Cynulliad Cenedlaethol Cymru | National Assembly for Wales

Cofnod y Trafodion
The Record of Proceedings

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol Dro Dro

Interim Committee on Constitutional and Legislative Affairs

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Hyrwyddwyd gan Gomisiwn Cynulliad Cenedlaethol Cymru, Bae Caerdydd, Caerdydd, CF99 1NA.
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Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Gareth Bennett Bywgraffiad|Biography	UKIP Cymru (yn dirprwyo ar ran Michelle Brown) UKIP Wales (substitute for Michelle Brown)
Yr Arglwydd / Lord Dafydd Elis-Thomas Bywgraffiad|Biography	Plaid Cymru The Party of Wales
Huw Irranca-Davies Bywgraffiad|Biography	Llafur Labour
David Melding Bywgraffiad|Biography	Ceidwadwyr Cymreig (Cadeirydd y Pwyllgor) Welsh Conservatives (Committee Chair)

Eraill yn bresennol
Others in attendance

Yr Athro / Professor Thomas Glyn Watkin	

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

Gwyn Griffiths	Cynghorydd Cyfreithiol Legal Adviser
Naomi Stocks	Ail Glerc Second Clerk
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Gareth Williams	Clerc Clerk

Dechreuodd y cyfarfod am 15:30.
The meeting began at 15:30.

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

[1] **David Melding:** Good afternoon, and welcome to this meeting of the interim Committee on Constitutional and Legislative Affairs. I have apologies from Michelle Brown, and I'm very grateful to Gareth Bennett, who will be substituting. I do understand that, at some point in the proceedings, Gareth may have to leave to attend to business in Plenary, but you are most welcome here this afternoon, Gareth. Can I just make the usual housekeeping announcements? We do not expect a routine fire drill, which is a great surprise, as Plenary is on. If you hear the bell, please follow the instructions of the ushers. Please switch off all electronic devices, or at least put them on silent. These proceedings will be conducted in Welsh and English. When Welsh is spoken, there is a translation on channel 1. Should you be hard of hearing, then you can amplify proceedings on channel 0.

Tystiolaeth Mewn Perthynas â Bil Cymru
Evidence in Relation to the Wales Bill

[2] **David Melding:** Item 2, then, is evidence in relation to the Wales Bill, and I'm delighted to welcome an old friend back to the committee, Professor Thomas Glyn Watkin, who's a former chief legislative counsel to the Welsh Government, a distinguished academic and author.

[3] Thomas, welcome once again. We are very grateful to you for appearing at such short notice to help us with our work. You have been before us so often that I don't think I need to explain, really, how we operate. So, I'm going to dive into the first question, if that's permitted, without any opening remarks from you. But perhaps I could then start with a very general question—we'll obviously follow up on specific detail. Do you think that the Bill is an improvement on the draft Bill? Let's take it as general as that.

[4] **Professor Watkin:** I think it does mark an improvement on the draft Bill, although I would say that with some degree of caution. The new Bill is complex, and, in the time available, having looked at it, it's the complications that strike me most, I think. I'm not sure that the question I'm trying to address, quite often, when I look at it, is whether or not it's an improvement on the previous Bill so much as whether it is an improvement upon the current settlement and whether the degree of improvement on the current settlement is sufficient to merit moving on. It is clear that there are some

things in the new Bill that do improve the position on the draft Bill, most notably, clearly, the fact that the necessity tests have gone—the necessity tests, that is, with regard to private law and criminal law—and there has been some reworking of the position with regard to Minister of the Crown consents, which I think marks a step in the right direction—whether or not one has yet reached where one would like to be is a different matter—and also in the manner in which Welsh public authorities are now being defined.

[5] Having said that, I think there are probably members of the committee from earlier Assemblies present who will know that I was slightly sceptical about whether the move from a conferred-powers model to a reserved-powers model would, of itself, deliver an improvement. My position has been, throughout, that, really, it is not the form of the settlement that has caused difficulties with regard to the exercise of legislative competence, but the space that there is available within which to legislate. The manner in which you define that space, to me, is secondary. What is important is that you have the space to legislate freely, and that was my main worry with regard to the plans to introduce a new settlement on the reserved-powers model: would it actually create more space?

[6] Now, in the draft Bill, there were a very large number of reservations; the reserved matters were very considerable. But, somehow, from left field, there came other issues—the necessity tests, the problems with Minister of the Crown consents—that attracted a lot of criticism and, in attracting criticism, got the focus of the debate to at least broaden, if not shift. Again, I think I have expressed here before my worry that the next stage would be giving ground on those matters that we never thought we would be discussing, but not achieving very much with regard to the extra space that would be accorded to legislate freely. My biggest worry about the new Bill, as it appears, is that actually there's not been much progress with regard to creating that extra space. And it is there I would most want to have seen improvement, because I think it's because of the lack of space that the Assembly has been bumping up against the boundaries and having to ask the Supreme Court whether it has passed them. And until, I think, one has an idea of what the extent of the space is we can't really say that there is that much of an improvement, not so much upon the draft Bill, but upon the current settlement and the difficulties that have attended it.

[7] **David Melding:** Thank you for that. I do remember the force with which you made that argument in evidence to the previous committee, and perhaps I could just take you on there. I infer from what you've said that

you're not convinced that the Bill provides very much more clarity than the draft Bill. However, in terms of space and what it allows the Assembly to do and the lack of advance there, have we gone backwards at all in terms of the Bill that's being presented? Is there anything that is actually going to end up making our legislative competence more restrictive within the Bill as introduced compared to the draft Bill? I realise that you want much more, but let's just deal with that first.

[8] **Professor Watkin:** What I'd like to see more of is improvement on the current settlement. I think that there are clearly still some issues where there is roll-back on powers that the Assembly currently has. The one that really strikes me most in that regard on the face of this Bill, as on the draft Bill, is the lack of provision to allow the Assembly to make incidental and consequential changes to Minister of the Crown functions. That was, of course, the basis of the challenge to the Local Government Byelaws (Wales) Bill. If one looks at the provisions of the current Bill as presented, it is quite clear that that would not have gone to the Supreme Court because there would not have been an issue to discuss.

[9] **David Melding:** In fact, the First Minister's said that.

[10] **Professor Watkin:** Yes. The Secretary of State's refusal would have been a refusal and that would have been that. So, that is certainly a loss of competence—one that had been gained, or at least confirmed, at considerable expense and effort. And yet that has gone. Much the same can be said, but it's not quite so clear, with regard to the second of those references, the Agricultural Sector (Wales) Bill. The substance of that Act is now an exception to a reserved matter in the draft Bill. But, of course, the substance of that Act was one of many things of that nature that the Assembly could have done in other areas of conferred competence. But the only one that is now being put in as an exception, as far as I can see, is the one that has been gained, again, at considerable expense and effort. So, one must assume that there are many other things of that ilk that could have been the subject of Assembly legislation—can be the subject of Assembly legislation under the current settlement—which will disappear if we go down the route of the draft Bill and the Bill that is now presented.

[11] **David Melding:** Okay. Those are fairly general points to start with. Do you want to follow up any specifics in your questions, Huw? Do you want to do it immediately? It's fine if you do, but can we—?

[12] **Huw Irranca-Davies:** It's only a brief supplementary. From what you're saying, if my understanding is correct, we could be back in the same situation once again of challenging, like we did with the agricultural wages Act, specifics and looking for exceptions even within the Bill that's in front of us.

[13] **Professor Watkin:** I think the danger is that the Bill that is in front of us would not allow you to proceed in the same way in relation to other headings of competence as you were able to do, or as the Assembly was able to do, in the case of the Agricultural Sector (Wales) Bill. There will have been, in point of fact, a loss; the ground is lost before you get to that point.

