



Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales

Cofnod y Trafodion The Record of Proceedings

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

The Constitutional and Legislative Affairs Committee

8/5/2017

Agenda'r Cyfarfod
Meeting Agenda

Trawsgrifiadau'r Pwyllgor
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Motion under Standing Order 17.42 to Resolve to Exclude the Public
from the Remainder of the Meeting

Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynnddi yn y pwyllgor. Yn ogystal, cynhwysir trawsgrifiad o'r cyfieithu ar y pryd. Lle mae cyfranwyr wedi darparu cywiriadau i'w tystiolaeth, nodir y rheini yn y trawsgrifiad.

The proceedings are reported in the language in which they were spoken in the committee. In addition, a transcription of the simultaneous interpretation is included. Where contributors have supplied corrections to their evidence, these are noted in the transcript.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Yr Arglwydd / Lord Dafydd Elis-Thomas Bywgraffiad Biography	Annibynnol Independent
Nathan Gill Bywgraffiad Biography	Annibynnol Independent
Huw Irranca-Davies Bywgraffiad Biography	Llafur (Cadeirydd y Pwyllgor) Labour (Committee Chair)
Dai Lloyd Bywgraffiad Biography	Plaid Cymru The Party of Wales
David Melding Bywgraffiad Biography	Ceidwadwyr Cymreig Welsh Conservatives

Eraill yn bresennol
Others in attendance

Mick Antoniw Bywgraffiad Biography	Aelod Cynulliad, Llafur, (Cwnsler Cyffredinol Cymru) Assembly Member, Labour, (Counsel General for Wales)
Diane Dunning	Llywodraeth Cymru Welsh Government
Claire Fife	Llywodraeth Cymru Welsh Government
Jeff Godfrey	Llywodraeth Cymru Welsh Government
Y Gwir Anrhydeddus yr Arglwydd/Rt. Hon. the Lord Peter Hain	
Dylan Hughes	Llywodraeth Cymru Welsh Government

Y Gwir Anrhydeddus/
Rt. Hon. Rhodri
Morgan

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

Gareth Howells	Cynghorydd Cyfreithiol Legal Adviser
Ruth Hatton	Dirprwy Glerc Deputy Clerk
Tanwen Summers	Ail Glerc Second Clerk
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Gareth Williams	Clerc Clerk

Dechreuodd y cyfarfod am 10:30.
The meeting began at 10:30.

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

[1] **Huw Irranca-Davies:** Good morning, everyone. Good morning, Lord Hain. We are at the opening session of quite a long session today for the Constitutional and Legislative Affairs Committee. We'll have a short break for lunch, but we're going to get under way this morning with evidence from Lord Hain. Before I do, if I could make the normal housekeeping announcements. If there is a fire alarm, then watch our staff for indicating the fire exits and the exit routes. Could you make sure that all your mobile devices are switched to silent? We have simultaneous translation in Welsh and English here. You don't need to press any buttons; it automatically picks you up. And the translation is on channel 1.

Ymchwiliad Llais Cryfach i Gymru: Sesiwn Dystiolaeth 7
A Stronger Voice for Wales Inquiry: Evidence Session 7

[2] **Huw Irranca-Davies:** So, Lord Hain, you're very welcome here today. Thank you for taking the time to come and meet with us and to discuss our inquiry on a stronger voice for Wales. We've had some fascinating evidence already from many of the people who've been involved at crucial stages of the devolution process. You, of course, have been there at significant moments as well. Perhaps I can begin with a very broad opening question, which is one that we've asked a few of the people who've given evidence to us, which is: when you look back, what do you consider has worked well in the process of devolution, and what do you think has worked not so well? And I'm sorry that's such a broad one, because we'll get into the detail, but when you look back—. Well, let's start. When it's worked well, what do you think has worked well, and why?

[3] **Lord Hain:** Well, first of all, thank you for inviting me. Diolch yn fawr i chi i gyd. Good morning—bore da.

[4] I think what's worked well is, at a time when people are demanding more control over their own lives, Wales has had its own legislature, has gained more powers, and I've been able to help that as Secretary of State for Wales, through the Government of Wales Act 2006. It has also established itself in the national psyche, the national culture, in a way that I think everybody's proud of, and I'm certainly proud. So, I think that's good. What hasn't worked as well is not so much the constitutional, governmental side of it, though there are issues there, but the delivery of services and the transformation of the economy, but then that's a much, much deeper issue than simply can be resolved by the substitution of Westminster rule for Wales rule—there are deep social and economic, historical reasons why that transformation has been much more difficult than we all had hoped.

[5] **Huw Irranca-Davies:** So, the transfer of powers from one place to the other is, of itself, of no great value in that, unless it delivers the outcomes. But your observation is, on the process of devolution, that it has been by and large a positive process.

[6] **Lord Hain:** Yes, a positive process, with some hiccups and some steps sideways and backwards as we continue moving forward inevitably, and there's a lot of room for, I think, improvement, which we will no doubt discuss. But I think we shouldn't underestimate the achievement of this past

nearly 20 years of devolution now; it has been incredible. And just imagine where Wales would have been if we didn't have our own Assembly. That's the question, I think. However critical people are—and we could all be, because nothing is perfect—where would we have been as a nation if the result of the 1997 referendum, so tantalisingly close, had been the other way? I think we would have been lagging far behind.

[7] **Huw Irranca-Davies:** You had involvement in the 'yes' campaign, but also as two periods as Secretary of State for Wales as well, and I think that's a good point perhaps to pass to my colleague Lord Dafydd Elis-Thomas, to take us on.

[8] **Yr Arglwydd Elis-Thomas:** Thank you very much, Chair, and a very warm welcome as a former Secretary of State on two occasions. I recall with some pleasure the discussions that we had during the period when you were responsible for rewriting the constitution of Wales, which became the Wales Act soon after that, and which set a foundation for all of our activities after the 2007 election. What was the main difference between the period between 2002 and 2007 and the period between 2009 and 2010, the two times that you were Secretary of State for Wales?

Lord Elis-Thomas: Thank you very much, Chair, and a very warm welcome as a former Secretary of State on two occasions. I recall with some pleasure the discussions that we had during the period when you were responsible for rewriting the constitution of Wales, which became the Wales Act soon after that, and which set a foundation for all of our activities after the 2007 election. What was the main difference between the period between 2002 and 2007 and the period between 2009 and 2010, the two times that you were Secretary of State for Wales?

[9] **Lord Hain:** The second one was in the run-up to the general election, and the main difference, of course, was that Labour was in coalition with Plaid Cymru at that time, whereas the former time we were governing on our own for almost the entire time; there was a bit during the Liberal Democrat coalition when I was Secretary of State. So, inevitably, there were differences there. But substantially for me as Secretary of State, there wasn't a great change, except towards the latter when Carwyn Jones took over as First Minister from Rhodri Morgan. But the same close personal working relationship with the First Minister, which is the main way in which the Secretary of State—. You know, the main, as it were, interlocutors of relationship between the Wales Office, the Secretary of State and the Welsh Government/Welsh Assembly were through the First Minister–Secretary of

State relationship, and I think that relationship is terribly important in making devolution work as it should do.

[10] **Lord Elis-Thomas:** I think it might be also useful if we were to say something about the way you assisted this institution by preparing for full law-making powers, and providing for a referendum for it in the second Government of Wales Act. Could you tell us something of your thinking at the time, and whether any of your thinking at that time is relevant to any future discussion about further powers that may arise after this current Westminster general election?

[11] **Lord Hain:** Thank you. We worked closely together, I remember, as Presiding Officer—and you were incredibly supportive of what I was trying to do, which was to get the full law-making powers in place on statute, as we managed to achieve, in a situation where both the Labour Party in Wales and UK-wide was divided on that, and also where Whitehall was unenthusiastic about it. And it was quite hard work squaring that circle. We went, as you'll recall, for the two stages—one an enhanced legislative procedure, the other full law-making powers achieved after the referendum in 2011. But it was very hard work. I think, without going into that—Chairman, you may remember—but it was extremely hard work squaring that circle, but we managed to do it and I'm very proud that we did.

[12] Looking forward, I think Brexit is the main issue now facing the Assembly and, indeed, the whole of the UK, and maybe we'll cover that later on; I don't know. But I think that's going to pose both a big challenge, but also potential opportunity to get the powers that will be repatriated, if Brexit does happen finally, to the UK—to actually get those powers that are in the devolved areas residing in Wales through the Assembly, rather than being grabbed on the way past from Brussels, as it were, to Wales by Whitehall, which I think is something we need to take care to guard against.

[13] **Lord Elis-Thomas:** And are there particular lessons that you can tell us of your joint experience in Northern Ireland, as well as in Wales, for part of your period as Secretary of State? I do think that politicians in Wales, if I can put this in the form of a rhetorical question, Chair, often speak of Scotland as if there was something very similar between Wales and Scotland constitutionally or historically, whereas I would have thought that the experience of Ireland, and especially the experience of devolution in the north, is much more relevant to what goes on here. Would you agree with that?

[14] **Lord Hain:** I probably would. Clearly, however, doing the Secretary of State roles, both of those roles simultaneously, apart from being extremely hard work, but exhilarating nevertheless—. Because I was negotiating the conclusion of the Good Friday process, which we managed to achieve in Northern Ireland with the 2007 settlement, and Ian Paisley and Martin McGuinness coming into power together as First Minister and deputy First Minister. But at the same time, as you will recall, that was also a period when the Government of Wales Act 2006 had to be negotiated, taken through, and then the eventual coalition between Welsh Labour and Plaid Cymru had to be put in place, and there was a lot of difficult politics in Welsh Labour to achieve that, and I daresay in Plaid Cymru as well.

[15] **Lord Elis-Thomas:** Probably worse, from my recollection.

[16] **Lord Hain:** But in terms of similarities, I do think the model in Northern Ireland, leaving aside the history and the conflict and what we were trying to achieve on the peace process—in the actual model of devolution, there are greater similarities, probably, with Wales.

[17] **Lord Elis-Thomas:** And finally, on this round anyway, would you say that, looking to the future, without going into the whole question of our relationship with the European Union and the different way the different nations and regions of the United Kingdom actually voted in the referendum, there are particular lessons that we can learn about the potential of developing a constitutional relationship with the north and south of Ireland, as our nearest and dearest neighbours—apart from England, obviously—from your experience in working in Northern Ireland?

[18] **Lord Hain:** Well, I served on the British-Irish Council, which was one of the institutions set up through the Good Friday process. It was never really, in my experience, a body that ever fulfilled its true potential. For example, the Prime Minister never attended it, as far as I know. Certainly, in my time, a Labour Prime Minister, I don't think, ever attended a BIC—I stand ready to be corrected on that—and I don't know that that happened after 2010 either. I think, post Brexit, the British-Irish Council has either got to be given a real, substantial role, or it will remain largely ceremonial, largely a talking shop, but valuable in terms of social interaction. Never underestimate the importance of personal and social interaction in politics, at a high level not least, and that was always valuable. But a lot of the issues discussed were—you know, we were discussing things like telematics and details of

environmental policy: all very interesting in their own way. But, really, in terms of the situation the United Kingdom will face after leaving the European Union, this will pose huge stresses and strains on the British isles as a whole, including the Republic of Ireland. The BIC could be a forum in which the Welsh interest could be expressed, both in relation to the island of Ireland, and wider interests, and conceivably with the rest of Europe, albeit we won't be in the EU, sadly.

[19] **Lord Elis-Thomas:** Just a very little one. Have you had an opportunity to discuss any of this with the First Minister of Wales? Because clearly he is very knowledgeable about the north of Ireland through his personal connections, but also has advocated for a long time a constitutional convention as one way forward of dealing with these matters. And could not the BIC, in fact, become that for some of these purposes?

[20] **Lord Hain:** I strongly agree, and I have discussed this with the First Minister. I strongly agree with his support and advocacy—I think he might have been the first to advocate it within the UK—for a constitutional convention. I think the United Kingdom is facing a very serious crisis as an entity, both existentially and actually. But the situation in Scotland, and the situation of the European Union's external customs frontier between the north and south of the island of Ireland—if that, in any sense, becomes a hard border, that is a real problem for the whole of the island, and it is a problem, particularly, for the peace process and the stability, as well as all the economic and other issues that are involved.

10:45

[21] But there's that, there's the Scottish situation, there's, I think, a real crisis of legitimacy of governance in England, which is the most centralised part of the United Kingdom—London excepted—and I don't think the mayors, though they are a welcome bit of devolution, really answer the question. And I do think a constitutional convention is needed if you are interested, as I am, in the UK being maintained as an entity, not just for history, identity, tradition and all of that, but because one of the major motivations for me of Wales's position in the wider United Kingdom is that 40 per cent of GDP, and more than that of revenue raising through taxation, comes from London and the south-east of England—40 per cent. Its population is substantially less than 40 per cent—under 30—and, if we were ever to cut ourselves off from that, which is why I had reservations in the debate in the House of Lords about tax devolution, as well, and the form in

which that put, though I think the fiscal compact that was agreed between the Welsh Government and the UK Government that Carwyn negotiated with Mark Drakeford is a valuable underpinning of it—. But I don't want to see Wales cut off from that wealth any more than I want to see the north-east of England, which, demographically, is very similar to us, or elsewhere in England, cut off either.

[22] But I think we need a new constitutional settlement for the whole of the UK, which I think should be more of a federal one, explicitly federal, in which Wales's position is recognised. I would turn the devolution process on its head, and instead of devolution coming from the centre down in a kind of progressive, spasmodic way, the nations, and, in Northern Ireland's case, Northern Ireland, being able to decide what they want at their own level—Scotland, Wales, Northern Ireland, and, I think, the regions of England outside London—and then deciding what they want the centre to do. So, you turn the model of devolution on its head, and, instead of a downward process, you make it an upward process. I think that would bind the whole of the UK better together, I think there'd be great opportunities for Wales in that, but I think the whole of our relationship with the rest of the UK would be better cemented in that context, especially with greater devolution within England. Many of the economic and national regions of England are actually, in population terms, greater than Wales, I think all of them are greater than Northern Ireland, and some are greater than Scotland.

[23] **Huw Irranca-Davies:** Thank you for that; that raises a lot of interesting questions. And, on the subject of turning things on its head, with the co-operation of the committee, I'm going to slightly change the order of play here, because introducing the concept of a very different constitutional model probably leads us into an area that David was going to take us. So, David, I'm going to hand over to you.

[24] **David Melding:** Thank you, Chair. I think your remarks are very interesting. I myself thought for a long time that if you move from a classically unitary—deeply unitary—position then you need to look for other lessons in your constitutional history. And we've, of course, applied parliamentary federalism to the dominions around the world, and I was always much interested by that possible precedent. But I suppose the real problem has been how you would see England participating in a more federal mechanism, or even in a federal constitution, if you went that far. I just want to pick up—. It seems to me that the greatest progress in that direction actually has been the introduction of these directly elected mayors. Just look

at the publicity they received last week. Local elections are very, very important and I think we should always remember that, but the level of attention given on the directly elected mayors and the nature of their mandate and national role, potentially, in British politics, I thought that was interesting. Is that not a base for, perhaps, us in Wales to open a door to a wider discussion about the future of the constitution, perhaps with the First Minister and the Scottish Government as well, looking to those mayors and involving them in some discussions about the further decentralisation of the British state?

[25] **Lord Hain:** Well, David, first of all I pay tribute to the work you've done and the books you've written on this area, which I found extremely interesting. I do agree with you that there is a new chapter opening in England, which, I think, is just the start of a process of devolution. Effectively, the mayor in greater Manchester—it's virtually at city region in all but name, and it could be reconfigured, perhaps—. I suspect the way things would go, if you subscribe to my belief in greater devolution in England both being in the interests of English citizens wherever they live, but also better in the interests of a more stable UK in which Wales would play a key part—I think other parts of England are going to start saying, 'Well, what about us?' There's already pressure for devolution to Cornwall, to the whole of the north-east—I know the Tees valley area has a mayor now. I think this is a beginning of a process. Was it Ron Davies, I think, who coined the phrase as Secretary of State, in respect to Wales, 'Devolution is a process, not an event'? I think the mayoral development is part of a process, not an event. In that sense, I totally agree with you, and I do think there's a lot of scope for your own committee to look at that to build relationships with those mayors and their own, as it were, legislative or deliberative arms in their councils and assemblies in order to see where this goes.

[26] **David Melding:** It's certainly my view, and, of course, we've had the London mayoralty itself getting on 20 years now. So, I think that's a very important dimension that we shouldn't overlook. Can I ask about the relations between first the Governments within the United Kingdom, and then, perhaps, a little bit about the British-Irish Council as well? I think in your long ministerial career you'd have seen the JMC working, and I don't think it's unfair to say that that process started pretty robustly then fell into a long period of neglect, really, and then was kicked into life a bit again in the last few years, but hasn't really taken off as a structure. Would you say that is fair?

[27] **Lord Hain:** I completely agree as somebody who attended JMC meetings. If I could describe it diplomatically as ‘underwhelming’—I mean, you could be less diplomatic about it. This is a governmental mechanism, which, especially in the era that we’re now moving into, with the Scottish situation and the other context that I’ve described, especially post Brexit—the JMC has either got to work properly or you scrap it and start again. The Prime Minister never attended it in my experience, and I don’t know whether the Prime Minister has attended it since 2010. It hasn’t really ever served a real function or, at least—sorry, let me rephrase it—fulfilled any function for which it was set up that I can recognise, and I think if you talk to Ministers from Northern Ireland, and I think the same would be true for Ministers from Wales and no doubt Scotland, they’d say exactly the same thing. It’s an opportunity. It is an arena that could be quite important, but it has certainly never been so in my experience.

[28] **David Melding:** I think David Cameron did attend the JMC fairly regularly and, certainly, the one in Cardiff was attended by Theresa May, but there was certainly criticism that it was ‘turn up, have a photo shoot, and issue the *communiqué*’, which, perhaps, doesn’t indicate a great depth, I suppose critics would say. So, how would we measure its vitality? If it was really working, what would we see coming out of it?

[29] **Lord Hain:** You’d need to have specific, urgent topics of the day, whether that was the broader question of the constitutional relationship between the UK’s entities or whether it was the impact of austerity and what you do about that. There’s a very different social economic model in Wales that I think is cross-party, more or less, certainly between Labour, Plaid Cymru and the Liberal Democrats—maybe UKIP; I don’t know—if not the Conservatives. Undoubtedly, that’s true in Scotland. If you like, the UK neoliberal economic model is not one that has much support in Wales, and virtually no support in Scotland, and very little, if any, in Northern Ireland. So, I think there are substantial issues that the JMC could address, leaving aside, as I say, the constitutional future and relationships. I think if it was actually used as an instrument in which there was real give and take, as opposed to a photo-shoot opportunity with some routine business that amounted to very little, to be perfectly frank, then I think it could be valuable—otherwise you might as well put it in cold storage.

[30] **David Melding:** And this would be your understanding of what Carwyn Jones is trying to capture when he says that the JMC process should be reformed to become a council of Ministers.

[31] **Lord Hain:** Yes. I think it's exactly that. But a council of Ministers could just be, as it were, wearing different clothes, and the same rather drifting purposelessness of the JMC would continue. It has to be recognised, especially by the UK Prime Minister, as an important body that is a priority for her or him in the future.

[32] **David Melding:** The First Minister has mentioned the development and negotiation of framework agreements, particularly around farming policy and environmental policy, which you've already alluded to—you know, where the powers that are currently at the EU level end up is quite a contentious issue. So, if we're going to have framework agreements—because, presumably, fundamentally different agricultural and environmental policies between administrations within the UK would not be in the United Kingdom's interest—do you think this is a key test and perhaps one that would also give some indications about how we should be developing constitutionally as well?

[33] **Lord Hain:** I do. I think it's going to be an absolutely key test. Is agriculture devolved or isn't it? What do we do about fisheries? The fisheries situation—. The extent of devolution in Wales is different from Scotland, for example. And the environment. And this is in the wider, Brexit context; acid rain doesn't stop at Calais, if you're thinking of the environment. Fisheries and seas, and the territorial control over those, rub up against each other. In the Bristol channel, we'll rub up against England—Wales will. We're on Europe's doorstep, Brexit notwithstanding: environmentally, in food standards, in export of food and import of food, and food hygiene and all of that—that whole big area of agriculture, fisheries, environment. These are all domestic to Wales but we're right along the English border, and the Republic of Ireland, still in the EU, is not very far away. All of these issues have a domestic, that's to say devolved, dimension, they have a UK dimension, and they have an international European dimension as well. So, there'll need to be quite sophisticated new arrangements to cope with that. If the tendency is for London to say, 'Well, we'll sort all that out on your behalf', I think that would be a very retrograde step for Wales to be pushed into, and I'm sure the Welsh Government will resist that as, no doubt, will you.

11:00

[34] **David Melding:** It's such a vital test, isn't it, of where the different Governments are in their relations? These are perhaps early-ish exchanges,

but it seems to me that everyone agrees that you're going to need some form of framework mechanism, but how you get there—i.e. is it something that's co-ordinated and very much strongly led by the UK Government, also acting as the English Government, or is it something negotiated from below, as it were, because in terms of constitutional propriety, the powers that were in the EU are given back to Cardiff, Belfast and Edinburgh? But where we need to get to, it seems to me, is a way of operating frameworks, and to have a preliminary row on all that is a bit disappointing, would you agree?

[35] **Lord Hain:** I do. I think you start off with the presumption that in devolved areas it all comes back to Wales. That's where I would start. That's the default position. Now, Whitehall will resist that, because Whitehall does. You saw that with the recent Wales Bill, especially in the first draft, but, frankly, even in the second draft—the second actual Bill and Act—what was meant to be a revolutionary change moving from a conferred to a reserved-powers model actually ended up with, frankly, a bit of a dog's breakfast. I know how it happens. What happens is the Wales Office will circulate and the First Minister, maybe directly, will circulate and there'll be a Cabinet committee saying, 'This is a new issue.' It will go around to every official in every Whitehall department, from the Home Office to DEFRA, and somebody will say, 'Hang on, we want to keep a bit of that' and then that becomes—. It's almost like a repatriation exercise, not for malevolent reasons, but because that's the way that bureaucracy works. So, I think we need to be very careful about this. But I think we need to be cognisant, also, of what I said: that there is a UK dimension, especially to all these three areas of agriculture, fisheries and environment. And there is a European dimension and an international dimension.

[36] **David Melding:** My final point, which you've led on to quite effectively, I think, is how Whitehall operates. Given your experience of being at the heart of the devolution process and Welsh politics, but also serving as a senior Minister in a UK Government, and, indeed, your responsibilities for UK departments of state, how deep is the cultural misunderstanding that some departments have of devolution in the first place, and then how places like Wales and Scotland operate? We've heard evidence that, if you look at DEFRA, or perversely, the Foreign Office, they get the fact that there are other Governments in the room, whereas many other departments, perhaps, don't. How true is that or are we being a bit unrealistic in the way we look at this, and we can't expect every Whitehall department to have in-depth knowledge of what's going on in Wales?

[37] **Lord Hain:** Well, I think we start from the presumption that I would that there's nothing malevolent going on here. There's nobody trying to do anybody else down. There's a natural human instinct to keep what you've got, and I even notice that there's territorialism in some—you know, I've experienced it, as it were, at the Wales end, the Cardiff end, the institutional end of the Assembly and the Welsh Government in terms of dealing with and trying to resolve an issue from the Wales Office standpoint, as Secretary of State. So, just to set this—there's nobody conspiring to do Wales down here. I think it's the natural tendency of officials—and I would say the most difficult department in this is the Home Office—to keep what you've got and not to let things go. And all sorts of good reasons may be advanced in that respect, but it is not recognising the nature of devolution.

