



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

6/3/2017

Agenda'r Cyfarfod
Meeting Agenda

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Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynnddi yn y pwyllgor. Yn ogystal, cynhwysir trawsgrifiad o'r cyfieithu ar y pryd. Mae hon yn fersiwn ddrafft o'r cofnod. Cyhoeddir fersiwn derfynol ymhen pum diwrnod gwaith.

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. This is a draft version of the record. The final version will be published within five working days.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Yr Arglwydd / Lord Annibynnol
 Dafydd Elis-Thomas Independent
[Bywgraffiad](#) | [Biography](#)

Nathan Gill Annibynnol
[Bywgraffiad](#) | [Biography](#) Independent

Huw Irranca-Davies Llafur (Cadeirydd y Pwyllgor)
[Bywgraffiad](#) | [Biography](#) Labour (Committee Chair)

Dai Lloyd Plaid Cymru
[Bywgraffiad](#) | [Biography](#) The Party of Wales

David Melding Ceidwadwyr Cymreig
[Bywgraffiad](#) | [Biography](#) Welsh Conservatives

Eraill yn bresennol
Others in attendance

Nicola Charles Cyfreithwraig, Llywodraeth Cymru
 Lawyer, Welsh Government

Mark Drakeford Aelod Cynulliad, Llafur (Ysgrifennydd y Cabinet dros
[Bywgraffiad](#) | [Biography](#) Gyllid a Llywodraeth Leol)
 Assembly Member, Labour (Cabinet Secretary for
 Finance and Local Government)

Syr / Sir Paul Silk Cadeirydd, Comisiwn ar Ddatganoli yng Nghymru
 Chair, Commission on Devolution in Wales

Paul Webb Uwch-swyddog Cyfrifol, Bil yr Undebau Llafur
 (Cymru), Llywodraeth Cymru
 Senior Responsible Officer, Trade Union (Wales) Bill,
 Welsh Government

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

Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Gerallt Roberts	Dirprwy Clerc Deputy Clerk
Tanwen Summers	Ail Clerc Second Clerk
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service
Gareth Williams	Clerc Clerk

*Dechreuodd y cyfarfod am 14:30.
The meeting began at 14:30.*

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

[1] **Huw Irranca-Davies:** Good afternoon and good afternoon, Cabinet Secretary and to your officials, as well. Before we introduce you properly to this session of the Constitutional and Legislative Affairs Committee, the normal housekeeping arrangements: we're not expecting a fire alarm, but if there is a fire alarm, please follow our clerks and stewards out of the exit; there are translation facilities on channel 1 in both languages; and if you can make sure that mobile devices are switched to silent mode, and so on. We're all familiar with the housekeeping issues here.

14:31

Bil yr Undebau Llafur (Cymru): Sesiwn Dystiolaeth gydag Ysgrifennydd y Cabinet dros Gyllid a Llywodraeth Leol Trade Union (Wales) Bill: Evidence Session with the Cabinet Secretary for Finance and Local Government

[2] **Huw Irranca-Davies:** So, Cabinet Secretary, you're very, very welcome indeed here today, again, in front of us and we appreciate your time. Would you like to introduce your officials or would they like to introduce

themselves?

[3] **Ysgrifennydd y Cabinet dros Gyllid a Llywodraeth Leol (Mark Drakeford):** Gadeirydd, diolch yn fawr. Gyda fi y prynhawn yma mae Paul Webb sy'n uwch-swyddog cyfrifol Bil yr Undebau Llafur (Cymru) a Nicola Charles, cyfreithiwr sy'n gweithio ar y Bil hefyd.

The Cabinet Secretary for Finance and Local Government (Mark Drakeford): Thank you very much, Chair. Joining me this afternoon is Paul Webb, senior responsible officer for the Trade Union (Wales) Bill, and Nicola Charles who is a lawyer working on the Bill also.

[4] **Huw Irranca-Davies:** Diolch yn fawr iawn. We're looking today at the very important issue of the Trade Union (Wales) Bill and the purpose and effect and many other issues. We're going to go straight into it. I'm going to ask my colleague David Melding to begin the questioning.

[5] **David Melding:** Prynhawn da, Cabinet Secretary. Could we just start, then, by asking you to say why you think this Bill is within the Assembly's competence?

[6] **Mark Drakeford:** Thank you, Chair. The Bill is within competence because it is about the management, delivery and continuity of devolved public services. The Supreme Court has made it clear that, provided a Bill provision fairly and realistically relates to one or more of the subjects in Schedule 7 to the Government of Wales Act 2006 and does not fall within any exception to that Schedule, it does not matter whether a provision might also be classified as relating to a subject that has not been devolved, such as employment rights and industrial relations.

[7] Significant elements in the UK Government's Act relate specifically to public services, which, in Wales, are unambiguously devolved responsibilities. The Act refers explicitly to health services and the education of those aged under 17 and fire services, all of which are plainly devolved. It is this Government's view that the relevant provisions of the Government of Wales Act 2006, insofar as they involve the delivery of public services, are to be found set out in section 108 in Schedule 7 to that Act, and that they bring the provisions of this Bill squarely within the devolved competence of the National Assembly.

[8] **David Melding:** That's quite emphatic, especially your last sentence, but the Llywydd has written to us to say that, on the question of competence,

in her judgment the matter is finely balanced. And, she goes on to say that,

[9] ‘there are credible arguments that some or all of the operative provisions of the Bill might be ruled outside the Assembly’s competence’.

[10] There’s quite a big gap between you, it seems, and I wonder why that’s the case, given that both the Llywydd and yourself would’ve had first-class legal advice.

[11] **Mark Drakeford:** Well, Chair, I’m not privy to the Presiding Officer’s legal advice. I see that, having weighed up all the advice that she has available to her, she concluded that the Bill is within the competence of the National Assembly and I agree with her conclusion.

[12] **David Melding:** You don’t agree with her that it’s finely balanced, however.

[13] **Mark Drakeford:** Well, Chair, it’s not a matter for me to be interested, really, in that argument. It’s either within competence or it’s not and the Bill is within competence. That’s what the Llywydd concludes and that’s what I conclude as well.