[14] **David Melding:** Presumably, the draftspeople in Whitehall would be quite pleased if they've produced that sort of clarity that you wouldn't need to go to the Supreme Court. But of course the issue was, when most people talk about a reserved-powers model, they assume that what you were reserving were those matters essential to the UK Government's functions and not, you know—. I think that was picked up as a general issue in the draft Bill and it's something no doubt we would want to reflect on. Let's move to some specifics. The first one I think we want to look at is the permanence of the Assembly and then the issue of the body of Welsh law and distinct jurisdiction and such matters and I'm going to ask Gareth to ask these questions.

[15] **Gareth Bennett:** Yes. Thanks, chairman. Thanks for your contribution, Professor. My colleague, actually, wanted to ask for your comments on any changes to clause 1 from the draft Bill pertaining to the permanence of the Assembly.

[16] **Professor Watkin:** Well, the clause has clearly been extended in terms of its content. I think the intention is the same, clearly: it's to recognise the political reality, as it was put, I think, by Professor Adam Tomkins when he was giving evidence to this committee looking at the draft Bill, that the Assembly and the Welsh Government are to be regarded as being permanent within the arrangements of the United Kingdom. There is, however, of course, this subsection, which follows, saying what the purpose of the section is, and it says that it's,

[17] 'with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Assembly and the Welsh Government.'

[18] I rather dislike that subsection, I must say. The reason I dislike it is that it seems to give a commitment to institutions, and the reason I dislike the commitment to institutions is this: I feel that the commitment needs to be to the existence of the Assembly, and the existence of the Assembly is the vehicle by which the people of Wales can legislate for themselves, and the Welsh Government, by which they can govern themselves. As I said, I think, in a previous evidence session here, I think what is really needed is a recognition of the right of the Welsh people to have a legislature and a government of their own within the context of the devolution settlement. I therefore dislike the way that there seems to be an inter-institutional commitment rather than the commitment of the United Kingdom and the people of the United Kingdom to the people of Wales. I think it's that sort of constitutional statement that I would prefer to see rather than the recognition of institutional permanence.

[19] **David Melding:** And that could have expression in statute.

[20] **Professor Watkin:** Well, it's customary to have that sort of expression in written constitutions, isn't it? I'm sure you don't want to go there, but that's the sort of thing one is moving towards with this sort of statement, without actually reaching the point, which is also almost inevitably where you must arrive, that is, recognising the rights of the people of Wales as a community to their own legislative and governmental institutions, not just to the existence of the institutions.

[21] The third clause is, I think, welcome, again, as an expression of political reality. It gives rise, of course, to the question of in what circumstances would such a referendum be held, and, at this particular moment in the development of the United Kingdom, with the referendum tomorrow on our continued membership of the European Union, whereas looking at this now one would think it would never occur, one can never be certain of that, and one needs to know exactly in what sort of circumstances it might occur. I say that partly as a result of the shock of seeing over 40,000 people in Wales, at the last Assembly elections, voting for the Abolish the Welsh Assembly Party. So, there is clearly feeling there that could be harnessed. I think it's a good thing that it's recognised that the change would not take place without a referendum, but I don't think that that in itself is a cause for complacency, and how far the number of people who are dissatisfied would increase if the devolution settlement does not become more user-friendly is a serious question for all those involved in fashioning

it.

[22] **David Melding**: Thank you. Do you want to move to the second question?

[23] **Gareth Bennett**: Yes. My colleague, who unfortunately isn't here, was also interested about the practical effect of the Bill containing a recognition of 'a distinct body of Welsh law' and what you thought about that.

[24] **Professor Watkin**: I think there is a distinct body of Welsh law, and indeed I've been saying this, I think, again to this committee, on numerous occasions in the last few years, beginning, I think, with when the committee held its inquiry on a Welsh jurisdiction, if my memory serves me right, about four years ago. My own view is that there is now within the legal system of England and Wales three bodies of law that can be recognised: a body of law that applies only in Wales, a body of law that applies only in England and a body of law that applies in both countries. I think that the legal system needs to adapt itself to that new reality, a reality that is growing as the body of law that applies only in Wales and the body of law that applies only in England increase in size.

15:45

[25] Having said that, I'm not entirely happy with the clause in the draft Bill. The reason for that is that it states that there is a body of Welsh law made by the Assembly and the Welsh Ministers. That's true, but it's not the same as the body of law that applies only in Wales, because the body of law that applies only in Wales also consists of those Acts of Parliament that have been made specifically for Wales over the years but have no application in England, but, perhaps more importantly, parts of the law of England and Wales that become Wales-only laws when the UK Parliament legislates for England only. All of those form part of the body of Welsh law, but they're not all made by the Assembly and the Welsh Ministers. I think it's that wider meaning of the body of Welsh law that needs to be considered when one is recognising the new legal reality that generates the need for jurisdictional development.

[26] Looking at the second subsection in that insertion, again we're told what the purpose of the section is and we're told that it's to recognise the ability of the Assembly and the Welsh Ministers to make law forming part of the law of England and Wales. When I put the two together, all I can really

make of it is to say that what the new 92B does is recognise that some of the law of England and Wales is made by the Assembly and the Welsh Ministers, and regards that as being a body of Welsh law. I don't really think that that is what is needed. What is needed is recognition of a body of law that applies only in Wales regardless of where it's made and who makes it; it's where it applies that's important. And, indeed, the way it reads here, you could just as easily take it to mean that there's a body of Welsh language law that is made by the Assembly and the Welsh Ministers and that, of course, is true, but it's not, I think, what is needed in order to move the settlement onwards.

[27] **David Melding:** It's very nuanced and interesting and I think we will reflect very much on that. I suppose it's also meant to take us somewhere beyond the debate about a Welsh jurisdiction, but a Welsh jurisdiction would run into similar problems, wouldn't it, in terms of its simplicity of expression, because you'd have more than one legislature still in that jurisdiction if you include Parliament's ability to pass certain laws for Wales only.

[28] **Professor Watkin:** Indeed. My own feeling about the Welsh jurisdiction—again, it goes back to what I said to the committee four years ago and my views really haven't changed much, if at all, during that period—is that what is needed is an arrangement that recognises the fact that you do have these three bodies of law and that therefore, the jurisdictional arrangements need to reflect that to make sure that, where you're dealing with the body of law, not in the sense that it is in 92B, but in the sense that I've just described it, it is courts in Wales that administer it. And, likewise, where you're dealing with England-only law that it's courts in England that deal with it. But, where you're dealing with a law that applies in both countries, both sets of courts also have complete jurisdiction in that regard, so you're not unnecessarily untying the jurisdictional knots. That basically is the adaptation that I would favour seeing in that regard—that is, a change to the jurisdiction arrangements that reflects and keeps pace with the changes in devolution.

[29] **David Melding:** Thank you for that. I think we'd like to move on now and look at reservations and Dafydd will lead us there.

[30] **Yr Arglwydd Elis-Thomas: Lord Elis-Thomas:** Thank you very much, Chair. As I am used to conversing with Professor Thomas Watkin in Welsh, I shall do so again

Diolch yn fawr, Gadeirydd. Gan fy mod i wedi arfer ymddiddan gyda'r Athro Thomas Watkin yn Gymraeg,

well i mi wneud hynny heddiw hefyd. Roeddwn i'n gwrando gyda diddordeb mawr ar yr hyn yr oedd gyda chi i ddweud ynglŷn â'r syniad o ofod i ddeddfu yn rhydd. Roeddwn i'n meddwl fod hynny yn gosod anghenion cyfansoddiadol mewn ffordd eithaf gwahanol i beth sydd yn y Deddfau rydym wedi bod yn delio efo nhw. Fe gawsom ni, yn Neddf Llywodraeth Cymru 2006, Atodlen 7, a rŵan mae gennym ni Atodlen 7A a 7B. A garech chi, yn gyntaf, gymharu'r modd y mae'r cyfyngiadau wedi cael eu gosod yn nhermau cymalau cadw ac yn nhermau cymalau a oedd yn gosod grymoedd o'r blaen, a hefyd, efallai, y gwahaniaeth rhwng hyn—mewn ffordd o osod setliad a diffinio cymhwysedd Cynulliad Cenedlaethol Cymru—y gwahaniaeth rhyngddo fo a Chynulliad Gogledd Iwerddon a Senedd yr Alban, yn yr effeithiau?

today. I was listening with very great interest to what you had to say about this concept of space to legislate freely. I thought that that placed the constitutional needs in quite a different perspective to what has been included in the legislation that we have dealt with. We had, in the Government of Wales Act 2006, Schedule 7, and now we have a Schedule 7A and 7B. First of all, would you wish to compare the way in which these reservations have been set out in terms of the reservations as they are now and the conferral that existed in the past, and, perhaps, the difference between this—as a way of putting in place a settlement and defining the competence of the National Assembly for Wales—the difference between this and the approach in the Northern Ireland Assembly and the Scottish Parliament, in terms of its impact?