[38] So, I would say the Home Office is probably the worst. Yes, DEFRA may have an understanding, because of its wider European and international environment, but it hasn't been all that clever, in my experience, either. And without going on a ranking exercise, those two, I think, would be the ones I would say that most need a culture change on devolution and they're going to have to in the coming period. Having said that, things have got substantially better. When we were negotiating the first Government of Wales Bill and even trying to get permission to put out 'a strong voice for Wales', the document behind the 'yes' campaign, there were all sorts of things that were put in our way. But it has moved substantially on, then. Most Whitehall departments are pretty well aware of devolution and recognise that's the reality they're working in.

[39] **David Melding:** Thank you, Chair.

[40] **Huw Irranca-Davies:** Thank you, David. You've very nicely queued up, of course, the title of this current inquiry, which is 'A stronger voice for Wales', and we're very cognisant of the original aspiration of—

[41] **Lord Hain:** I think it was just 'A Voice for Wales', wasn't it?

[42] **Huw Irranca-Davies:** 'A Voice for Wales'.

[43] **Lord Hain:** It was just 'A Voice for Wales', yes. Well, I like the 'stronger'.

[44] **David Melding:** But we came first—[*Inaudible.*]

[45] **Huw Irranca-Davies:** Yes, absolutely. Now we're going to pass on to Nathan, who's interestingly been, in some ways, looking ahead, and in some ways looking retrospectively at your experience of inter-governmental work. I think Nathan has got an interesting line of questioning for us on some of those mechanical issues of inter-governmental relations. Nathan.

[46] **Nathan Gill:** Yes, thank you, Chair. My apologies, Lord Hain, for being slightly late. I was at the hands of an airline pilot. So, just going on a little bit from what David was saying, I just wanted to look at how the relationship between the Welsh Government and the Wales Office—how did that work? At a time when there was obviously a Labour Government in Westminster and a Labour Government here, was that done on a party basis, or was it done more formally?

[47] **Lord Hain:** Both. In my experience as Secretary of State—and I'll answer the question from that vantage point, as it were; Chairman, you've been a Welsh Minister, so you'd have dealt at a different level—the relationship between the Secretary of State and the First Minister is absolutely crucial. I used to have Monday morning regular meetings. They were weekly unless there was some reason for them not to be, for diary purposes. Those relationships are very important. The relationships between the Welsh Ministers and, for that matter, Whitehall Ministers and their counterparts in the Welsh Government—personal relationships are everything here. You don't always have to agree, but it's important to be able to work things through. And the same for officials, between Welsh Government officials, Wales Office officials and Whitehall officials directly between Cardiff and London—that's absolutely crucial.

[48] Another area that often isn't addressed, but don't underestimate it, is the special advisers. I think the relationships between Whitehall and the Wales Office special advisers and the special advisers here are more important than often people have recognised. They may be further down in the food chain, as it were, but they are really important, especially on a party basis. To be perfectly frank, Labour to Labour we often found it frustrating that our special advisers seemed to be in a more influential role than Welsh Government special advisers. That may have changed under Matt Greenough, but certainly in our experience beforehand, that was the case—that there seemed to be a defensiveness, a lack of confidence on the part of many Welsh Government special advisers to actually make decisions and get information quickly, even when we were wanting, as UK Government Ministers, to defend the Welsh Government's record, on a party basis

because we're both Labour, or because that was the right thing to do whatever the ministerial composition was.

[49] You couldn't get information quickly. It was often not very high calibre. To deal with the vagaries of the London media and the Westminster bubble realities, it was often slow or substandard, and we were blocked from dealing official to official. There was then a kind of rather complicated bureaucratic chain where you had to get on to the special adviser to special adviser, then the special adviser in Cardiff got the information from the official, and it went back through the special adviser. It would have been a lot easier for my economic official in the Wales Office to say, 'Right, there's an attack on the Welsh Government's economic performance here. Let's have the stats in an hour's time so that we can rebut this'. Whether it was at Welsh questions, or whether it was in a debate, you will know how important health policy, how much of a political source of contention that has been in recent times between London and Cardiff. It was very frustrating, sometimes, getting that information in real time. I think that might have changed in recent times. Certainly, I think the special advisor situation here is a little more confident and mature, perhaps, but there was this view that a special advisor was somehow neutral. I mean, they are there to perform a function as civil servants but they're also performing a political function. That's what they're there for.

[50] So, I would say, in general, barriers between Whitehall and Wales were often lack of understanding and wilful obstruction, except for one situation: Wales was always second to Scotland, and still is. That was a deep source of frustration to me, to the point—and this is in a Labour Government where I was on very good terms with the Prime Minister and my fellow Secretaries of State, but Scotland would just get the crown every time and Wales was always as the back of the queue and it was very difficult.

[51] **Nathan Gill:** So, looking at the special advisors, would you say that, almost, the ones here in the Bay were playing second fiddle to London or, maybe because it wasn't seen as glamorous as a job in London, the quality of them wasn't as good?

[52] **Lord Hain:** No, not at all. It wasn't second fiddle to London, I just don't think they had the—and this may have changed now, but certainly in the regime that I operated under as Secretary of State, they didn't have the same influence and they didn't have the same confidence behind them by the Welsh Government machine to be able to take decisions, to act for their

Ministers or the First Minister in real time and to deliver, as I say, in the question of rebutting an attack. After all, I wanted to defend the Welsh Government and Wales, and we were not given the quality of information in real time. I don't think it was that they were sort of second fiddle to Whitehall, I just don't think they're recognised in the system in a way that I think they should be and for which their constitutional role is prescribed.

[53] **Nathan Gill:** Okay. Looking at the memorandum of understanding and the devolution guidance notes, how effective as a tool do you think these were in inter-governmental relations?

[54] **Lord Hain:** They don't play much of a part in it. They're only really, sort of, pulled out of the drawer, as it were, if there's a problem and tension and there's a genuine stand-off in terms of interpreting the settlement or the way it's working. In the end, personal relationships are more important than memoranda.

[55] **Nathan Gill:** Okay, thank you very much.

[56] **Lord Hain:** Thank you.

[57] **Nathan Gill:** Thank you, Chair.

[58] **Huw Irranca-Davies:** I'm going to pass to Dai, but it's fascinating—your comments, Lord Hain, on the JMC being less than meaningful, less than productive and the memorandum of understating and devolution guidance notes only being pulled out in cases of emergencies, to clarify situations perhaps, and the stress on interpersonal relationships. But before I pass to Dai, is that just the nature of the beast—that for devolution to work effectively at any moment in time, you have to have good interpersonal relationships between Secretaries of State and First Ministers, Cabinet Ministers and Secretaries of State at the other end? It comes down to that—that there is a willingness to treat honestly and fairly and to work together.

[59] **Lord Hain:** Yes, I do. I noticed, for example, that both the shadow Welsh Secretaries for two years after 2010, when I was meeting the First Minister regularly and just my natural observations in Parliament—. There was not a good relationship—I don't think I'm betraying any secrets here—between the First Minister and the Secretary of State when Cheryl Gillan held the post, and decidedly not when David Jones held the post, because of his hostility to devolution, which he never hid, to be fair to him. It improved

under Stephen Crabb and it's more or less maintained, as far as I can tell, under Alun Cairns. Now, I don't think the Supreme Court references and things like that would necessarily have happened under a different Secretary of State, even a Conservative one. So, I do think that matters a great deal. In the end, at a Governmental level, all politics is personal. I think this is going to be very true of the Brexit negotiations, and I fear for those because I don't think those relationships have been built. But I do think the personal is very important.

11:15

[60] **Huw Irranca-Davies:** But I think you've also helpfully clarified, there, that it doesn't actually matter what the political colour is at either end of the M4. It's more to do with those relationships and the willingness to work together.

[61] **Lord Hain:** It is. There will be turf wars—there inevitably are. There are turf wars in families. There are, no doubt, turf wars in this committee, for all I know. [*Laughter.*]

[62] **Lord Elis-Thomas:** Sure enough.

[63] **Huw Irranca-Davies:** Never.

[64] **Lord Hain:** It is in the human nature that people have disagreements, they get uptight and so on, but the personal always is crucial.

[65] **Huw Irranca-Davies:** Dai, over to you to take this on, please.

[66] **Dai Lloyd:** Ie, diolch yn fawr, Cadeirydd. Y llinellau roeddwn i'n mynd ar eu hôl nhw, rydych chi wedi eu hateb mewn ffordd gynhwysfawr iawn yn nhermau'r perthnasau personol sydd yn allweddol bwysig, ac rydym ni wedi cael tystiolaeth flaenorol i'r pwyllgor yma sydd yn ategu hynny, oddi wrth yr Arglwydd Murphy, y Farwnes Randerson a hefyd Ieuan Wyn Jones, yn dweud yr un math o beth—efo adrannau

Dai Lloyd: Yes, thank you very much, Chair. The lines that I was going to pursue, you have answered in a very comprehensive manner in terms of the personal relationships that are vitally important, and we have had evidence previously to this committee that would endorse that view, from Lord Murphy, Baroness Randerson and also Ieuan Wyn Jones, who all said the same thing—with regard to Government departments

llywodraethol yn Llundain lle nad oedd unrhyw berthynas bersonol, nid oedd dim perthynas o gwbl mewn rhai sefyllfaoedd.

[67] Wrth gwrs, rydych chi hefyd wedi crybwyll hyd yn oed pan mae yna glymblaid wedi bod yn y fan hyn sydd â lliw gwahanol i'r Llywodraeth yn Llundain, eto y berthynas bersonol oedd yn rhagori. Felly, o droi'r sefyllfa yna ar ei phen a thrio gwella pethau, neu o leiaf meddwl yn amgenach am newid, pa fesurau y gallid eu rhoi mewn lle er mwyn sicrhau bod yna ryw fath o berthynas rhwng adrannau yn y fan hyn ac yn Llundain pan nad oes perthynas bersonol? Hynny yw, buasai rhai pobl y tu allan i'r fan hyn yn edrych ar y sgwrs yma a meddwl, 'Wel dyna drychineb', achos ar ddiwedd y dydd rydym ni eisiau gweld Cymru'n gwneud y gorau a ddylai hi ddim bod yn dibynnu os oes rhywun yn y fan hyn yn ffrindiau efo rhywun yn fan yna. Os oes yna unrhyw weithgaredd penodol y gallid ei roi mewn lle?

[68] Rydych chi wedi sôn am y memorandwm cyd-ddealltwriaeth yma sydd yn llai na phwysig, ac rydych chi ond yn ymestyn amdano fe pan mae yna ryw fath o argyfwng, Ond nid ydych chi hefyd yn cytuno y dylai fod yna ryw sail fwy cadarn i unrhyw berthynas rhwng Llywodraeth yn fan hyn a Llywodraeth yn Llundain sydd ddim jest yn dibynnu ar y ffaith

in London where there were no personal relationships, there was no relationship at all in some situations.

Of course, you've also mentioned that even when there has been a coalition in this place of a different colour to that of the Government in London, again, it's about those personal relationships. They were most important. So, in turning that situation on its head and looking to improve things, or thinking in an alternative manner with regard to change, what measures could be put in place to ensure that there is some kind of relationship between departments in this place and in London when there is no personal relationship between those two places? Some people outside this place would perhaps be listening to this discussion and think, 'Well, what a shame', because, ultimately, we want to see Wales doing as well as it possibly can and it shouldn't be dependent on someone being friends with someone in London. Is there any specific measure that could be taken?

You've talked about the memorandum of understanding that is less than important perhaps, and you just reach for it when there is some kind of crisis. But you also don't agree that there should be a firmer foundation for a relationship between a Government in this place and a Government in London that isn't just dependent on the fact that

bod pawb yn licio'i gilydd.

everybody likes each other.

[69] **Lord Hain:** No, I agree, and there are such procedures in place, and the devolution settlement provides for that. But I think we've come a long way—an enormously long way—in the last 20 years since we were negotiating over the first Government of Wales Bill, which became the Act and set the Assembly up. I don't want to make a party point here; I'll simply make an observation of fact: the Conservative Party has travelled a considerable distance, from being opposed to devolution in 1997 to not only accepting it but actively engaging in it and taking forward greater powers to Wales, for which it's legislated as a Government. So, we've travelled a long way. If we're searching for perfection, I'm not sure that we can ever achieve that, and I'm not sure that you can do much about it in terms of procedures. Ultimately, politics is about power and, ultimately, politics may be personal, but it is also about power and about ideology, and there are big differences in the UK now, bigger than, possibly, they've ever been, between London, Edinburgh, Cardiff and Belfast, and it is the job of the Prime Minister to resolve those, ultimately.

[70] **Dai Lloyd:** Yn bellach i hynny, **Dai Lloyd:** Further to that, what do felly, beth ydych chi'n meddwl sydd y you think lies behind the fact that tu ôl i'r ffaith bod yr Alban, fel rydych Scotland, as you've said, always chi wedi ei ddweud, wastad yn cael receives attention before Wales? Is it sylw o flaen Cymru? Ai dim ond just a matter of size, or influence, or mater o faint yw hi, ynteu dylanwad, a stronger vote for the SNP in ynteu pleidlais gryfach i'r SNP yn yr Scotland than there is for Plaid Alban nag sydd i Blaid Cymru yng Cymru in Wales? Nghymru?

[71] **Lord Hain:** I think it's the history. Scotland's history is very different to Wales's. Scotland is larger. As you say, it made more noise. I don't only think, though there is something in that, that the nationalist push has been much stronger, and the push for independence in Scotland has been much greater. Even in 1979, the Scottish referendum was a much better result than the appalling one we had in Wales. So, that's an indication that we had more popular support for devolved politics, and Wales has come, thankfully, a long way since then. I don't think, again, it's for malevolent reasons. I think it's for historic reasons and the fact that the Scots have got more Members of Parliament and have exerted greater clout. There have been more Scottish Ministers, certainly under Labour, in the Cabinet to a very prominent level than Welsh Ministers.

[72] **Huw Irranca-Davies:** Thank you, Dai. Now, I want to turn, in this final part of our session, Lord Hain, to the issue of inter-parliamentary relations rather than inter-governmental relations. David, I think you're going to take us down that route.

[73] **David Melding:** Yes. I suppose what we're looking at here is how useful a legislative equivalent to whatever executive bodies are existing for joint or inter-governmental action. I suppose the only model we really have at the moment is the British-Irish parliamentary association. You've had a long experience with Northern Ireland and politics widely between the United Kingdom and the Republic of Ireland. I suppose the British-Irish parliamentary association has been very successful in getting, particularly, politicians from the Dáil and politicians from Westminster to work effectively. In the early 2000s, it then had this expansion to include parliamentarians from other parts of the United Kingdom and the Channel Islands and the Isle of Man. In that phase, I think it's fair to say it's not been as successful as the first phase, which was obviously this confidence-building mission they'd had between the parliamentarians of the republic and the UK, but does it still remain something of a model for us who would like to see stronger inter-parliamentary relations, to look at that body and perhaps try to strengthen that body rather than create a new one just for the jurisdiction within the United Kingdom, for instance?

[74] **Lord Hain:** Well, if the British-Irish Council is given real teeth and performs an enhanced role of the kind that I suggested might be valuable, then it may well be that the British-Irish parliamentary association could be extended or developed. It could be. Dai Lloyd will have a view on that. We served together on it. It will be interesting to see what you decide on that.

[75] I'll just make a couple of points, not necessarily about the form and whether it's a new body or an extension of the existing one. First of all, the Irish situation was very specific. There was enormous distrust to hostility to contempt between British MPs and MPs from the Dáil. The Irish-British relationship has been a historically tangled, conflict-ridden one. The BIPA was very important in kind of, as it were, dissolving that hostility, and people—. I had conversations with Irish MPs, in which they would freely admit they would have never talked so convivially or consensually with me, as a British MP, in years gone by. So, that was crucial. That's the first point. You've got to have a purpose to these things. It can't just be a talking shop, though there's an element of that. The purpose is developing personal

relations; the purpose is developing mutual understanding; the purpose is discussing common problems and resolving common policy positions where that's possible. But don't routinise it. Don't make it a kind of thing that people think, 'Oh, my God, I've got to get on a plane to go to this. I wish I was able to do something else'. Give it a real mission and a real purpose. So, in a sense, whatever, as it were, configuration is the best for that, make sure you get that mission in place first.

[76] **David Melding:** And what worth would you put on constructing a more vigorous inter-parliamentary body? Is that something we should be concentrating on, or would your concerns be much more about how the JMC evolves to an effective council of Ministers? I mean, what role for the legislatures, I suppose is what I'm asking.

[77] **Lord Hain:** Again, I think an enhanced role. But it's always difficult. I mean, your sitting times, for example, are different from Westminster's—the hours and the days. There's an overlap. And you have responsibilities here, just as MPs have responsibilities there. There's less room for pairing, I suspect, here than there is there, simply because of the size of the Assembly by comparison. So, there are practical, diary-kind of real pressures getting in the way—obstacles getting in the way—of serious, common institutional relationships, say, between Westminster Parliament and the Assembly, which are nothing to do with lack of will but simply making it work. So, if you can find a model that works in that way, then I think that would be very valuable. I think joint evidence sessions between the Welsh Affairs Committee and Assembly committees here are valuable, partly because witnesses, especially if they're from Wales, have limited time. So, that's just more efficient use of the time of witnesses and things like that. But don't make a fetish of it; make it work, rather than just set the thing up because it's a nice thing to do.

[78] **David Melding:** And if you thought this was important, would you favour building on the British-Irish Parliamentary Assembly, or do you think, actually, we would need a specific body for inter-parliamentary work within the United Kingdom?

[79] **Lord Hain:** I'm not sure. I think it would be good to have better informal relationships when you are looking at common issues. If the Welsh Affairs Committee was looking at the economy, and the relevant committee here was doing the same thing, why not get economies of scale, as it were. If the British-Irish Council is given a real role in this new era—post Brexit especially—then it may be that the BIPA does need to shadow that. On the

other hand, if the BIC doesn't have that real role, then it may be that a UK inter-parliamentary body is a more suitable vehicle, and you keep the BIPA there for that different purpose that it's historically served.

[80] **David Melding:** Thank you.

[81] **Huw Irranca-Davies:** Now, Lord Hain, you've strayed quite helpfully into areas of questioning that we might have pursued with you, but I just want to ask Dafydd Elis-Thomas and Dai Lloyd whether they want to follow up on anything you've heard from that. Dafydd.

[82] **Lord Elis-Thomas:** Just one. You mentioned co-working with Westminster committees. We have done a bit of that, and I felt, certainly during the passage of the last Government of Wales Bill—now the Act 2017—that there would have been much benefit if there could have been some form of co-legislating that was taking place. I'm not sure at which stages that might work. But this committee did produce a report and, in fact, some of the significant amendments that came through our process were eventually adopted. It did help that the Minister was a former member of this place, obviously—Lord Bourne of Aberystwyth.

[83] **Lord Hain:** That was valuable work you did—valuable work.

[84] **Lord Elis-Thomas:** All that, and I'm very pleased with what we achieved in a limited way on that. But isn't it time that the constitution of Wales was written in Wales, really, and scrutinised properly in Wales?

[85] **Lord Hain:** Yes.

[86] **Lord Elis-Thomas:** But how are we going to do it, Peter? [*Laughter.*]

[87] **Lord Hain:** Well, I'm looking forward to your report telling me all the answers to these complicated questions, some of which I've made more complicated by my evidence right now. [*Laughter.*]

[88] **Huw Irranca-Davies:** Thank you, Dafydd. Nathan, I think you're going to take us into the familiar country—and-western territory of 'r-e-s-p-e-c-t', but between institutions.

11:30

[89] **Nathan Gill:** Yes. You've mentioned the importance of personal relationships in politics and making Government work, and, of course, respect—mutual respect—I think fits in with that quite well. How much mutual respect do you think that there is in inter-governmental relationships? I've noticed, from meeting with Members of Westminster, there is definitely a feeling amongst many of them that they are superior to Members of the Welsh Assembly. I just wondered whether you thought that that was a reality and how damaging you think that that might be and whether you think that there is this respect that's necessary.

[90] **Lord Elis-Thomas:** Members of the House of Lords clearly are inferior [*Laughter.*]

[91] **Lord Hain:** Well, I mean, your Chairman is an example of where that clearly doesn't apply.

[92] **Nathan Gill:** Well, yes, absolutely.

[93] **Lord Hain:** He's chosen to come from Westminster to Wales.

[94] **Huw Irranca-Davies:** I upgraded. [*Laughter.*]

[95] **Lord Hain:** Upgraded, yes.

[96] I think that may have been the case in the past amongst some Members of Parliament—maybe a significant number. I think it's less so now. I think, if I was 30 years old and deciding, if I had the chance, if I were given that opportunity, to stand for Parliament or stand for the Assembly, I think it would've been a much more difficult choice for me, even with the fact that I've come from outside Wales, than it would've been for me—well, the Assembly didn't exist in 1990 when I was selected as a parliamentary candidate for Neath by the Neath Labour party, but I think it's a much tougher choice now. I think there are real powers in Wales in the way that there never were then, and you may be able to achieve much more as a Welsh Assembly Member than possibly as a Welsh MP, though you need Welsh MPs because, in the end, the budget, a lot of the resources, the whole constitutional future of the UK is decided in Westminster. So, I don't think there's the same, as it were, differential that might have existed in the past at all.

[97] **Nathan Gill:** Okay, thank you very much.

[98] **Huw Irranca-Davies:** Can I, just in closing, ask you one question? We've talked about changes to mechanisms and appropriate relationships between institutions and individuals. If we didn't make some of the changes that you and others have put forward to our constitutional arrangements to make this inter-institutional working more effective, could we just bumble along? Could we just carry on as we are, and, things, they'll happen—we'll get through Brexit, we'll get through the next iteration of a future Wales Bill, we'll hit thematic areas and difficulties in health or transport—and we'll bumble through in the classic, traditional constitutional way within the UK? Do you think that would work?

[99] **Lord Hain:** I don't. I think we've reached a point in our history where, unless you have a major radical change, there is deep trouble along the way. You've seen what's happening in Scotland. We have the uncertainty and instability between Northern Ireland and the Republic on the island of Ireland. You've seen populism breaking out right across the UK—in England, in Wales and in Scotland, and right across the European Union. The models that came from the post-second world war era—the constitutional political models—are simply not working for too many people, and unless you change—. In my view, the economy is at the centre of this and continued austerity is the curse over it all when it's not necessary, but that's another subject. But, if you don't reform your governance arrangements, there's a lot of dissatisfaction out there amongst the average citizen, with their politicians, with their Government structures, and they express that time and time again. We've just seen the election in France where that has been expressed, where the old parties have been pushed aside, and that's happening right across Europe. I don't think we're insulated from that at all. So, I think unless you stay ahead of that constitutionally and governmentally, it catches up with you and could bite you quite hard.

[100] **Huw Irranca-Davies:** Lord Hain, thank you very much indeed.

[101] **Lord Hain:** It's a pleasure. I've really enjoyed it and I wish you all the best. I look forward, as I said, to you solving all these problems and—
[*Laughter.*]

[102] **Huw Irranca-Davies:** We will, of course.

[103] **Lord Hain:** And I look forward to reading your report.

[104] **Huw Irranca–Davies:** Thank you. We'll send a transcript to you for any observations that you have, but thank you very much indeed. Committee members, we understand that our next guest is with us, but do you want to take a very short break, or are you okay? Right, okay.

*Gohiriwyd y cyfarfod rhwng 11:35 ac 11:38.
The meeting adjourned between 11:35 and 11:38.*

Ymchwiliad Llais Cryfach i Gymru: Sesiwn Dystiolaeth 8 A Stronger Voice for Wales Inquiry: Evidence Session 8

[105] **Huw Irranca–Davies:** We shall recommence our second session for this morning of evidence on our stronger voice for Wales inquiry. We're delighted to have with us today the Rt Hon Rhodri Morgan, former First Minister, former Member of Parliament as well, in years before my time up there. So, with great experience—

[106] **Mr Morgan:** Back in Boadicea's time, I think you can say [*Laughter.*]

[107] **Huw Irranca–Davies:** But we're delighted you could spend some time with us today here, and, as you know, we're looking at the issue, in quite some detail, of what has worked well and what could be improved in terms of our constitutional arrangements, but also looking backwards over where we've come from with devolution. On that basis, Rhodri, and without any apologies for the broad nature of this question, from your time as First Minister and from your observations subsequently, how do you feel the devolution process has worked—has it worked well, by and large?