[14] **David Melding:** Well, let’s pursue some of the issues raised by the PO, then. The advice that she has received stresses that the ‘relates to’ test, which is critical here, focuses primarily on the purpose of a particular provision or set of provisions.

[15] Now, the short title of this Bill is not the public service delivery Bill or suchlike, but the Trade Union (Wales) Act—that would be the short title. Does this not demonstrate that the primary purpose of the Bill is to do with—and I quote from your opening statement when introducing the Bill—

[16] ‘the rights of trade unions and their members in a series of significant areas’?

[17] That’s the real purpose of this, isn’t it?

[18] **Mark Drakeford:** No, Chair, it’s not. The Bill is here to protect public services in Wales. It is a public services Bill. It refers to the part played by trade unions, the very important part played by trade unions, in the successful maintenance of public services in Wales. That’s what this Bill is

about. It is about securing the continuity of the very successful model of social partnership that we have here in Wales. Our Bill simply seeks to allow the law as it has been since 1992 to continue uninterrupted and to build on the successful model we have here in Wales of delivering public services on a social partnership basis.

[19] **David Melding:** Well, if the primary purpose of the Bill was public service delivery, then why have you not introduced a Bill on public service delivery?

[20] **Mark Drakeford:** What we have done in the Bill, Chair, is to focus on those aspects of the UK Government's Act that were from the very beginning the subject of dispute between the Welsh Government—and, subsequently, the National Assembly for Wales—and the UK Government. So, there are aspects of the UK Government's Act that are inimical to us as a Government, but we constructed our Bill in a way that draws its parameters around those aspects that are most closely related to public services and therefore most closely within the competence of the National Assembly, and then focused on those matters that, as I say, from the very beginning, were the subject of discussions with the UK Government, were the subject of a legislative consent motion laid before this National Assembly in January of last year, and which continue to be a matter of correspondence between ourselves and UK Ministers.

[21] **David Melding:** Well, let me quote again from your introductory statement and, I have to say, the attacks, which you're perfectly within your rights to make, on the England and Wales legislation, I think, the Trade Union Act 2016. You referred to the discussions and indeed the criticisms of the provisions of that Act, and then I quote you again:

[22] 'But none of that could stand in the way of their ideological determination to attack the rights of organised labour.'

[23] I mean, this is before we get to all the social partnership. This is what you started with in your statement, and I come back to the question: it's because the primary purpose of this Bill is about trade union rights.

[24] **Mark Drakeford:** Well, Chair, the point that the Member and I disagree on is his attempt to suggest that the rights of organised labour cannot be aligned with the proper conduct of public services. I put the two things together because, in the Welsh context, in the way that we have done things,

they absolutely go hand in hand. Our social partnership model depends upon the rights of organised labour being real, so that they come to the table as genuine partners in that shared endeavour. If you remove the rights of one of the partners in a partnership model, you cease to have a model of the sort that we have attempted and successfully succeeded in constructing here in Wales. That's why the attempt to suggest that, somehow, a Bill that is about public services cannot also be about the rights of organised labour does not seem to me to bear examination.

[25] **David Melding:** Well, what we're examining here is whether you have competence to act and what your primary purpose in acting is. I've not made any reference to the pros or cons of the policy content, as you see them, or indeed what's contained in the Westminster Government's legislation. After dealing with competence and the assault, as you saw it, on trade union rights, you did, towards the middle and latter part of your statement, then talk about the social partnership. You stress that the Welsh Government's policy of social partnership had prevented strikes in Wales and, indeed, you contrasted your record and the record of your colleagues with Ministers in England, where there had been strikes and you argued that that was, at least in part, because they had not followed the sort of policy followed here. You emphasise the importance of dialogue and the avoidance of confrontation. I put it to you that those policies of social partnership could be pursued regardless of what's in the Trade Union Act 2016, because you're talking about avoiding conflict and strikes and not how you actually regulate them, should they be a possibility. So, again, I have to come back and ask you directly: this is about the rights of trade unionists and, pure and simple, that is its primary purpose.

[26] **Mark Drakeford:** I've answered the question a number of times now, Chair, and I'll answer it again. Of course, this is a Bill about public services. It is about the way we deliver public services here in Wales. The way we deliver them is through a social partnership model, and that social partnership model relies on having partners who come properly equipped to discharge their responsibilities to the table where social partnership is conducted. We believe that our Bill ensures that the trade unions are able to go on playing their part in that successful model of social partnership that supports our public services. That's why this is a Bill about public service delivery and that's why it is clearly, we believe, within the competence of the National Assembly for Wales.

[27] **David Melding:** Let me finish then. Your colleague, Dawn Bowden, in

the debate, opened with this, and I quote—about the Bill that you're introducing and that she was supporting:

[28] 'It seen that the Welsh Government is seeking to overturn the most recent attacks on trade unions from what can only be described as the most vindictive trade union Bill that we've seen in recent times.'

[29] I again put it to you that you've not introduced a general Bill on public service delivery; you've introduced a Bill to overturn something that you deeply feel is pernicious—I don't doubt that—but that relates to trade union rights.

[30] **Mark Drakeford:** The Bill is designed to avoid the most egregious efforts of the UK Government to undermine the sort of model that we have devised here in Wales in support of our public services. That's the purpose of the Bill and that's why it's been drawn up in the way that it has, Chair.

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

[32] **Huw Irranca-Davies:** Thank you. Before I take it on to another related area of questioning, it seems to me that you're saying, Cabinet Secretary, that the social partnership model, which you would define as very particular to the Welsh way of working within the public sector, is critical to the way in which this Government wants to see the public services and the public sector work. As such, your argument is that this would be undermined by the proposals. Is there no other way, if this UK Bill were to proceed and to be implemented, that the social partnership model could be maintained?