[31] **Yr Athro Watkin**: Nid wyf yn siŵr a allaf wneud yr ail beth, oherwydd nid wyf yn arbenigwr ar gyfraith yr Alban a Gogledd Iwerddon. Ond yr hyn rwy'n ofni, wrth inni symud o'r setliad o dan Ddeddf 2006—o'r pwerau sydd wedi cael eu gosod at setliad o bwerau sydd wedi cael eu cadw yn ôl—yw'r ffaith nad yw'r prawf wedi newid.

Professor Watkin: I'm not sure if I could actually answer your second question, because I'm no expert in Northern Irish or Scottish law. But what I fear, as we move from the settlement under the Government of Wales Act 2006—from conferred powers towards a reserved-powers model as is set out here—is the fact that the test hasn't changed.

[32] Felly, o'r blaen, roeddech yn gofyn y cwestiwn, '*Does this relate to*—?', beth bynnag oedd y pwnc. Os oedd y ddarpariaeth yn cysylltu â'r mater, roeddech y tu fewn i

Therefore, in the past, you would ask the question, 'Does this relate to—?', whatever the subject was. If the provision did relate to that particular subject, then you were within

gymhwysedd. Yn y Bil drafft a'r Bil newydd, y cwestiwn yw: a yw'r ddarpariaeth yn y Bil yn y Cynulliad, yn defnyddio'r un prawf, '*Does it relate to*—?', yn awr yn rhywbeth sydd wedi cael ei gadw'n ôl? Mae nifer o'r pethau sydd wedi cael eu cadw'n ôl—roedden nhw'n eithriadau o dan yr hen setliad—wel, y setliad presennol.

competence. In the draft Bill and the new Bill, the question is: whether the provision of an Assembly Bill, using the same test, 'Does it relate to—?', is now in relation to something that is reserved. A number of the things that are reserved were exceptions under the old settlement—or rather, under the current settlement.

[33] Ond, ynglŷn â'r eithriadau, nid y prawf '*relates to*' a oedd yn gweithio, ond y prawf '*falls within*', nad oedd cweit mor gyfyng â'r cwestiwn sy'n codi nawr. Felly, wrth newid yr eithriadau i faterion sy'n cael eu cadw'n ôl, rydych yn ehangu'r materion yna. Ac, wrth gwrs, felly, yn colli cymhwysedd.

But, in terms of those exceptions, it's not the test of 'relates to' that was relevant, but the test of 'falls within', which was not quite as restrictive as the question that's currently posed. So, in changing the exceptions to reservations, you are broadening the range of those matters. And, therefore, losing competence.

[34] Gan gymryd yr enghraifft o amaethyddiaeth, os ydych yn gofyn y cwestiwn am y Bil, sef yr *Agricultural Sector (Wales) Bill* a'i ddarpariaeth—'*Did they relate to agriculture*?'—yr ateb i'r cwestiwn oedd: roedden nhw. Roedd y Twrnai Cyffredinol yn dadlau, *'they relate to employment*'.

To take the example of agriculture, if you were to ask the question about the Agricultural Sector (Wales) Bill and its provisions—'Did they relate to agriculture?'—well, yes, they did. The Attorney-General argued, 'they relate to employment'.

[35] Nawr, o dan y Bil newydd, fe fydd y gyfraith ynglŷn â *employment* yn cael ei chadw yn ôl, ond ni fydd amaethyddiaeth yn dangos ar wyneb y Ddeddf. Fel canlyniad, byddwch yn gofyn y cwestiwn: '*Does this relate to employment*?' Yr ateb yw 'ydy'. Felly, rydych wedi colli cymhwysedd. Rydych y tu fas i'r cymhwysedd ar unwaith.

Well, under the new Bill, the law on employment will be reserved, but agriculture won't appear on the face of the legislation. As a result of that, you will ask the question: 'Does this relate to employment?' The conclusion will be 'yes'. Therefore, you have lost competence. You are outside competence immediately.

[36] Dyna'r fath o broblem sy'n codi, rwy'n credu, wrth newid o'r setliad o bwerau sydd wedi cael eu gosod i bwerau sydd wedi cael eu cadw yn ôl, os ydych yn cadw'r un prawf. Y broblem yw, wrth gwrs, dyna'r prawf sydd yn bodoli yn yr Alban ac yng Ngogledd Iwerddon. Felly, os ydych yn defnyddio prawf ar wahân i Gymru, efallai y byddwch yn rhoi mwy o bwerau deddfu i Gymru na sydd gan yr Alban a Gogledd Iwerddon.

That's the kind of problem that emerges, I think, in moving from the conferred-powers settlement to a reserved-powers model, if you stick to that same test. The problem is, of course, that that is the test that exists in Scotland and Northern Ireland. Therefore, if you use a separate test for Wales, perhaps you will be giving more powers to Wales than either Scotland or Northern Ireland currently has.

[37] Felly, yn wleidyddol, mae'r peth yn anodd iawn. Ond, i fi, heb os nac oni bai, wrth newid o'r un math o setliad i'r llall—a dim ond newid yr eithriadau i mewn i faterion sydd yn cael eu cadw yn ôl—mae'n anochel eich bod yn colli cymhwysedd.

So, politically, it's extremely difficult. But, for me, there is no doubt about the fact that the change from one settlement to another—and only changing the exceptions into reservations—is inevitably going to mean that you are going to lose competence

[38] **Yr Arglwydd Elis-Thomas**: Nid wyf eisiau gofyn ichi ddweud unrhyw beth—ac ni fyddech yn dweud, wrth gwrs—unrhyw beth na fyddech am ei ddweud, ond mae wedi fy nharo i, ers imi astudio'r Bil newydd yma, bod hwn wedi'i ysgrifennu yn bennaf er mwyn goresgyn y sefyllfa a ddigwyddodd yn y Goruchaf Lys gyda'r holl gwestiwn yma o gymhwysedd y Bil taliadau amaethyddol. Oherwydd drwy y math o ddehongliad barnwrol a gawsom ni gan y Goruchaf Lys, fe ddiffiniwyd cymhwysedd datganoledig y lle hwn a grymoedd Gweinidogion Cymru mewn modd ehangach, efallai, nag oedd rhai pobl—ac, yn amlwg,

Lord Elis-Thomas: I don't want to ask you to say anything—and you wouldn't, of course—that you wouldn't wish to say publicly—but it has struck me, since I started studying this new Bill, that this has been drafted mainly in order to overcome the situation that occurred in the Supreme Court in terms of this whole question of the competence of the agricultural sector Bill. Because through the kind of judicial decision that we received from the Supreme Court, the devolved competence of this place and the powers of Welsh Ministers was defined in a broader way than some people—and, clearly, the UK Government, given the stance

Llywodraeth y Deyrnas Unedig, o ystyried y safbwynt a gymerwyd ganddyn nhw yn y Goruchaf Lys—yn ei ddymuno. Ac felly, drwy ba resymeg cyfansoddiadol y mae rhywun yn disgwyl gweld Senedd y Deyrnas Unedig yn ceisio cau bylchau—neu Llywodraeth y Deyrnas Unedig yn gofyn i Senedd y Deyrnas Unedig—gau bylchau mewn ffordd nad oes a wnelo fo ddim ag eglurder cyfansoddiadol, ond mae a wnelo fo â chyfyngiad ar ddatblygiad datganoli? Ydy hynny yn rhy gignoeth?

that they took in the Supreme Court—wished to see. And therefore, what constitutional rationale can one use in expecting to see the UK Parliament trying to actually close gaps—or the UK Government asking the UK Parliament—to actually close those gaps in a way that has nothing to do with constitutional clarity, but does relate to a restriction on the development of devolution? Is that too close to the bone?