[108] **Mr Morgan:** Yes, I do, of course. It exists in a constitutional vacuum, because Britain has such a loose constitution—unwritten, with bits and bobs here. We almost accumulate a constitution as we go, but we haven't enshrined devolution in a written constitution. So, I'm a big fan of having a written constitution once we sort out the issue of what is the real future of the House of Lords, without which you can't really—pace present members, of course, but you need to sort that out. Then you can have a written constitution, which would enshrine the issue of the Scottish Parliament, Northern Ireland Assembly and Welsh Assembly, and so on. Without that enshrinement, you always have this slightly odd feeling about, 'What's the real status of the Welsh Assembly?' It was a manifesto commitment, it was passed by legislation after having a referendum, but it's not enshrined in a constitution that would make it completely different from other pieces of

legislation. I'm sure that people in Scotland feel the same, which is one of the reasons why I think that the quicker a written constitution comes along, enshrining the Scottish Parliament, Welsh Assembly, Northern Ireland Assembly and many other things, then the sooner the Scottish boil would be lanced, and then, in turn, certain English boils that have come out here and there—jealousy about devolution and so forth.

[109] So, I'm a big fan of a written constitution, which would enshrine what has happened since 1999. But then if you ask what is the experience that I had and that I observed in the passing of the legislation, campaigning for the referendum and all that, and then what happened afterwards as First Minister, then, again, there was no real organised system by which certain powers were transferred to the Assembly. So, Chris Smith would say to me one day, 'I couldn't persuade you to take on S4C, could I?', and I said, 'Certainly not', because if it was transferred to us, in 10 years' time there would be no S4C, because it would lose 10 per cent of its budget every year, because it wouldn't be able to compete with health and education in Wales, right. Then we were given, without actually asking for it, prisoner health, animal health, the fire service. These were not big issues, but they kept sort of giving us bits. Student finance was another one, in Peter Hain's time. But the transfers of power, which took place pretty regularly within the period of the Secretary of State for Wales in the 35 years between 1964 and 1999, sort of ground to a halt a bit. There was no particular reason for that. It just sort of did.

[110] Then, of course, you had actual operationally transferring things that weren't devolved to us. During the foot and mouth epidemic, there was an Order in Council to say, 'Well, the Welsh Assembly had better deal with Wales'. Animal health at that time was not devolved. So, we didn't have to pay a penny towards it, but we had to run it because there wasn't anybody else that could run it in Wales. And the Ministry for Agriculture, Fisheries and Food—on a non-devolved issue—were up to their eyes, in fact drowning at one or two points, in foot and mouth, so we ran it in Wales even though it was not a devolved issue, but we ran it differently from England, although it's a non-devolved function.

[111] So, there was a lot of give and take, but, in the case of animal health, lovely issue that—you know, England was paying for the lot. We didn't have to worry about who was going to pay for all this. We didn't have to worry about that—Margaret Beckett had the bill, and she had to pay it. But we could do things differently if we wanted to in Wales, and, indeed, on one major

issue, we did.

[112] **Huw Irranca-Davies:** And your assessment would be—it's quite interesting, because your assessment seems to imply that it was driven by necessity, an iterative process, a bit of this and a bit of that, and on we get with it.

[113] **Mr Morgan:** Muddling through.

[114] **Huw Irranca-Davies:** Muddling through.

[115] **Mr Morgan:** Completely. There was no system. But it was based on, of course, at that time, similarity of Government. Let's think now: foot and mouth, the outbreak was in February to August 2001, by which time we were in a coalition with the Liberal Democrats. So, to a degree we had a different form of Government than in England. Scotland, where animal health was devolved, that was already a Lab-Lib Dem coalition from the start in 1999. But it made it easier, obviously, if you had a Labour First Minister in Scotland, First Minister in Wales and Prime Minister in England. But of course, we weren't part of the UK Government, and there were times when you did feel that they somehow assumed that we were a new kind of junior Minister or a new kind of Minister in the Blair Government, which we clearly weren't, but the civil service often, I think, assumed we were.

11:45

[116] And there were times as well, of course, when we would be asked—or I would be asked, almost personally, by Stephen Byers, for instance, at the time that Railtrack was collapsing. He rang me; I was at home—because, of course, we tend to have family-friendly hours here—I was working at home, of course, but he rang me to say, 'Well, how does Welsh Water/Dŵr Cymru work, because I'm thinking we're going to have to do something similar because Railtrack is collapsing behind my ears and I'm going to do something similar?' And I remember another occasion late, just before I retired, when John Denham rang me at home, who was Secretary of State for the Department for Innovation, Universities and Skills, to say, 'I've got a real problem with my Permanent Secretary. Your Permanent Secretary has just retired, Sir Jon Shortridge. If I can persuade the Cabinet Secretary to sort of shunt my Permanent Secretary out of the way, would you give your former Permanent Secretary 7.5 out of 10, 9 out of 10, 4 out of 10, or whatever? Because he's offered himself to the Cabinet Secretary, now that he's just

retired, to come in and cover maternity leave, gardening leave, or, you know, shunts out of the way?’ I was able to say, ‘Oh, okay. Here’s a list of strengths and weaknesses; I’ll give him 7.5 out of 10’, and the next thing I knew he was up there becoming the temporary Permanent Secretary of DIAS.

[117] **Huw Irranca-Davies:** I’m going to pass on to Dafydd to pursue this a little bit further, but this is fascinating. Can I just ask you if bumbling along and making things up as they go and responding—

[118] **Mr Morgan:** No, don’t use that word please. Muddling through—I much prefer muddling through.

[119] **Huw Irranca-Davies:** Muddling through. Muddling through has got us to a half-decent place. Why should we be looking at these fundamental things like constitutional conventions, strengthening—

[120] **Mr Morgan:** I just think you have to, because—

[121] **Huw Irranca-Davies:** Why? Why?

[122] **Mr Morgan:** At some point, you have to draw the line under the muddling through and say, ‘What actually is the system of Government that we’ve got in to serve the United Kingdom, now in a post-Brexit world, with the two Houses of Parliament and with these big anomalies, if you like?’ There are two big anomalies in the British constitution that you have to make work. One is that England is so big that it’s like the elephant and the three fleas, or a great big sow and three little piglets, really, and if the elephant turns over at night it can squash the three without realising it. And second is that England doesn’t, on the other hand, if you like, a compensation mechanism, have any much in the way of devolution. They’ve got this new, non-referendum-sanctioned, almost Heath Robinson contraptions of these regional mayors in greater Manchester, now west Midlands and west of England, and so on, but, really, there’s no devolution in England. On the other hand, England is 82 per cent of the total, and there are very few other countries in the world that have got this giant and three small ones round the edges, which, between them, don’t constitute more than 15, 16 per cent of the total GDP of population. And, of course, England’s dominance in terms of population GDP is actually accreting over time because of the way the economy’s changed.

[123] **Huw Irranca-Davies:** Okay, thank you. Dafydd, do you want to

continue with that?

[124] **Yr Arglwydd Elis–Thomas:** Roeddwn i'n gwranddo gyda diddordeb mawr ynglŷn â'r datganiad clir a wnest ti o angen cael patrwm cyfansoddiadol clir ar gyfer y deyrnas. Ac fe fuaswn i yn dadlau efallai fod Llywodraeth y Deyrnas Unedig wedi cydnabod hynny yn y gwelliannau a dderbyniwyd yn y broses o drin beth ddaeth ym Mil Cymru diweddaraf ac yn Ddeddf Cymru 2017, oherwydd mae yna osodiad bellach ar ddechrau cymalau cychwynnol y Ddeddf yna bod y Cynulliad Cenedlaethol Cymru a Llywodraeth Cymru yn rhan barhaol o gyfansoddiad y Deyrnas Unedig, beth bynnag mae hynny yn ei feddwl. Ac mae yna hefyd gymal a oedd yn bwysig iawn i mi ar y pryd, oherwydd mi ddaeth allan o drafodaethau yn y pwyllgor yma—y gwelliant a gafodd ei gyflwyno wedyn yn yr ail dŷ—sef diffiniad o ddeddfwriaeth Gymreig, oherwydd nid oedd dim o'r fath beth i'w gael cyn hynny, sydd yn dangos bod deddfwriaeth sy'n cael ei phasio yn y Cynulliad hwn a deddfwriaeth berthnasol i Gymru sy'n dal i gael ei gwneud yn Senedd y Deyrnas Unedig i gyd yn rhan o rywbeth y gellir ei alw yn deddfwriaeth Cymru. Felly, rydym ni wedi cychwyn ar y broses yna, ond dy ddadl di mewn gwirionedd ydy bod eisiau gwneud hynny yn llawer iawn cynt ac yn fwy cyflawn.

Lord Elis–Thomas: I was listening with great interest to the clear statement that you made about the need to have a clear constitutional pattern for the kingdom. And I would argue that perhaps the United Kingdom has acknowledged that in the amendments accepted during the process of dealing with what was the Wales Bill and the Wales Act 2017, because there is a statement at the beginning of the Act that the National Assembly for Wales and the Welsh Government are a permanent part of the United Kingdom constitution, whatever that means. And there's also a clause that was very important to me at the time, because it stemmed from discussions in this committee—an amendment that was put forward in the second house—which is the definition of Welsh legislation, because there was no such thing before that, which shows that legislation passed in this Assembly and relevant legislation to Wales that is still made in the United Kingdom Parliament is all still part of something that could be called Welsh legislation. So, we have started that process, but your argument is that we need to do that far sooner and more completely.

[125] **Mr Morgan:** Wel, ie—dodi **Mr Morgan:** Well, yes—we need to put

stamp o fath hollol wahanol i ddweud, er enghraifft, am y Mesur Cymru newydd yma, ei fod yn Fesur cyfansoddiadol, nid jest tamaid bach o ddeddfwriaeth arall, yr un peth â dwsinau o ddarnau o ddeddfwriaeth sy'n cael eu pasio bob blwyddyn, ond bod rhai ohonyn nhw'n cael eu marcio fel Mesurau neu ddeddfwriaeth gyfansoddiadol, yr un peth â'r Grundgesetz yng nghyfansoddiad yr Almaen, a ysgrifennwyd gan gyfreithwyr blaenllaw Prydain Fawr ac ambell Americanwr ac yn y blaen. Rŷm ni wedi ysgrifennu cyfansoddiadau o'r math yna dros wledydd eraill, sef yr Almaen, ond nid ydym ni wedi ei gwneud drosom ni ein hunain, ac er bod y pisyn, y darn, o ddeddfwriaeth rwy'ti'n cyfeirio ato fe, sef y Ddeddf Cymru newydd, nid oes ffordd o ddweud bod honno yn Fesur cyfansoddiadol ac y byddai eisiau rhyw broses arbennig iawn i rifyrso'r darn o ddeddfwriaeth yna.

[126] **Yr Arglwydd Elis-Thomas:** Mae o'n dweud hynny, mewn ffordd, onid yw? Hynny ydy, dim ond drwy bobl Cymru mewn refferendwm i newid y sefyllfa y byddai modd dileu'r Cynulliad. Ond mae dy bwynt di yn dal i sefyll, rwy'n meddwl. Ond beth sy'n ddryswch hefyd ydy bod y memoranda sydd yn esbonio—yr *explanatory memorandums* yma—beth yw deddfwriaeth, mae yna adran am oblygiadau datganoli i mewn ers blynyddoedd erbyn hyn, ond nid yw hynny'n cael ei weld fel deddfwriaeth

an entirely new stamp on things; for example, in terms of the Wales Bill, we should say that it is a constitutional Act, not just a piece of legislation akin to dozens of other pieces of legislation passed every year, but some of them should be stamped as constitutional law, just as the Grundgesetz in the German constitution, written by some prominent British draughtspeople and a few Americans and so on. We have written these kinds of constitutions for other nations, such as Germany, but we haven't done it for ourselves, so that the piece of legislation that you referred to, namely the new Wales Act, well, there's no way of saying that that is a piece of constitutional legislation and you would need some sort of special process to reverse or revoke that piece of legislation.

Lord Elis-Thomas: Well, it does say that, in a way, doesn't it? That is, it is only through the acts of the Welsh people via a referendum to change the situation that it would be possible to abolish the Assembly. But your point does hold water, I think. But what causes confusion is that the memoranda that explain—the explanatory memoranda—what legislation is, there is a section included about the implications of devolution that has existed for many years, but that isn't seen as

gyfansoddiadol sydd yn berthnasol i'r deyrnas i gyd. Ond diolch yn fawr am hynny, ac rwy'n meddwl y bydd yn rhywbeth inni edrych arno fo.

constitutional legislation that is relevant to the entire kingdom. But thank you very much for the points that you have made, and I think that's something that we should look at.

[127] Rwyf eisiau mynd yn ôl at glwy'r traed a'r genau, oherwydd rwy'n cofio'r cyfnod yna, fel tithau, yn eithaf clir.

I wanted to return to the discussion we had about foot and mouth, because, like you, I remember that time very clearly.

[128] **Mr Morgan:** Rŷm ni i gyd yn ei gofio fe.

Mr Morgan: We all do.

[129] **Yr Arglwydd Elis-Thomas:** Ac yn boenus iawn. Rwy'n meddwl mai'r peth mwyaf diddorol ddigwyddodd i mi, o'm profiad i o'r peth, oedd sylweddoli yn sydyn fod Llywodraeth Cymru, yn y byncher, fel petai, wrth reoli argyfwng, yn gyfrifol am y lluoedd arfog, oherwydd eu bod nhw fel lluoedd yn gweithredu mewn argyfwng sifil, ac roedden nhw'n falch iawn, ac rwy'n cofio siarad ag uwch-swyddogion ar y pryd, ei bod yn bwysig iawn iddyn nhw bod gyda nhw gyfr gwleidyddol yng Nghymru ynglŷn â beth oedden nhw'n ei wneud a'r ffordd yr oedden nhw'n ei wneud o.

Lord Elis-Thomas: And painfully so. What I think was most interesting for me, in my experience at that time, was to realise very suddenly that the Welsh Government, in the bunker, as it were, in managing the crisis, was responsible for the armed forces, because they, as forces, were taking action within a civil emergency, and they were very pleased, and I remember talking to the senior officers at the time, that it was very important that they had political cover in Wales with regard to what they did and how they did it.

[130] **Mr Morgan:** Wel, mae honno'n enghraifft hyd yn oed yn gryfach na'r enghraifft yr oeddwn i'n ei rhoi, sef, er bod Margaret Beckett, fel yr Ysgrifennydd Gwladol yn Llundain, yn gorfod talu am yr holl beth, achos nid oedd e ddim yn wasanaeth neu bwnc datganoledig, ond hyd yn oed wedi

Mr Morgan: Well, that's an even stronger example than the example I gave, namely that, although Margaret Beckett, as the Secretary of State in London, had to pay for all of this, because it wasn't a devolved issue at that time, but even then, because we, de facto, had to take the decisions

hynny, gan ein bod ni, *de facto*, yn cymryd y penderfyniadau, pan oedd y lluoedd arfog—wel, y fyddin, te—ar gael i'r gwasanaethau sifil, fe fyddai'r *brigadier*, os cofiaf i'n iawn—efallai *brigadier general*; nid wyf yn cofio nawr yn gymwys beth oedd ei statws e, ond *brigadier* rwy'n meddwl—yn dod i mewn i'm swyddfa i ar fore dydd Llun ac yn dweud, 'Well, now, First Minister, what can I do for you today?' A phe byddai rhywun wedi dweud wrthyf fi, wrth ddod yn Brif Weinidog yn y Cynulliad ym mis bach 2000, yn y flwyddyn neu 15 mis nes ymlaen, y byddai *brigadier* yn dod i mewn i'm swyddfa i ar fore dydd Llun ac yn dweud, 'Well, now, First Minister, what do you want me to do for you today?', byddwn i wedi 'collapse-o', a bydden nhw wedi gorfod mynd â fi i'r ysbyty i'm hatgyfodi fi, achos ei bod yn gymaint o syndod. Ond dyna beth ddigwyddodd.

[131] **Yr Arglwydd Elis-Thomas:** Diolch yn fawr am gadarnhau hynny; rwy'n falch iawn ein bod ni wedi cael cofnod o hynny yn y pwyllgor cyfansoddiadol, achos mae yn dangos, mewn ffordd, y ffordd y mae pethau yn gallu digwydd. A beth yr oeddwn i eisiau ei ofyn yn sgil hynny—

[132] **Mr Morgan:** Ie, ni fyddai hynny—. Rwy'n ymddiheuro am ymyrryd, ond ni fyddai hynny wedi digwydd yn Ffrainc nac yn Sbaen.

when the armed forces—or the army, as it was—were available for civil emergency purposes, the brigadier—I think it was a brigadier, perhaps a brigadier general; I can't exactly remember his rank—would come into my office on a Monday morning and would say, 'Well, now, First Minister, what can I do for you today?' And if someone had told me when I became First Minister in the Assembly in February 2000 that a year or 15 months later, a brigadier would be in my office on a Monday morning saying, 'Well, now, First Minister, what do you want me to do for you today?', then I would have fallen off my chair, and they would have had to take me to hospital to bring me round following the shock, because it was such a shock. But that's what happened.

Lord Elis-Thomas: Thank you very much for confirming that; I'm very pleased that we have a record of that in the constitutional committee, because it shows, in a way, how things can happen. But I wanted to ask as a result of that—

Mr Morgan: Yes, but that wouldn't—. I apologise for intervening, but that wouldn't have happened in France or in Spain.

[133] **Yr Arglwydd Elis–Thomas:** Na. **Lord Elis–Thomas:** No.

[134] **Mr Morgan:** Achos bod cyfansoddiadau ysgrifenedig gyda nhw sydd yn dechrau gyda'r frawddeg 'France is one and indivisible', ac mae Sbaen, er cymaint o dystiolaeth i'r gwrthwyneb, a Chatalonia a Gwlad y Basg, rwy'n meddwl bod cyfansoddiad Sbaen yn dweud, 'Spain is one and indivisible', ond, ym Mhrydain, nid oes dim sut beth, felly rŷch chi yn gallu symud pethau ymlaen trwy 'bumble-o' neu drwy—beth oedd fy ymadrodd i; rwyf wedi anghofio beth a ddywedais i nawr—*muddling through*, dyna'r ymadrodd yn Saesneg. Er hynny, yn y diwedd, mae eisiau cymoni pethau.

Mr Morgan: Because they have written constitutions that start with the sentence, 'France is one and indivisible', and Spain, despite all the evidence to the contrary, in Catalonia and the Basque Country, and so on, I think that the Spanish constitution says 'Spain is one and indivisible', but, in Britain, we have no such constitution, so you can move things on by bumbling along or—what was my phrase; I can't remember what I said now—*muddling through*, that was it, of course. Now, despite that, ultimately, we do need to tidy these things up.

[135] **Yr Arglwydd Elis–Thomas:** Ond roedd hynny yn enghraifft dda iawn o'r angen democrataidd i allu rhoi cyfr i weithredu'n wleidyddol.

Lord Elis–Thomas: But that was a good example of the democratic need to provide cover for political actions.

[136] **Mr Morgan:** Nid oedd y *brigadier* yn moyn gweithredu heb gyfr. Rwyf ti wedi rhoi'r ymadrodd yna'n berffaith—cyfr. Nid oedden nhw'n moyn gwneud pethau ar eu hylt eu hunain. Roedden nhw'n moyn gwybod beth oedd y Gweinidog yn moyn—naill ai Carwyn fel y Gweinidog amaeth neu finnau fel Prif Weinidog.

Mr Morgan: The brigadier didn't want to take action without that cover. You've termed it perfectly. They didn't want to do anything off their own back. They wanted to know what the Minister wanted—either Carwyn as the Minister for agriculture or myself as First Minister.

[137] **Yr Arglwydd Elis–Thomas:** Tybed a allet ti ddweud wrth y pwyllgor yma sut rwyf ti'n edrych ar y newidiadau a ddigwyddodd o hynny ymlaen wedyn, ac yn enwedig Deddf

Lord Elis–Thomas: I wonder whether you could tell this committee how you perceive the changes that happened from then on, especially with regard to the Government of

Llywodraeth Cymru 2006 a'r Wales Act 2006 and the datblygiad cyfansoddiadol drwyddo constitutional development through i'r refferendwm. Efallai y byddet ti'n to the referendum. Perhaps you'll cofio bod y Llywydd ar y pryd, sef fi remember that the Presiding Officer fy hun, bach yn ofnus ynglŷn â at the time, myself, was slightly chynnal refferendwm, pan concerned about holding a ddigwyddodd yn 2011, oherwydd nid referendum, when it happened in oeddem ni mor hyderus fod pobl 2011, because I wasn't confident that Cymru wedi gweld gwerth beth the people of Wales had seen the roeddem ni'n ei wneud. Ond dyna the value of what we'd done. But that's ddigwyddodd, felly. what happened.

[138] **Mr Morgan:** Fe oedd newid yn **Mr Morgan:** There was a change in ymateb pobl Cymru i'r siawns o gael the response of the people of Wales fwy o bwerau ac o drosglwyddo'r to the opportunity to have more hawl i ddeddfu yn y meysydd powers and to have legislative datganoledig ar ôl y—trydydd neu powers in the devolved fields after bedwerydd—pedwerydd etholiad, sef the—was it the third or the fourth— o 2011 ymlaen. Roedden nhw'n gallu fourth election, from 2011 onwards. gweld y sens ac yn enwedig y newid They could see that it was necessary. ymhlith—. Beth wnaeth y What made that huge difference was gwahaniaeth enfawr oedd newid the change in the response of the ymateb y blaid Doriaidd yng Conservative party in Wales. They Nghymru—eu bod nhw nawr yn were now willing, with a few fodlon ymgyrchu, gydag ambell i exceptions, to campaign. They eithriad. Roedden nhw'n moyn wanted to campaign with the other ymgyrchu gyda'r pleidiau eraill dros y parties for this change in that newid yma yn y refferendwm. referendum.

[139] Felly, nid oedd So, there was no opposition, apart gwrthwynebiad, oni bai am ambell i from a few individuals and a few unigolyn ac ambell i gornel fach o corners of Wales. Everyone was in Gymru. Roedd pawb o blaid, bron a favour, generally speaking. The BBC bod. Roedd y BBC yn stryglan i was struggling to find anyone to ffeindio unrhyw un i siarad dros yr speak for the 'no' side, in order to ochr arall, i gadw gyda'r ffaith eu bod maintain its impartiality in terms of nhw'n gorfod cael elfen o degwch the coverage of the referendum. It rhwng y ddwy ochr. Ond roedd hi'n was very difficult to actually achieve anodd iawn i gael y tegwch yna. that impartiality.

[140] Ond, mewn ffordd, fe oedd yn But, in a way, it was a window. I'm

fffenestr, rydw i'n meddwl. Fe oedd yn ffenestr. Nid ydw i'n siŵr a allech chi ei wneud mor rhwydd nawr. Ond roedd y ffenestr yna yn y flwyddyn 2011 i gael y refferendwm yna yn syth cyn ein pedwerydd etholiadau ni ym mis Mai.

