background. I was formerly a practising solicitor and I started doing academic work on devolution in about 2001. One of the first activities that we undertook was a detailed study of the impact of devolution on the Westminster statute book. We looked at every provision of every statute in three legislative years: 1999-2000, 2000-01 and 2001-02. Much of what I have to say generally comes out of seeing what was done at that time, which is now quite a long time ago, particularly in relation to Scotland and how legislative issues and the legislative interface between Holyrood and Westminster was dealt with. One of the things that has, if anything, become more apparent since then is the importance of the Sewel convention as part of the constitutional glue that knits the post-devolution UK together. When we were carrying out that work, we found that there were probably rather more Sewel motions passed at Holyrood than we had expected. Indeed, around that time, there was something of a political fuss when it was noticed quite how many there were.

[31] We are now much more aware of the constitutional dimension of the Sewel convention, not least because of the protracted consideration at Holyrood as well as at

Westminster of the Scotland Bill. That Bill is getting much more thorough scrutiny now at Holyrood than it has had at Westminster, it is fair to say. I am travelling this evening to Edinburgh to give evidence to the second Scotland Bill Committee tomorrow. They have been around this territory once already, and they are giving it a thorough second examination. Two ad hoc select committees are holding detailed inquiries into the provisions of that Bill and its effect. That is as it should be. This is a hugely important piece of legislation for Scotland. It is quite right that the Scottish Parliament should scrutinise it.

[32] It is telling that what was originally proposed as a relatively slight, odd little niche aspect of devolution, when Lord Sewel first enunciated what we now call the Sewel convention in 1998, has turned into such an important phenomenon. It comes quite close to being a mechanism for the constitutional entrenchment of devolution within the UK. It means that, in principle and certainly with regard to Scotland, nothing can be done to the devolved legislature without its consent. So, within the framework of an unwritten constitution and a system that remains underpinned by a doctrine of parliamentary sovereignty at Westminster, this is as close to a hard and fast form of entrenchment of the constitutional settlement as we are likely to get.

[33] One of the things that we learned during that scrutiny of the statute book and by talking to Scottish officials was how they understood what the Sewel convention applied to. The test that they used to decide whether the Sewel convention should apply was very interesting. It was exactly the same test, looking in the mirror, as whether they had the power to enact legislation. The question that they asked themselves was: 'If this provision were in a Scottish Bill, would it be within the legislative competence of the Scottish Parliament?'. So, it did not mean that it merely related to a devolved subject or to the scope of those powers, because various interpretive aids are set out in the Scotland Act 1998 that are paralleled by similar provisions, such as section 154 of the Government of Wales Act 2006, that, in certain circumstances, amplify the scope of legislative competence in a Scottish context. So, they were not simply limited to the scope of the excepted and reserved matters in Schedules 4 and 5 to the Scotland Act 1998; it applied more widely than that. That gives one an idea of the different approach that has been taken at Holyrood since then. I hope that that helps as a general introduction.

[34] I find more generally, and I have tried to say this in my memorandum, that the Scottish Parliament has been generally vigilant in looking at the whole range of the application of the Sewel convention, whether it is substantively used by Westminster on devolved matters; whether it is Westminster legislation that happens to have some limited effect on a devolved function or a devolved institution, for example, a cross-border public body; or whether it is something that adds to the powers of the Scottish Ministers or the Scottish Parliament or subtracts from their powers. All those provisions have been treated as falling within the Sewel convention. If you sit down and analyse the provisions that have triggered Sewel motions or legislative consent motions, as they are now known, you will see that there is a mixture of all those factors.

[35] Over time, Scottish legislative consent memoranda have become clearer about what triggers the need for such a motion and what sort of criteria will be applied. In turn, that feeds back into London, because when one is talking about the application of the Sewel convention, one is overwhelmingly talking about what happened because of the Westminster legislative programme. If Scotland wishes to seek enhanced legislative powers to do something that happens to fall within reserved matters, either it does not bother because it considers that it will not get them, or it seeks them and they can be conferred by a number of mechanisms analogous to the section 107 power that now applies in order to extend devolution and amend Schedule 7, under the current arrangements. In the Scottish context, it is a section 30 Order of the Scotland Act 1988. These Orders are sought quite routinely. On a quick scan quite recently, it appeared that about one third of Scottish Bills needed a section 30 Order. That will

sometimes be for only a very limited provision, but, nonetheless, there is something in a Scottish Bill that triggers that.

[36] The heavy use of the Sewel convention has been the obverse of that from the London end: when the UK is proposing to do something that marginally affects a devolved matter, such as matters affecting cross-border public bodies, and therefore there needs to be a legislative consent motion. However, that is driven by the London legislative agenda, where Scottish concerns loom pretty low in the list of factors that have to be considered. I am sorry to say that I suspect that Welsh considerations loom a little lower than the Scottish ones.

[37] **David Melding:** We will drill into some of the detail, but I do not think that I need to rehearse my question—I think that your own question was better than mine, incidentally, and you gave a good answer to it.

[38] **Mr Trench:** I am pleased to say that I am very good at answering my own questions. [*Laughter.*]

[39] **Simon Thomas:** Gofynnaf fy nghwestiwn yn Gymraeg.

Simon Thomas: I will ask my question in Welsh.

[40] **Mr Trench:** You are most welcome to do so.