[39] **Yr Athro Watkin:** Rwy'n credu fod y sefyllfa yn agored i'r dehongliad yna. Wrth edrych nôl, rwy'n credu, ar y tro diwethaf roeddwn yma yn rhoi tystiolaeth i'r pwyllgor yma ar y cyd gyda Phwyllgor Materion Cymreig San Steffan, roedd yn amlwg bod rhai Aelodau San Steffan yn credu mewn rhyw ffordd neu'i gilydd bod y Goruchaf Lys wedi camddeall yr hyn roedd Senedd San Steffan ei eisiau yn Neddf 2006. Mae hynny i mi yn ffordd anghywir o edrych ar y sefyllfa, oherwydd mae'r Goruchaf Lys yn dehongli'r Ddeddf fel y mae. Ac, wrth gwrs, nid yw barn Aelodau Seneddol heddiw yn berthnasol o gwbl i'r hyn yr oedd y Senedd yn ei fwriadu yn 2006. Mae'r Ddeddf yn dechrau gyda'r geiriau:

Professor Watkin: I think the situation is open to that interpretation. In looking back at my last visit, when I gave evidence to this committee jointly, when you met with the Welsh Affairs Committee in Westminster, it was clear that some Members from Westminster believed that, in one way or another, the Supreme Court had misinterpreted what the Westminster Parliament had anticipated in the 2006 Act. For me, that's the wrong way of looking at the situation, because the Supreme Court actually interprets the Act as it is. And, of course, the views of Members of Parliament today aren't in any way relevant to what parliament had intended in 2006. The Act starts with the words:

[40] 'Be it enacted...in this present Parliament assembled...'

[41] Nid yw barn Senedd mwy diweddar o unrhyw werth, mewn

Therefore, the views of a later Parliament are of no value, in a way,

ffordd, oherwydd mae'r Aelodau wedi newid ac mae'r Llywodraeth wedi newid. Ond beth mae'r Goruchaf Lys a llysoedd eraill yn chwilio amdano yw bwriad y Senedd ar y pryd. Ond, wrth gwrs, mae'n agored i'r Senedd i ailddeddfu os nad ydynt yn dymuno'r hyn sydd wedi digwydd, ond os ydych chi'n gwneud hynny, mae'n rhaid bod yn onest a dweud eich bod chi yn cymryd nôl bethau a oedd wedi cael eu rhoi.

because the membership has changed and the Government has changed. But what the Supreme Court and other courts are seeking is the intention of Parliament at the point that it legislated. But, of course, it is open for Parliament to re-legislate if they are not content with past legislation, but if you do that, you have to be honest and say that you are taking back powers that had been conferred.

[42] **Yr Arglwydd Elis-Thomas**: Ond yr hyn sy'n anodd yw pan fo Senedd sydd gyda'r grym i wneud hynny yn defnyddio hynny i gyfyngu ar ddatblygiad cyfansoddiadol Senedd arall. Mae hynny, yn fy marn i, yn mynd i dir cyfansoddiadol dyrys iawn, oherwydd mae o yn creu sefyllfa—a dyma'r ail gwestiwn—lle gellid dadlau, ar ôl i etholwyr Cymru yn y refferendwm diweddaraf bleidleisio ar yr egwyddor o ddatganoli deddfwriaethol, a hynny gyda mwyafrif sylweddol, bod Senedd bresennol y Deyrnas Unedig—ac felly'r Llywodraeth bresennol drwy'r Senedd bresennol—yn cymryd arni'i hun i weithredu mewn ffordd sydd yn groes i ddymuniad pobl Cymru mewn refferendwm.

Lord Elis-Thomas: But what is difficult is when a Parliament that has the power to do that uses that to restrict the constitutional development of another Parliament or Assembly. That, in my view, goes into very complex constitutional areas, because it does create a situation—and this is the second question—where one could argue that, after the Welsh electorate in the latest referendum voted on the principle of legislative devolution, and did so with a significant majority, that the current UK Parliament—and the current Government through the Parliament—is taking it upon itself to act in a way that is contrary to the wishes of the people of Wales as expressed in a referendum.

[43] **Yr Athro Watkin**: Mae'n agored i'r dehongliad hwnnw.

Professor Watkin: It's open to that interpretation.

[44] **Yr Arglwydd Elis-Thomas**: Diolch. Ac a gaf i ofyn un cwestiwn arall? A oes yna ryw feysydd eraill yn arbennig yn y cymalau cadw yr ydych

Lord Elis-Thomas: Thank you. And may I ask one further question? Are there any other areas particularly in the reservations that you believe to

chi yn eu hystyried yn gam yn ôl annisgwyl o ran cymhwysedd? Rwy'n meddwl am gyfraith gymdeithasol, er enghraifft, ynglŷn â mabwysiadu.

be an unexpected rollback of competence? I am thinking, for example, of social policy in terms of adoption.

[45] **Yr Athro Watkin**: Ie, mae rhywbeth rhyfeddol wedi digwydd yna yn fy marn i.

Professor Watkin: Yes, something quite surprising has happened there in my view.

[46] **Yr Arglwydd Elis-Thomas**: Dyna rydym ni yn ei feddwl, rwy'n credu.

Lord Elis-Thomas: That is what we think, I believe.

[47] **Yr Athro Watkin**: Os ydych chi'n edrych ar y Bil drafft, rydych chi'n gweld bod yna—os gallaf ei ffeindio yma—*section N8,* '*Intercountry adoption'*. Mae'r materion yna—214 a 215—'*Intercountry adoption*', ac wedyn

Professor Watkin: If you look at the draft Bill, then you will see—I wonder if I can find it here—that there is a section N8, 'Intercountry adoption'. There are those matters—214 and 215—'Intercountry adoption', and then

[48] 'Functions of the Central Authority under the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.'

16:00

[49] Fel materion sydd wedi cael eu cadw yn ôl, mae'r rheini yn diflannu o'r Bil newydd. Felly, nid ydyn nhw yna. Ond pan ydych chi'n edrych ar—os gallaf ei ffeindio fe'n glou—*section* L12 nawr, yn y Bil newydd, mae hynny wedi cael ei ehangu, ond mae yna eithriad, a'r eithriad yw: '*Adoption agencies and their functions*'. Mae hynny ar dudalen 70 o'r Bil newydd. Ond, er bod '*Adoption agencies and their functions*' yn eithriad yn y Bil drafft hefyd, mae'r Bil newydd wedi ychwanegu

As reservations, these will disappear from the new Bill. So, they're not included as reservations. But when you look at—let me just try and find this again—section L12 of the new Bill, then that has been expanded, but there is an exception, and the exception is 'Adoption agencies and their functions'. That is on page 70 of the new Bill. But, although 'Adoption agencies and their functions' is an exception in the draft Bill too, the new Bill has added

[50] ‘other than functions of the Central Authority under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.’