[141] **Yr Arglwydd Elis–Thomas:** Ond beth am beth sydd wedi digwydd wedyn? Oherwydd rydym ni wedi cael tystiolaeth yn y pwyllgor yma—ac mae gan lawer ohonom ni brofiad uniongyrchol efallai o'r ffordd y mae agwedd adrannau gwahanol o Lywodraeth y Deyrnas Unedig tuag at ddatganoli yn gallu bod yn wahanol, gyda rhai yn ceisio cadw pwerau yn ôl hyd yn oed er i ni gael cyfundrefn bellach lle mae trefn lle mae pwerau cadwedig a phwerau gosodedig yn glir, ac mae'r eithriadau yn achos Cymru yn sylweddol fwy nag ydyn nhw yn achos Gogledd Iwerddon a'r Alban. Felly, er bod gyda ni fwy o ddatganoli, efallai fod yna bron gymaint o ddryswch ag yr oedd yn y dyddiau rhyfeddol hynny pan oeddem ni'n gorfod ceisio Gorchmynion cymhwysedd deddfwriaethol—yr hen LCOs uffernol yna.

[142] **Mr Morgan:** LCOs, ie. Wel, mae ar ôl fy amser i a dweud y gwir, felly ni allaf i roi tystiolaeth uniongyrchol. Ond yr argraff rwy'n ei chael yw bod yna gamddealltwriaeth yn Whitehall ynglŷn â manteision sefydlu cryfder a phatrwm clir. Bwriad y ddeddfwriaeth ddiweddaraf yma oedd cael patrwm

not sure if you could do it as easily now. But there was a window of opportunity in the year 2011 to have that referendum immediately before our fourth elections in that May.

Lord Elis–Thomas: What about what's happened since then? Because we have had evidence in this committee—and many of us have direct experience perhaps of the way that the attitude of different departments of the United Kingdom Government towards devolution can differ, with some trying to retain powers even though we've had a regime now where the arrangements for reserved powers and conferred powers is clear, and the exceptions with regard to Wales are significantly greater than in the case of Northern Ireland and Scotland. So, even though we do have greater devolution, perhaps there is just as much confusion as there was in the incredible days when we had to seek legislative consent via legislative competence Orders.

Mr Morgan: LCOs, yes. Well, it's after my time, so I can't give you direct evidence. But the impression that I get is that there is some misunderstanding in Whitehall on the benefits of a clear pattern. The intention of this latest legislation was to have a clear system in place that

clir, tebycach i beth ddigwyddodd reit o'r dechrau yn yr Alban. was more akin to what happened from the very outset in Scotland.

[143] Ond, hyd yn oed wedyn, roedden nhw'n moyn dweud, 'Ie, rŷm ni'n moyn y patrwm clir yma ond rydym ni'n moyn tynnu nôl hefyd ynglŷn â phwerau ar ddŵr achos bod ein hafonydd ni'n dechrau yng Nghymru ac yn mynd draw i Loegr ac wedyn yn dod nôl mewn i Gymru', ac ati. Felly, beth allwch chi ei wneud ynglŷn â'r broblem yma o *catchments* y dŵr, sydd mor bwysig i Loegr, er eu bod nhw yn dechrau yng Nghymru ac ambell i waith yn cwpla yng Nghymru hefyd—pynciau anodd fel yna? Ond yn ail law rwy'n siarad nawr. Felly, nid wyf yn moyn rhoi gormod o dystiolaeth lle na allaf i siarad yn uniongyrchol. But, even then, they said, 'Yes, we want this clarity but we also want to reserve a number of issues in terms of powers over water because our rivers start in Wales and cross the border to England and then come back into Wales', and so on and forth. So, what can you do about this problem of the water catchments, which are so important to England, because they start in Wales and on occasion they finish in Wales too—difficult topics like that? But this is second hand experience. I don't want to give you too much evidence where I cannot speak from direct experience.

[144] **Huw Irranca-Davies:** Thank you. Nathan, do you want to take us on into another subject?

[145] **Nathan Gill:** Yes, thank you, Chair. Just taking it back now to the memorandum of understanding and also the devolution guidance notes, how effective do you think that they were as a tool in the intergovernmental relations?

[146] **Mr Morgan:** What was set out attached to the devolution legislation in 1998?

[147] **Nathan Gill:** Yes.

12:00

[148] **Mr Morgan:** Oh gosh, I don't think we made a huge amount of use of them to be honest. I think—. This is going back 17—no, more than that now—19 years, and subsequent to that, when we started 18 years ago now—. As I said, it was strange. At that time, Westminster—when I say

Westminster, I mean the Government, rather than Parliament—and Whitehall treated my Scottish opposite numbers—I'm not so sure about Northern Ireland, but certainly my Scottish opposite numbers: Donald Dewar to begin with, then Henry McLeish, then Jack McConnell—and myself as though we were some strange adjunct Minister of a new kind but undoubtedly part of the administration in Whitehall and Westminster, and we kept having to point out that, in fact, we weren't. It was nice to have the invites to the big dinners with visiting European commissioners, or nice to have the COBRA briefings from the head of MI6 or whatever it might be, but on the other hand you had to remind them from time to time that we were separate. So, it was more how you played it in this relationship with Westminster and Whitehall that had greater impact, probably, than the wording of the memorandum of understanding about how the relationship should work. Now, I don't say that my civil servants wouldn't have made a lot more study of the memorandum of understanding than I did.

[149] **Nathan Gill:** Okay, that's very interesting. Basically what you're saying is the personal relationship between yourself and your counterparts was very crucial. Looking, then, at the Secretary of State for Wales and yourself, how did that relationship work, because, of course, you were from the same party as well? Was it more party political or was it on more of a formal basis, more 'This is the new position now and therefore we are going to work more professionally'? Sorry, that's probably the wrong way of saying it, but you know what I mean.

[150] **Mr Morgan:** Yes. That's a good question. I'm just trying to think back to foot and mouth. There was no way in which the staff reporting to the Secretary for State for Wales, which would not have exceeded 40 or 50, maybe, at the outside at the time, could possibly have administered foot and mouth, for example, but in no way would we have cut Paul Murphy out of the process. So, for instance, the most critical meeting that we had—you may even have been there, Nathan—was in Anglesey, where we had to fly up in a tiny little plane—Carwyn, as the Minister, myself and Paul Murphy, the Secretary of State—to go to Llangefni, to the shire hall, and have what we thought was going to be a meeting just with the council leader and the chief executive to discuss where on earth they were going to have the burning pits to get rid of the carcasses, because Anglesey was on day 2 of the outbreak. I think Essex or Devon was the first. Anglesey was on the second day I think, and immediately the problem arose—'Well, where are you going to burn the carcasses?' Nobody wanted it near them, and Anglesey, as a council, was in a state of chaos at the time—there was no clear leadership. Anyway, we

weren't going to cut Paul Murphy out of that meeting—it was very important to have the Secretary of State there, even though he may have been the only person in the room who couldn't speak Welsh, but, you know, he had to be there because it was a fairly chaotic situation and we had to try and pour oil on troubled waters. It was pretty, well, panic stations—very different to when we stopped off in Welshpool—Welshpool international airport, of course—on the way back to south Wales, and it was like entering a war zone with the pyres from the burning, but there was no political problem to deal with as there was in Anglesey. The farmers and Powys County Council got together and said, 'Right, burning pit over there and over there', and it was a horrific sight, but at least there wasn't a political problem as there was in Anglesey.

[151] **Nathan Gill:** Obviously, because you were from the same party, were you able to galvanise better, do you feel, because of that?

[152] **Mr Morgan:** Well, it was one of these weird things where, de facto: we are not in charge of this, it's not a devolved service; de jure, we are. Well, I think there was an Order in Council to transfer powers to us at some stage, but in any case we were running the show when it came to a non-devolved function of that sort. So, de facto, farmers looked to us: 'What's the'—expletive deleted—'point of having a Welsh Assembly if it's not going to be able to help us with something as gigantic—?' Not just for the farmers, now, but the tourist industry in Wales was totally devastated, because all the footpaths were closed and so forth. So, we were running it, but you had to have—. You know, on a de facto basis, the farmers of Wales decided that it was the Welsh Assembly Government—whatever title we had at the time—that they were looking to to run foot and mouth in Wales. And, yes, we brought Paul Murphy in, but he didn't have any staff, effectively, so it was our staff because it was agriculture—apart from the State Veterinary Service staff, who were non-devolved, but they were the ones who advised us to do things differently in Wales, because transhumance was much more important in Wales than in England, which we did. Now, you might say, 'Well, how can you do that? How can a non-devolved service make different decisions?' Well, it was in response to farmers' pleas. They said, 'We can't run our farms unless we can transfer our sheep to the upland pastures.' They weren't allowed to do that in England, unless it was contiguous, but in Wales we said, 'On the basis of advice from the SVS, we'll do it differently', even though the State Veterinary Service was a non-devolved service.

[153] **Huw Irranca-Davies:** Thank you, Nathan. Dai, do you want to take us further down this line of questioning?

[154] **Dai Lloyd:** Ydw, jest yn nhermau—. Rydym ni wedi clywed crin dipyn o dystiolaeth gan eraill, ac, yn wir, ychydig gennych chi, y bore yma, ynglŷn â phwysigrwydd perthynas bersonol. Gweinidogion yn fan hyn, a Gweinidogion yn Llundain, rŵan—rydym ni'n sôn amdany'n nhw. I fod yn deg, pan oedd yna glymbleidiau yn fan hyn, rhwng gwahanol bleidiau yn fan hyn, a gwahanol bleidiau yn Llundain hefyd, beth oedd yn helpu pethau yn fawr oedd y berthynas bersonol rhwng pa Weinidog bynnag o ba blaid bynnag fan hyn a Gweinidog o ba blaid bynnag pen arall yr M4. Wedyn, wedi derbyn y doreth yna o dystiolaeth mai'r peth allweddol yw'r berthynas bersonol yna, a hefyd wedi derbyn tystiolaeth sydd yn dweud os nag oedd yna berthynas bersonol, roedd pa adran bynnag yn San Steffan yn cymryd fawr neu nemor ddim sylw o Gymru chwaith, a ydych chi'n gresynu neu—? O edrych ar y broblem mewn ffordd wahanol, pa fath o strwythurau a ellir cael eu defnyddio er mwyn sicrhau bod yna gysylltiadau pwysig yn gallu digwydd, hyd yn oed pan nad oes perthynas bersonol rhwng Gweinidog yn fan hyn a Gweinidog yn Llundain?

[155] **Mr Morgan:** O ran perthynas bersonol, fe fyddai hynny'n cyfri o ran y berthynas rhwng y Prif Weinidog, er enghraifft, a'r Ysgrifennydd Gwladol, achos rydych chi'n bownd o adnabod eich gilydd

Dai Lloyd: Yes, just with regard to—. We've heard a lot of evidence from others, and, indeed, a little from you yourself this morning, about the importance of personal relationships. Ministers here and Ministers in London—that's what we're talking about here. To be fair, when there were coalitions here between different parties here, and between different parties in London as well, what helped the situation was a personal relationship between whatever Minister from whatever party here and a Minister of whatever party at the other end of the M4. So, having received that whole host of evidence that the vital thing is the personal relationship, and also evidence that states that if there wasn't that personal relationship, then whatever department in Westminster took very little notice of Wales, do you deplore or—? Looking at the issue in another light, what kind of structures could be put in place to ensure that important communications can happen, even when there isn't a personal relationship between a Minister in this place and a Minister in London?

Mr Morgan: In terms of the personal relationship, that would be important in terms of the relationship between the First Minister and, for example, the Secretary of State, because you're bound to know each other well and

yn dda ac yn gallu gweithio gyda'ch gilydd ac ati. A ydych chi'n disgrifio hynny yn berthynas bersonol neu yn berthynas bleidiol, nid ydw i'n siŵr. Nawr, rwy'n meddwl, efallai, eich bod chi, Dai, yn mynd yn rhy bell, achos un peth rwyf yn cofio oedd y newid enfawr yn yr awyrgylch, y teimladau, o achos perthynas bersonol, ond i'r gwrthwyneb, sef casineb personol. Er enghraifft, cyn gynted i Alex Salmond ddod yn Brif Weinidog yn yr Alban, roedd y berthynas yna gyda'r Prif Weinidog, gyda'r Canghellor, Gordon Brown—ac wedyn wedi i'r Canghellor, y person yna, Gordon Brown, ddod yn Brif Weinidog yn yr haf—ddeufis ar ôl i Alex Salmond gael ei ethol fel Prif Weinidog yn yr Alban, roedd Gordon Brown yn Brif Weinidog dros Brydain Fawr i gyd—roedd y casineb yna yn effeithio hyd yn oed arnom ni. Roedd y teimlad cynnes yma, twym, y berthynas bod y teulu Llafur, gyda chlymbleidiau, gyda'r Rhyddfrydwyr, jest wedi stopio—bron â bod dros nos. Achos roedd Gordon Brown yn ffaelw derbyn, bron â bod, fod rhywun arall, ac yn enwedig Alex Salmond, wedi cymryd drosodd yn yr Alban. A daeth lot o'r perthnasau yna a oedd yn digwydd yn awtomatig, a'r gwahoddiadau i gyfarfodydd pwysig yn Llundain—roedden nhw bron â bod wedi dod i stop ar ôl i Alex Salmond ddod mewn, achos y berthynas yn bersonol, ond i'r gwrthwyneb o berthynas bersonol o fod o'r un blaid ac yn y blaen. Felly, dyna'r broblem, ac nid oedd ffordd o ddweud, 'Wel, ie, efallai taw Alex

you need to work together and so on. Whether you describe that as a personal relationship or a party relationship, I'm not sure. Now, I think that you, Dai, go a little too far, because one thing I do recall is the huge change in terms of the atmosphere because of the personal relationship, but the reverse—it was a personal animosity. For example, as soon as Alex Salmond became First Minister in Scotland, that relationship with the Prime Minister, with the Chancellor, Gordon Brown—and once Gordon Brown became Prime Minister in the summer, two months after the election of Alex Salmond as First Minister in Scotland, Gordon Brown was Prime Minister, and that animosity between them did have an impact, even upon us. That feeling of warmth and affection that had existed in terms of the Labour family, with coalitions, with the Liberal Democrats, ceased—virtually overnight. Because Gordon Brown almost couldn't accept that someone else, particularly Alex Salmond, had taken over in Scotland. And many of those relationships that happened automatically, and the invitations to important meetings in London, almost came to a complete halt after the election of Alex Salmond, because of the personal relationship, but the opposite of a relationship between members of the same party and so on. So, that was the problem, and there was no way of saying, 'Well, perhaps it is Alex Salmond. Perhaps he is a member of the SNP,

Salmond yw e. Efallai ei fod e yn yr SNP, ond hyd yn oed wedyn, mae e'n Brif Weinidog.' Felly, dylai'r un hawliau barhau ymlaen i'r Prif Weinidog o Gymru, sy'n parhau i fod yn Llafur, neu i rywun o'r Alban, sydd ddim yn Llafur, ac yn elyniaethus iawn i Lafur, sef yr SNP. Ond fe oedd wedi cael ei ethol, hyd yn oed gyda Llywodraeth leiafrifol iawn. Ond hyd yn oed wedyn, fe oedd y Prif Weinidog, ond roedd y broblem yma: i bwy roedd yr Alban yn perthyn—i Gordon Brown neu i Alex Salmond—yn effeithio, hyd yn oed, arnom ni.

[156] **Dai Lloyd:** Mae hynny'n bwynt digon teg, ond y pwynt sylfaenol roeddwn i'n trio mynd ar ei ôl oedd—wel, fel y pwyntiau roedd Nathan wedi'u codi, yn wir—rydym ni'n trio cael rhyw fath o strwythur i wneud yn siŵr bod y Gweinidogion yn fan hyn yn gallu siarad efo Gweinidogion yn Llundain, y memorandwm cyd-ddealltwriaeth ac ati, pa faint bynnag o ddefnydd o hynny sydd, ac lle nad ydym mewn sefyllfa y dylwn ni fod yn gorfod dibynnu ar berthnasau personol positif, gan amlaf, wrth gwrs, ond wrth gwrs rydych chi wedi darlunio un sydd yn negyddol tu hwnt. Felly, a oes yna ateb arall? Achos y dystiolaeth rydym ni wedi'i chael yw: os nad oedd yna berthynas, nid oedd Cymru yn cael *look in*.

[157] **Mr Morgan:** Wel, yn sicr, fe gawsom ni ein heffeithio'n negyddol yn y *backwash* o'r ffrae barhaol a oedd wedi bod yn mynd ymlaen am

but he is still the First Minister of Scotland.' So, the same rights should continue for the First Minister for Wales, as Labour, or for someone from Scotland, who is not Labour and who is hostile to Labour, and who is SNP. But he was elected to that position, even though it was a minority Government. He was still the First Minister of Scotland, but you did have this problem: to whom did Scotland belong? Did it belong to Alex Salmond or to Gordon Brown? And that had an impact, even upon us.

Dai Lloyd: Well, that point is fair enough, but the fundamental point that I was trying to pursue, like the points that Nathan made, was: we need some kind of structure to ensure that Ministers here can talk to Ministers in London, with the memorandum for understanding, and so on, however much it is sued, and where we are not in a situation where we do have to depend on those personal relationships, positive usually, of course, but you've taken us through one that was very negative. Is there another solution? Because the evidence that we've received is that if there wasn't a relationship, then Wales wouldn't receive a look in.

Mr Morgan: Well, certainly, we were negatively impacted in the backwash of the ongoing arguments that had been going on for 20 years between,

20 mlynedd, rwy'n siŵr, rhwng, er enghraifft, Gordon Brown, y prif arweinyddion ac Alex Salmond. Felly, dyna un o'r rhesymau pam rydw i o blaid cyfansoddiad ysgrifenedig i'r Deyrnas Gyfunol: fel bod pethau yn gliriach. Nid ydw i'n dweud bod eisiau, neu y byddai wedi bod yn fanteisiol pe byddwn ni wedi cael cyfansoddiad ysgrifenedig reit ar y dechrau ym 1999. Nid wyf yn dweud hynny o gwbl. Efallai ei bod yn eithaf doeth eich bod chi'n cael 10 mlynedd o *muddling through*, jest trio gweld faint o berthynas rydych chi yn gallu ei hadeiladu a ble rydych chi yn cael eich cnocio nôl a ble rydych chi'n ffeindio bod y drws yn agored, ac yn y blaen. Felly, roedd yn iawn, efallai, am y 10 mlynedd gyntaf, ond wedyn, ac yn sicr pan oedd wedi dod o dan y prawf yma o gael yr SNP yn rhedeg yr Alban, roeddech chi'n gallu gweld y fantais o gael rhywbeth wedi'i ysgrifennu i lawr yn glir, a'i fod yn cael ei ystyried fel cyfansoddiad i'r Deyrnas Gyfunol.

[158] Roeddwn i wastad wedi dweud y byddai'n cymryd hyd nes ar ôl i fi gwplu, ac rydw i wedi cwplu nawr, ond rydw i'n yn parhau i feddwl am y peth, ac rydw i'n meddwl bod y flwyddyn 2020 neu'r flwyddyn 2025, efallai—y byddai'n cymryd hyd at hynny er mwyn setlo pethau ynglŷn â beth yn gwmws yw statws Tŷ'r Arglwyddi, a nawr ein bod ni'n mynd mas o'r Undeb Ewropeaidd, mae eisiau ysgrifennu pethau i lawr a chymoni pethau, a dweud, 'Beth yw'r

for example, Gordon Brown, the leadership and Alex Salmond. So, that's one of the reasons why I'm in favour of a written constitution for the United Kingdom: so that things are clearer. I'm not saying that it would have been beneficial if we had had a written constitution at the very outset in 1999. I'm not saying that at all. Perhaps it showed some wisdom that you had some 10 years of muddling through just to see how much of a relationship you could build, and where you find doors open, and where you find some push-backs too and so on. So, that was fine for the first 10 years, but then, and certainly when it faced this test of having the SNP in charge in Scotland, you could see the clear advantage of having a written constitution that provided clarity, and that it was looked upon as a constitution for the UK.

I always said that it would take until after my time, and my time in this place is over, but I still consider these issues and I think that the year 2020 or the year 2025—that it would take until that time in order to settle these issues in terms of what exactly the status of the House of Lords is, and now that we are facing exiting the European Union, we do need to write these things down. Things need to be made clearer. We need to establish what the rights are, and

hawliau?’ a ‘Beth yn gwmws yw’r what the interrelationships are
berthynas rhwng y cyrff datganoledig between devolved bodies and the
a Llywodraeth ganolog y Deyrnas central Government of the UK. It is
gyfunol?’ Mae ei eisiau fe nawr, rydw necessary now, I think, but I don’t
i’n meddwl, ond nid wyf yn meddwl, think that it would have been wise to
efallai, y byddai wedi bod yn ddoeth i try and write things down in 1999.
drio ysgrifennu pethau i lawr ym
1999.

[159] **Huw Irranca–Davies:** Before we pass to David to take us on a little bit further again, in this changing world of devolution that we’re in, from a Wales perspective, is the Wales Office now, and the position of the Secretary of State for Wales, a benefit, an assistance, or an impediment to that direct relationship between First Minister and Prime Minister? Because that, certainly—and you were hinting at it then—at critical times in devolution, but also at critical times in national emergency situations, such as the foot and mouth epidemic, the direct relationship between First Minister and Prime Minister has been key, as well as through the Wales Office and the Secretary of State for Wales.

[160] **Mr Morgan:** Yes.

[161] **Huw Irranca–Davies:** What are your thoughts on that now, in this new world that you envisage of written constitution and so on?

[162] **Mr Morgan:** Well, the survival of the Secretary of State for Wales and Scotland—Northern Ireland is in a slightly different category, as we can see from the present moment when the Assembly goes into suspension—. But if you take Wales and Scotland, I think the survival of the Secretary of State’s Office for Wales and Scotland, 18 years after a devolution—nobody would have anticipated that. There were times, of course, when it was thought that you should merge the three offices, so that you had a kind of office for the Celtic fringe or something with a voice in the Cabinet.

12:15

[163] There were other solutions, which both Paul Murphy and certainly Peter Hain had, of having the Wales Office continue. But when a much bigger Cabinet job like social security was being done by that person—I can’t remember whether the Secretary of State for Scotland ever did a major Whitehall job as well as being Secretary of State, but I don’t think anybody

expected those offices to continue. Does it involve a bit of a blockage in relationships, not just with the Prime Minister but with individual Secretaries of State? I can't answer for the last—what is it now, since I finished in December 2009—that's seven years and a half now. I've no idea, but during the Wales Bill it would have been very interesting to be a fly on the wall, knowing what happened when the Secretary of State for Wales rings up the Whitehall Minister responsible for, for instance, water catchments or the Arriva rail franchise or whatever—obviously, the services to north Wales pass through England and back towards Holyhead when they get back into Wales around Chirk and Gobowen—and says to the Secretary of State for transport or Secretary of State for the environment, 'Well, look, let's try and clear this up now, is this going to go to Wales or is it going to go to England?', or 'How are we going to work it?'. Do they say, 'Well, what the hell's it got to do with you, anyway? You're only the Secretary of State for Wales. I want to talk to the Minister in Wales' or do they say, 'Yes, Alun'—as it is now—'Yes, fine; give us your advice'? I just don't know, because I've been out of it for seven and a half years.

[164] **Huw Irranca-Davies:** Okay. That's a neat way to come on to you, David.

[165] **Mr Morgan:** But the Prime Minister—. Sorry, David. Just to say, of course, if it's important enough, you have to speak to the Prime Minister. So, on foot and mouth, Tony Blair did a visit down. Now, he didn't for the other crises that we had just before foot and mouth, namely the flooding and the steel crisis in the autumn of 2000. We had crises almost one a month, but he did for foot and mouth because it's important enough. So, I would discuss foot and mouth with him as well as, obviously, Carwyn, being the Minister. So, if it's important enough, you have to have access to the Prime Minister.

[166] **Huw Irranca-Davies:** Okay. Thank you.

[167] **Mr Morgan:** Sorry, David.