[41] **Simon Thomas:** Yr oeddwn yn ystyried yr hyn yr ydym newydd ei drafod a'r hyn a ddywedwch yn eich tystiolaeth ynglŷn â'r ffaith bod Senedd yr Alban wedi bod yn fwy o geidwad y porth ac felly wedi bod yn fwy effeithiol yn y rôl honno na'r Cynulliad hwn. A allwch esbonio sut ddigwyddodd hynny? Yr wyf yn siŵr eich bod eisoes wedi dechrau cyfeirio at hynny. Yn benodol, beth yr ydym yn methu yn ei wneud yn y Cynulliad y mae Senedd yr Alban yn ei wneud sy'n gwella'r system yno?

Simon Thomas: I was considering what we have just been discussing and what you have said in your evidence about the fact that the Scottish Parliament has been more of a gatekeeper and has therefore been more effective in that role than this Assembly. Can you explain how that happened? I am sure that you have already started to refer to that. Specifically, what do we fail to do here in the Assembly that the Scottish Parliament does that improves the system there?

[42] **Mr Trench:** Thank you for that question, Mr Thomas. Forgive me for answering in English; you have two languages, but I am afraid that I do not know Welsh.

[43] **Simon Thomas:** You must remember that I do not know legalese. [*Laughter.*]

[44] **Mr Trench:** That is a language that I understand, but try not to speak. The big difference between the role of the Scottish Parliament and the role of the National Assembly lies in two factors. One is something that you have already been talking about, which is the more active and engaged processes at Holyrood to identify Bills that are likely to trigger these. I cannot say this with certainty, but I suspect from what I know that that comes about from the way in which consultation between the Scottish Government and the UK Government would proceed at the stage before legislation is framed. In principle, that process should work in exactly the same way between the Welsh Government and the UK Government, but, in practice, I fear that it does not. However, because of the nature of the Scottish Government, it is engaged in this process and knows that it has to watch it. There is a significant team within the constitution directorate of the Scottish Government that is concerned with legislative liaison, whether it is the Sewel convention or the Westminster legislative programme. So, there is a serious high-level engagement on the official side that precedes what happens in the Parliament.

[45] **Simon Thomas:** Specifically on that, is that something that you judge by observing the outcomes of this process or is it something that you have evidence of it actually happening?

[46] **Mr Trench:** I do not know as much about the detail of the process in Wales, but I know that there is a team in Scotland. I know them reasonably well and I have interviewed them on several occasions. This is a recurrent and significant thread of their work, and has been since 1999. This is one of the teams charged with managing inter-governmental relations. I was always slightly puzzled to discover that the Scots divided their officials for managing inter-governmental relations into one team that was concerned with strategy and another that was concerned with legislation. That was essentially the approach. There was a strategic team that included legislation and there was a day-to-day liaison team that also managed things like joint ministerial committees, which always struck me as a slightly disjointed approach, but I could sort of understand how that worked.

3.00 p.m.

[47] On that, we have a broad process in which Holyrood is more engaged and from an earlier stage, but we also have a very tangible difference, because Holyrood has always looked at all dimensions of what happens under the Sewel convention. I sent in with my evidence devolution guidance note 10, on post-devolution legislation for Scotland, in its latest and current version, just in case you have not seen it, because it sets out very neatly at the beginning how to identify three categories of Bills—that is at paragraph 4 on pages 2 and 3 of the note. Of the three categories that are identified there, only one in three distinct limbs deals with matters that require Sewel motions, but this has been in place, if not since 1999, then since about 2001. So, this has been in place for quite a long time, even though the notes have been amended and reissued over time.

[48] One of the things, equally, that we identified during our trawl of the statute book was that there were certain things that, in principle, one might think would trigger a Sewel motion that did not. One example was that the creation of new criminal offences in Scots law in connection with devolved matters did not trigger Sewel motions, so if, for example, there was a Bill regarding the Post Office or nuclear installations—both being reserved matters—that included a criminal offence to ensure effective enforcement, then no Sewel motion was required, even though that would have an effect on Scots law. However, equally, there was clearly understood to be a requirement for consultation because of the practicalities of enforcing that offence. The UK was told that it needed to consult with the Crown Office and Procurator Fiscal Service and the Lord Advocate to ensure that that offence actually could be prosecuted in a Scots court if need be.

[49] The big difference in that third limb of section 3 of paragraph 4 of devolution guidance note 10 relates to this business of the acquisition of legislative powers in particular. You will have noticed, if you have looked at devolution guidance note 9 in its pre-referendum form, which is still not amended or revised, that we have a clear statement that there is no requirement to consult on primary legislation for any additional powers, whether those are legislative or executive in nature. That seems to me to be, in formal terms, the big gap, and I cannot rationalise that. I can think of all sorts of practical reasons for that, but I cannot come up with a conceptual, constitutional one, particularly when it comes to executive powers rather than legislative powers.

[50] **Simon Thomas:** Let me ask you about that, because some of the things that you have set out as being part of a better system in Scotland, at least on the face of it, related to the Scottish Executive dealing better with the Executive in London—not necessarily the Scottish Parliament dealing better with the Parliament in London. However, what you have just

mentioned is very much a parliamentary role, I would suggest, that is, the scrutiny of the acquisition of new legislative powers by either the parliamentary body or the Executive. Is there something missing in the Assembly that does not allow us to scrutinise that properly? You also say that, in effect, there are executive powers that have been taken beyond the scrutiny of the Assembly.