[51] Mae’r materion a oedd wedi cael eu cadw yn ôl wedi diflannu, ond maen nhw wedi dod i mewn yma, fel rhywbeth y mae’r papur o Dŷ’r Cyffredin yn ei alw’n ‘*carve out*’ o’r eithriad sydd yna. Felly, nid yw’r gofod yn fwy, er bod y nifer o faterion sydd wedi cael eu rhestru yn llai. Mae hynny’n digwydd mwy nag unwaith yn y Bil newydd. Os ewch chi trwy’r Bil, rydych yn gweld, mwy nag unwaith, mai beth sydd wedi digwydd yw’r ffaith bod y rhestr o faterion wedi cael ei lleihau, ond mewn modd sy’n sicrhau nad oes yna ddim mwy o le i ddeddfu.

Therefore, the issues that were reserved have disappeared, but they have been included here as what the House of Commons paper would describe as a ‘carve out’ of the exception. Therefore, the space is no greater, although the number of reservations listed is reduced. That happens more than once in the new Bill. If you actually go through the Bill, you will see that, more than once, what has happened is that the list of reservations has been reduced or curtailed, but in a way that ensures that there is no greater space to legislate.

[52] Yr enghraifft orau, efallai, yw adran G, lle yr oedd yna bum adran, a bellach dim ond un sydd, ond yr adrannau oedd: ‘*G1 Architects*’, ‘*G2 Health Professions*’, ‘*G3 Auditors*’; pan edrychwch nawr, dim ond G1 sydd yna, ac G1 yw: ‘*Architects, auditors, health professionals*’. Maen nhw i gyd o dan yr un pennawd. Felly, nid ydych wedi cael mwy o bwerau o gwbl; yr unig beth maen nhw wedi ei wneud yw lleihau’r rhestr—ac mae hynny’n digwydd nifer o weithiau.

I think the best example of this, perhaps, is section G, where there were five sections, but now there is just one, but those sections were, ‘G1 Architects’, ‘G2 Health Professions’, ‘G3 Auditors’; you now only have G1, and G1 is ‘Architects, auditors, health professionals’. They’re all included under the same heading. So, you haven’t enhanced your powers at all, all they’ve done is to reduce the number of reservations on the list—and that happens on a number of occasions.

[53] **Yr Arglwydd Elis-Thomas:** Ond onid ydy hyn efallai’n cadarnhau beth yr oeddem ni’n ei drafod ychydig funudau yn ôl, sef bod yr holl

Lord Elis-Thomas: But doesn’t this therefore confirm what we were discussing just a few moments ago, namely that the whole exercise has

ymarfer wedi bod yn gosod cymhwysedd o dan fwy o bwysau—gwell imi beidio â dweud 'gosod' achos ei fod yn cymhlethu pethau, ond yn cyfyngu cymhwysedd dan gochl y syniad bod mynd i faterion sydd wedi eu cadw yn ôl yn rhoi mwy o rym na materion wedi eu gosod?

been placing competence under greater pressure, or has restricted competence under the cloak of this concept that moving towards a reserved-powers model does provide greater power than a conferred-powers model?

[54] **Yr Athro Watkin:** Yn ei hun, byddwn; dyna'r cwestiwn. Y cynnwys sydd yn bwysig. I fi, mae hwn yn-. Rwy'n ofni gweld rhestr o'r fath yma wrth i bobl gredu y buasai symud ymlaen yn ei hun yn gwneud pethau llawer yn well. Rwy'n ofni mai hwn fyddai'r canlyniad. Rwy'n ofni wedyn bod y ffaith bod y materion eraill am gael caniatâd Gweinidogion y Goron ac am y profion angenrheidrwydd wedi tynnu sylw o'r ffaith mai'r peth mwyaf pwysig oedd sicrhau y gofod oedd gan y Cynulliad i ddeddfu. A dyma le rwy'n siomedig ynglŷn â'r Bil newydd: nid wyf yn credu bod y broblem yna eto wedi cael ei datrys.

Professor Watkin: Well, yes; that's the question. It's the content that's important. To me, this is—. I do fear seeing a list such as this as people believe, as we move forward, that this of itself is going to improve the situation greatly. I fear that this would be the outcome. I then fear that the other issues where ministerial consents are required and where the necessity test was required has actually detracted attention from the fact that the most important thing was to secure that space for the Assembly to legislate. This is where I'm disappointed about the new Bill: I don't think that that problem has yet been resolved.

[55] **David Melding:** Thank you. I'll ask Huw Irranca-Davies to move us on to the next range of questions we want to put to you.

[56] **Huw Irranca-Davies:** Thank you, Chair. I just wonder, Chair, if I could just dwell on that for a moment. That was extremely helpful, that exchange there with my esteemed colleague beside me. It seems to me that it's not so much that there is a difficulty then with the principle of a reserved-powers model, but the content and the exceptions and the detail is paramount. Let me just put it to you: it seems that one of the useful things that our engagement in this as a committee, but also the engagement between the Secretary of State for Wales's office and the First Minister's office from here, over the summer until it gets back up to the other place at the other end of the M4, should be on engaging on this area and making sure that there is no

roll-back, from our perspective, this side of the M4, but also from, I suspect, that of the people of Wales—that they should be proofed, in some way, against roll-back. Because I noticed you said in those remarks that, in moving to a reserved model, you lose competence. Well, only if the content and the detail are wrong.

[57] **Professor Watkin**: Yes.

[58] **Huw Irranca-Davies**: Okay, thank you for that. I just wanted to ask you one other very quick one before I move on with my questions, and it comes from the earlier exchanges, which is this question you raised about the—I think your words were the new legal reality that recognises the need for jurisdictional development, and you talked about where law for Wales is made: it could be at the other end of the M4, or it could be down here. Do you think it's immensely difficult to craft a clause that could express the collection of all the Welsh law in terms of that distinct—? Is it particularly difficult to express in statute, that no matter where that legislation is made, it falls into a distinct jurisdiction in Wales?

[59] **Professor Watkin**: It's a question of perspective and focus. The current suggested 92B focuses on where the law is made. The focus that's needed is focusing where it applies.

[60] **Huw Irranca-Davies**: Right. As simple as that.

[61] **Professor Watkin**: I think, basically, that's what it comes down to.

[62] **Huw Irranca-Davies**: Thank you. To move on to the issues I wanted to raise with you, when you've appeared previously during the scrutiny on the draft Wales Bill, you did express strong concerns about the so-called 'necessity tests', and you touched on these in your opening remarks. You mentioned that, in terms of private and criminal law, it seemed that you have now some comfort. Are you totally comfortable now that this has addressed your concerns about the Bill acting as a constraint on the Assembly as a legislature?

[63] **Professor Watkin**: Not totally comfortable, no. I think the changes that have been made with regard to criminal law have clearly identified what are to be the reserved offences, if I can put it that way, and made it clear where the Assembly then is free to legislate. I think that's a massive improvement upon what was suggested with regard to criminal law in the earlier draft. I'm

less comfortable with regard to private law because it lacks that specificity. It still uses terms that are widely understood but are not terms of art, such as 'the law of contract' and 'the law of property'. Now, if one asks, 'What is the law of property?', is one talking about the law of landlord and tenant, which is something upon which the Assembly clearly has legislated? There are areas in which it's very difficult to say how you would categorise on some of these boundaries. That lack of specificity will leave a lot to the judgment and judgment calls of individuals in the future with regard to whether or not the boundary has been passed. And it's that lack of certainty, I think, that is the enemy of the legislative freedom that a legislative body needs to have.

[64] But I think you could resolve that quite easily, to a certain extent, by making a jurisdiction arrangement that would allow for some degree of variation, because the reality is that, across the common law world, where there has been independence given to countries, you haven't had the sort of divergence with regard to these areas of the law that has made it impossible for there to be interchange of judges, for appeals to come to this country from other parts of the Commonwealth to be taken by judges from England and Wales. It's not made it impossible for students from across the Commonwealth to come to study law here and go back and take their qualifications with them. Why it should be thought that Wales will act in a way that is entirely different and create a division that will make it impossible for there to be interchange of that nature, I don't know. But it strikes me as flying in the face of the historical reality here, rather than the legal reality.