[168] **David Melding:** Thank you, Chair. Actually, the energy and candour of your evidence is just fascinating, and it's great to see you back, incidentally, and helping this committee in our work. Rhodri, can I look at the joint ministerial council and how that operated? I hadn't made the association before, actually, of how the arrival of an SNP minority Government affected the operation of devolution. But the JMC obviously comes in because we have devolved Governments. It has a certain amount of energy and purpose in the

early days, then it goes into abeyance, and it may be—and you could confirm this—that one of the reasons was the arrival of the SNP. Then, after 2010, the coalition Government, and then, after 2015, the Conservative Government, you know, keep the JMC running, but some critics say it's more formalistic than obviously purposeful. Is that a fair description of where we are with the JMC and its phases?

[169] **Mr Morgan:** Yes, absolutely. It's almost like what I said about the Prime Minister coming down to do a visit on foot and mouth, because foot and mouth was that big that you had to have a visit not by the Secretary of State for agriculture but by the Prime Minister, to show that he is the Prime Minister and is taking an interest. This Joint Ministerial Committee started off with the Prime Minister chairing pretty much every one. The British-Irish Council, which was seen as a similar body to the JMC—no disputes resolution function or anything like that, but because it kept the unionist community in Northern Ireland happy that there was this east-west strand, it made it more acceptable for them to have a north-south strand—they were chaired by the Prime Minister as well in the initial years, and then gradually it would be the Deputy Prime Minister, John Prescott, to take over. Then it would go from John Prescott to the leader of the house, and Robin Cook took over and whatever. You could see it gradually dropping. I regretted that, because forgetting the disputes resolution mechanism, which was never going to work that well, because the Westminster and Whitehall machine could always say, 'This has not been resolved at the Joint Ministerial Committee, we'll now go to the Prime Minister for a final decision'—. Well, obviously, the Prime Minister is going to back the Westminster/Whitehall view, not the view of the devolveds, and that's why we had such an evil row over the funding of the Olympic Games. But if you forget that, the great advantage of the Joint Ministerial Committee was the compare-and-contrast possibilities that it had. Bill Clinton, long before he was President—when he was Governor of Arkansas—said that the great thing about the US system is that you've got 50 living laboratories to try out experiments in health, social security, prison reform, whatever it might be, and if something works well, other governors can say, 'Bill, how's that system working in Arkansas? Can I send somebody down?' There's a whole industry in America of comparing different states and their different approaches to all manner of social welfare and economic regeneration issues, and that's what we used to do in the Joint Ministerial Committee: 'How are you doing on health? How are you doing on economic development?'—whatever it might be. And I thought that was one of its great strengths; that we could see how we were playing it differently. We were playing some things long, like health, in public health terms; the English

priority was to play in short in terms of waiting lists. You could compare and contrast that approach. I thought that was very healthy, and I regretted that it ceased to be sufficiently important to deserve the Prime Minister's time after about—I can't remember now—three years or something like that.

[170] **David Melding:** That's very helpful. Your successor as First Minister has now emphasised how important it is to strengthen the JMC process and, indeed, thinks it should probably have a new title of 'Council of Ministers' to give it that sense of importance to the wider constitution and certainly in terms of relations between the Governments that are within the United Kingdom. I suspect that's something you'd support, but perhaps you could put on the record whether you think this is an important development in the more formal mechanisms of that sort of federal approach to Government, I suppose, which you opened this session on when you referred to reforming the House of Lords along those lines.

[171] **Mr Morgan:** I feel a bit out of it compared—. It's Carwyn's view rather than mine that would say whether the deterioration of importance in the joint ministerial council has got to such as you would want, therefore, to now relaunch it. What I think you've got to try and solve is the missing parts of the original devolution settlement, namely the absence of an independent dispute resolution mechanism; an independent resource allocation mechanism; and, in particular, an independent mechanism for solving a dispute over resource allocation, which is what happened over the Olympics, where we were just told, 'You're not having any Barnett formula money from the Olympics'. We said: 'Hang on a minute, what about—not the track, not the swimming pool—what about the urban regeneration benefits and what about the transport expenditure?' 'No; it's all covered by a Bill, the House of Commons passed it'—and so on. It didn't say that it was exempt from the Barnett formula in the legislation and that Wales and Scotland and Northern Ireland are not going to get anything, not only from the stadium and the sports facilities. 'No—sorry.' And I suspect that if the SNP hadn't won control of Scotland, there would have been a Barnett formula application, certainly to the non-sport side of it. But as it was, they said, 'Alex Salmond's got too much money already' et cetera and they said, 'Yes, well, we haven't got an SNP Government in Wales, and we certainly haven't got enough money'. But, you know, it was just lost in this very evil and poisonous relationship, going back years, either personally between Gordon Brown and Alex Salmond, or between Labour and the SNP, over who runs Scotland.

[172] **David Melding:** Do you think it's this potential heavy-handedness from

the UK Government, under whichever party or parties, that is causing some anxiety here in Cardiff, and I suspect also in Scotland, about what happens to the powers that will now come back from the EU, particularly in terms of agriculture and the environment?

[173] **Mr Morgan:** Absolutely.

[174] **David Melding:** We seem to be in this odd situation where most people think that there should be some form of UK framework so that you don't have radically different agricultural and environmental policies in different parts of the UK, but we're not quite sure how you set that up with the Welsh Government and Scottish Government saying, 'Well, you need to formally transfer the powers to us and then we'll negotiate the common working arrangements'. It doesn't seem to be very functional that we can agree in principle that there should be a framework, but we have this row, then, about the direction of the powers in terms of where they will land.

[175] **Mr Morgan:** Yes. I doubt there are going to be a lot of votes in this in the election in four or five weeks' time. But, yes, you're absolutely right to point that out as a major concern. The Secretary of State for Wales has virtually no staff. Perhaps they have 100 staff now, but certainly, they can't run a function if they just don't have the people to do it. So, if, for instance, the Secretary of State for Wales, with the encouragement of the Prime Minister, made a power grab for the agricultural powers that will be reverting to the UK, well, you have to ask how many civil servants would they have to hire in order to run that function. Or, in effect, would the Secretary of State for Wales say, 'Well, I've grabbed the power now. I should be running agriculture in Wales, but I'll have to ask the Ministry of Agriculture, Fisheries and Food to actually run it', which would mean that it would cease to be a devolved function, even though it's been devolved, not since right at the start, but in 1970 or thereabouts—1974 with John Morris, I think, wasn't it? So, it's been devolved for 43 years; it could become undevolved, but it certainly couldn't be run by the Wales Office, not without a massive hiring programme of civil servants—or if they say, 'We're keeping the power, but we'll give an agency to the Assembly, the Welsh Government'.

[176] Economic regeneration: a little bit more complicated. You know, scientific research is not a devolved function, so that would be different. But agriculture is probably the big one. It could not be run by the Wales Office as presently constituted in Whitehall. Now, does the Wales Office have any ambition to reconstruct itself as an executive body with administrative

functions, rather than co-ordinating functions? I have no idea. But I doubt this is going to be a major issue in the election. It's a shame; it should be, but I don't think it will be.

[177] **David Melding:** I suppose from our point of view, we would like to see evidence that the various Governments were talking seriously about it and, in a practical way, getting on with the job. But can I just finish my questions by just asking you whether you think the relations between the Whitehall departments and the Welsh and Scottish Governments have improved in terms of their knowledge of the cultural change and governmental changes that have gone on—

[178] **Mr Morgan:** Of Wales to Scotland and Scotland to Wales, now, forgetting Whitehall and Westminster?

[179] **David Melding:** No, no. How Whitehall deals with Wales and Scotland in the devolved spheres of Government. You started off saying that they more or less, in the early days, just regarded devolution as an extension of the former territorial departments of state, only dressed up with a more democratic and legislative—

[180] **Mr Morgan:** Instinctively, that was the case, yes.

[181] **David Melding:** Did that change during your time and did they realise that this is a real shift in terms of our practice?

[182] **Mr Morgan:** I would say so. I mean, even by the time that I finished seven and a half years ago as First Minister, I think that cultural shift had taken place. I don't think that we were considered an odd kind of adjunct ministry, but abiding by almost collective Government responsibility. I just don't think—. And that was before Alex Salmond arrived in the SNP.

[183] **David Melding:** And then when you were dealing with tricky situations, did you breathe a sigh of relief when you heard which Whitehall department was dealing with it, or did you have a shiver when you heard about another?

[184] **Mr Morgan:** Yes.

[185] **David Melding:** So, does that remain an issue, do you think?

[186] **Mr Morgan:** I've no idea over the past seven and a half years, but what

we found was that if a Government ministry in Whitehall carried out almost identical functions to our devolved functions—for instance, John Prescott’s super department had—. Although it was a super department, all of its functions in Wales, with tiny exceptions, were done by us. So, there was always immense tension.

12:30

[187] The Foreign and Commonwealth Office thought we were wonderful because we didn’t compete with them. They treated us as people to be looked after, saying, ‘You must stay, if you’re in Brussels, with the British ambassador or the high commissioner’—what do they call it? I can’t remember the exact title now—‘or the high representative to the EU, in his palatial establishment’, and so forth. They wanted to incorporate us and to treat us as a wonderful new part of the British constitution, which they could boast about to the French and say, ‘Well, you would never have done this, would you, Froggies? We’ve done it in Britain. You probably thought we’d never do it, but we’ve got devolution. You should try it sometime’. It was something to be boasted about, that the Brits had shown the flexibility to bring in devolution, and they were immensely proud. So, there was never a problem with the Foreign Office, but immense problems with John Prescott’s department. And the others were on a sliding scale, really, of to what degree were they carrying out the same functions as us. If they were, there was trouble; if they were completely different from us, they thought we were wonderful.

[188] **David Melding:** Thank you. That’s very interesting.

[189] **Huw Irranca-Davies:** Now, Rhodri, with the committee’s willingness, because time is always our enemy unfortunately, what I might do is skip ahead a little bit here to Nathan to just explore a little bit the implications of Brexit before we finish. But what we might do is write to you on the issue of inter-parliamentary relations because we’ve focused very much on inter-governmental relations. Of course, obviously, as a committee we’re quite interested in the exercise of influence through the committee structures and those wider parliamentary bodies as well, unless you have any particular observations at this moment on inter-parliamentary relations, then what—

[190] **Mr Morgan:** I’m happy to take a question on it, but I haven’t got—

[191] **Huw Irranca-Davies:** Well, I suggest that what we’ll do is write to you

and seek a couple of observations on that rather than rush it now, because you might, on reflection, have some interesting points to make.

[192] **Mr Morgan:** Yes, okay. I owe you that after letting you down a month ago when I had a terrible chest infection.

[193] **Huw Irranca-Davies:** No, no, not at all. But it does allow us, then, Nathan to take us into the sphere of the implications of EU exiting.

[194] **Mr Morgan:** Yes.

[195] **Nathan Gill:** Yes, thank you. Obviously, you served seven years on the European community office for Wales—

[196] **Mr Morgan:** I did, yes.

[197] **Nathan Gill:** So, you must have quite a bit of insight within the workings and also your own opinions about how now Wales will be affected through the Brexit process, and also the effect of it on inter-governmental working. So, I just wondered if you could maybe share some of those thoughts with us.

[198] **Mr Morgan:** Yes. I think my experience from 1980 to half way through 1987 is probably pretty irrelevant now, to be honest there, but, obviously, the huge issue is the one that David and I have already discussed. So, Brexit is going to mean—. It just depends how the psychology of the United Kingdom changes, really, because we always enjoyed, in Government, having this direct relationship with Brussels, where the four agriculture Ministers were regarded—. I mean, one was much bigger than the other, but it was very interesting for the four agriculture Ministers to travel together and be almost co-equal in status but not quite. So, agriculture is a key issue in that sense, in that it's almost totally devolved—not agriculture research probably, but apart from that. Higher education and research funding were very important.

[199] So, does Wales have any kind of a voice post Brexit or will the psychology of the country be now that it's the United Kingdom as a sort of single entity, and breathing space for a Welsh view to emerge and have sufficient clout to actually get recognised and listened to is going to be the big issue? It goes very deep in British psychology that Scotland has got a kind of special status in which people in England regard it with a strange mixture

of respect and loathing and what have you. Wales has neither the respect nor the loathing—one is a bad thing, one is a good thing—but we’re trying to make sure that we get listened to. Scotland will get listened to, because of this status that it has always had in British society. Northern Ireland, again, has a totally special status because it’s almost got far more devolution even than in Scotland, but no political party from the UK operates over there. So, again, you have to listen to their political parties, because they’re unique to Northern Ireland—forgetting that Sinn Fein operates in the republic. Wales is the trickiest one in terms of banging the table and being listened to. We were listened to in the EU, and then we won’t be in the EU because Britain won’t be. Well, what’s the capacity of Wales to kick the door down occasionally in order to make itself heard? We don’t know what the answer to that is.

[200] **Nathan Gill:** The current First Minister has talked several times now, that I’ve heard, about the need for a single market within the United Kingdom, almost a common market. Do you agree with that kind of idea?

[201] **Mr Morgan:** Who said this, sorry?

[202] **Nathan Gill:** Carwyn Jones has mentioned—

[203] **Mr Morgan:** Oh, current First Minister. Sorry, yes, you’re right.

[204] **Nathan Gill:** The current—

[205] **Mr Morgan:** The current First Minister. Right. Well, again, is that on the assumption of Scotland remaining part of the United Kingdom?

[206] **Nathan Gill:** Yes.

[207] **Mr Morgan:** You need to establish—. That would be a huge disadvantage, certainly, if Scotland were not part of the United Kingdom, but if it was part of United Kingdom, you don’t want barriers. But what if you have different policies on food supplements or something of that sort, which was a major subject for discussion in the passage of the original devolution legislation in 1998? So, for instance, simple things like if the Scots get devolution of driving tests, or something, and say, ‘You can drive at 15 or 16,’ or on food hygiene. Smoking, of course, in public places—how would people from England, coming into Wales, if we have different rules, which we almost did, by and large—? They were only a couple of months apart, I think, in the end, wasn’t it, the legislation, but it could have been different. How do

you manage if you've got different regulations in different parts? They're used to it in Australia. We are not used to it in Britain.

[208] So, do you need a set of rules that then says these will be common, but these will be areas where if one part of the United Kingdom wants to go forward on the make-up of food, the regulation of smoking, water quality or whatever, you do want to encourage an individual part of the United Kingdom to be able to march forward, and the other countries will follow. So, the people in England don't realise that the plastic shopping bags regulations are different, and they're still different, even though England has followed. Many more shops are exempt in England and they're notionally not exempt in Wales, for instance. But that doesn't affect the tourism industry. But if you had a much bigger issue than that, could it affect the exchange of student finance? There are very different regulations on student finance between Wales and England, when there's a huge amount of cross-border exchanges of students from Wales going to England, and England going to Wales. It's less of a problem in Scotland, because, by and large, Scottish students go to Scottish universities.

[209] **Nathan Gill:** So, do you think that there is a way around this or there's something that we should be doing or could be doing in order to allow the voice of Welsh Ministers to be heard—

[210] **Mr Morgan:** The Welsh media?

[211] **Nathan Gill:** No, the Welsh Ministers.

[212] **Mr Morgan:** Oh, Ministers, sorry.

[213] **Nathan Gill:** On an equal basis with those in England and Scotland.

[214] **Mr Morgan:** Well, if we stick to the principle that interstate commerce, to use the American expression, must be unrestricted within the United Kingdom, but that each separate part of the United Kingdom shall not be discouraged from producing social legislation that it believes to be right for their area—because there are very substantial differences between Wales and Scotland and England, let alone Northern Ireland, when it comes to social need. The population of Wales is, on average, older and poorer, and, therefore, you might want to have a policy that is attuned to the fact that you've got more elderly people and more people in social class 5 as a proportion of your total population than in England. So, you might want to

do that. Or, you might just want to introduce new regulations on e.g. plastic bags, which we pinched from Ireland obviously, or a new nursery curriculum. You wouldn't want to discourage individual parts of the United Kingdom from moving ahead with something that they think suits the different circumstances that they've got, but it's got to be within that framework of saying, 'Inter-state commerce is unrestricted, but social legislation attuned to local population needs should not be discouraged'.

[215] **Nathan Gill:** Okay, thank you.

[216] **Huw Irranca-Davies:** Rhodri, thank you very much. Short of writing to you on inter-parliamentary relations, is there anything that you think we've missed, or any other thoughts that you want to leave with us?

[217] **Mr Morgan:** Well, only on what are the practical issues relating to drawing up a written constitution. Is your committee going to be seeking to offer advice to the authorities, or the Government in Wales, plus the body politic outside Government in Wales, and outside Wales, on what a written constitution would look like? I've heard Carwyn, my successor, refer to the fact that you need a constitutional convention at least to talk about this, and that's been dismissed out of hand. But I think he's absolutely spot on. I think you've got to have a target date, and you've got to see what the major obstacles to it are, but I hope your committee will be considering whether to offer advice to the Welsh Assembly, the Welsh body politic and outside Wales as well, because, making a constitutional affairs inquiry, it's bound to have to be read in Westminster and Whitehall if it's going to have an impact.

[218] **Huw Irranca-Davies:** Brilliant. Rhodri, thank you very much indeed. Thank you for your time. We'll send you a transcript so you can check through for accuracy. We do really appreciate you spending the time with us. It's been very valuable indeed. Diolch yn fawr iawn.

[219] **Mr Morgan:** That's okay.

[220] Popeth yn iawn. Pleser. That's all right. It was a pleasure.

12:42

**Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd
o'r Cyfarfod ar gyfer Eitemau 5 a 6 yn unig
Motion under Standing Order 17.42 to Resolve to Exclude the Public
from the Meeting for Items 5 and 6 only**

*Cynnig:**Motion:*

*bod y pwyllgor yn penderfynu that the committee resolves to
gwahardd y cyhoedd o'r cyfarfod ar exclude the public from the meeting
gyfer eitemau 5 a 6 yn unig yn unol â for items 5 and 6 in accordance with
Rheol Sefydlog 17.42(vi). Standing Order 17.42(vi).*

*Cynigiwyd y cynnig.**Motion moved.*

[221] **Huw Irranca-Davies:** Now, under Standing Order 17.42, if the committee are content, we'll move a motion to meet in private. We're content. No dissent there, so we'll move to private now and clear the gallery.

*Derbyniwyd y cynnig.**Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 12:42
The public part of the meeting ended at 12:42.*

*Ailymgynullodd y pwyllgor yn gyhoeddus am 13:30.
The committee reconvened in public at 13:30.*

**Codeiddio a Chydgrynhai Cyfraith Cymru: Sesiwn Dystiolaeth 1
Codification and Consolidation of Welsh Law: Evidence Session 1**

[222] **Huw Irranca-Davies:** Good afternoon—prynhawn da. Welcome to this session of the Constitutional and Legislative Affairs Committee. This afternoon we are commencing with an evidence session on the codification and consolidation of Welsh law, and we're delighted to have with us Mick Antoniw Assembly Member, the Counsel General. You're very welcome indeed. Thank you for sparing the time. Council General, would you like to just introduce your colleagues for us, please?

[223] **The Counsel General (Mick Antoniw):** Yes, I've Claire Fife and Dylan Hughes.

[224] **Mr Hughes:** Prynawn da.

[225] **Huw Irranca-Davies:** You're both very welcome. If I can begin, Counsel General, by asking you how your vision of the code that you're talking about, that you're proposing, differs from that vision put forward by the Law Commission—we understand that it does—and, if it does differ, why you consider your approach to be better.

[226] **Mick Antoniw:** When you read what the Law Commission are proposing, I'm not clear exactly how much division there really is. We certainly see the code as a way of creating a framework within which legislation is placed. Now, there are two ways of doing it. I think the Law Commission is looking at single statute going into the code, but then all the ancillary legislation, whether it be secondary legislation, regulations and so on, would not form part of that. It isn't completely clear.

[227] But I think we've been fairly clear from day one in terms of our vision as to how we think the code will develop, and that is by the creation of a framework so that if, for example, you're looking at education law, you will go to the education code and the legislation is there in one place. Now, that brings on, obviously, the question of consolidating the enormous number of education statutes that there are into one, and also, then, the question is: should you just have the one primary Act or would it be more sensible to have it broken down? Perhaps you might want a separate section in respect of higher education, as opposed to general education or schools education, and so on. So, those are things that, I think, will emerge as we examine them item by item, which is one of useful things about the pilot process. So, that's the distinction. I don't think it is a great distinction.

[228] I think I can say as well that we are all on a learning curve, now, as to precisely how this is going to work. The key thing is that the codification process is really, as described by the Law Commission, about creating greater clarity and greater accessibility. If I might just add, I quite like the one quote, I think, in 2.7 of the Law Commission's paper, which basically describes what consolidation is, and I think this is the vision that we buy into. It says:

[229] 'Consolidation is the process by which existing statutory provisions, spread across different statutes, are replaced with a single Act or a series of related Acts.'

[230] **Huw Irranca-Davies:** Okay. Thank you, and that's a helpful clarification, but you do highlight the important difference in approach between yours, which seems to be much more comprehensive, bringing everything together under a new system of codification pertaining to one area of law or wider—quite a comprehensive approach. I just wonder how you arrived at that. Was there an evidence base? Did you seek opinions?

[231] **Mick Antoniw:** I think it's a working base in terms of understanding what has been happening here in the Assembly with our legislation and what has emerged as particular pieces of legislation have come forward within our responsibilities, but then against a backdrop of enormous amounts of often quite historic pieces of legislation. So, I think it's just an understanding of that, but then what leads on from that is: do we really just want the primary legislation? Looking at it from the layperson's perspective, if we want it to be clearer and more easily accessible to, say, the layperson looking at it, they want to go to one location, they want to have the updated law there as clear as possible. If there is secondary legislation or other regulations that are important to that, they want to be able to access them there and then. So, it may be that the differentiation is what you mean by 'code' as opposed to what you mean by 'an Act'. We have to use the terminology 'Act', because that's what the Government of Wales Act 2006 says, and it may be that that's really the main distinction between us. But certainly that's the way our thinking has been going, that it's access to not just the primary legislation, but possibly also to secondary legislation and regulations as well. The mechanics within an e-system are something that's obviously going to have to be looked at very closely.

[232] **Huw Irranca-Davies:** You are very clear, both in your written evidence and what you're saying now, that this is a learning process as well. But you are equally clear in your written submission that your interpretation of codification could go beyond, if you like, the traditional confines of a single Act. You could be looking at a thematic body of law and encompassing everything—secondary regulations and everything that flows not just under one Act, but a wider body of law.

[233] **Mick Antoniw:** I think the answer to that is 'yes', and I think we will learn from the pilot as to precisely how that works. We were looking at this,

for example, with regard to one of the pilot areas that we're looking at in terms of what might be a quick win in terms of codification—for example, historic environment—and, of course, one of the aspects of historic environment is planning. So, there is now an overlap with planning, which is also an area where there is work developing. So, all these things begin to emerge. It's like a legislative stone. Once you pick it up, what seemed relatively simple and clear at the beginning actually becomes a lot more complex. So, it's that process that I think we're beginning to go through.

[234] **Huw Irranca-Davies:** Okay. We'll explore this a bit further under your stewardship, David.

[235] **David Melding:** Thank you, Chair, and thank you, Counsel General. I found your papers very interesting.

[236] These are complicated matters, and I address this question as an interested lay person; I am not a lawyer. But, to really ask a basic question, does the code have any life of its own other than the items that are contained within it? So, is the code something other than the Acts and secondary pieces of legislation within it?