[51] **Mr Trench:** I cannot explain that; it is one of those absences that cannot be explained, because there is nothing positive to explain the absence. I can see no foundation for that in the understanding of the Sewel convention when it was first enunciated by Lord Sewel in 1998 in the way that it was first set out in the memorandum of understanding between Governments in 1999. The categorisation of this in devolution guidance note 10 is paralleled by a Scottish internal document, I might add, which I know was carefully discussed between the two Governments. So, even though we are talking about two sets of internal guidance to two distinct Governments, they say the same substantive thing, and they say it because of a process of behind-the-scenes agreements.

[52] I cannot see why any of that should not apply in principle to Wales, certainly not after a referendum. Given the nature of devolved powers in Wales, some of the details of how this works are necessarily different because of the difference between the reserved powers model and the defined powers model in Wales. I cannot see any reason in principle why that should not apply to Wales, and I cannot see any reason in principle why it should not apply to the conferral of powers on Welsh Ministers since 2007, since when they have existed in their present form.

[53] **Simon Thomas:** A lot of this is very technical, so would you say that there is a lack of capacity or a lack of will within the Welsh Government to engage? What is stopping the engagement from happening here compared with Scotland? It may be sometimes flawed in Scotland, but it is happening at a different level.

[54] **Mr Trench:** That is an interesting question. I could not comment on whether there is a lack of capacity in the Welsh Government. I think that there is a lack of habit of thinking about what the legislature would do, and that goes back quite a long way to the different ways of working of the old Scottish and Welsh offices, for example. Scotland, being a distinct legal jurisdiction, always had its own legislative programme going through Westminster, even before 1997, whereas Wales never did; I think that there were only four Wales-only pieces of legislation between 1945 and 1997. So, the orientation of the Welsh Office towards Westminster was a different one. The idea of engagement and respect for the legislature may have been a different one.

[55] **Simon Thomas:** Is this why you suggest in your evidence that you would expect to see more legislative consent motions arising post the referendum in Wales?

[56] **Mr Trench:** That is one of several reasons why I would expect that. It is a result of this history of administrative entanglement on a very practical level in relation to a very much wider range of matters, and a wider degree of interface between devolved and non-devolved matters. For example, policing and criminal justice are not devolved. There are a great many interface issues arising out of that that would present themselves rather differently in Scotland, because criminal justice, policing, and so forth, are devolved there.

[57] **Simon Thomas:** So, taken together, those are the reasons why you would expect more legislative consent motions to come up this year?

[58] **Mr Trench:** Yes.

[59] **Simon Thomas:** Yr ydych newydd **Simon Thomas:** You have just referred to

gyfeirio at ganllaw ar ddatganoli 9, ac yr oeddech yn dweud nad oedd yn glir iawn o safbwynt pam mae datganoli gweithredol neu ddeddfwriaethol wedi digwydd yn y cyd-destun Cymreig. Hynny yw, nid oedd yn glir pam yr oedd y naill drywydd neu'r llall wedi cael ei ddewis. Nid oedd yn glir o'r dystiolaeth a oeddech yn cyfeirio at rywbeth hanesyddol yr oeddech yn disgwyl iddo ddod i ben gyda'r refferendwm a'r ffaith bod y Cynulliad bellach yn gorff deddfu llawn, neu a yw hon yn broblem a fydd yn parhau yn y cyfnod nesaf, a fydd hefyd yn gwneud y system hyd yn oed yn fwy cymhleth?

devolution guidance note 9, and you said that it was not very clear as to why executive or legislative devolution had happened in the Welsh context. That is, it was unclear why one path had been chose over the other. It was unclear from the evidence whether you were referring to something historical that you expected to end as a result of the referendum and the fact that the Assembly is now a full legislative body, or whether this is a problem that will continue in the next period, which will also make the system even more complex?

[60] **Mr Trench:** One of the very few certainties in life is that it gets more complex. Let me try to say what I think the answer is to that. Forgive me if I did not hear the translation correctly. Welsh devolution basically started as an executive form of devolution. There is an academic argument about whether and to what extent it was legislative. Rick Rawlings, who is now my colleague and formerly my collaborator on a research project, described it as being quasi-legislative, but we will not go into that. It started as the transfer of the powers vested in the Secretary of State for Wales, minus a few, to the National Assembly mark 1 as created by the Government of Wales Act 1998. That meant that the Assembly was an Executive body with very limited law-making powers. One of the big differences that that created between Scottish and Welsh devolution, oddly enough, was that Welsh devolution was almost always therefore exclusive, whereas Scottish devolution was concurrent.

[61] The creation of the Scottish Parliament created two legislatures for Scotland. It did not erase Westminster's sovereignty in relation to devolved or non-reserved matters. Westminster remained fully capable of legislating for them, hence the Sewel convention and all that goes on. However, the executive powers that were transferred with a small number of very carefully specified exceptions were transferred exclusively. That remains the case, even now, and even though the powers that were vested legally in the National Assembly in 1998, and those that have accrued between 1999 and 2007, have transmigrated to the Welsh Government. So, its powers are exclusive and, in some cases, are going to be broader than the legislative powers of the National Assembly. That is more or less the same page that Scotland is now on as well. However, it has taken Wales quite a long time to get to that point. That exclusivity is, I have to say, a very comfortable thing for officials to have. They know that no-one is going to interfere with them and that they can carry on doing what they want to do. I suspect that a combination of enjoying that—the ease with which it makes for administration and the practice of government—and the fact that there is not an ingrained habit of looking to Parliament, to the legislature, to ensure that there is legislative authority for something helps to explain why we have come to be where we are.