[65] **Huw Irranca-Davies:** Okay, thank you for that. I'm going to ask you a question but I think your comments already have indicated what the answer might be, but it's in relation to the Secretary of State. At Second Reading, his comments in respect of a separate legal jurisdiction—let me just read you what he said. He looked at the changes that have been made in terms of—he said he'd listened to the concerns about a separate legal jurisdiction in pre-legislative scrutiny. He said:

[66] 'The necessity test was believed to set too high a bar, and calls were made for a lower threshold. I have gone further, however, and removed the test entirely when the Assembly modifies the civil and criminal law for devolved purposes.'

[67] And he says:

[68] 'As a consequence, many of the arguments for a separate legal

jurisdiction for Wales should have fallen away.'

[69] Do you agree?

[70] **Professor Watkin:** No, I don't agree, and going back to, again, evidence I gave to the jurisdiction inquiry in this committee a few years ago; that is, I think the case for distinct jurisdictional arrangements to be made does not rest solely on the law making of the National Assembly and the Welsh Ministers. I think there are three bases, three things, that not just justify but necessitate some moving forward with regard to the development of the legal system as we know it. The first of those things is that, regardless of whether the law applies in Wales only or is common to England and Wales, it is only in Wales that parties before the courts have the right to use the Welsh language. That has already created a difference between the administration of justice in Wales and the administration of justice in England because there is no such right in England. That isn't to do with devolution and devolved law. That's just to do with the general law of England and Wales.

[71] You've now got to add to that the fact that there is a distinct body of law that applies only in Wales and a distinct body of law that applies only in England. So, the notion that it's all one law is a fiction. It's basically one of the last long line of legal fictions. I said 'last'—it probably isn't the last. It's the most recent of a long line of legal fictions that are meant to support various claims about jurisdiction. Bridging those two is the fact that the law that is made for Wales only by the Welsh Ministers and the Assembly is made bilingually, and it's meant to be, when made bilingually, of equal standing. Both versions of equal standing for all purposes. All purposes include the application of those laws by the courts and their interpretation by the courts. That also calls for some distinct arrangement. So, the fact that you may have solved the question of the necessity tests with regard to Assembly legislation does not touch on what I regard as the other two areas, which are germane to the call for distinct jurisdictional arrangements. So, therefore, I wouldn't, for a moment, accept that it had fallen away. It may have solved one aspect of it to a certain extent, but that is really only resisting a direction in which, for other reasons, there is full justification to move.

[72] **Huw Irranca-Davies:** Thank you. That's very helpful and very clear as well. Could I turn to a separate issue, which is clause 10 and the justice impact assessments? As you know, there's been a lot of concern that these justice impact assessments would actually place restrictions—in effect, a

veto—they would provide a veto for the UK Government on matters that are rightly devolved to the Assembly. But the Secretary of State was at great pains in the Second Reading to give assurance when this was pushed in that this wasn't a valid concern. He said:

[73] 'It is a matter for Assembly Members, and the requirement is that the Standing Orders include a request for a justice impact assessment. No, there will be no veto arising out of the justice impact assessment.'

[74] Are you completely reassured?

[75] **Professor Watkin:** Yes.

[76] **Huw Irranca-Davies:** You are. Okay.

[77] **Professor Watkin:** I think so. I was worried that the justice impact assessments would be used as a vehicle for Secretary of State intervention if they had not been properly conducted.

[78] **Huw Irranca-Davies:** Right.

[79] **Professor Watkin:** I was therefore very heartened to hear the Secretary of State make that statement at the despatch box in the debate. I'm left at a slight loss as to what the importance of the justice impact assessments therefore will be, but I don't see that it is now open for a veto power to be used, given what the Secretary of State has said on the back of the justice impact assessments.

[80] **Huw Irranca-Davies:** Okay. My final question, Chair, would be in relation to the Wales public authority concept within the Bill, and, again, in your opening remarks you seem to be more comforted in respect of the clarification that is there now. Could you just expand on that a little bit?

16:15

[81] **Professor Watkin:** Yes. The draft Bill referred to public authorities and there was considerable concern that it was very difficult to define and recognise what these public authorities would be. What we now have in the Bill is a concept of a Welsh public authority that is accompanied by both a definition and a list of bodies on the basis that the bodies that are listed are covered even if they don't quite fit into the definition. I think, at the previous

meeting here, I thought you needed, as I said, a test—that is, a definition that would give you complete conceptual certainty with regard to what were the bodies concerned, and either they were in or out. Now you have got this sort of long stop, which is that, 'Well, if the definition isn't quite working for all cases, you've got the list.' And the list is not one that is closed; it's a list that can be added to. It's added to by Order in Council, which would be through the Assembly and Parliament. That's where I begin to get a little bit worried, because of course it looks very much like the old LCO procedure. It's something that is made by Order in Council, having been approved by both the Assembly and by both Houses of Parliament, and the question arises: if the Assembly wants something added to the list, who have they got to persuade to lay the statutory instrument at the other end? What changes would be asked, perhaps? Although clearly here, with bodies, it's whether they accept them or not, isn't it? So, it leaves a lot to depend on the attitude of the parties who will have to work the system, and that's where my worry would come in here, I think. To put it most kindly, one would not say, regardless of which political party was in power, that relations had been smooth between Cardiff and Westminster over the last 10 years, and I worry a little about what that procedure might involve. But I think it is definitely a step forward. It is a significant step forward in my view.

[82] **Huw Irranca-Davies:** Thank you.

[83] **David Melding:** And Dafydd, will you take us through the next bit on ministerial consent?

[84] **Yr Arglwydd Elis-Thomas:** Ie. A gaf i ofyn beth yw'ch ymateb chi i'r ffaith bod y cyfyngiad cyffredinol ar geisio cydsyniadau gweinidogol wedi'i ddileu yn y Bil presennol, gyda golwg hefyd ar yr hyn a ddywedodd Prif Weinidog Cymru, sef er ei fod yn croesawu'r newid yma, y bydd hyn hefyd yn creu cymhlethdod, ac nad ydy eto'n glir, yn ei olwg o, a fydd y canlyniadau i hyn yn dderbyniol ac yn ymarferol?

Lord Elis-Thomas: Yes. May I ask what your response is to the fact that the general restriction on seeking ministerial consents has been removed from the current Bill, with a view also on the comments made by the First Minister, that although he welcomes this change, this too will create some confusion, and that it is not yet clear in his mind as to whether the outcomes of this will be either acceptable or practical?

[85] **Yr Athro Watkin:** Mae'n anodd iawn i ddweud. Rwy'n credu bod

Professor Watkin: It's very difficult to say. I think things have moved on

pethau wedi symud ymlaen. Mae pethau yn well. Mae'r ffaith nad oes eisiau cael caniatâd i ddeddfu ynglŷn â phwerau Gweinidogion y Goron, a dim ond ymgynghori â nhw, yn llawer yn well, wrth gwrs. Mae yna angen caniatâd o hyd, os ydy'r pŵer yn un sydd yn—rwy'n credu mai'r geiriau yw '*qualified devolution function*'. Felly, mae llawer yn dibynnu ar beth fydd y pwerau a fydd wedi cael eu cadw gan Weinidogion y Goron.

and things are improved. The fact that there is no need to have consent to legislate on the powers of Ministers of the Crown, but just to consult with them, is much improved, of course. You would still need consent if that power is a qualified devolution function—I think that's the wording. So, much depends upon the powers reserved to Ministers of the Crown.