[237] **Mick Antoniw:** I think the answer to that is 'no', that it is essentially the framework within which you place the legislation. What is important then is the actual quality and clarity of the legislation that you place there once it has gone through a process, I suppose, of consolidation—pulling the pieces of legislation together to get rid of all the bits and pieces that might be outdated, might be unused, might be irrelevant, might need tweaking, might be inconsistent with various bits of legislation, so that what you produce is the primary piece of legislation that says, 'In this particular area, that is the law. That is as clear as we can make it. This is there available and it is now accessible'. So, it is the law itself. The code is the process by which, and the framework within which, we incorporate that. But also, very importantly, what is important about the code is that it sets the framework for future legislation. It sets the culture of the way in which we will need to legislate in this place so that, in future, for example, if we have consolidated law and we have all the law of a particular subject in one area but we need to make changes, we don't bring forward a new piece of legislation, as has happened in so many areas. You amend the law that is within the code. So, you are making changes to that. So, you still only have the one piece, but, once you've changed it, it is the up-to-date piece of legislation. You don't have to start doing or going on a trail through older and older pieces of legislation to

try and work out exactly what the law is.

[238] **David Melding:** My problem is I understand consolidation, but I'm not quite sure I understand codification. Because once you've consolidated something, it is all there, isn't it?

[239] **Mick Antoniw:** Yes.

[240] **David Melding:** You don't have to go anywhere else. I'm trying to work out what benefits do we get from codification that are greater than what we get with consolidation.

[241] **Mick Antoniw:** Well, once you've codified, you've set the norm as to how legislation is made and how you actually change legislation in the future. So, you have that. In many ways, it is about how you actually marshal the legislation. It is a marshalling process, as I see it, to make sure that you know where it is. It might be the case that it's almost a new version of the traditional textbook where you had the up-to-date law all in one place, in different chapters, and there it is. You now have it in an e-form that's accessible. The difference, of course, is that that textbook had to be amended every three months or every four months, so you ended up with situations—I don't know if you remember—in libraries where you would have a primary textbook that set out the law in an area, and then you would have a whole army of people who spent all their time inserting new pages, updating, and so on. So, it's a way of marshalling that evidence, putting it together and making it accessible. So, in some ways, perhaps we shouldn't get hung up with the term 'code', but it's how you understand it as a framework, not something that has a legislative status. There are countries, of course, that have a code that has its own narrative and is very, very different. I don't think that's the road we're going down; I think that would be too complicated. It might be fine if you were starting off from day one with no legislation at all, but we're quite the way down there, and, as devolution has added additional powers, so, of course, there are more areas of law that need to actually be consolidated and marshalled into identifiable areas.

[242] **David Melding:** Okay. I think that's helpful. I think I can understand what marshalling might be; it's about—. It's not—. You couldn't dismiss it as like just a chapter heading, 'This is health law'. It's more than that; it's about marshalling, ordering, possibly making things more succinct and perhaps developed in a more logical order than piecemeal with Acts, if they're

consolidated or not. So, contradict me if I've just said something that you don't agree with.

[243] **Mick Antoniw:** No. I was wondering—

[244] **David Melding:** But I think that helps me, anyway, as a lay person to get more of a grasp about what we're talking about here.

[245] **Mr Hughes:** If I could just add to that, in simple terms it is about how you publish or how you marshal the law, so what we envisage is an online presence where you would be able to click on a link that says, 'This is the housing code or the planning code', and it brings all the legislation together. There is a possibility that a code could have some degree of legal status, so you could say that it is a legal concept and you essentially say, 'This Act forms part of a wider code and that has legal consequences'. So, there are examples of that. If you consider the concept of the education Acts—I'm getting a bit technical here—but, when an education Bill is put together, one of the things that you have to consider is, 'Does this Bill form part of this wider set of education law called the education Acts, and, if it does, does it attract the terminology, the defined terms, that are contained in some of the other education Acts?' So, that's a theoretical possibility for us, but, as the Counsel General says, I don't think that should be the focus; I think the focus should be that we're trying to bring everything together and we're trying to publish it in a logical form and keep it together.

[246] **David Melding:** So, if I was chair of a residents group and we were concerned about a particular aspect of planning, I could then be confident that by clicking on to the planning code I'm not missing anything, potentially. Is that the major gain for the citizen, would you say, that you have that confidence that there isn't an Act from 1870 that should be looked at as well?

[247] **Mick Antoniw:** If we haven't achieved that then I think we've failed, because this has to be seen—. We can look at it from the perspective of lawyers, legislatures and everything else, but, at the end of the day, one of the key features in it—and I think Lord Thomas made that point in his evidence in the contributions he made to the Law Commission paper—is that ultimately it's all about access and clarity. In an environment where there is less and less support available to individuals, at least having your law understandable and accessible and up to date in one place is a major step forward and a major asset, and is a very attractive objective, I think, for the

National Assembly for Wales.

[248] **Huw Irranca-Davies:** David, I wonder if I could just follow up on that with a very short supplementary. I can see the benefits of that for the lay persons like David and myself, so that we could go to something that is easily accessible and understandable. For the legal practitioner, for the person who is taking this into a court of law, would they go to the primary source documents—the Acts of Parliament, the underpinning regulations—or would they rely on the code?

[249] **Mick Antoniw:** Well, the code is, effectively, the primary legislation, because what you would do in the code is, if it was a housing matter, you would go to the housing section of the code, and within that code would be the primary legislation. What would be different post-codification than pre—is that the up-to-date law would be there in one place, whereas now you might have to follow a whole trail or a trawl of legislation to ensure you had it together, and even then you might fail.

[250] **Huw Irranca-Davies:** So, David, my apologies on this, but just to pursue one a bit further—. So, case law changes from time to time, there's a case that changes the interpretation of a piece of law that's been on the statute book for a long, long, long, long time—how does that get incorporated into a code that is simplifying and clarifying for a lay person like myself? How do we know that that's happened—that when we read that simplified code, that that is taken into account, that case, which has just changed the interpretation?

13:45

[251] **Mick Antoniw:** That actually takes you to a stage further, which is something we need to think about in the code. That is, within the code, if you want to keep it simple, you keep the legislation in one place—probably with the secondary legislation and any key regulations. But in terms of the interpretation and the case law, you might want to section it. I think this would be one of those things that you work to add on later on. There might be areas where you have notes that actually refer you—you know, sub-notes that refer you to case law. But at the end of the day, a code—. The interpretation of law is different to setting out what the law actually is. How you interpret it and what the law is and what the case law is and what the various judicial interpretations are is a secondary matter, I think. We don't want to confuse codification and consolidation with that aspect.

[252] **Mr Hughes:** Can I just come in there? Going back to the first limb of the question, the law will still be published in the normal way. So, the law will still be contained on the legislation.gov.uk website. What we are talking about is that you would be able to access, through the Law Wales/Cyfraith Cymru website, the code, which is essentially links to the primary legislation that we will have consolidated and brought up to date. So, that doesn't change. From the perspective of practising lawyers, it will be of equal benefit to them as it will be to laypeople, because it will do that job of telling you, 'This is the up-to-date law'. You start in the Law Wales website and then that will take you to the published law as it stands now.

[253] In respect of the second question, as the Counsel General says, generally speaking, we're not proposing to codify the common law. That, we think, is a step too far. But, in your example, if the case law is sufficiently significant, then there are two possibilities. One is that we could actually change—we could redraft the law. So, we could make it again so that it better reflects what the court has said. Or, the second option is that we could use the Law Wales website to provide a commentary that would sit alongside the law, saying, 'By the way, when you're looking at section 35'—or whatever it is—'you should be aware of this case law'. But I think we're a little wary of making too many promises in that regard, because that is an enormous task.

[254] **David Melding:** I think it's fair to describe your paper as enthusiastic but also perhaps warning us it's going to take a while. I just wonder, does the fact that we are currently in a single jurisdiction of England and Wales affect the timescale of this work? Do you anticipate much starting before any possibility of clarifying our current legal jurisdiction? Where are we with this?

[255] **Mick Antoniw:** Well, you're right to raise it. This is the perfect storm of a time to actually start this process, on the basis that if you don't start the journey you probably never will. Brexit is going to impose an enormous number of demands. We don't know the full scale of them. We don't know the precise parameters as to where we are within it and what the demands are. What is clearly a priority is dealing with that, but also dealing with the Government's legislative programme as well. So, those demands of work actually come forward, which is why we're starting off with a pilot to look at some areas where, firstly, there is some considerable work going on and has been going on for a while, in respect of planning, but secondly in respect of one or two other areas where perhaps the law is already relatively straightforward or relatively amenable to consolidation.

[256] **David Melding:** In the more complicated areas—not that the pilot would be without complications, but obviously you are choosing something that one would anticipate would be perhaps an easier codification than other areas—in the more complicated areas, is it feasible to codify until we have a single jurisdiction or not?

[257] **Mick Antoniw:** I think the answer to that is, 'Yes, we can'. The jurisdiction is essentially about where the cases are heard and how they're heard and judges who are familiar with the law and able to apply it appropriately. You've heard me say many times about my concerns about the mythical status the jurisdiction has sort of reached, as opposed to it being an administrative measure. For us, I think, there are a number of areas that are under way. One is an enormous area of planning. Planning is extremely important in terms of business and so on. The Law Commission has been involved in that. That's been going on for a number of years. That will be significant. But I think, from the other areas, it's about actually the learning process we're going to get once you start actually doing this and realising what the complications are, and how you might actually deal with them, and what challenges that may then bring in terms of the consolidation process, the Standing Orders and so on.

[258] **David Melding:** I think that's helpful. In this whole issue of what the code is and how it's amended in future, as I understand it, the code won't simply be a list, however marshalled and ordered, of primary legislation. It will include other things—Statutory Instruments—and, I don't know, it may have narrative sections as well. I'm trying to think, you know—under housing, the rights of tenants and that sort of thing, how's that going to be presented? It won't be 'Rights of tenants—here's the website to the relevant Act'. It might state something there; I don't know. How will this code look in terms of presenting the material as some form of indication or summary before you actually are referred to the actual legalese?

[259] **Mick Antoniw:** Well, the answer to that is 'I don't know' or 'We don't know' and you don't know until you actually start doing it and you work out what actually is the model that works better. For example, you might want something that doesn't have a specific judicial status. You might have a narrative of the law, and then you go into the Act. That might be a possibility. At the moment, I move away from that because it just adds another layer and another bit of complication to it. But it might be that once you do it, you say, 'Well, actually, that would be quite useful to the

individual' and you actually say, 'Well, this is the law relating to housing in Wales, and it is broken down into four sections. One of it relates to tenants and the rights of tenants; the other might be to do with—', et cetera. The other one might be to do with general housing policy and so on.

[260] Education might be an easy one to show how it might compartmentalise, because you've got a considerable amount of law there. When you bring it together, it might come together in a number of different Acts, or you might want them in one Act that has a certain section. The complication may be that, of course, if you brought all education together you might end up with one primary piece of legislation that's 1,000 pages long. Now, the logic would be that you might not want to do that. Computerisation is a wonderful thing, but 1,000 pages is still 1,000 pages. In terms of accessibility, you might say that, in actual fact, someone who has got an issue and wants to know what the law is relating to aspects of higher education will want to just go into higher education. They won't be interested in all the other aspects of education that are there. Someone may be going, in the same light, just wanting to know about special needs, about learning needs and so on, and the law that relates to that. If that's to go within the educational section of the code, you might well want that to be separate.

[261] So, why this session is actually quite useful is because it's a way of actually exploring the thinking as we go along in it, in working out what is going to be the best way of pulling the law together and consolidating it. As I say, the usefulness about the pilot is that it's just giving us a bit of time to do it, but also the experience you begin to get in learning that. No other part of the United Kingdom is going down this—. This is an extremely ambitious and long-term programme. The principles of what is going to be, at the end of the day, the most accessible and clearest and most useful are the same in what we're doing now as was done during the times of Hywel Dda, and done for exactly the same reasons: how do you modernise the law, make it available and make sure that people understand it? Exactly the same principles apply.

[262] **David Melding:** I think it is, in that sense, very exciting and innovative, and we wouldn't expect you to have all the answers at this stage, but there are some principles, perhaps, that do need to be explored now and, no doubt, to be continued. I understand that it's an ordered, marshalled list and a logical way of presenting material, but my understanding is that the code wouldn't simply be, in effect, a very elegant list of legislation; it's going to be a bit more than that. And if so, is it going to be, in part, something like an

explanatory memorandum, for instance, so that a person could read a section that would give you an overview of the law in a particular area, and then it would refer you to the particular statutes that—? You know, the more tricky the question is that you're involved in, or how it might be applied—it's where you go to start to really get that level of detail.

[263] **Mick Antoniw:** Well, my preferred thinking on this at the moment—and you're right, there is a whole variety of options and it's like making a cake; you can put extra cherries and you can keep adding bits and pieces to make it an even better cake et cetera, but at the end of the day you want something that is easily understood. My preferred thinking is that I want the law to be identifiable, clear and as uncomplicated as possible. There will be, inevitably, mechanisms you will want to actually refer to the deeper you want to go into it, and the more complicated you want to—whether it be case law, whether it be reasoning behind it or debates around certain aspects to understand. But the more complicated it is, I think the more we have failed in a task. That's my thinking, I don't know—.

[264] **Mr Hughes:** Yes, I think that's right. I think you're getting at two things here: one is, yes, it is more than a list. There would be some merit in producing lists, and to an extent we've already done that on the Law Wales website. But if you offer as your service that there are 25 Acts of Parliament, three Assembly Measures and two Assembly Acts on education, that's of limited benefit. So, by far the biggest task here, and the most complicated task, is consolidating that law. So, taking all of the law that we have on a particular subject, consolidating it, making it up to date, putting it into a sensible structure, is the biggest task. So, at the end of that process you might have a schools Act, a higher education Act, a further education Act, a teachers Act, let's say. We don't know what exactly it will look like, but, as the Counsel General said earlier, we do see merit in keeping some sort of compartmentalisation within the code, so that if the code is vast in its own right with an enormous table of contents, then that doesn't necessarily help anybody. When you think of a US-type code, you think of a book, almost. We're thinking of this in digital ways. We're thinking: 'How do you access this online? What's the quickest way to get to where you want to get to?' And we think that the structure that we have at the moment of Acts and statutory instruments and guidance is useful, and we also think there is benefit, as I said, in having potentially different Acts within a particular code. So, that is the main task that we want to achieve and that's the thing that will take time.

[265] Your second question then: is there an explanatory narrative in the

code? No. There isn't an explanatory narrative; the code is still the law. But the Law Wales website can be used so that if you—. Let's say you're a tenant; you should be able to work out from the Law Wales website, 'Right, this is where I need to go'. So, if we have a housing code, and the housing code—. Housing is quite a good example because the Assembly has legislated in a number of areas. So, we've got already some consolidated law, essentially, with mobile homes, we've got renting homes, we've got a number of Wales-only provisions about homelessness, for example. So, if we consolidated all of that law, the tenant should then know, 'Right, I can go on to the Law Wales website, that will take me to the housing code, and I will know that within the housing code, the Renting Homes (Wales) Act 2016'—we don't need to do anything to the Renting Homes Act because it is already comprehensive—'that's where the law is that will deal with my particular problem.' So, that's our goal, but that's a huge task.

[266] **David Melding:** And the use of terms like 'principal Act'. Does that mean a consolidated Act? Is that basically what it is?

[267] **Mick Antoniw:** I think it has to, because if you're preparing a piece of legislation to be the code, you've got to pull together all the surrounding legislation and ancillary legislation and put it together. You need to simplify it to make it consistent, to ensure the terminology is common and understandable, and put that together into one place.

14:00

[268] So, it is a modernisation and consolidation of the law as it is; it will not be about reforming the law—that's a different process—but it is about ensuring that, from reading that principal Act, all the law that applies in that area is within that Act or one of the compartments of that Act within the code.

[269] **David Melding:** When you talk about one or more principal Acts, presumably, if we took health as an example, you wouldn't even attempt to have just one Act dealing with the whole field of health—you would want several, probably, certainly more than one principal Act, so, physical health and mental health are obviously very different, but there are all sorts of—you know, preventative health, public health—which may warrant a principal Act on their own. That's the—

[270] **Mick Antoniw:** That's certainly right and it seems to me that there are

two ways of achieving the same aim. One is that you do actually just have one Act, but it's broken down into sections, so Part 1 is this particular item, Part 2 is mental health, Part 3 might be something else. The other one is, though, of course, you just have, 'This is the law as it applies to mental health', 'This is the law as it applies to this aspect of health' and so on, but they are all within that code, so you know exactly what is where, and when you go into that code, that is the totality of the evidence.

[271] **David Melding:** And finally from me just at this stage, because obviously we're at the start of quite a long journey, I suspect, but much of public law deals with cross-cutting areas—do you see particular problems there with the spill overs that we get in a lot of public policy? Is that going to be particularly challenging or not?

[272] **Mick Antoniw:** Well, I think the answer is that it sort of emerges once you start the process. We were having this discussion earlier looking at the historic environment where you think, 'Well, this may be a relatively straightforward pilot to proceed with' until, of course, you realise that there's a significant element of planning within it. Now, does the planning stay within the historic environment part of the code, or do you put it within planning? You've been looking at this, what's your—?

[273] **Mr Hughes:** Yes. The historic environment is a good example of a cross-cutting area, in some respects, or at least a subject that crosses over two wider subjects. It touches upon planning and it touches upon culture and heritage, and in some respects, it's a subject in its own right. So, one of the first questions you've got to ask is: does this stand on its own? Does it become part of a code on the law of culture and heritage or does it go into a code on planning and land use, say? We don't know yet.

[274] **David Melding:** And could you state it in more than one place in the code? Well, obviously, it can then be amended—

[275] **Mr Hughes:** There are various techniques. One of the—. There's the high-level question about this and then there is the drafting question and there are techniques that we will have to adopt, I'm sure, to point people in the right direction and signpost people. But we would like to get the structure coherent at that high level, so that you minimise the number of times you have to be telling people you've got to go and look over here for the rest of this answer.

[276] **Mick Antoniw:** I think we suspect that there may be an awful lot of these once you start doing it. So, it will all go to the clarity, because the last thing you want is being referred from section to section to section, et cetera. You want to go to one place, but inevitably, it may be that if you're in historic environment, it might be the case that, in respect of all matters relating to planning, you have to refer to this section or there might be a section within planning—you know, those are things we don't know the answers to, but are beginning to emerge.

[277] **David Melding:** Thank you, Chair.

[278] **Huw Irranca-Davies:** Thank you. Dai, please.

[279] **Dai Lloyd:** Diolch, Gadeirydd. **Dai Lloyd:** Thank you, Chair. Thank you for those answers, and also, as I've said before, supporting your general intention to improve the information that's out there for the layperson and to improve accessibility—. But, of course, at present, we have some laws that are generated here at the Assembly, and there are some England and Wales Acts that are produced in another Parliament, if I put it that way—how will those codes stay together? Will they exist side by side, or is there another system that you've thought about? How will that work when there are some laws made here and other laws—England and Wales Acts—made in London?

Diolch am yr atebion cyn belled, a hefyd, fel rwyf i wedi ei ddweud o'r blaen, gan gefnogi'ch bwriad yn gyffredinol i wella'r wybodaeth sydd allan yna i'r lleygwr a hefyd i wella hygyrchedd—. Ond, wrth gwrs, ar hyn o bryd, mae gennym rai Deddfau sy'n cael eu cynhyrchu fan hyn gan y Cynulliad, ac mae yna rai Deddfau Cymru a Lloegr sy'n cael eu cynhyrchu mewn Senedd-dŷ arall, ddywedwn ni—sut fydd y codau hynny'n aros efo'i gilydd? A ydyn nhw'n mynd i fodoli ochr yn ochr, yntau a oes yna ryw system rydych chi wedi meddwl amdani? Sut mae hynny'n mynd i weithio pan mae yna rai Deddfau'n cael eu cynhyrchu yn fan hyn a Deddfau eraill, sy'n cynnwys rhai Cymru a Lloegr, yn cael eu cynhyrchu yn Llundain?

[280] **Mick Antoniw:** Well, all the laws that will be in the code will be the up-to-date laws. So, if we have to restate parts of legislation that are already in existence, that we've effectively adopted and don't want to change, then that remains, and, of course, we've started that process already. Certain laws we've had have been longer than might otherwise have been the case

because they have actually been restating the existing law that's been made, and then we've been changing it and adding to it in terms of the Welsh dimension and what we want that law overall to be like. So, the key is that the law is actually in one single place. That's the whole point about it, and that's what we've got to aim to achieve.

[281] **Dai Lloyd:** Ac yn dilyn o hynny, rydw i'n siŵr y byddwch chi wedi meddwl am hyn yn barod, ond, wrth gwrs, bydd yna rai Deddfau sy'n berthnasol i Gymru yn cael eu gwneud yn Senedd y Deyrnas Unedig ta beth, ac yn parhau i gael eu gwneud yn y fan yna, trwy ba bynnag gydsyniad deddfwriaethol neu beth bynnag—materion sy'n cael eu gwneud a materion sydd wedi'u cadw i fyny yn y fan yna. Wrth gwrs, mae'r rhestr yna yn hir iawn efo Deddf Cymru 2017—rhestr faith tu hwnt o bethau sy'n cael eu cadw. Felly, sut ydych chi'n gweld ymdrin efo codau deddfwriaethol fel yna i Gymru, ond y ddeddfwriaeth yn cael ei gwneud yn rhywle arall?

Dai Lloyd: And following on from that, I'm sure that you will have already thought about this, but, of course, there'll be some laws relevant to Wales made in the UK Parliament anyway, and will continue to be made in that place, either by legislative consent and so on—matters involving reserved matters there. That list is very long with regard to the Wales Act 2017. It's a very long list of reserved matters. So, how do you see codification of that kind of legislation—the legislation made in another place?

[282] **Mick Antoniw:** Well, I think what we want to achieve is that that legislation gets incorporated—if it's legislation that we've consented to—into our code, so that our code always remains the up-to-date and definitive law as it applies in that particular area. There'll be areas, of course, of law that are not part of our responsibility, that are not devolved, and, of course, that won't apply.

[283] **Dai Lloyd:** Diolch. A allaf i jest ofyn hefyd yn gyffredinol: y gwaith yma—ac mae'n swnio fel gwaith cynhwysfawr; lot ohono fe—ynglŷn â chodeiddio? Pa effaith y bydd e'n cael ar raglen ddeddfwriaethol bresennol y Llywodraeth yn fan hyn?

Dai Lloyd: Thank you. May I just ask in general: this work—and it sounds like very comprehensive work; there's a great deal of it—with regard to codification? What effect will that have on the Government's existing legislative programme?

[284] **Mick Antoniw:** It's a very good question, and the answer is that we have to ensure that we are not disruptive. The last thing we want to do is to disrupt the legislative programme, and it's very clear that that has to take priority, just as the issues that will emerge with regard to the whole Brexit situation have to take priority. This is a long-scale, long-time programme, of however many years—10, 15, whatever it is. Of course, once you've completed a large chunk of it, it makes a lot of subsequent legislation simpler, but we have to fit within that. So, it may be that we're doing work of codification and consolidation in one year, but it slows down in a subsequent year because of the other demands. We can't tell precisely what the scale of those demands are, only that they are going to be there.

[285] Codification should not be a process of disruption of the work and the direction of Government, but, of course, what codification does do, in addition to existing law and the codification process, is that it sets the framework for new legislation and ongoing legislation. It sets it into a format that makes it capable of codification, so that we're not producing Acts that we then have to come back to and codify as we go into new areas of law and new legislation is forthcoming. It has to be within the mindset, I think, of the process of codification and the framework in which we want it to actually operate. That again is, I think, a bit of a learning curve, because we're talking about certain legislative vacuums; you know, you're feeling your way at the moment. But I think once the process has started—well, the process has started—that will have an impact, and that will be something that we want to monitor very closely to look at legislation that's coming through, to ensure that it is in the right format.