[62] **Simon Thomas:** So, is this why Welsh Ministers tend to go for the legislative option—

[63] **Mr Trench:** The executive—

[64] **Simon Thomas:** Sorry, that is what I meant to say.

[65] **Mr Trench:** Yes, that is why there is often a tendency to do so and, I suspect, a need for a clear rationale for them to seek legislative powers rather than merely resting on executive powers. There is a great accrued book setting out what their executive powers are, and the legislative ones are all a bit vaguer, a bit less certain and no-one is quite clear—

[66] **Simon Thomas:** However, this is an accrual of power without much scrutiny, is it not?

[67] **Mr Trench:** One of the things we found during this detailed scrutiny of the statute book was just how weak the scrutiny of powers being conferred on the National Assembly in those early years of devolution had been. Some colleagues of mine went a stage further and looked at the legislative history of some of the legislation that had conferred powers on the Welsh Government. At the time, a good deal of emphasis was put on the importance of a Wales-only Act that went through Parliament. It is fairly obvious that it does not matter what you call a piece of legislation. It might be a short, separate Wales-only Act or a Wales-only part of a UK Act. What is important is the nature of the primary power that has been conferred. There was a good deal of attention paid by Welsh MPs to the Wales-only Act, but much, much less so when there were even very far-reaching provisions affecting Wales set out in Acts that had a wider application—whether they were England and Wales, Great Britain, Northern Ireland or whatever.

[68] **David Melding:** Suzy Davies will now take us on to some of the remedies of the general situation you have been describing in your evidence so far.

[69] **Suzy Davies:** Perhaps I could take you to the last page of your memorandum and your kind advice to us. Looking at some of the suggestions you made, first, you mentioned that, as an Assembly, we should be using LCMs to endorse the substantive legislative provisions of a UK Bill rather than just endorsing consideration of those provisions. Could you explain the difference in emphasis and the significance of those two different approaches?

[70] **Mr Trench:** Approving consideration of a provision at Westminster essentially endorses whatever it is that Westminster chooses to do. Endorsing the substantive consideration means that you are emphasising that these are your powers that you are delegating or re-delegating to Westminster and that if Westminster alters the way that these provisions apply, you, in turn, can take them back. It ensures that you are emphasising the extent to which the Assembly has custody and is responsible for the legislative powers vested in the Assembly and set out in Schedule 7 to the Act.

[71] **Suzy Davies:** That is helpful, and, in a way, it takes me on to my next question. You mentioned in your third suggestion to us that a mechanism should be developed to identify amendments relating to devolved matters, and to ensure that those are considered by the Assembly before they are passed into law.

3.15 p.m.

[72] **Mr Trench:** Indeed, and I listened with interest to your discussion earlier.

[73] **Suzy Davies:** Yes, exactly; we have just had a perfect example of it now. We are all aware of the system is Scotland whereby matters are identified as early as possible prior, or adjacent, to the Queens's Speech. Would something similar be useful in Wales?

[74] **Mr Trench:** I think that it would. One important difference between Scotland and Wales is that, in principle, Wales should be much more aware of and closely engaged in the Westminster legislative programme than Scotland. After all, detailed provisions are set out in the Government of Wales Act 2006 requiring the Secretary of State for Wales to present the UK Government's legislative programme. Arguably, that is a hangover from the 1998 Act, which was particularly important while Part 3 of the 2006 Act was in force. However, it is still there, and it is still an important provision. There was no consideration of limiting its

scope to the period when Part 3 was in force. So, in principle, there should be more consideration of these issues in a Welsh context than in a Scottish context, but it seems to work the other way around.

[75] **Suzy Davies:** This, presumably, is why you are keen to suggest that the Assembly, with legislative consent motions, does not have to give an absolute consent to them. It could be conditional, or it could even be open enough to suggest amendments to UK legislation.

[76] **Mr Trench:** Indeed, and there is a precedent for that. I am very much aware of the present Scotland Bill, because I am closely engaged with it, where the Scotland Bill committee in the last Parliament produced an extremely long and detailed report requesting amendments and Government statements in relation to a wide range of matters, most of which, I have to say, the present Government decided to ignore.

[77] **Suzy Davies:** I was going to ask you if Scotland has tried this out and, given conditional consents, what the final result would be. What has Parliament done?

[78] **Mr Trench:** We do not know what the final result has been; that is the result so far. This Bill has not received Royal Assent, for which we have a deadline of the end of the present Westminster parliamentary session, which appears to be sometime around May.

[79] **Suzy Davies:** At the moment, you have not been overly impressed by the alacrity with which suggestions have been taken on board.

[80] **Mr Trench:** Westminster has not rushed to endorse the changes that were sought, even though these were of a committee with a broadly similar composition to that at Westminster, and arose from the consideration of the report of a commission that was appointed by that same Parliament.

[81] **Suzy Davies:** Are they nervous about setting some sort of precedent here?

[82] **Mr Trench:** I think that everyone is conscious that we are setting a large number of precedents.

[83] **Suzy Davies:** I will take you back, then, to the Sewel convention. You recommended in your paper to us that both Parliaments should endorse this formally in some way. Will you suggest how we might do that? What is the genuine value of doing that, bearing in mind that this convention is already out there?