[33] **Mark Drakeford:** We argued very strongly with UK Ministers throughout the passage of their Bill, which is now of course an Act, that they should have excluded Welsh public services from the ambit of that Bill in order to allow us to continue with the development of a model that we can demonstrate we have delivered here in Wales and which we believe has a record of success that we can point to. We were unsuccessful in persuading UK Ministers to do that, despite the legal advice which they themselves had and which they shared amongst one another, saying that they had a very weak case indeed in relation to Wales. It's as a result of their insistence on going ahead in the way that they did that has led us to this Bill today. That's why we have no alternative; we simply have to reverse their insistence that their remit extends into the way that we conduct industrial relations within devolved public services. So, we've had to bring this Bill in front of the

National Assembly.

14:45

[34] **Huw Irranca-Davies:** Okay, thank you. Can I ask you, on these issues that we've already discussed—the issues of competence—what discussions you've had with the UK Government on this already or what correspondence you may have had already?

[35] **Mark Drakeford:** Chair, as I've said, from the very first signs that the UK Government were intending to bring forward such a Bill, which they did immediately after the general election of 2015, Ministers in the fourth Assembly were in correspondence with their counterparts at Whitehall. The correspondence was led by my predecessor in this job, Leighton Andrews. He corresponded with his counterpart and put the points that I have been making to you this afternoon as to why that Bill should not have trespassed into devolved competencies in the way that we believe that it does.

[36] The First Minister wrote subsequently to the Prime Minister at the time, David Cameron, again setting out what we believe to be a very reasonable case— simply asking them not to try and impose on us a model, which we said they were perfectly entitled to operate within their area of devolved competence. We are not attempting to impose our view on anybody else. We simply ask that they don't attempt to impose their view on us. That was the nature of that correspondence. It continued up to the point of the LCM being put in front of the National Assembly for Wales. So, there was extensive correspondence that lies behind our decision to have to bring a Bill in front of the Assembly.

[37] **Huw Irranca-Davies:** And on the issue of competence, further to actually bringing forward this Bill, this Trade Union (Wales) Bill, what discussions have you now had with the UK Government about their views about whether this falls within competence? What correspondence might you have had? I refer you back, in your letter of 15 February, in the last-but-three paragraph, you say that you spoke to the committee about correspondence you've received from Ben Gummer MP, Minister for the Cabinet Office and Paymaster General. You say,

[38] 'I have contacted his office to forward the Committee's request to see the correspondence and informed them that I feel obliged to release the letter to you.'

[39] Now, at this moment in time, there is no public status of such a letter, but would you like to discuss that letter, because it's been released in confidence, I understand? Would you like to talk about what the UK Minister's view is on devolved competence and so on?

[40] **Mark Drakeford:** Of course, Chair, I can. I believe the letter has been released to the committee, but I have a copy in front of me and I'm very happy, therefore, to share it with you. I'm uncomfortable, as I said to—

[41] **Huw Irranca-Davies:** Sorry, Cabinet Secretary, if you're comfortable, in releasing it to us, and you're happy that this letter is not just with the committee but in the public domain—

[42] **Mark Drakeford:** I have released the letter to the Chair of the equality and local government committee, and to you as Chair of this committee. I've taken no further steps to put it more directly into the public domain, and it's because there is an awkwardness in it. The letter comes to me, and I say to the writer of the letter that I think it's material to the scrutiny of this Bill and, therefore, that it ought to be made available to Assembly Members to assist them in the discharge of their responsibilities—the writer of the letter disagreed. But, following an exchange with the Chair of the equality and local government committee, where the Chair felt very much that it was material to the work of that committee, I wrote to Mr Gummer, the UK Minister, explaining that I would be making it available to the committee. I don't feel that I have a more general basis to make it available to everybody, but it's to allow the committees to do the job that committees are expected to do in the National Assembly.

[43] **Huw Irranca-Davies:** For clarity, for the purposes of this evidence session and for the committee, could you relay to us what that letter reveals about the Minister the Right Honourable Ben Gummer MP's approach to how the legislation that they passed in Westminster should apply across the UK?

[44] **Mark Drakeford:** Absolutely, Chair. I'm very happy to do that. The letter begins by referring to two aspects of the UK's Trade Union Act 2016, section 13, Facility Time, and section 15, Check-off. It tells me that the UK Government intends to bring forward regulations on those matters, but that Mr Gummer has agreed with the Secretary of State for Wales that these regulations will not include devolved Welsh public bodies within their scope until the Wales Bill comes into force. So, Members here will know that, on 1

March, the UK Government turned on the Secretary of State's ability to make those regulations—they've not been made as yet—but we now have an undertaking from Mr Gummer that, when they are made, they will not cover devolved public services. The Bill does not refer to the 40 per cent threshold in ballots and, on 1 March, regulations were brought forward that mean that if there were to be a strike ballot in important public services here in Wales between now and when our Bill, if it ever reaches the statute book, does so, then those ballots would be subject to that 40 per cent threshold.

[45] **Huw Irranca-Davies:** Thank you for that. Let me bring in Dai at this point and then I'll come back.

[46] **Dai Lloyd:** Well, just specifically on what you've said so I get some clarity of what's going on here, because, obviously, we are in exciting legislative times, some people would say. So, at the moment, we have the conferred model—I'll start simply—and your trade union Bill can stand and suggest alterations along the lines that you have suggested to the Trade Union Act that applies across the board. So, what you're saying now is that London has effectively agreed that they're not going to mess with us at this side of the Wales Bill kicking in, but that, once the Wales Bill has kicked in, all of this will be deemed to be a reserved matter. And for the sake of uniformity across the different jurisdictions of these islands, what's stopping them then, once the Wales Bill has come into action, from rolling back your legislation to exactly what applies in England on the grounds that the Wales Bill clarifies that these matters will now be reserved? They're not reserved at the moment, but they will be reserved from next year. Have we got any guarantees that these discussions on this trade union Bill now will be actually just completely gone and will be reversed simply when the Wales Bill kicks in next year, which is the basis that some of us opposed the Wales Bill, because we actually lose powers that we have at present?

[47] **Mark Drakeford:** Well, Chair, to take the points in order, to begin with, I think Dr Lloyd makes exactly the right point. I think what this letter does, without saying it in so many words, is that it concedes the competency issue under the current settlement. So, under the current settlement, Mr Gummer does not intend to interfere with the ability of the National Assembly for Wales to pass this legislation if it chooses to do so. He does—I'll read his final paragraph to you, because it does answer the second point that Dr Lloyd made, in much the way that he made it himself. The letter here says,

[48] 'The Wales Bill will clarify that industrial relations are a reserved

matter, and the UK Government will act at the earliest possible opportunity, following commencement of the Wales Act, to ensure the legislation protects our public services.’