[286] **Dai Lloyd:** Diolch am hynny. **Dai Lloyd:** Thank you for that. The A'r cwestiwn olaf sydd gyda fi am final question from me for the time rŵan ydy: wrth gwrs, pan mae yna being is: of course, when there is a Ddeddf wedi cael ei chreu, a hefyd law that's been created and that has wedi cael ei chodeiddio, mae yna fân been codified, there are minor newidiadau technegol yn gallu technical changes that can be made digwydd dros y blynyddoedd. Oes over the years. Do you have a gyda chi fframwaith, felly, i gadw'r framework, therefore, to maintain the broses o godeiddio i fyny efo'r mân codification process and ensure that newidiadau yna? Wel, mae'r it is up to date with those changes? Llywodraeth weithiau yn dweud bod The Government sometimes does say yna 'fân newidiadau' sydd ddim that there are 'minor changes' that angen eu dwyn i sylw'r Siambr yn y don't need to be brought to the fan hyn, ond weithiau mae'r pwyllgor attention of the Chamber, and this

hyn yn tueddu i anghytuno os yw'r committee tends to disagree with newidiadau technegol yna yn 'fân' ar whether those technical changes are ddiwedd y dydd. Ond ta waeth am minor or not. But that aside, what hynny, beth ydy'r fframwaith i framework is there to update the ddiweddarau'r cod efo'r mân code with those minor technical newidiadau technegol yma? changes?

[287] **Mick Antoniw:** Well, I think the whole issue of Standing Orders is something that has to be looked at very, very carefully, and, again, it's within the hands of the Assembly—any changes to Standing Orders obviously require a two thirds majority. So, I think it's going to be a challenge to the Assembly as a whole and to Government in terms of understanding what is happening and the process that we need, and this will equally apply, I think, to the Brexit situation, and it will apply to consolidation as well. But what we don't want to do is to bog down the whole working of this Assembly into one great glorious committee that does nothing but look at the minutiae of legislation. Stuff that is technical, we want a mechanism that enables that to go through, obviously with built-in protections and so on, but enables that to go through whilst the real work of scrutiny is on things that are actually changing the law and making significant change to the law. So, that's going to be, I think, the challenge to us, and it does involve, I think—. It's another stage in our development as a legislature—the understanding of our role and the trust that exists between Government and the Assembly in terms of what is important, what is important for scrutiny, and what is effectively the management of the law book.

[288] **Huw Irranca-Davies:** Thank you, Dai. Dafydd.

[289] **Yr Arglwydd Elis-Thomas:** Lord Elis-Thomas: Thank you very Diolch yn fawr, Gadeirydd. A gaf i much, Chair. May I ask the Counsel ofyn i'r Cwnsler Cyffredinol ac i General and the Welsh Government's gyfreithwyr Llywodraeth Cymru: a legal advisers whether they think that ydych chi yn meddwl bod y cymalau a the clauses tabled after much osodwyd ar ôl llawer o drafod ar discussion at the beginning of the ddechrau Deddf Cymru 2017 yn Wales Act 2017 recognising the cydnabod natur barhaol y Cynulliad a permanence of this Assembly and the Llywodraeth Cymru yn rhan o Welsh Government as part of the UK gyfansoddiad y Deyrnas Unedig, a constitution, and also this clause that hefyd y cymal yma, a gafwyd yn was partially achieved because of rhannol yn dilyn gwelliannau a proposals made by this committee in ddaeth o'r pwyllgor yma fel cynigion terms of recognising Welsh law—is

gwreiddiol, ynglŷn â chydabod this of any assistance to you in clarifying? And I do assume that in your work on codification and explaining Welsh law will include all pieces of Welsh law according to the definition contained within the 2017 Act, namely what is done here, what's made by the Assembly and by Welsh Ministers, and that that is all part of England and Wales law, as well as what will continue to be made within the UK. I apologise for the length of the question.

cyfraith Gymreig—a ydy hwn o unrhyw help i chi egluro yn gliriach? Ac rwy'n cymryd y byddwch chi yn eich gwaith ar godeiddio ac esbonio cyfraith Cymru yn cynnwys pob cyfraith Gymreig yn ôl diffiniad Deddf 2017, sef yr hyn sy'n cael ei wneud yn y lle hwn gan y Cynulliad a chan Weinidogion Cymru, a bod hwnnw i gyd yn rhan o gyfraith Cymru a Lloegr, yn ogystal â'r hyn sy'n parhau i gael ei wneud yn y Deyrnas Unedig. Mae'n ddrwg gen i fod y cwestiwn mor hir.

[290] **Mick Antoniw:** No, it's a very good and a very interesting question. It's one that I think is the subject of quite an amount of debate within the Assembly. For me, the importance of that clause—. I know that part of the debate was, 'Well, it doesn't really add anything; all it does is says what's there', but what it does is puts in statute that it is there and it's the permanence of it that it's there, and it is recognised constitutionally that that is now the permanence of Welsh law, and I think leads us on to the whole question of the jurisdiction. As I've said on a number of occasions, I think the jurisdiction issue is one that will inevitably be arrived at because it lacks common sense not to. For various reasons, we are where we are. Interestingly, it's been the subject of considerable discussion in the House of Lords Constitution Committee and in the House of Commons committee as well.

[291] So, for me, it is an important statement, but it is like a starting point now. We've really got to move on and that will inevitably happen; I think it will inevitably happen post Brexit because the dynamics of the constitutional structure will inevitably be different. There will be a whole series of issues that are going to arise there, and the importance of consent through the convention and through Sewel and so on I think is going to emerge as a very important issue as well. We're in a period of considerable constitutional flux, so having that as a ground base I think is important, and it's not just important for us—it's important to what it says to the rest of the UK in terms of the role of this Assembly and the legislation that is passed here.

[292] **Lord Elis-Thomas:** Thank you very much for saying that, because I was quite excited when Lord Bourne of Aberystwyth showed me his proposed Government amendment, and the way that it has come out in the 2017 Act, because I do think that these things are important. The constitution is also declaratory, isn't it—

[293] **Mick Antoniw:** Yes.

[294] **Lord Elis-Thomas:** —in terms of status and power? Diolch.

[295] **Mick Antoniw:** I think, importantly, the point about—. You didn't go on to it, and I don't want to develop this into another Sewel development, but, of course, it was important in Sewel, and it was mentioned again in the Supreme Court in that article 50 case that, of course, once it is there it's in statute, so it has permanence. Now, how it is applied and how it works is another matter.

14:15

[296] I think the issue of the justiciability of Sewel and its statutory status is something I suspect will emerge in the post-Brexit era when we look at the inter-relationships between the four nations of the United Kingdom. But, the fact that it is there means that it is permanent. It has to be given due consideration. It is now actually part of the core constitution of the United Kingdom

[297] **Lord Elis-Thomas:** So, what you're—. Not putting words into your mouth, even if I could do such a thing, but you would foresee in the future that a far-sighted Supreme Court decision might arise out of these sorts of statements.

[298] **Mick Antoniw:** Well, if we recognise that a big chunk of the constitution that applies is not actually written, and is purely the product of political consensus—most of the United Kingdom's constitution is, in fact, a political convention—and, as the Supreme Court said, conventions exist, they may not be justiciable, but they exist in order to enable the process of constitutional relationships to actually work. So, by conventions not having any real status and not being applied, there are political consequences, and that has been the whole nature of the UK constitution and the way it has developed, and was actually a fundamental part of the discussions in the Miller case, in the article 50 case. And, after a period of time, what is there

actually becomes a core part of the constitution and open to further interpretation. Now, I think we may well get to a situation where we need to actually put that, sooner rather than later, into a formal status, but that's, I think, a debate for another time.

[299] **Lord Elis-Thomas:** Thank you.

[300] **Huw Irranca-Davies:** Thank you, Dafydd.

[301] **Mr Hughes:** A allaf i adio un peth o ran y ddarpariaeth ynglŷn â'r gyfraith Gymreig? Ateb oedd hynny, wrth gwrs, i'r ddadl ar yr awdurdodaeth, a gofynnwyd cwestiwn yn gynharach ynglŷn â phwysigrwydd yr awdurdodaeth, neu'r ffaith nad oes awdurdodaeth Gymreig. Y diffyg ddarpariaeth sydd yn y Ddeddf yw'r ffaith nad oes corff penodol o gyfraith Gymreig bellach, er gwaethaf beth mae'n ei ddweud yn Neddf Llywodraeth Cymru 2006. Pan fyddwn ni'n creu cod, er enghraifft, ar gyfraith tai, neu gyfraith addysg, bydd y gyfraith yna yn gyfraith Cymru a Lloegr. Felly, ar lefel dechnegol, nid yw'r ddarpariaeth yma fod yna'r fath beth â chyfraith Gymreig yn delio â'r broblem honno, ac, wrth gwrs, mae yna gyfraith Gymreig, achos mae'r lle yma'n gwneud cyfraith Gymreig, ond nid yw e'n mynd â ni mor bell ag y mae'r Llywodraeth wedi dadlau.

Mr Hughes: If I could just add one thing in terms of the provision on Welsh law? That was a response to the question on jurisdiction, and a question was asked earlier on about the importance of the jurisdiction, or the fact that there was no Welsh jurisdiction. The lack of provision in the Act is the fact that there is no specific body of Welsh law, despite what it says in the Government of Wales Act 2006. When we create a code, for example, on housing law, or education law, that law will be England and Wales law. And therefore, at a technical level, this provision that there is such a thing as Welsh law doesn't deal with that problem, and, of course, there is Welsh law, because this place makes Welsh law, but it doesn't take us as far as the Government has argued it should go.

[302] **Yr Arglwydd Elis-Thomas:** Fel roeddwn i'n gweld ar hwn, mae e'n cadw'r cwestiwn yn fyw i'w ailagor yn barhaus.

Lord Elis-Thomas: But as I saw it, it does keep the question alive to be looked at again.

[303] **Mr Hughes:** Efallai ei fod e.

Mr Hughes: Perhaps it does.

[304] **Yr Arglwydd Elis–Thomas: Lord Elis–Thomas:** Thank you. Diolch.

[305] **Huw Irranca–Davies:** Thank you, Dafydd. Before I bring in Nathan for a couple of final questions on this particular part of your evidence, could I just ask something? You refer in your written evidence to the repeal of statute law through consolidation, or in the context of repealing statute law you refer to consolidation procedure making minor changes to the law. That’s quite interesting to us, obviously, because of this issue of what is a minor change. So, can I ask you the extent to which you think that a consolidation procedure should be permitted to change the law?

[306] **Mick Antoniw:** I don’t think it should be used to permit it to change the law, certainly not without the consent of the Assembly. There has to be a process for distinguishing between the overwhelming majority of circumstances where you are really pulling together the existing law, tidying up—you’re not changing the policy of this Assembly, or of Government, or the legislation itself—but what may emerge as you go through it—. I’m referring to this thing of lifting a legislative stone, and suddenly there are all of these things—things may emerge. There may be areas, ‘Well, in actual fact, this is actually a really important area that just can’t go on like this.’ If that were to happen, that’s a place that should go through the normal scrutiny process. That is not something that should apply to existing—. So, I think, in accordance with the normal constitutional principles, we want to get through efficiently technical change and the technical process of consolidation, but it should not have as its objective changing the law. If that were to be the case, then I think we would massively increase the workload. The consolidation process would become almost impossible, because everything you attempted to look at would require a debate. And reform it in what way? There would be whole areas that then need thought, need consultation, and so on. So, clearly, we want to keep that out of it, unless something emerges within there that does need to be dealt with, in which case there has to be a mechanism within our procedures for ensuring that that does achieve proper scrutiny, is identified, and scrutinised properly.

[307] **Huw Irranca–Davies:** That’s really helpful clarification; thank you. Nathan.

[308] **Nathan Gill:** Thank you, Chair. You state that, during the pilot programme, you will be considering the arguments for and against developing an interpretation Act for Wales. And I just wondered what other

matters you will need to consider if you decide to go ahead with this.

[309] **Mick Antoniw:** Dylan, do you want to take that one?

[310] **Mr Hughes:** Yes. I should start by saying that the interpretation Act is very much for the techies—even many lawyers are unaware of the presence of the interpretation Act. The interpretation Act is there to deal with minor issues around the interpretation of the laws, such as, if you have to give notice to somebody, at what date does that apply—things of that nature. What happens if you repeal primary legislation, and what happens to things that you have done before, under that legislation—does the action that has taken place continue? Things of that nature. And there are also certain defined terms in there, so that you don't have to define them again and again across the statute book.

[311] So, the issue that we're looking at is that the interpretation Act is quite old—it's from 1978—it's a UK interpretation Act, or it's a UK Parliament interpretation Act. The Scots have their own interpretation Act, and have had since 2010. In Northern Ireland, there is an interpretation Act that actually goes back to the 1950s, from the old Stormont Parliament. So, one of the things we're looking at is, as a matter of principle, whether we should have an interpretation Act that applies to Welsh laws, i.e. the laws that are passed in the Assembly, and made by the Welsh Ministers. And, in doing that, we will cover a gap that this committee has identified in the past, which is that the defined terms that I was referring to in the 1978 Act are only defined in English, and they are also terms that are defined from a UK perspective. So, in looking at this from a Welsh perspective, we might want to use, or add, additional terms, and of course we want to make them bilingual. And we're also looking at various deficiencies in the 1978 Act that are very minor. This is not exciting stuff, I should have to admit.

[312] **Mick Antoniw:** Chair, I couldn't have put it better myself. [*Laughter.*]

[313] **Nathan Gill:** Okay. Your paper says, in paragraph 3, that it's difficult to commit to specific action over the short term and medium term. But, in terms of codifying the law, can you give us any direction as to how long you think it's actually going to take, and how much extra Government resources you are going to need, and have you decided how much money this is going to cost?

[314] **Mick Antoniw:** Well, they're all good and important questions, and

ones that we've had to look at. The reality is, there is no significant resource available for this process, so what we have to look at is where there are opportunities, where there are sometimes lulls or gaps within the process, to actually maximise it, maximise the usage of the resources that we actually do have. And, again, that within the environment of all the other demands that we don't know.

[315] So, I think the point about this is that we're in this for the long haul. We're setting the creation of a Welsh statute book, effectively, as a permanent feature of the legislation of this Assembly. And that means that it is a process—it goes on into the future. How long it will take to do everything, I mean, if we were here in 10 or 15 years' time, I think we would still be looking at the process. We might well have a big chunk of it done. How quickly it operates depends on what the demands are going to be over the next couple of years, in particular. But, I think what was important was that we not only started the process, but we set the norm, we set the framework for other legislation, so that the way in which we're operating is with the purpose of legislation fitting into a code and having the maximum clarity and accessibility.

[316] So, I suppose the answer to that is I really haven't a clue, other than it's going to take a long time, but we are starting the process, and there will be some results early on. So, for example, planning, which, for me, is fundamentally important to business, to investors—you know, it's a very important part of the way we sell ourselves as a country, economically and so on—that work's been going on for a couple of years with the Law Commission, and it'll be another year before we begin to reach the process of having a tangible piece of work and so on, and maybe another year beyond that, and that's just in respect of one area. But even though it may only be one area of work, it would be a very important piece of an area, and I think the message that it sends out is extremely important. So, we'll look for those areas where, to some extent, they've already been drafted with codification in mind.

[317] And, of course, one of the recommendations of the Law Commission was to create a duty, which I think we have to look at, to ensure that there is consistency. This isn't something that we want to start with the possibility of opting out later on because, you know, there are all these other pressures; this is something that, as a legislature and as an Assembly, we have to decide that we are going to proceed with and that it is going to be a permanent feature of the way in which this Assembly operates, because that

is best example. That's what the Law Commission say, and I think it is recognised. We have an opportunity to adopt best practice. Difficult, limited resources, all sorts of other pressures, but the process has begun to start and, you know, I think this conversation with this committee is one that's going to be, hopefully, ongoing.

[318] **Nathan Gill:** Yes, so, with that in mind, then, with regard to starting as you mean to go on with best practice, and you're going to put it to the Assembly to look at that, would it not be sensible to ask for finances to enable you to continue from that moment on, but then also to start to codify retrospectively as well?

[319] **Mick Antoniw:** Well, I think the process we've adopted at this stage is that we think we have a certain degree of capacity that we can utilise, and that we start the process, utilise that, so that we have an understanding as to the scale of what we're undertaking, what's involved, and also how we might plan that for the long term. I would not want to start this process at this stage by arguing that resources that are much needed in other parts of the Assembly budget should be used to focus on the consolidation of law. I think we have capacity to do work, we have capacity to make progress in it, and we are looking at ways in which to make that a permanent part of the Assembly's work. In a couple of years' time, I think, when we've made some progress in the areas we've started, it will need to be looked at and will need to be reviewed. One of the recommendations, of course, was for an annual report to be brought to the Assembly; that's something we need to look at so that the Assembly itself has the opportunity to consider the progress of codification, but also is itself aware of what the resource implications are.

[320] **Nathan Gill:** Okay. Do you foresee that spare capacity that you say you have right now, when the great repeal Bill comes in do you think that that will get absorbed for that, or do you think it will continue down the line?

[321] **Mick Antoniw:** I think that work will have to take a priority. So, there may be periods when the actual progress we're making is indeed very slow.

[322] **Nathan Gill:** Okay.

[323] **Mick Antoniw:** But I think that's just the nature, you know, of parliaments and legislation, that the demands that are going to be made are going to be extremely important during the next couple of years. We have to ensure that those are the key focus, but that, even if it means that we are

slowing down significantly the process of consolidation, it is not being lost. And that's why I want this idea of permanence to be in there.

[324] **Nathan Gill:** Yes, that's very good. Okay, just finally, in paragraph 5 of your submission, you state that you're developing your thinking. When do you think you'll be able to publish a firm outline of your proposal?

[325] **Mick Antoniw:** Phew, that's a very, very good question, and the answer is that I don't know; it's under review significantly at the moment. I would hope that by the autumn we will be in a position to bring forward a progress report.

[326] **Nathan Gill:** Okay, thank you very much.

[327] **Huw Irranca-Davies:** Thank you very much. Can I say on behalf of the committee how much we're looking forward to being here in 10 or 15 years' time, evaluating how the process is going? [*Laughter.*] But it's been a very useful session. Thank you very much. I hope it's been useful for you as well in trying to explore some of your thinking. I understand we're going to do something of a tag-team changeover here. So, can I thank very much your senior officials for their time as well?

14:30

**Papur Gwyn Llywodraeth y DU ar Fil y Diddymu Mawr: Sesiwn
Dystiolaeth 1
UK Government's White Paper on the Great Repeal Bill: Evidence
Session 1**

[328] **Huw Irranca-Davies:** There we are, very efficiently and smoothly done—the changeover. Counsel General, can I ask you again, please, just if you could introduce your colleagues, or ask them to introduce themselves?

[329] **Mick Antoniw:** Yes. Do you want to introduce yourselves?

[330] **Mr Godfrey:** I'm Jeff Godfrey, director of legal services.

[331] **Ms Dunning:** I'm Diane Dunning. I'm a deputy director of legal services.

[332] **Huw Irranca-Davies:** You're both very welcome indeed. We're looking at the matter of the great repeal Bill. Nathan, you're going to start us off, if you would.

[333] **Nathan Gill:** Thank you very much, Chair. Really, have you any information at all, Counsel General, about the likely timing of the great repeal Bill in the light of the current UK general election?

[334] **Mick Antoniw:** Well, I could just say 'no'.

[335] **Nathan Gill:** That's fair enough.

[336] **Mick Antoniw:** Of course, the general election has sort of intruded into all sorts of planning. But, of course, the Queen's Speech, we know, is going to be on 19 June 2017. We know that the parliamentary recess is on 21 July. So, once Parliament, post election, resits, there's a space of about three or four weeks, I think, within which we would hope that the Bill is published. I don't know if we have any further information on that.

[337] **Mr Godfrey:** No.

[338] **Nathan Gill:** No. Okay, that's fair enough. Thank you very much. Have you or your team undertaken any work to try and estimate how many pieces of subordinate legislation will be needed in Wales in order to devolve responsibility to make transferred EU law workable?

[339] **Mick Antoniw:** Very good question. We have for some time been doing a mapping exercise to try and identify it, and the more we go down that mapping exercise, the more enormous you realise the task actually is. Do you want to update on where we are with the mapping?

[340] **Ms Dunning:** We've worked out that there's approximately 12,600 instruments that need to be looked at, to work out whether or not there's any amendments to be required from those.

[341] **Lord Elis-Thomas:** They all come to this committee, presumably.
[*Laughter.*]

[342] **Ms Dunning:** So, it's a sizeable task, but it's something that is ongoing, to try and identify a clear idea of the figure.

[343] **Nathan Gill:** Okay, thank you very much.

[344] **Huw Irranca-Davies:** Very good. Dafydd, would you like to take us on, please?

[345] **Lord Elis-Thomas:** Yes, I would like to ask in particular about the White Paper, or the blue and white paper actually, from the Department for Exiting the European Union, particularly chapter 4 on interaction with the devolution settlements. In particular, I would like to focus on paragraph 4.2, because it talks about the legislative competence of the devolved administrations and then relates to the common frameworks that are currently at the EU level, and then says this:

[346] ‘When the UK leaves the EU, the powers which the EU currently exercises in relation to the common frameworks will return to the UK, allowing these rules to be set here in the UK by democratically-elected representatives.’

[347] What about the democratically elected representatives that sit in this Assembly then?

[348] **Mick Antoniw:** Well, you, as other Members, have gone to the crux of the concerns that we have about the whole process. If you read it within paragraph 4.5 as well, you have the phrase there:

[349] ‘It is the expectation of the Government that the outcome of this process will be a significant increase in the decision making power of each devolved administration.’

[350] But then you go to the Prime Minister’s speech in Scotland, where she says:

[351] ‘I wanted to make clear that strengthening and sustaining the bonds that unite us is a personal priority for me.’

[352] When you take the combination of comments that have actually been made, there is concern about what precisely is being said. The legal situation that we’ve started with—and I think this is the position from the Welsh Government—is really this: if nothing happened at all, then, under the devolution legislation, all those areas that come within our devolved areas of responsibility are ours and remain with the Assembly. That is the nature of

the constitutional settlement that we actually have, and anything that deviates from that is a rolling back of the devolution process.

[353] Now, that's a very important principle to start from, because it doesn't mean from there, of course, you do want to engage with, and there has to be co-operation between the four nations in order to achieve areas of common agreement, which may be in the environment, it may be in agriculture, and certainly it will be within areas of trade. But the position, it seems to me, has to be that it has to be by consent, and, of course, that's where, I think, the First Minister has made these comments that if you start from that premise, it leads you automatically to the JMC having to become a different type of body, and probably Sewel has to reflect that as well, so that, whereas there may be, for example, as has been suggested, a temporary transference to Westminster, it is not at all clear from my reading of what has been said that that is really just the staging post for constitutional convenience, but that it's also being suggested that Westminster will then decide which of those powers would actually then go back into the devolved areas. And that might mean, again, a rolling back of the powers of this Assembly.

[354] Of course, you could take it and read it in another way, which is that what the commitment being given is there will be no diminution of the powers of the Assembly. But, of course, having powers without the resources to go with them is quite meaningless. And this was something that was very much raised, I think very importantly—and I think it is one of the most definitive identifications of some of the challenges that we may face—in the House of Lords' Constitution Committee's report. I think it was Professor Alan Page's evidence that said,

[355] 'You need to have a way of incorporating the devolved assemblies in processes of scrutiny to make sure that their prerogatives and budgets are properly protected by what is being agreed'.

[356] So, I think there are very many challenges. My concern at the moment is it is not completely clear what exactly the UK Government has been saying. And, as we all know, as lawyers in contract, you can't have a binding contract unless the parties are ad idem. And I think that ad idem point is the bit that concerns me. We're talking about the same subject matter, but I'm not quite sure our understanding of that subject matter is exactly the same. And I think that's an area that is going to need to be clarified. The difficulty, of course, is that, in the absence of the great repeal Bill, in the absence of knowing what is in it, what are its clauses and so on, there is too much scope

for speculation at the moment. But, certainly, my view at the moment is that there's too much in clarity around, and there's still ground for significant concerns about what the intentions are.