[84] **Mr Trench:** The convention as it exists is largely an inter-governmental matter. My concern is that it should become more clearly an inter-parliamentary matter. Although it was first enunciated in Parliament and various statements of it have been laid before Parliament in the form of documents, such as command papers, there has never been any formal endorsement of it in the UK Parliament. There are a number of people who I know would favour that, and a committee of the House of Lords that I advised in 2002-03 said so quite strongly. However, that has not happened so far.

[85] There is a difference between doing it at Westminster because this is a convention that primarily impacts on Westminster. It is Westminster acknowledging, for practical purposes in certain ways, limits on what it, as a sovereign Parliament, can do. In a Welsh context, what you are doing is somewhat different. You cannot assert a similar degree of sovereignty. You can assert your authority in relation to the Executive. It would be open to you to say to the Welsh Government that you do not think that it is appropriate that it should be simply dealing with these matters by itself and only consulting you to a limited extent late in the day and, in some cases, not at all. Rather, anything that affects the overall ambit of

devolved powers is a matter that is within the Assembly's prerogatives and the Assembly's authority; it must, therefore, be considered by the Assembly.

[86] **Suzy Davies:** So, it is moving the decision about what is important enough for the Assembly to consider back to the Assembly.

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

[88] **Simon Thomas:** Specifically on that point, are you saying that it is down to changing our Standing Orders to reflect this convention? Is that what should happen here?

[89] **Mr Trench:** I think that you would probably want to amend your Standing Orders—I cannot pretend to be an expert on the Assembly's Standing Orders. You might also want to pass a motion or resolution that, essentially, has a declaratory effect—again, I do not know your procedures well enough—to set out what you understand to be the case and as a way of indicating your understanding of how things should work from now on. To go with that, a change of approach on the part of Assembly Members is perhaps required, to be more vigilant about the nature of the powers and to be more conscious of the distinction between the legislative and Executive branches of Government. My experience is that that distinction has been somewhat muddied and blurred over the last few years. It is a distinction of which I am very conscious, and it is there for pretty good reasons. It would be rather a good thing to sharpen that up.

[90] **Julie James:** The issue that you touched on is the difference between the Welsh devolution settlement and the Scottish devolution settlement, and the limited powers of the Assembly as opposed to the power of general competence, if you like, of the Scottish Parliament. We are set up to reflect that, it seems to me. This inquiry has received evidence from others who are of the view that it is therefore quite right that the Assembly's ability to consent to the Executive's devolution settlement is limited, and that we should only have the power to consent to changes to the Assembly's own particular powers. I take it that you would disagree with that.

[91] **Mr Trench:** I would disagree with that. The arguments about the distinction between Welsh and Scottish devolution are easy to overstate. I would argue that they have been easy to overstate since 1999, but that it has become particularly easy to overstate them since the referendum result. Indeed, I would draw your attention to some of the remarks that were made in a recent judgment in the Supreme Court, namely in the case of AXA General Insurance Ltd versus the Lord Advocate. This is a very important devolution case. The judgment was handed down on 12 October, so it is very new indeed. The case was about how the courts should approach the business of judging a piece of Scottish legislation. The Welsh Government intervened in this action, though it was not directly a party in it. It concerned legislation passed by the Scottish Parliament and the Northern Ireland Assembly with regard to civil liability for an industrial disease known as pleural plaques. It is quite telling that, first of all, the court emphasised that what it is saying applies to all three devolution settlements. I have to say, with the greatest respect to Lord Hope, who presided in the case, that I think that he is wrong about certain aspects, and I do not think that his judgment goes quite as far in relation to Wales as it appears. However, he says in paragraph 46 of the judgment:

[92] 'The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority. The United Kingdom Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence.'

[93] Lord Reed, in his judgment, went even further. In paragraph 146, he says:

[94] 'Within the limits set by section 29(2), however, its power to legislate is as ample as it could possibly be: there is no indication in the Scotland Act of any specific purposes which are to guide it in its law-making or of any specific matters to which it is to have regard.'

[95] In a Scottish context, that is a broad, ringing endorsement of the nature of devolved legislative power. The judges are keen to emphasise that that applies to all three devolution settlements. While that position is arguable, it was an arguable point with which I would probably have disagreed before the referendum, but now I would disagree with it very forcefully.

[96] **Julie James:** That is very helpful. In terms of what we are able to do as an Assembly, one of the things that all Members will agree on—I speak for myself, but I am sure that the others will nod—is the difficulty of finding time in the process to scrutinise well, or to scrutinise at all, as we discovered earlier today. You talk in your paper about trying to winnow out various aspects—regarding legislative consent motions in particular, but I imagine that it applies to everything—to do with more technical matters and those matters to which you think we should give better consideration. Could you elaborate on that a little bit?

[97] **Mr Trench:** That is, first and foremost, a job for Assembly staff. I am not quite clear on the internal organisation structures, but I know that, in Westminster, it would be first and foremost a job for a committee clerk, with possible assistance from the parliamentary library and committee specialist advisers. It would be a staff job to make it as clear as possible what would be the nature of provisions that would require Members' attention, and there could well be a mechanism to provide informal consultation at a relatively early stage with Members to get a steer about whether a particular provision should be pursued. The question would be to ensure that Members spend as much time as possible on matters of genuine importance and as little time as possible on genuinely limited, narrow or technical matters. For example, in a Scottish context, the incidental impact on a cross-border public body is the sort of thing that one would find of relatively little interest; I would not expect Members to get very excited about that. However, if the cross-border public body was the River Tweed commissioners, I imagine that a number of people might get quite concerned. The difficult point is ensuring that the officials involved have enough sensitivity to spot those issues and to be able to identify whether they should be pursued.