[49] Now, you could read that as a fairly direct threat to bring forward legislation to overturn any legislation passed by the National Assembly. Now, I’m not conceding for a minute today that Mr Gummer’s understanding of competence post the Wales Bill would allow him to do what he says he is going to do. I do say to him very directly that, in my personal view it would be a democratic outrage, if this National Assembly were to express its view so clearly as to the way we wish public services in Wales to be organised, and to have done so, for those of you have been following the evidence, with the very, very clear support of both employers and trade unionists here in Wales, if he were then to try to take action to force us to be in a position that the National Assembly will have explicitly said it does not want to be in. But that’s a different matter; that’s a matter of political argument. I am not conceding for a minute that the competence issues are resolvable in the way that the letter suggests.

[50] **Huw Irranca-Davies:** So, if your interpretation of that final paragraph is correct, we should assume from that that there is a possibility—if not a probability—of this going forward to the Supreme Court at some point in the future.

[51] **Mark Drakeford:** No, Chair, that’s not my conclusion from it. In fact, I think the letter suggests that the Supreme Court is not the course of action that the UK Government contemplate, because I think they are conceding the issue of competence, that this Bill will be taken—*[Interruption.]* I think what they’re saying is that they will pass a Westminster Bill to overturn the Bill that will be passed in this National Assembly.

[52] **Huw Irranca-Davies:** Dai.

[53] **Dai Lloyd:** Just coming back, just to clarify that, I happen to agree with you there, in terms of I think it’s quite clear that the—. I mean, that was the whole point of having the Wales Bill, wasn’t it, to sort of take the Supreme Court out of the equation, following recent—we would say ‘victories’, or they would say ‘defeats’. So, the Supreme Court would be out of the equation completely, and so that’s a fairly clear statement that, once the Wales Bill kicks in next year, all of this is a reserved matter, and I read that as an intention to bring forward a new Westminster Act to overturn your Bill here

this year. I've got to say I'm not legally qualified myself, and I'm surrounded by legal experts, knee-deep in all the relevant knowledge, but, from what you've been saying and what the letter appears to be saying, there is a direct challenge to our advancement as an Assembly, then, as a Senedd, if we pass an Act this year that then can be overturned next year by Westminster legislation. Would you agree on that point?

[54] **Mark Drakeford:** Well, I definitely agree that that is what I think the letter is suggesting. It is suggesting that the fight will not be in the Supreme Court, that, if there is to be a fight, it will be that the National Assembly will have passed a Bill here that sets out our preferred model for dealing with public services in Wales, and that a Westminster Government would say that it is not interested in what the National Assembly has to say on these matters, it will act to impose its view on us. Now, that fight may come, but I would hope that when Westminster Ministers have had an opportunity to reflect on the democratic processes that we will have undergone here and the view of the National Assembly, if that's what it is, they will want to reconsider the course of action that they set out in this letter.

[55] **Dai Lloyd:** Just one small final point—so, in the conferred model we have at present, such a route for the Westminster Government could not be contemplated. Would that be a fair assessment as well? Because you're doing what you're doing because the main area is a devolved competence, and the rest is a so-called silent subject at the moment, so that, in terms of—. This is a fairly naked example of rolling back powers.

[56] **Mark Drakeford:** Well, Chair, I think what I have to say is that I am confident that this Bill, under the settlement we have now, is within competence. There may be a different fight in the future about where competence lies, and I am not conceding at all, this afternoon, that Mr Gummer's view of where competence lies would be the Welsh Government's view. But that is a fight yet to come, and there would have to be proper advice and Ministers would have to consider it at the time. I suppose the only additional point to make to Dr Lloyd's question—and I'm alert to it, because Westminster Ministers remind me of it regularly in the Brexit context—is that, in the end, their view is that the UK Parliament remains sovereign and that it can overturn anything that any devolved legislature does in any field, no matter how clearly it might be devolved.

[57] **Dai Lloyd:** Thank you. Good old Henry VIII.

[58] **Huw Irranca-Davies:** Indeed. Fascinating. Dafydd, would you like to take us forward, please?

[59] **Yr Arglwydd Elis-Thomas:** Diolch yn fawr, Weinidog, am y sylwadau. A gaf i ofyn beth, yn eich barn chi, yw'r gwahaniaeth rhwng 'gwasanaethau cyhoeddus pwysig' yn niffiniad Deddf Undebau Llafur 2016, a ddaeth i rym ar Ddydd Gŵyl Dewi, a gwasanaethau cyhoeddus Cymru?

Lord Elis-Thomas: Thank you very much, Minister, for those comments. May I ask what, in your view, is the difference between 'important public services' in the definition contained within the Trade Union Act 2016, which came into force on St David's Day, and public services in Wales?

[60] **Mark Drakeford:** Wel, mae diffiniad gyda ni nawr, ar ôl 1 Mawrth—yr un diffiniad, a dweud y gwir, a oedd yn y *skeleton Bill* yr oedd y Llywodraeth wedi ei gyhoeddi yn ôl ym mis Ionawr. Rŷm ni'n glir mai nifer fawr o bethau maen nhw'n eu dweud yn y ddogfen 1 Mawrth, maen nhw yn ein dwylo ni fel y Cynulliad yma yng Nghymru—so, yr enghraifft rydw i wedi'i ddweud yn barod.

Mark Drakeford: Well, we have a definition now, after 1 March. It's the same definition, truth be told, that was in the skeleton Bill that the Government published back in January. We are clear that a number of things that they state in the document of 1 March, they're in our hands as the Assembly here in Wales—so, the example that I've given already.

15:00

[61] They identify those important public services as being health services; well, they are clearly devolved. Education, children under the age of 17: clearly devolved. Fire services: clearly devolved. So, our view is that the definitions that the UK Government are using very directly trespass into the responsibilities of the National Assembly.