[357] **Huw Irranca-Davies:** Dafydd, do you mind if I just bring David in on that very issue?

[358] **Mick Antoniw:** I do apologise—I started and then I went into—

[359] **David Melding:** Yes, how real is this as a potential conflict? Because it seems to me that, certainly, the Welsh Government—I'm not so knowledgeable about the Scottish Government—agree there should be common frameworks over, particularly, agricultural policy and environmental policy, so that you have some sort of analogous framework to what we currently get with the EU. So, if you agree the outcome, why are we getting so embroiled in all this process stuff? What's the real problem?

[360] **Mick Antoniw:** Well, I think the answer to that is that it isn't actually clear what is going to happen. And it's also not completely clear. If we take the *acquis*—we've had these arguments whether it's pronounced 'acquis' or 'acqui' or whatever—but, the *acquis*, whether that is an element in itself, because my reading of what's being said is that the view is that that goes to Westminster and that there will then be a process within Westminster as to what will happen to that. There will then be decisions being taken. Now, if that is the case, it seems to me that is fine, provided that it is with the consent of the Assembly if it relates to a devolved area, which means that, obviously, the devolved Governments have the right to say, 'No, we don't want to do it', and, in which case, those powers remain with those devolved Governments to do as they wish in accordance with the devolution settlements. Now, if that is the understanding, then I think we're fine. I think that we are *ad idem*. We do have a common understanding. The problem is, in everything that's being said, it is not clear to me that that is the understanding. If it isn't the understanding, then it means there are concerns as to what might happen there. So, part of the process now is to get that understanding, and I think the obligation will be on the new Government to give those clear messages, clear understandings and clear undertakings on those fundamental matters of constitutional principle.

[361] **David Melding:** This is where I get a bit confused. Is there an argument from fundamental constitutional principle, because I think most people accept the 1998 Acts took as a premise European governance? So, when we

looked at our environmental powers and our agricultural powers, it was clearly understood what the limits were of powers in those fields that sat with member states and then those powers that sat at the European level, and that's how our devolution settlement was constructed. But you seem to be arguing that something much more fundamental was done then—that, basically, all source of authority on those fields was, by its nature, vested in Cardiff and Edinburgh, and I find that a big stretch, I have to say.

[362] I take this point that it should be done by agreement between Governments, and there could be real issues if that doesn't happen, and I think the First Minister's completely right about the JMC needing to be strengthened if we're going to have common frameworks and arbitration, possibly, needed. I buy into all that and I think that is fair comment. But I think this is about Governments being grown up and just getting on and coming to a reasonable deal between themselves, and it isn't based in fundamental constitutional principle in my view. Well, I could be persuaded, but I've not been yet.

[363] **Mick Antoniw:** I think the starting point on that is to say, 'Well, look, if there is no great repeal Bill and, say, Parliament, for some reason, can't reach an agreement and that there was no legislation, so all that happens is that, after two years, we drop out of the European Union, who, then, has the legal power to legislate in those areas that are within our responsibility but that up until now have been exercised in Brussels?' Legally, constitutionally, it must be in accordance with the Government of Wales Act, and we take the 2006—

[364] **David Melding:** So, the powers that are at the moment at the supra-state level, you think it's logical for them to jump straight to the sub-state level?

[365] **Mick Antoniw:** I don't think there is any other legal power that exists other than those that are set out in UK law.

[366] **David Melding:** But, functionally, that's remarkable, because it pulls apart all sorts common standards you need over large geographical areas, common standards in terms of trade policy and the externalities that a radically different income policy for agriculture would imply for Wales if England went down a different road. Really, in practical politics, why on earth—? We're doing our citizens a disservice, really, by raising these issues—

[367] **Mick Antoniw:** The problem is—

[368] **Dai Lloyd:** Oh, come on.

[369] **Lord Elis-Thomas:** Come on. Chair.

[370] **Huw Irranca-Davies:** I'm coming back to you, Dafydd. I'm coming back.

[371] **Mick Antoniw:** Can I just add—?

[372] **David Melding:** Hold on, I have not finished yet.

[373] **Huw Irranca-Davies:** I'm coming back, I promise.

[374] **Lord Elis-Thomas:** See you in a sheep sale in Dolgellau next time and you can repeat those things.

[375] **David Melding:** We should be seeking practical solutions and working these areas of governance, and it seems to me that you could end up by saying the European area of governance goes, therefore we come right down to sub-state, missing out the state level altogether and the benefits we can have with common frameworks, and I find that a difficult one to follow.

[376] **Mick Antoniw:** Well, the answer I'd give to that is it's not about—. Firstly, yes, you're absolutely right, and I think the whole intention is to actually resolve these by agreement and by common interest. But if you're asking me in terms of the law and what the law says, well, I think the law is exactly as I have outlined it. I don't think we can turn around and say, 'Yes, well that might be the law, but surely common sense will et cetera'.

14:45

[377] Well, the law is—it sets out the powers, and that's the situation we're in with the type of constitution that we have. We have a dualist system that is coming to an end, so we will no longer have a dualist system. The *acquis*, as it is called, all those powers that are currently in Brussels, will suddenly cease to be in Brussels. So, the question is, legally, in the absence of any other legislation, where will those powers be? Well, all you have to do is to go to the Government of Wales Act, go to the 2017 Act, which will be in force by then, which is a reserved-powers model, which basically says that any matter

that is not reserved is within the responsibility of the Assembly.

[378] **Huw Irranca-Davies:** Dafydd, I'm bringing this back to you, but it's—

[379] **Lord Elis-Thomas:** No, no. I will have my right of reply in other fora.

[380] **Huw Irranca-Davies:** Okay. But in that case, Dai, you wanted to respond—

[381] **Dai Lloyd:** Well, only briefly, because the Counsel General has made the point excellently. I mean, you know, agriculture, for instance, is devolved, so 4.2, I think, is factually incorrect when it says

[382] 'the UK Government represents the whole of the UK's interests',

[383] because, certainly, in the past, here, we've had Welsh agricultural Ministers from here going to Europe, representing, at times, the UK position, as it were, because agriculture is devolved, as you say, here, so that, in those devolved areas, the UK Government, in other words, represents the English region, as it were, or English sub-state, in David's parlance, but that's a matter for the English sub-state to get used to.

[384] **David Melding:** [*Inaudible.*]—sub-state.

[385] **Dai Lloyd:** Yes, absolutely, but the situation is: agriculture, fisheries, environment—the powers have never left. So, it's not a question of going from Brussels to London. That's the thinking behind the continuation Bill that this Assembly, obviously, voted in favour of developing, a few weeks ago.

[386] **Mick Antoniw:** For me, I think the legal position is clear in terms of what the powers are and where they lie. You just have to go back to the core legislation that actually applies. Is there dysfunctionality in the system? Well, clearly, there is dysfunctionality. It's a point we've made numerous times about the constitutional structure. The point you make that it's fundamentally important, David, is absolutely right. There are all sorts of challenges where we need to work collectively together for a common interest, but it has to be on the basis of the devolution statutes and the devolution settlements that exist, and shouldn't be a mechanism for centralisation. And it is not just a matter, for me, that goes back to the law itself. You have look again to the point I raised from the House of Lords—the comment that was made there. UK Government could well turn around and

say, 'Well, we will not intrude in any way.' You are absolutely right in what you say about the interpretation of the constitution, but you only get the resources if you agree to do it in a particular way. So, you have the power, but the power without the resources.

[387] So, this is a whole package that relates to the allocation of funding, as well, that was previously within Europe, to the devolution settlements, and to the fact that we're going to be in a different environment where we—all four nations—need to co-operate to achieve an outcome that is for the benefit of everyone, that represents common interests. And if there is that good intent there, and there is that clarity of understanding of the role of the four nations within this process, then I think that will work. But it does mean—. The fact that we're talking about the four nations now in a way that's slightly different to the UK does mean that we are in a different constitutional world post Brexit. We're not where we were in 1971, 1972. It's a very different relationship, and there are other issues, of course, that arise in respect of the legislative framework in terms of the fact that, the next few years, there are going to be ongoing negotiations. We're going to have to look at those as they emerge. Each one may impose different challenges, and you then have to look at the issue as to, well, if we're going to have agreements with the European Union, which I'm sure we all want to have, there has to be a mechanism for arbitrating on disputes and disagreements and interpretation, and how should that happen, should it be the European Court of Justice, whereas the Prime Minister has said they want to break from the ECJ, or does that mean you then create another body—you know, there are all sorts of complications and challenges that I think emerge there.

[388] **David Melding:** I agree that this isn't 1973 or 1972, when we weren't in the, well, then, European Economic Community, so to simply say, 'Therefore, we just get back everything, then we recreate the situation in 1972', that clearly ignores devolution, but devolution itself was within a framework of the EU, and to ignore that fact as well I think is problematic.

[389] **Huw Irranca-Davies:** You can see this is not only contended—

[390] **David Melding:** Anyway, you've been very kind.

[391] **Huw Irranca-Davies:** —at the moment in terms of interpretation, but also contended amongst committee members. And, without abusing my position as Chair, I just note that, in paragraph 4.2, it seems to be clear at the opening where it says:

[392] ‘In areas where the devolved administrations and legislatures have competence, such as agriculture, environment’

[393] et cetera,

[394] ‘the devolved administrations and legislatures are responsible’.

[395] It seems to be quite clear, it’s heading in the direction, but, then, in the final sentence:

[396] ‘When the UK leaves the EU, the powers which the EU currently exercises in relation to the common frameworks will return to the UK, allowing these rules to be set here in the UK by democratically-elected representatives’—

[397] **Dai Lloyd:** But they never left us. They never left us.

[398] **Huw Irranca-Davies:** —and that’s where we are. Okay. Well, I think—. Dai, do you want to take up the issue of the Supreme Court, on challenge around these areas?

[399] **Dai Lloyd:** Well, only in terms of the natural progression of that, then, is what are we going to do about it, and how realistic is the Supreme Court challenge when we feel as though we’re losing powers.

[400] **Mick Antoniw:** Well, there are two aspects to it. Ultimately, the UK Parliament can legislate in any matter, but the Supreme Court recognised very, very clearly that there are consequences to breaching political conventions. Those conventions exist to enable the constitution to actually work. So, it’s a question as to whether we want a workable outcome or not. I think that’s the important point. Just on the point that was raised earlier, of course, the Supreme Court did also deal with the issue of the conduit, and rejected it. So, the argument you’re making about the *acquis*, I think, was actually rejected by the Supreme Court. I just thought I’d have the last word on that.

[401] **Lord Elis-Thomas:** Good.

[402] **Huw Irranca-Davies:** And could I, before Dai takes—[*Interruption.*] Could I ask: in an earlier session, on a different inquiry we’re pursuing,

where we're exploring the intergovernmental relations—and it is pertinent to this line of questioning now, this ability of Welsh Government and other devolved administrations and Governments to engage positively and early in the process of such things as this—. So, we haven't seen the great repeal Act itself yet—it'll come forward in due course, imminently. To what extent are you able, in the light of the discussion we've just had, to help shape that to get that clarity? Can you give us some hint of what work you, your officials, or others are engaged in? What doors are being opened to you to allow you to shape that?

[403] **Mick Antoniw:** Well, the key is, ultimately, communication between the various Governments around the common objective. The difficulty has been, of course, that, after the publication of the UK Government's White Paper, we then, very soon, ended up with a situation of a general election being called. So, suddenly, everything comes to a halt. So the test, really—I mean, it's very difficult to answer, because the test is now going to be, with a very short space of time, seeing what the great repeal Bill looks like, and what issues arise from that. For me, the important thing is that there's got to be a very open level of communication between the devolved Governments and the Westminster Government.

[404] **Huw Irranca-Davies:** And I think my question for you, Counsel General, is: is that now happening in this critical time?

[405] **Mick Antoniw:** Well, nothing's happening at the moment because there is no Parliament, so it's all up in the air. I mean, do you want—? Is there anything you'd like to add to that, Jeff?

[406] **Huw Irranca-Davies:** Had it been happening up to the point where Parliament was dissolved?

[407] **Mr Godfrey:** There is dialogue between policy officials, and there is ministerial dialogue that has been happening through the JMC. So, I think the Welsh Government's position is articulated, but a lot of these things get right down to technical detail, and I think the frustration at the present time is there's a need to see the clauses in the great repeal Bill in order to make further progress. It's only when you see the clauses, and what they're actually saying, that you can start to get to the level of technical detail that we think we will need. So, at a legal level, we've been providing supporting information in terms of our own legislation base, but the real need now is to actually engage at a level of detail on the Bill, which we're not doing at the

moment.

[408] **Huw Irranca-Davies:** Okay. Thank you for that. Could I just rattle through some very quick technical but very, very important issues for us as a committee?

[409] **Mick Antoniw:** Certainly.

[410] **Huw Irranca-Davies:** One would be—for you, Counsel General—how you think that the great repeal Bill should deal with delegated powers.

[411] **Mick Antoniw:** Yes, well, it's a very good question. There are going to be two elements of delegated powers, aren't there? One is the powers, the sort of Henry VIII-type powers, that are going to Westminster, but, equally so, on powers that then go to the Welsh Ministers, how those are then exercised and scrutinised within the Assembly. Now, that's going to be—it must be—a matter for the Assembly to decide those procedures. It shouldn't be something that is determined in Westminster. So, those are things that we take ownership of. The second part of them is that we then go through the process that we discussed earlier, and that is those things that are very much of a technical nature, as far as possible will need to go through an efficient, streamlined process. Those things that have more significant policy implications need to be scrutinised. Now, the amount of work may be enormous. It's difficult to actually predict precisely how much it is, and that's going to be a challenge again to all of us to actually ensure that we have the systems, the processes, in place, and also the degree of trust in place to enable us to get through. Otherwise the real danger is that we get bogged down into an enormous amount of technical minutiae, which I think will distract us from very many important issues.

[412] Did you want to add anything to that? No?

[413] **Huw Irranca-Davies:** I think we're very aware of that as well, but on that basis perhaps my final question is this: how you would envisage that SIs, Brexit SIs, in effect, would be scrutinised by the Assembly, including in committees and in Plenary, recognising that these are unusual circumstances, but they do need due scrutiny—what do you envisage will happen as the process?

[414] **Mick Antoniw:** It depends on the nature of those Brexit statutory instruments, and also whether they are—. If they relate in any way to

responsibilities of the Assembly, then there will have to be a legislative consent motion. And the same in terms of the primary legislation itself; that almost certainly will require an LCM. So, there are going to be considerable opportunities, I suspect, whereby the Assembly will be debating and considering these and within the context of the processes as well.

[415] **Huw Irranca-Davies:** David.

[416] **David Melding:** I just wonder, over the devolved fields, where the UK Government for England will have to implement all these changes to a whole host of legislation and new secondary instruments, but secondary instruments themselves have to be changed in terms of the references they make, will you be cutting and pasting their approach and procedures, or will the Welsh Government go through its own exercise to pick out those that it feels should be scrutinised thoroughly in terms of Assembly procedure. And could you envisage us having a different procedure here to the one that is used in Parliament?

[417] **Mick Antoniw:** I think we could have a procedure. I think it will be up to the Assembly to determine what that procedure is. We have to decide what's going to be, you know—

[418] **David Melding:** The reason I ask is that we often hear from Ministers here, 'Oh well, this is the procedure that's used in Parliament'—you don't have affirmative powers or processes here, it goes through with a negative procedure, or you may argue that the Henry VIII powers are appropriate to be exercised in certain areas on the basis that they're going to be doing that in England.

[419] **Mick Antoniw:** Well you have to be very cautious with Henry VIII powers. We also have to not be zealots in the sense that there might be no role, particularly within the circumstances we're in, but we also have to preserve the constitutional principles of ensuring there is proper scrutiny. I can't really give you an answer what those processes will be other than I think it will be for this Assembly to decide what is going to be the best mechanism, what is going to be the best process, for actually dealing with these. I think that's going to come when we have a better understanding as to precisely in what raft or what swathes these powers are going to come or the processes are going to be adopted.

15:00

[420] The point is very, very important, but I probably can't give you a very useful answer until we've actually seen the great repeal Bill and we have a better understanding of what other legislation there's going to be and what use of Henry VIII powers there's going to be.

[421] **Huw Irranca-Davies:** Thank you. I think we've come to the conclusion—. The clock has beaten us again. But you are already flagging that this committee's traditional—quite correct, as well—zealotry around Henry VIII powers, or the misuse or abuse or overuse of Henry VIII powers—it might be slightly different with the plethora of SIs that might be hurtling down to the Assembly's way. Is it your role—do you see it as your role to notify the Assembly of the SIs that committees might need to engage with?

[422] **Mick Antoniw:** Well, I certainly see it as my role to actually be aware of the SIs that are coming in and what any of the constitutional implications are, and to raise those with Government. And I think, ultimately, in terms of the direction of Government, it would be a matter for the First Minister. But, again, our Standing Orders provide, in terms of processes that we're going to need, that they are determined by the Assembly itself. So, ultimately, the overall conduct of these, I think, are matters that are within the ambit of the Assembly, as it should be.

[423] **Huw Irranca-Davies:** Thank you. Is there anything else you want to raise? We've covered a lot of ground there.

[424] **Mick Antoniw:** Only to make the point that, I think, in some ways, one of the problems we have is we're talking about the unknown—speculations, what if, what if that, and so on. And it's correct that we anticipate all the options and the problems and the potential, because that's our responsibility. But I do think the consideration, and the consistent consideration, by this committee is very important, because it's also the way in which we actually develop our own thinking in these areas where we are treading formerly untrodden territory.

[425] **Huw Irranca-Davies:** Thank you very much, Counsel General, for your evidence, and to your two senior officials as well. Thank you very much.

15:02

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

[426] **Huw Irranca-Davies:** And with that, we move onto item number 9 for committee Members, which are instruments that raise no reporting issues under Standing Order 21.2 or 21.3. There are a range of statutory instruments with clear reports under paper 3 in your pack. Do we have any comments or observations, or are we happy to note?

[427] **Dai Lloyd:** Bodlon.

Dai Lloyd: Content.

[428] **Huw Irranca-Davies:** Diolch.

Offerynnau sy'n Cynnwys Materion i Gyflwyno Adroddiad arnynt i'r Cynulliad o dan Reol Sefydlog 21.7
Instruments that Raise Issues to be Reported to the Assembly under Standing Order 21.7

[429] **Huw Irranca-Davies:** Under item number 10, we have instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3, and under that we have a no resolution instrument, which is statutory guidance 'Historic Environment Records in Wales: Compilation and Use'. Paper 4 is the statutory guidance and paper 5 is the report. Could I ask, Gareth, is there something that you want to comment on?

[430] **Mr Howells:** Just to note that, even though it's not regulations and it's not a statutory instrument, it's still a form of legislation that's laid before the Assembly. And even though there's no procedure, it's just a kind of thing we do—keep an eye on the drafting and the way it talks about what public bodies must do and should do. We've seen previous similar guidance that is really clear about what 'must' means and what 'should' means and the consequences of not doing what you should do or must do, and I think that's maybe something that's slightly lacking in this guidance.

[431] **Lord Elis-Thomas:** This is an area where I tried to intervene way back, on David Lambert's advice, actually. He said there's no use saying the Assembly scrutinises primary legislation and secondary legislating but does not scrutinise the executive messages that come out from Ministers. And, of

course, this goes back, way back, to the whole behaviour of the old Welsh Office—that there were letters going out, sometimes signed by Ministers, often just signed by officials, that actually, in David’s view, had the force of law, because they were executive decisions undertaken by Government that local authorities, sometimes within a specified piece of legislation, sometimes outwith that, would be expected to enact, or to do. So, I think we should have a go at things like this now. It’s well within the purview of this committee, isn’t it, Gareth?

[432] Onid yw? Mae’n gyfan gwbl Isn’t it? It’s completely suitable.
addas.

[433] **Mr Howells:** Ydy. Mae’n ffurf o **Mr Howells:** Yes. It’s a form of
ddeddfwriaeth. legislation.

[434] **Yr Arglwydd Elis–Thomas:** Wel, **Lord Elis–Thomas:** Yes, exactly.
yn union.

[435] **Huw Irranca–Davies:** Well, the guidance has been laid. Let us put forward a polite, diplomatic, but helpful letter to the Minister responsible to say, ‘Let’s have that consistency between what is passed in legislation and what comes through in guidance’.

[436] **Lord Elis–Thomas:** If I may, I would also suggest that we invite the Minister and his officials here to give evidence.

[437] **Huw Irranca–Davies:** On this particular—?

[438] **Lord Elis–Thomas:** Specifically on this. Is it to be examined by a policy committee?

[439] **Mr Howells:** Not as far as I’m aware.

[440] **Huw Irranca–Davies:** Right, okay. Do we have an opportunity where we have the relevant Minister in front of us in the near future for any other reason?

[441] **David Melding:** I do agree that the confusion is quite fundamental, really, isn’t it, especially as there is existing good practice. I think this policy area is quite an important one as well, because the number of historic sites now being discovered because of the advances in aerial photography in

particular is quite large, and they've legislated on this. And it seems to me that it is an area that could impinge on the public quite a bit.

[442] **Huw Irranca-Davies:** Well, I think there's a clear will of the committee here. Let's go away and explore bringing the Minister here to examine this in a bit more detail.

[443] **Dai Lloyd:** Yes, just the whole concept of statutory guidance.

[444] **Huw Irranca-Davies:** Yes, indeed. And it might be helpful to the Government as well if we pick it up now and then there's clarity on what we're going to expect from others.

[445] **Lord Elis-Thomas:** I can tell you, they're not going to like it.

[446] **Huw Irranca-Davies:** We can be very nice. Right, okay. There we are. If we can go away and have a look at that.

15:06

Papurau i'w Nodi Papers to Note

[447] **Huw Irranca-Davies:** Then we have further papers to note under item 11. We have a written statement, which is only for noting at the moment. It's the progress update on the work of the justice stakeholder group from the relevant Cabinet Secretary for Communities and Children. So, are we happy to note that?

[448] **David Melding:** I just want to say, on point 10, the Government says that there should be a permanent group, but they don't say anything about when it might be established, which I think is a bit weak.

[449] **Huw Irranca-Davies:** Yes, okay. On paper 7, correspondence from the Minister for Lifelong Learning and Welsh Language, we are, of course, considering the draft report at a later point on the agenda today, so if you're happy to note that, then, and we'll come back to it. On paper 8, correspondence from the Chair of the External Affairs and Additional Legislation Committee, again, we can discuss this in private session later in the agenda, if you're happy to note that. And then, paper 9, the committee's response to the Procedure Committee of the House of Commons inquiry into

delegated powers in the great repeal Bill—we've circulated the hard copy of the House of Commons Procedure Committee report here, which was published just before dissolution. That's quite helpful. And the letter that we sent was circulated by e-mail. So, it's just to note that for the moment.

15:08

**Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o
Weddill y Cyfarfod
Motion under Standing Order 17.42 to Resolve to Exclude the Public
from the Remainder of the Meeting**

Cynnig:

Motion:

bod y pwyllgor yn penderfynu that the committee resolves to gwahardd y cyhoedd o weddill y exclude the public from the cyfarfod yn unol â Rheol Sefydlog remainder of the meeting in 17.42(vi).

accordance with Standing Order 17.42(vi).

Cynigiwyd y cynnig.

Motion moved.

[450] **Huw Irranca-Davies:** Under item number 12, we can move now to a motion under Standing Order 17.42 to resolve to meet in private, if that meets with the consent of Members. It does. So, we'll move to private session, please.

Derbyniwyd y cynnig.

Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 15:08.

The public part of the meeting ended at 15:08.