[98] **Julie James:** Are you suggesting that these are a range of things that are included in UK legislation generally?

[99] **Mr Trench:** You pretty much have to do a trawl across the whole of the statute book. That sounds slightly more time consuming than it really is. There are a very small number of pieces of legislation that can be wholly excluded. It is a different sort of context, but I discovered while undertaking this work a few years ago that the Armed Forces Act, which is the basis on which military discipline is given its legal force, has to be passed every five years. That is one of the very few Acts that has a routine sunset clause, which means that it expires at the end of a five-year period and must be re-enacted. Even the Armed Forces Act, which one would think was a purely reserved and non-devolved matter in the Scottish context, had attracted a Sewel motion. The reason for that is that it conferred some additional functions on the Ministry of Defence police, so it affected the devolved matter of policing, and because the Ministy of Defence police operate across the UK, it applied in Scotland. It is easy to assume that provisions will not impact on devolved matters, when, in fact, they do.

[100] **Julie James:** If I understand you rightly, what you are saying is that we need a combination of being more proactive on the Sewel motion front ourselves, as well as our staff support being more proactive about deciding what requires proper scrutiny and what is

technical.

[101] **Mr Trench:** Indeed. The way that this thing works means that it is heavily weighted to certain parts of the calendar. The key point is what happens in the wake of the legislative programme. It is the Queen's Speech at Westminster that triggers a huge amount of this, because, in principle, many of these issues should have been identified and should be in the process of being resolved by the time of the Queen's Speech. That was not the case at the time of the last Queen's Speech, because, of course, a post-election Queen's Speech, particularly when there has been a change of Government, always brings in a raft of legislation that has not had time to go through the sorts of consultative processes that are clearly set out in things such as devolution guidance notes 9 and 10 and the Cabinet Office guide to legislative procedures.

3.30 p.m.

[102] However, in theory, that whole process at Westminster should help to ensure that these issues have long since been identified. Shortly after the Queen's Speech appears, most of the Bills appear, and that is the point at which some poor soul has to put a towel over their heads, sit down, go through them and work out what is in them and what their impact will be, if that is the way that they are being engaged with. I am afraid to say that there is no real alternative to that.

[103] I was thankful that, under the last Labour Government, for at least a couple of years, it had a process of elongating the legislative process. So, we had a draft legislative programme appearing usually about June, maybe even in May, followed by the proper legislative programme in the autumn—late October or November—with the Queen's Speech proper. One had a pretty good idea of what was coming through six months before it appeared. Equally, because the Government was giving notice of that, it would be possible, at least in theory, perhaps not for the Assembly, but for the Welsh Government, to engage more actively with proposals for legislation, because they were in the public domain.

[104] **Julie James:** That leads me nicely to the next bit of your evidence to us, which is about devolution guidance note 9, and devolution guidance notes in general, I think. You seem to feel that devolution guidance note 9 requires vigorous redrafting. We have heard evidence as a committee that it requires little redrafting. I suspect that the difference comes from two different interpretations of the devolution settlement. Can you expand on that?

[105] **Mr Trench:** Devolution guidance note 9 is an extremely lengthy document, as you will have noticed—it is 16 pages in the version that I sent to you. On one level, it is a detailed guide to what should be done, but on another, it is remarkably vague. It is, effectively, a long way of saying 'We will make it up as we go along, but, in the normal course of events, we might want to do this'. Contrast that with the much more precise form of devolution guidance note 10. Given the resemblances that now exist between Scottish devolution and Welsh devolution, I would expect something that looks like devolution guidance note 10 to come out of the review process of devolution guidance note 9, in particular on paragraph 4, which identifies the categories of Bills to which the Sewel convention applies. I would be concerned if that did not appear in a revision of devolution guidance note 9, because that seems to me to be quite important. It may not be as explicit in terms of its wording as it ideally might be, but that would be in the same way that certain articles of a European Union treaty do not now mean what the words appear to say, but a vast body of jurisprudence in the European court of justice has accumulated around them. So, you do not alter the articles of free trade, even though they no longer actually relate to rules on free trade. Enough has accrued around this in terms of administrative expectations and precedence that one would want to keep and replicate. If it is going to be altered, it needs to be altered on a fairly thoroughgoing basis, so that you do not have a different situation applying in Wales and in Scotland.

[106] There is a strong practical reason for that. One of the recurrent problems with Welsh devolution within the Government in Whitehall has been that it is different from Scottish devolution. Officials have found it terribly difficult to get their heads around the fact that the two systems are different. The closer the two are in terms of their administrative frameworks, the easier it will be for civil servants to ensure that they have complied with good practice in relation to both.

[107] **Julie James:** Would you say that that applies across the whole devolution guidance note system? Should we look for that approach right through?

[108] **Mr Trench:** I think so, and across Whitehall approaches to devolution generally. One of the problems with devolution is that it has been a variable mix-and-match process. There are three quite different sets of rules that have applied. It is quite understandable that officials, and often quite junior ones, fail to understand all of the complexities of those and to get all of them right, often in circumstances where they are under quite a lot of pressure with regard to time and, possibly, political pressure as well. The closer it is to a single blueprint, the easier it will be for Whitehall to comply.

[109] **Julie James:** Finally, we have heard evidence from the Wales Governance Centre that devolution guidance note 4 is the one that requires the most rewriting.