[62] **Yr Arglwydd Elis-Thomas:** Ond mae gyda ni hefyd, wrth gwrs, bellach, yn Neddf Cymru 2017, ddiffiniad o 'wasanaethau cyhoeddus Cymreig': yr hyn a alwyd yn y drafftiau cynharach yn 'wasanaethau datganoledig'. Ac felly, mae gyda ni yn y Deyrnas Unedig ddau ddiffiniad

Lord Elis-Thomas: But we also, of course, in the Wales Act 2017, have a definition of 'Welsh public services': what was called in earlier drafts 'devolved services'. So, in the UK, we have two different definitions, from two different Governments, that have been enacted by the same

gwahanol, gan ddwy Lywodraeth Parliament.
wahanol, wedi cael eu deddfu gan yr
un Senedd.

[63] **Mark Drakeford:** Ac rydw i'n meddwl, Gadeirydd, y gwahaniaeth yw yn y gair 'pwysig'. Achos maen nhw'n trio tynnu mas o'r rhestr fawr y pethau maen nhw'n eu dweud yw'r gwasanaethau cyhoeddus pwysig ble mae'r *threshold* newydd yn mynd i ddod i mewn. Ond, yn gyffredinol, dyna pam yn y memorandwm esboniadol rŷm ni wedi'i gyhoeddi, rŷm ni wedi rhoi i lawr nifer fawr o bethau dan Ddeddf 2006, achos, yn fy marn i, mae'r Bil yn mynd i mewn i fwy na gwasanaethau cyhoeddus pwysig, ond i mewn i'r nifer fawr o bethau sydd wedi cael eu datganoli i'r Cynulliad.

Mark Drakeford: And I think, Chair, that the difference is in the word 'important'. Because they try to draw down from the long list the things that they say are the important public services where this new threshold is going to come in. But, in general, that's why in the explanatory memorandum that we've published, we have stated a whole host of things under the 2006 Act, because, in my opinion, the Bill goes into more than important public services, but into a whole host of things that have been devolved to the Assembly.

[64] **Yr Arglwydd Elis-Thomas:** A fyddech chi'n cytuno, felly, fod y diffiniad o wasanaethau cyhoeddus pwysig, fel y mae'n mynd i ymddangos yn y rheoliadau a gaiff eu gwneud gan Lywodraeth y Deyrnas Unedig, yn gwrthdaro gyda'n dealltwriaeth ni yn y pwyllgor hwn, ac yn y byd datganoledig, o wasanaethau cyhoeddus Cymru?

Lord Elis-Thomas: Do you agree, therefore, that the definition of important public services, as it will appear in the regulations that are to be made by the UK Government, actually conflict with our understanding as a committee, and in the devolved sphere, of Welsh public services?

[65] **Mark Drakeford:** Well, I do agree with that point very much, Chair, and it was implicit in a number of the answers I tried to give in the first set of questions from Mr Melding as to why I believe that the Bill is firmly constructed to protect Welsh public services and the way that we attempt to make sure that we are able to protect, safeguard, and develop them here in Wales.

[66] **Huw Irranca-Davies:** Content, Dafydd? Diolch. Nathan.

[67] **Nathan Gill:** Thank you, Chair. Cabinet Secretary, looking at the explanatory memorandum from page 5 to page 13—so, that's nine pages—there it goes through the legislative competencies that we hold here. Could you perhaps expand on their significance to the Bill that you're putting forward?

[68] **Mark Drakeford:** Well, thank you, Chair. We set those matters out in the explanatory memorandum in the way that we did in order to demonstrate the comprehensive way in which we believe that public services are reflected in Schedule 7 of the 2006 Act. In answer to questions from Dafydd Elis-Thomas, it's clear that health, local government and education, for example, are devolved public services, but the reach of the Trade Union Act of 2016 goes beyond that; it goes into that much wider set of public services that are devolved to Wales. Because this is a Bill about public services, it was important for us to be able to demonstrate that the Bill wasn't just narrowly on those most obviously devolved public services, but had that wider reach as well. It's why we set out that comprehensive list of subjects in Schedule 7 that we think involve, one way or another, public services, and are therefore relevant to this Bill.

[69] **Nathan Gill:** Okay, thank you. I just wondered as well why was it that you decided to amend existing UK legislation and not actually introduce a free-standing Bill of its own?

[70] **Mark Drakeford:** Thank you, Chair. Well, I suppose, in one sense, this is a free-standing Bill—it stands on its own merits—but it proceeds by amendment to other Bills. Of course, we did consider a number of different ways in which we could have given effect, as we believe we are doing, to the clear views of the fourth Assembly, and which were affected in the manifesto put in last May's elections by my party, and by some other parties at the Assembly as well. I tried to say earlier, Chair, so I want just to say it again, that what we are trying to do is to preserve the status quo. We think the way that things have worked under the 1992 Act—good enough for Mrs Thatcher, good enough for Mr Major, good enough for Mr Cameron in his first term—. We think carrying on in that way will be the best way for Wales. So, what we do is to amend the 2006 Act in a way that goes back to the 1992 Act. I understand that it could be thought of as a slightly complex way of constructing a Bill, but, given that the Bill is very short, very specific, very well understood amongst the audiences who will have the most direct interest to it, we thought this was the most straightforward way to achieve

what we set out to achieve.

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

[72] **Huw Irranca-Davies:** Just further to that, Cabinet Secretary, when you looked at the different ways in which you could take this—as you’ve expressed it, protecting exactly where we are now in terms of the important public services in Wales—you must have considered at some point bringing forward a separate piece of legislation and the pros and cons of that. One of the reasons we ask that is whether you considered, if you brought forward a separate, stand-alone piece of legislation, it would be more difficult, quite frankly, to repeal. Did that go through your deliberations at all? Did you consider that—rather than one that is seeking to amend England-and-Wales legislation?

[73] **Mark Drakeford:** Well, thank you, Chair. That’s an important point that you make. As I said, there were a number of different ways in which we could give legislative expression to the views of the National Assembly for Wales that were considered. Because we are unambiguously confident that the Bill we’ve put forward is within competence, and will not by itself be overturned under the system that this Bill began under, we felt that this was the most straightforward and simplest way to achieve our legislative ambitions.