[86] Rwy'n deall y bydd yna Orchymyn yn trosglwyddo mwy o bwerau o San Steffan, o Weinidogion y Goron, i Weinidogion Cymru, a chyn i ni wybod maint y trosglwyddiad yna, mae'n anodd iawn i fod yn sicr pa mor bell rydym wedi symud ymlaen. Ar ôl dweud hynny, rwyf yn credu bod hwn yn gam pwysig ymlaen oherwydd dim ond ynglŷn â'r swyddogaethau sydd yn cael eu disgrifio fel '*concurrent*' neu '*joint*' y mae angen cael caniatâd. Yn fy marn i, pan fydd swyddogaeth wedi cael ei rhestru yn y modd yna, fel un sydd yn cael ei rhannu rhwng Cymru a Lloegr, mae yna fwy neu lai egwyddor dan y penderfyniad yna, ac felly nid hap yw e. Yn sefyllfa nifer fawr, rwy'n credu, o'r swyddogaethau sydd wedi bod hyd yn hyn, mwy neu lai hap yw'r ffaith eu bod nhw wedi cael eu cadw yn San Steffan ac nid wedi cael eu trosglwyddo i Gymru. Ond mae popeth nawr, rwy'n credu, yn dibynnu ar y nifer o bwerau sy'n mynd i gael eu trosglwyddo. Os rwy'n deall yn iawn, mae Ysgrifennydd

As I understand it, there will be an Order transferring more powers from Westminster, from Ministers of the Crown, to Welsh Ministers, and until we know the scale of that transfer, it's very difficult to know how far we've moved forward in this area. But having said that, I do think that this is an important step forward because it's only in relation to functions that are described as 'concurrent' or 'joint' that one needs consent. In my view, when a function is listed in that way, as one that is shared between England and Wales, then there is more or less a principle underpinning that decision, so it doesn't happen by accident. In the situation, I think, of many of the functions that have existed up until now, it is more or less by accident that they've been retained in Westminster and not transferred to Wales. But everything now, I think, depends on the number of powers that are to be transferred. If I understand correctly, then the Secretary of State has said that they are preparing an Order to transfer a

Gwladol Cymru wedi dweud eu bod nhw'n paratoi Gorchymyn i drosglwyddo nifer o swyddogaethau. Ac os yw hynny'n wir, rwy'n credu bydd y cam ymlaen yn un eithaf sylweddol.

number of functions. And if that is the case, then I do think the step forward taken will be quite significant.

[87] **Yr Arglwydd Elis-Thomas:** Mae yna un agwedd arall ar Ran 4 o'r Bil. Rwy'n edrych ar dudalennau 38 a 39 a'r pwerau yng nghymal 51, lle mae yna bŵer i'r Ysgrifennydd Gwladol i ddiwygio, diddymu, dirymu neu addasu deddfiadau mewn deddfwriaeth sylfaenol, yn ymestyn i Ddeddfau a Mesurau Cynulliad. Mewn amgylchiadau felly, mi fydd yna angen i ddau dŷ Senedd y Deyrnas Unedig i gymeradwyo'r newidiadau yma drwy offeryn statudol, ond nid y Cynulliad. Onid yw hynny'n ymddangos yn beth rhyfeddol; bod gan yr Ysgrifennydd Gwladol unwaith eto yr hawl i ymyrryd yn ein cyfansoddiad ni heb ein caniatâd ni?

Lord Elis-Thomas: There is one other aspect of Part 4 of the Bill. I'm looking at pages 38 and 39, and the powers in clause 51, where there is a power for the Secretary of State to amend, repeal, revoke or otherwise modify enactments contained in primary legislation, extending to Assembly Acts and Measures. In such circumstances, there would be a need for both houses of the Parliament of the United Kingdom to approve these changes by statutory instrument, but not the National Assembly. Doesn't that appear to be astonishing; that the Secretary of State once again has the right to intervene in our constitution without our consent?

[88] **Yr Athro Watkin:** Rwy'n credu, yn y dystiolaeth ysgrifenedig a anfonais i at y pwyllgor yma y tro diwethaf, wrth i chi graffu ar y Bil drafft, y dywedais i, yn fy marn i, nad oedd hwn yn dderbyniol, os oes Ysgrifennydd Gwladol y Deyrnas Unedig yn newid Deddfau a oedd wedi cael eu gwneud gan y Cynulliad. Yma ddylai fod y pŵer i ddweud bod hwn yn dderbyniol, nid yn San Steffan, oherwydd mae hwn, i ryw raddau, yn tanlinellu'r ffaith mai pwerau San Steffan o hyd—hyd yn oed mewn meysydd sydd wedi cael

Professor Watkin: I think, in the written evidence that I submitted to this committee last time, when you were scrutinising the draft Bill, I did say that, in my view, this was not acceptable, if a UK Secretary of State were to change legislation made by the Assembly. The power should actually sit here, not in Westminster, to say whether that is acceptable or not, because, to some extent, this highlights the fact that the powers of Westminster—even in devolved areas—are still superior in terms of their voice.

eu datganoli—yw'r llais mwyaf.

[89] **Yr Arglwydd Elis-Thomas:** Wel, fel un a aeth unwaith i ryfel drwy gyfrwng— wel, ddim yn union i ryfel, ond un a wrthwynebodd i Fesur gael ei gymeradwyo, neu i'r Gorchymyn gael ei gymeradwyo yn yr ail dŷ, oherwydd bod cychwyniad y Gorchymyn hwnnw i gael ei amseru gan yr Ysgrifennydd Gwladol, ac oherwydd bod yr egwyddor yn bwysig i mi nad oedd yr Ysgrifennydd Gwladol yn ymyrryd o gwbl mewn Mesurau, fel yr oeddent bryd hynny, neu mewn unrhyw fath o ddeddfwriaeth a oedd wedi cael ei gwneud yn y Cynulliad, gan fod hwnna yn wrth-ddatganoli mewn gwirionedd. Ond dyna fo.

Lord Elis-Thomas: Well, as one who once went to war; well, not exactly to war, but who did certainly oppose a Bill being approved, or an Order being approved in the second chamber, because the commencement of that Order was to be decided by the Secretary of State, and because the principle was important to me that the Secretary of State shouldn't intervene at all in Measures as they were at that time, or in any sort of legislation made by the Assembly, because that was anti-devolutionary in its essence. But there we are.

[90] Ac, wedyn, un cwestiwn olaf gen i. Rydym ni wedi clywed Ysgrifenyddion Gwladol, a gwleidyddion eraill hyd yn oed, yn sôn am ryw awydd bod pob Bil Cymru maen nhw yn ei gyflwyno yn cyfrannu tuag at, neu yn darparu setliad parhaol. Fel un sy'n credu nad oes setliad parhaol o unrhyw beth i gael yn y byd hwn, a yw'r athro yn meddwl bod y Bil yma mewn unrhyw ffordd yn werth ei ddisgrifio fel ymgais i ddarparu setliad mwy parhaol?

And, then, one final question from me. We've heard Secretaries of State, and other politicians, mentioning some desire to ensure that every Wales Bill that they bring forward does contribute towards or provides a stable and permanent settlement. As one who believes that there is no such thing as a permanent settlement to be had in this realm, does the professor believe that this Bill in any way can be described as an attempt to provide a more durable settlement?

[91] **Yr Athro Watkin:** Nid wyf yn gweld y setliad yma mewn unrhyw ffordd yn fwy parhaol na'r lleill. I ddechrau, nid yw'n delio â'r cwestiwn o awdurdodaeth, a tan i ni gyrraedd y

Professor Watkin: I don't see this settlement as being any more permanent than any of the others. First of all, it doesn't deal with the issue of jurisdiction, and until we

pwynt o gael ryw fath o awdurdodaeth arbennig ar gyfer Cymru, nid wyf yn credu bydd y broses o ddatganoli wedi dod i ben. Ond, eto, rwy'n teimlo bod y modd y mae'r materion sy'n cael eu cadw'n ôl yn cael eu delio â nhw yn y Bil yma eto yn rhywbeth sydd yn sefyllfa dros dro, nid yn sefyllfa parhaol mewn unrhyw ffordd. Efallai bydd e'n tawelu pethau am gyfnod, ond nid wyf yn ei weld e'n parhau am fwy na pedair, pum mlynedd.

reach the point of having some sort of jurisdiction for Wales, then I don't think that the process of devolution will have been concluded. But, again, I do feel that the way in which the matters that are to be reserved are dealt with in this particular Bill is again something that can only be a temporary solution rather than a permanent one. It may quieten things down for a time, but I can't see it remaining in place for more than four or five years.