[110] **Mr Trench:** I would not dispute that it requires extensive rewriting, but my experience is that the legislative ones are among the most used bits of material in Whitehall. My focus on devolution guidance notes in general as being important came out of doing quite a lot of interviewing in Whitehall in the early years of devolution, and discovering that no-one looked at the memorandum of understanding or at the concordats, which were much talked about at that time—particularly bilateral concordats between particular departments and devolved Governments. No-one looked at those; they gathered dust on shelves. Very often, people did not know that they existed, and when they had known that they existed and had bothered to use them, they found that they were not very useful anyway, because they did not cover the situation that had arisen. What did count were the devolution guidance notes, because those were regularly consulted on and were also fairly regularly updated. So, they remained the most current documents around. I mentioned the House of Lords Constitution Committee's inquiry into devolution, and one of that committee's recommendations was that there should be a sunset clause on inter-departmental concordats, precisely to ensure that they got reviewed and people thought about what was in them. As far as I know, most of those have still not been reviewed. They were not of much use in 2003, and I fear that they are of very little use now.

[111] **Simon Thomas:** I have a quick follow-up question, so that I know that I have understood your point correctly. Is it that you are not saying that devolution guidance note 9 should or should not be reviewed post the referendum, but that it was not up to scratch anyway? Are you saying that devolution guidance note 10 is a better example of how this should be done and that a more common approach throughout Whitehall would benefit the whole system?

[112] **Mr Trench:** There are two questions there: one is whether devolution guidance note 9 was appropriate when the Part 3 provisions were in operation and the other is how appropriate it is now.

[113] **Simon Thomas:** It is to the second question that we really want an answer to.

[114] **Mr Trench:** Clearly, in its present form, guidance note 9 does not work. I have been told privately that it is already being reviewed, but what I do not know is what stage that work

has reached or who is involved. This is a UK document and the Wales Office is quite entitled to revise it and amend it as it sees fit. One would expect it to comply with the past precedent and be consulting the Welsh Government in that process. That has been the practice for the framing of all the devolution guidance notes since they were first used in around 2000. However, I do not know the answer, and if I were in your shoes, I would put that question to the Welsh Government.

[115] **David Melding:** We now move to the last group of questions. Eluned Parrott has the first one.

[116] **Eluned Parrott:** I want to talk about the scrutiny of Welsh ministerial powers as they are transferred in UK Bills and, in particular, what you described in your paper as a lack of transparency. What can we do, in a practical sense, to improve the scrutiny of those Welsh ministerial powers to overcome this issue?

[117] **Mr Trench:** First, you would need to signal to the Welsh Government that this is a matter of concern to the Assembly and that it will be watching. Secondly, you need to ensure that you are aware in the Assembly of what provisions are being set out in Westminster legislation, and that you are then deciding whether and how to pursue that. It may be that you will decide that it is of no interest whatsoever, but it is certainly a decision that you should make consciously, rather than unconsciously. Even if you do not make a conscious decision in these circumstances, that is in itself a decision. The sorts of processes that we have already talked about in terms of a greater degree of scrutiny of the statute book, and of proposed legislation, are the most effective mechanisms for doing that. You must then ensure that legislative consent motions are brought before the Assembly when powers are being conferred that you consider fall within the Assembly's remit.

[118] **Eluned Parrott:** You mentioned the idea of a statute book, and I am sure that you are aware that there is a proposal to create such a thing. In your evidence, you identify that there is no clear, publicly available list to which we can refer to find out what powers have been conferred on Welsh Ministers. Who do you think might take on the role or responsibility of setting up such a list? Can you explain to us why, in your evidence, you have suggested that a list should only cover executive powers conferred on the Assembly and Welsh Ministers by UK legislation since 2007?

[119] **Mr Trench:** Principally because, before 2007, the system was quite a different one, but also because this was very well covered by Wales Legislation Online, and it is the change of regime from the 1998 Act to the 2006 Act that means that Wales Legislation Online no longer provides that function, save on an archival basis. However, Wales Legislation Online has been a godsend to anyone concerned with these sorts of issues, and it is a pity that it is no longer as effective a tool as it was, particularly under the 1998 Act regime, in identifying these sorts of matters. They might be the right people to do that. I have huge respect for Wales Legislation Online; I think that its contribution has been quite invaluable. However, it does seem that this is something that the Government itself should do—that is to say, Government or legislature; I am slightly agnostic as to which. I was very pleased that the National Assembly took custody of Schedule 5 and that, throughout the currency of the Part 3 arrangements, the best version of Schedule 5, setting out the devolved matters and fields, was on the Assembly's website. Whether that is an appropriate thing to do in this case, given that these are executive powers that we are talking about, is another question, but I think that it should be a public authority.

[120] **David Melding:** Sorry, Julie—you wanted to ask something. I was so interested in the answer, and rapidly making notes, that I forgot. I apologise.

[121] **Julie James:** To jump back a question to scrutiny, I think that the lack of

transparency where ministerial powers are conferred goes to the heart of the business of how you view the devolutionary settlement. I do not wish to seem to be speaking for the Government, but it seems to me that it feels that it is none of the Assembly's business if it is given powers outside the devolutionary settlement for the Assembly—that is, if Ministers are given executive powers in Wales for something that would be outside the devolutionary settlement. Would you take the same view?

[122] **Mr Trench:** No, I certainly would not, and I do not believe that the Scots would either. If that were the position that one takes, that begs a huge question: to whom are the Welsh Ministers accountable in those circumstances? If they are not accountable to this place, then logic says that they are accountable to Westminster.