[74] **Huw Irranca-Davies:** Okay, thank you. David, you wanted to address some other areas of competence, or—?

[75] **David Melding:** Yes. I think—I mean, it’s obviously getting quite tricky at this stage, but I think, given what might happen in the course of the history of this Bill—Act, if that’s what it becomes—it’s my understanding that—. Obviously, you believe this Bill is within competence. It wouldn’t be in competence if the Wales Act 2017 was currently operative, but you have that window, which Mr Gummer has said he’s not likely to interfere with, in terms of a referral to the Supreme Court. But, when the Wales Act does come into force in 2018, you fear that the UK Government will pass legislation to change the situation to what you’ve described as ‘their policy’ in these areas. Now, that’s where we’re at. At that stage, do you foresee a referral of this matter to the Supreme Court? Because, as I understand it, it would be open to the Welsh Government at that stage—I’m looking at our lawyers. But is that the likely course of action? Because, then, this whole issue of competence now does become critical, because that’s probably what’s going to determine the longevity of this legislation.

[76] **Mark Drakeford:** Well, Chair, I thank David Melding for making that point, because it's something we will definitely want to think through. Probably all I could say to you this afternoon is that I think that there are one or two steps between here and there that we would need to understand better and be sure about before I could give a sensible answer to the question. But it's an important matter, which we'll certainly want to think through. My hope is, Chair, quite straightforwardly, that, if this National Assembly takes a view that we think public services in Wales are best organised on the basis that this Bill brings forward, and if that gains the support of the National Assembly, I hope that will be respected by Ministers at Westminster.

[77] **David Melding:** Thank you for that. I do feel slightly unnerved now, Chair, because I thought I was stating what I'd already heard, or at least my understanding of it, but maybe I've opened another door completely into another room into which we might wander. Anyway, that's my interpretation. If we get back to competence and the Presiding Officer's judgment that things were very finely balanced, she did say that the arguments in favour of competence seemed less strong in section 1(2) of the Bill you've introduced, which relates to the deduction of union subscriptions. And there, it is quite difficult to argue that that's directly a matter to do with public services; it's much to do with the individual's right to receive their full income or to agree—and the manner in which you agree—to deductions at source. So, have you given this particular attention? Because presumably, your advisers have seen the advice we've received. I think it's public; am I right in saying that? So, there's a particular weak spot there, possibly, in terms of the advice that the Presiding Officer has passed to us, and I'd like your reaction to that.

[78] **Mark Drakeford:** Chair, what I would like to do would be to draw the committee's attention to the evidence received from NHS employers by the equality and local government committee in this regard. It's only one example of the evidence they've received, but this point was rehearsed with employers in the national health service. And the point they made in terms of public services was that they encourage their employees to join a trade union, because the ability to carry out very important day-to-day duties relies on them being able to have a proper conversation with people whose views are able to be expressed to them in that way, and that offering facility time and check-off, in the case that we've just been asked about, is an investment by them in making sure that they are able to go on delivering public services, because this means that trade unions are able to go about

their business. The protection of public services, and the development of public services, the employers said, is absolutely underlined by their ability to have those conversations with their workforce, whether that is in the case of health and safety legislation, or whether it is, as the employers said, making sure that ideas from the workforce, which are often some of the best ideas they get, as to how services can be improved—that they have a mechanism for doing that. They said that from an employer’s point of view, it is very helpful to them to know who are members of trade unions, and the check-off helps them to do that, so that that way of conducting industrial relations in a social partnership model can be enhanced. So, the link between check-off, trade union membership, social partnership and public services was one that they were absolutely able to articulate.

[79] **David Melding:** You know, we are dealing with whether it’s within competence here, Minister, if we can get back to that. And the issue surely is that a citizen is not a public service. We’re talking about a deduction from an individual’s income. Now, there are reasonable grounds for saying that’s quite appropriate, but in terms of your competence, it seems an awful stretch to have something that’s supposed to be about public services that relates so directly to an individual citizen’s rights in terms of their income.

[80] **Mark Drakeford:** Well, Chair, I was doing my best—failing, I can see—to construct my last answer in a way that exactly tried to demonstrate the competence issue. When employers were asked about the check-off matter, their understanding of it was exactly that by having this facility that allowed trade unions to carry out the job that trade unions are there to carry out, and allowing trade unions to carry out the job that they do, leads to better public services. That’s the competence issue. That’s the line from—[*Inaudible.*] And that’s why check-off is not just a matter of an individual citizen in a relationship with an employer. It is a foundational way of the way that trade unions collectively are able to operate, and the proper operation of organised trade unions is a foundation of the way that we provide public services in Wales. The competence issue is clear.

15:15

[81] **Huw Irranca-Davies:** We’re going to move on from that. Dafydd, if you could take us on to—

[82] **Yr Arglwydd Elis-Thomas:** Lord Elis-Thomas: Perhaps, Efallai, Weinidog—ac rwy’n Minister—and I do appreciate the

gwerthfawrogi'r atebion clir—. Y clear responses that we've received
modd y byddet ti'n bwriadu so far—. How you would intend to
defnyddio pwerau o dan adran 2(2) use the powers under section 2(2) of
o'r Bil arfaethedig. the proposed Bill.

[83] **Mark Drakeford:** Wel, diolch yn **Mark Drakeford:** Well, thank you very
fawr am y cwestiynau yna. much for those questions.

[84] Chair, there are two section 2 issued powers, and if it's acceptable, I'll
mention them both while we are on them. The first is to do with Royal Assent
and whether the Bill should be commenced immediately on Royal Assent.
Section 2, subsection (1) allows that to happen. It doesn't prevent it from
happening; it allows it to happen. But it also takes account of the
convention—the Counsel General's convention—that a period of two months
is allowed following the passage of the Bill through the Assembly. Acts are
not normally commenced within two months of them receiving the Royal
Assent. So, that's what section 2, subsection (1) allows to happen. Now, in
this Bill, given its very specific focus, and limited extent, there may well be a
case for the Counsel General to be willing to waive that convention. But that's
not for me to do on his or her behalf. I want to the Bill to allow the Counsel
General to make that decision in the way they normally would, and we give
that power in section 2 to allow that to happen.