[92] **David Melding**: Thank you. I wonder if I could—. It's probably for my own benefit rather than the committee's, but on the difficult issue of a necessity test, which, of course, dominated a lot of the discussion on the draft Bill, we seem to have made some advance, but we still have this issue of reserved matters, and matters that relate specifically to English law, but we need to modify in certain ways to make our powers effective, limited probably, the number of instances, but still could be significant. Now, the necessity test, though, for those two areas, applies in Scotland. Why is it more restrictive to us to have this Scottish test in our case? Is it—? Well, I don't want to lead you. Why is it more troublesome, potentially?

[93] **Professor Watkin**: You're referring now to the two necessity tests that remain—

[94] **David Melding**: Yes.

[95] **Professor Watkin**: Basically the ones in relation to the law on reserved matters and the cross-border issues.

[96] **David Melding**: Yes.

[97] **Professor Watkin**: I think it goes back, in a way, to the point that was made earlier that the greater the number of reserved matters, the greater the problem would be; the smaller the number of reserved matters, the smaller the problem would be. Of course, with Scotland, you're dealing with no cross-over into private law and criminal law because those are Scottish—

[98] **David Melding:** So, it's because Scotland is a separate jurisdiction. And Northern Ireland as well, presumably, would have that characteristic in not causing such trouble in these areas. It's simply because there's a clear division already and there isn't this sort of overspill.

[99] **Professor Watkin:** I think that's part of it, but I think it's also significant that the area of reservation is not as great. I think the greater the area of reservation, the greater that problem will be because you are going to bump up against that boundary and need to make changes to the law on reserved matters in order to get your devolved legislation through.

[100] **David Melding:** I have the final question. It just relates to the transitional arrangements set out in Schedule 6 and whether there are potential problems here because, as I read it, it means that Assembly Bills that have not completed Stage 1 by the time the Wales Bill is implemented would fall.

[101] **Professor Watkin:** I can't shed any light on why the line has been drawn where it has been drawn. It seems rather odd that, if a Bill has been introduced under an existing head of competence, it cannot continue on its way and why, if it hasn't reached agreement on general principles at Stage 1, it should be required that it should fall at that time. I'm also slightly worried by the notion that it should be necessary, because the only reason I can think of why you would want a Bill to fall when you move to this new settlement is that it would no longer be within competence, and that would mean, in effect, that competence had been lost. If competence is being gained, there should be no problem in just proceeding. So, it does seem rather strange that you require Bills to fall.

[102] **David Melding:** Okay. I think you've made a very strong point there. Thomas, we've covered a lot of ground, but is there anything we've not touched on that you think is relevant for our considerations?

[103] **Professor Watkin:** No. The only thing I think I would add, which is a point that was made in the second report of the Silk commission, is that, looking back on the current settlement and how it worked during the fourth Assembly, much has been made of the fact that the restricted nature of the competence causes references to the Supreme Court. I think it's worth while reflecting that it's only in one or two of those references that there has really been doubt on the basis of competence. In the asbestos case, where there was a doubt at the time of the Bill's introduction, the Counsel General

referred it because of the continuing doubt at that point, and it's a doubt that split the Supreme Court three to two. And you can't really have a bigger doubt about where the line lies than when the judges of the Supreme Court divide down the middle, virtually, on it.

[104] In relation to the other two references, particularly the first, the Local Government Byelaws (Wales) Bill, really that should never have gone to the Supreme Court because it's a matter that could've been solved between the two Governments with greater goodwill. Something the same might be said with regard to the second, although the judgment of the Supreme Court in the Agricultural Sector (Wales) Bill did serve a very important function in clarifying—not changing; clarifying—where the boundary lay.

[105] The one lesson that comes from that, I think, is this: whether or not we avoid references to the Supreme Court in the future depends as much upon attitude as upon the actual statutory arrangements. It's unfortunately been the case, I think, over the last 50 years that, on both sides of the political divide, there have been Secretaries of State who are proponents of devolved law making and opponents of devolved law making. And a lot depends upon the attitude of individual holders of that office. Whatever settlement we have has got to be proofed against that sort of change of attitude—whether it's a change of political party or just a change of personality. It's important, I think, therefore, that the elements of discretion are, as far as possible, kept to an absolute minimum, because I think that is what will make for smooth working and avoidance of the expense and effort in trips to the Supreme Court.

[106] I suspect that, whatever the future of the Bill here now, if it gets through, one won't have many references to the Supreme Court from the London end for a few years, quite simply because the settlement has been presented as being one that is solving the problems, and to start sending cases to the Supreme Court would be an admission of failure. So, I think the likelihood is it's not going to happen. I'm not going to make any judgments about it, but the current Secretary of State has been here in the Assembly and, I think, knows how well the Assembly does its work.

[107] The other thing I feel strongly that needs to be borne in mind is that these issues about the reserved-powers list—the problems don't, I think, lie between the Welsh Government and the Assembly and the Wales Office. I think the Wales Office is caught in the middle. And, I think, until there is a full and proper negotiation between the two Governments, and between their

officials, I don't think we will see the sort of progress that we need to make. That's a point, I think, that was also made by—well, touched upon by—the Silk commission in its second report.

[108] **Lord Elis-Thomas:** Can I just ask—

[109] **David Melding:** Oh, this is in under the wire.

[110] **Lord Elis-Thomas:** —one question to follow that? Would you also, perhaps, give us a view as to whether there should be some inter-parliamentary forum to enable such discussion to take place between two Parliaments, so that the constitution of Wales is not merely an inter-governmental issue?

[111] **Professor Watkin:** First, can I express my astonishment—

[112] —eich bod yn siarad Saesneg â mi wrth ofyn y cwestiwn yna.

—that you are speaking to me in English and asking me that question in English.

[113] **Yr Arglwydd Elis-Thomas:** Mae'n ddrwg gen i. [*Anghlywadwy.*] Gofynnaf y cwestiwn yn gywir ac yn y Gymraeg.

Lord Elis-Thomas: I apologise. I will ask it in Welsh, if you prefer.

[114] **Yr Athro Watkin:** Na, fe wnaf ei ateb yn Saesneg, gan eich bod wedi'i ofyn yn Saesneg.

Professor Watkin: No, I will answer it in English, as you did ask it in English.

[115] I can only imagine that it would be beneficial if there were such discussions, particularly in situations where you don't have a majority Government.

[116] **David Melding:** Thank you. Professor Watkin, once again, we are greatly in your debt, and, as I said at the start, we're particularly grateful on this occasion because of the short notice we gave you and, again, you've come in and greatly aided our work. So, thank you very much indeed. You're the first witness, so I'm sure I express the view of all committee members that we feel that we've got off to a very good and clear start.

16:33

Papurau i'w Nodi
Papers to Note

[117] **David Melding:** Item 3 are papers to note. There's a letter from the Presiding Officer and a letter from the leader of the house to the Presiding Officer regarding the Wales Bill legislative consent, dated 20 June. Can we note those?

Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o'r Cyfarfod
Motion under Standing Order 17.42 to Resolve to Exclude the Public from the Meeting

Cynnig:	*Motion:*
bod y pwyllgor yn penderfynu gwahardd y cyhoedd o weddill y cyfarfod yn unol â Rheol Sefydlog 17.42(iv).	*that the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order 17.42(iv).*

Cynigiwyd y cynnig.
Motion moved.

[118] **David Melding:** I now move the relevant Standing Order that we conduct the rest of our meeting in private, unless any Member objects. I don't see any Member objecting, so please switch off the broadcasting equipment and clear the public gallery. Thank you, Thomas, so much.

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 16:33.
The public part of the meeting ended at 16:33.