[123] **Simon Thomas:** They should go to select committees.

[124] **Mr Trench:** That is the door that is opened up if Ministers do not want to ensure that they are accountable here. The idea that they would not be accountable anywhere would fill me with horror.

[125] **Julie James:** I am sure. May I make one last point on the other issue? I do not know if you know, but the Counsel General made a statement in Plenary the other day about this very point on the codification or otherwise of Welsh law. I do not know if you have had a chance to look at that.

[126] **Mr Trench:** I have not seen the statement, but I knew that he was making one.

[127] **Julie James:** He made a statement about the new devolutionary settlement and how we might document this.

[128] **Mr Trench:** That is all a thoroughly good thing. My concern is the hazard of the best being the enemy of the good. There are some serious practical issues here, as well as some important issues of principle, and, being a pragmatist, I would rather see a messy solution dealing with current problems than an ideal solution reached in five years' time, by which time those problems will have got considerably worse.

3.45 p.m.

[129] **Eluned Parrott:** To talk a little bit more about liaison between Cardiff bay and Westminster, we have received some evidence from the Wales Governance Centre and Daniel Greenberg on whether the Assembly committee should work more closely with counterparts in Westminster. We also heard from the chair of the Welsh Affairs Select Committee, who did not seem quite so keen on that solution. Would you like to give us your view on that?

[130] **Mr Trench:** I emphasise that it is my view. I would be rather sceptical about that. It is something that, as I recall, was tried in the earlier years of the Assembly. It was hugely difficult in practical terms, in ensuring that Standing Orders at each end were framed so that a meeting could happen and could work. It was then found that there were very significant differences in the ways of working, the attitudes, and the approaches of Members on the two sides. As I recall, that process was a very short-term experiment that was not repeated. There would be some accountability problems as well if one were to do that, particularly, and very obviously, if you were to do that at a stage when you were considering a tangible legislative proposal, rather than at an earlier stage when you were either conducting a pre-legislative inquiry or trying to carry out some sort of forensic or more wide-ranging general inquiry. When you have committees fulfilling a legislative role, it is going to be really very difficult indeed, again because you are blurring lines of accountability. So, I am afraid that I would have great misgivings about that.

[131] **Eluned Parrott:** I have one final question, moving on to Standing Orders, which I recognise that we have touched on previously. It is our understanding that the Scottish Parliament's Standing Orders require the Scottish Government to bring forward legislative consent motions in circumstances where a UK Bill legislates in areas within the legislative competence of the Scottish Parliament and/or confers any powers on Scottish Ministers. In contrast, the Assembly's consent is required only when a UK Bill legislates on areas within the Assembly's legislative powers, and the consent of the Assembly is not required when a UK Bill confers powers on Welsh Ministers in areas that are outside the Assembly's legislative competence. Can you give us your views on these differences and the dangers therein?

[132] **Mr Trench:** I think that I have already answered that point in response to Julie James. There has to be accountability somewhere for every action of Ministers. My view would be that if you have legislation conferring powers on Welsh Ministers, as Welsh Ministers look to the Assembly as their legislature rather than to the UK Parliament as the source of their authority, it should be the Assembly that gives legislative consent rather than it being the case that it happens by default.

[133] **David Melding:** I know that you said at the outset that you do not know much about our Standing Orders, which puts you in the realm of the sane, probably. Standing Order No. 29 deals with legislative consent motions. When that Standing Order can be fully applied—we have problems sometimes with it not being applied because of time constraints—it is a reasonably robust scrutiny process. Standing Order No. 30, dealing with Westminster legislation—either England and Wales or UK—that confers, in effect, additional powers on the Assembly or the Executive does not have anything like the same scrutiny process: it basically just requires the Government to lay a written statement. Do you think that there would be value in bringing those Standing Orders together or for making Standing Order No. 30 as robust as Standing Order No. 29, so there is not this distinction between types of scrutiny when Westminster is giving us powers, whether we want them or not, or giving our Government powers, whether we want it to or not?

[134] **Mr Trench:** I think that there is a case for more robust scrutiny when it comes to the acquisition of powers than when it comes to the exercise of Westminster's powers in relation to devolved functions. The constitutional issue is more important than the ordinary policy-making one. The process should be at least as robust, if not more so.

[135] **David Melding:** Thank you for that very clear answer. As you can tell from the length of this session and the interest that we have shown, demonstrated by the number of supplementary questions on the areas that we had prepared, there is great interest in what you have said. I realise that, if it goes on too much longer, you might miss your flight to Edinburgh, but if there is anything that you feel we have not covered that would be pertinent, now is your chance to put it on the record.

[136] **Mr Trench:** The only thing that I have scribbled on my list of things that I ought to mention is the maxim of Wendell Phillips, that the price of liberty is eternal vigilance.

[137] **David Melding:** I think that we will all say 'Amen' to that. I thank you, Alan, once again for your generosity and thoroughness in what you have prepared. The range of your answers has given us a lot of food for thought. Who knows; some of your suggestions could well be reflected in our report. You have given us many practical things to think about, for which we are very grateful.

3.51 p.m.

Dyddiad y Cyfarfod Nesaf
Date of the Next Meeting

[138] **David Melding:** The next meeting will be held on 7 November. There is one paper to note: the report from our meeting on 17 October.

Cynnig Gweithdrefnol
Procedural Motion

[139] **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).

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

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 3.51 p.m.
The public part of the meeting ended at 3.51 p.m.