[85] Then there are the powers in relation to transitional and saving
provisions. Again, Chair, if I was just able to make decisions today, then I can
see that we may not need transitional or saving provisions in this particular
Bill, because we should be able to get straight on with it, if and when the
National Assembly agrees to it. The reason why the powers are there is
because the UK Government might yet take actions between now and the Bill
receiving Royal Assent that might have to change that position. We know, as I
said earlier, that as of 1 March, the regulation-making powers have been
made available to the Secretary of State, so that he can bring forward
proposals in relation to check-off and facility time. If there were things in
what the Secretary of State does that means that we would need a
transitional arrangement, this section allows for that to happen. As of today,
I would be hopeful that that wouldn't be necessary, but they're there to allow
us to make decisions in the light of the changing actions that the UK
Government might yet take while this Bill is in front of the National
Assembly.

[86] **Yr Arglwydd Elis-Thomas:** A **Lord Elis-Thomas:** May I just ask one

gaf i jest ofyn un cwestiwn efallai mwy cyffredinol i orffen, Weinidog? Rydym wedi bod yn trafod ymgais i ddeddfu ym maes gwasanaethau cyhoeddus, gan gynnwys safle undebau, lle mae yna, yn amlwg, wahaniaeth barn rhwng Llywodraeth y Deyrnas Unedig a Llywodraeth Cymru a rhwng y Cynulliad Cenedlaethol fel deddfwrfa â'r hyn sydd wedi digwydd yn San Steffan. Beth yw effaith trefniant cyfansoddiadol cynhennus fel hyn ar gyfle Gweinidogion Cymru i ddatblygu deddfwriaeth sydd yn gyfansoddiadol gywir yn eu tyb nhw?

perhaps more general question to conclude, Minister? We have been discussing an attempt to legislate in the area of public services, including the position of the trade unions, where there is clearly a difference of opinion between the UK Government and the Welsh Government and between the National Assembly as a legislature and what has happened in Westminster. What is the impact of a contentious constitutional arrangement on the ability of Welsh Ministers to develop legislation that is constitutionally correct in their view?

[87] **Mark Drakeford:** Well, Chair, I imagine the question is capable of being answered in more than one way. You could say that trying to legislate in contested areas means that you have to sharpen your arguments—that you have to make sure that you are able, at least, to attempt to answer questions from those who take a different point of view, and that it is a test that leaves the system stronger from having been tested than it would otherwise have been. So, you know, I'm happy to look at the way that the Bill has been developed, as an experience for us to learn from, and to come out of it stronger. But you could equally argue that it takes up a great deal of time—time of the National Assembly, time of Ministers, time of officials—to secure a point that in our view, as a Welsh Government, and, indeed, in the view of the last Assembly, certainly, was clear from the very beginning.

[88] **Yr Arglwydd Elis-Thomas:** **Lord Elis-Thomas:** Thank you. Diolch.

[89] **Huw Irranca-Davies:** Dafydd, thank you very much. Dai, if you'd like to take us on, please.

[90] **Dai Lloyd:** Ie, dau gwestiwn byr, ac efallai un arall i orffen. A allaf i ofyn, Ysgrifennydd Cabinet, pam nad oes rhestr o awdurdodau Cymreig datganoledig yn y

Dai Lloyd: Yes, two short questions, and perhaps one other to conclude. May I ask, Cabinet Secretary, why there is no list of devolved Welsh authorities in the explanatory

memorandwm esboniadol, o ystyried bod y Bil yn ymwneud yn benodol â'r awdurdodau hynny?

memorandum, considering that the Bill deals specifically with those authorities?

[91] **Mark Drakeford:** Wel, Gadeirydd, rwy'n siŵr y bydd Aelodau yn cofio, pan roedd Bil Cymru yn mynd drwy Dŷ'r Cyffredin, roedd lot o drafodaethau am y rhestr o gyrff a oedd yn y Bil gwreiddiol. Felly, mae'n gwneud synnwyr, yn fy marn i, i gyfeirio yn y Bil sydd o flaen y pwyllgor nawr at Ddeddf Cymru, achos dyna ble mae'r rhestr yr ydym ni i gyd nawr wedi cytuno arni.

Mark Drakeford: Well, Chair, I'm sure Members will recall that, when the Wales Bill was going through the House of Commons, there were a number of debates about the list of bodies contained within the original Bill. So, it does make sense, in my view, to refer in this Bill to that legislation, because that's where that list that we all agreed on is.

[92] Pan oeddem ni'n paratoi y memorandwm esboniadol, roedd y trafodaethau yna yn dal i fynd ymlaen. Os yw'r pwyllgor yn meddwl y bydd hi'n help i'w wneud e, pan rydym ni'n dod lan gydag ail fersiwn y memorandwm esboniadol, os mae'n help jest i roi mewn y rhestr rydym ni nawr wedi ei chytuno, jest i fod yn glir, rwy'n eithaf hapus i'w wneud e fel yna.

When we were preparing the explanatory memorandum, those discussions were still ongonig. Now, if the committee believes that it would be of assistance, when we do draw up the second version of the explanatory memorandum, just to transpose that agreed list into it, just for the sake of clarity, then I am more than content to do that.

[93] **Dai Lloyd:** Diolch yn fawr am y cynnig yna. A allaf i jest hefyd sôn am un maes arall? O ran atal defnyddio gweithwyr asiantaeth i weithio yn ystod cyfnodau o weithredu diwydiannol, pam oedd hi'n bosibl cynnal ymgynghoriad cyhoeddus ar y materion yna, ond nad oedd hi'n bosibl cynnal ymgynghoriad cyhoeddus ar y Bil yn ei gyfanrwydd?

Dai Lloyd: Thank you very much for that offer. May I also just mention one other area? In terms of preventing the use of agency workers to cover periods of industrial action, why was it possible to undertake a public consultation on those matters, but it wasn't possible to undertake a public consultation on the Bill as a whole?

[94] **Mark Drakeford:** Well, Chair, I don't think it's a matter of the one

being possible and the other not being possible. I think just the case was different on both sides. In relation to the main provision of the Bill you've got in front of you, as I've already said now, several times, I guess, this was very extensively rehearsed in the last Assembly. Beyond the Assembly, it appeared in the manifestos of political parties. On behalf of the First Minister, I went to the Wales TUC annual meeting in May of last year, to confirm that we would act on our manifesto commitment to legislate. It was in the First Minister's legislative statement in June of last year. And it has been discussed, Chair, at every single meeting of the workforce partnership council, where employers, trade unionists and the Welsh Government come together three or four times every year. It's been a standing item on the WPC's agenda ever since the Bill was first introduced into Parliament in July 2015. So, the case for a public consultation on something that was already so very extensively publicly rehearsed did not seem a strong one. And we gave a commitment to legislate in the first year of this Assembly term.

[95] The agency workers issue, however, had not been part of that conversation; it wasn't part of the original Westminster proposals. And I thought, therefore, that that was a different issue, and deserved a different sort of public airing, because it hadn't got the background—the depth of background of discussion—that the Bill in front of the committee today had already gathered.

[96] **Dai Lloyd:** Just to round off, in terms of rehearsing arguments, I remain worried, I've got to say, about when the new Wales Bill does come into force, and the whole idea, obviously, that industrial relations are a reserved matter, and employment law, presumably, is then meant to be uniform across these islands. And so, I don't know. In terms of rehearsing the arguments for the reality when that day dawns, what is going to happen to your trade union Bill now, vis-à-vis in the future, because the whole point of having a reserved model, then, is to have some uniformity, I would have thought, whereas if you don't believe in that uniformity, you'd have given us more powers down here, rather than rolling them back?

[97] **Mark Drakeford:** Well, Chair, I think the Member is right to light on the uniformity argument as something that UK Ministers might wish to advance, should they decide that they wanted to overturn the democratic decision of the National Assembly for Wales. If that happens, there will be a fight to be had and the fight will have to be fought out at the time, and I'm not conceding any ground, this afternoon, to arguments that UK Ministers might advance at the time. What I am doing is to repeat here what I have said to

them: that I hope that when they have had a chance to listen to what the National Assembly for Wales has to say, they will decide that these things are properly left in the hands of elected Members here, and that they will respect the decision that will have been made.

[98] **Huw Irranca-Davies:** Thank you. David.

[99] **David Melding:** Can I just go back to the agency workers issue, because obviously we've had sight now of the consultation document? Are you minded to bring in amendments to your Bill to include a provision on agency working?

[100] **Mark Drakeford:** Well, Chair, that's actively under consideration at the moment. I wanted to publish the results of the consultation in advance of this committee, so that they would be available to you. There is a workforce partnership council on Thursday of this week. This matter is, again, on the agenda there. I want to have the opportunity to hear from members of the council—now that they will have had a chance to look at the results of the consultation as well—and then I will need to come to a conclusion as to whether or not to bring forward a Stage 2 amendment.

[101] **David Melding:** Obviously, we've had exchanges on competency issues, about the existing provisions. Do you anticipate any competency issues in relation to provisions on agency workers, beyond the ones we've already discussed, as perhaps apply here?

[102] **Mark Drakeford:** No, Chair, I don't anticipate any further ones. The consultation was brought forward on the basis that, were an amendment to be laid, it would be possible to lay such an amendment within the competence of the National Assembly.

[103] **Huw Irranca-Davies:** Okay, thank you for that. I have two further brief questions—or, at least, I hope the first one is brief. Can I just take you back to the explanatory memorandum and how it deals with section 2(2)? So, if I take you to paragraph 5.1, 'Power to make subordinate legislation', where it says:

[104] 'The regulations require no procedure because the provisions which are the subject of the power have already been subject to Assembly scrutiny during the legislative process.'

[105] So, 'require no procedure—I wonder if you could just clarify your intent in that, and why not a negative procedure, for example?

[106] **Mark Drakeford:** Well, Chair, I believe—. If I'm not remembering this completely accurately I'm very happy to sort of set it out for you on paper afterwards.

[107] **Huw Irranca-Davies:** That would be good, yes.

[108] **Mark Drakeford:** I believe I'm simply following the way that these matters have been consecutively navigated in Bills brought before the National Assembly. If there's any difference to that, I will certainly—

[109] **Huw Irranca-Davies:** We'd appreciate that, if you could just clarify that in writing. The other one is slightly more substantive and something we haven't touched on today, and it's the human right issues, which are not dealt with to any great degree within the explanatory memorandum. I'm curious why, because much of your argument around the purpose of this and the approach of the Welsh Government, the social partnership model within public services and important public service—many of the individual measures that David was alluding to earlier on seem also to have a human rights impact as well. Do you want to touch on that now, or do you want to write to us further, because it just seems a little bit scant within the explanatory memorandum?

15:30

[110] **Mark Drakeford:** Well, I'm very happy to put it on paper to you, Chair, but our view is very clear, which is that our Bill strengthens people's rights. It prevents the erosion of those rights that we believe was the effect of the 2016 Act. That Act removes people's rights, it creates new impediments in their pursuit of their membership of trade unions and their ability to make a successful contribution to the way that public services in Wales are designed and delivered. By removing those impediments to people's human rights, we believe that our Bill is not simply consistent with human rights, in the way that the Llywydd's letter confirms and casts no ambiguous suggestion on the human rights issue—not only does it preserve people's human rights in Wales, but we believe that it actually enhances them.

[111] **Huw Irranca-Davies:** Okay, well, thank you very much indeed. We've gone slightly over time but we appreciate your time. It's been quite a robust

session, but I know you would expect that as well on something of such key importance. We'll send to you the transcript so that you can check it. If there are items that we've raised that you need to expand upon in writing with us, if you could do so—and thanks to your officials as well. Thank you very much.

[112] **Mark Drakeford:** Thank you all very much.

[113] **Huw Irranca–Davies:** I'd like to propose now that we adjourn the meeting for 10 minutes, for a very short break before our next session. Content? Thank you.

*Gohiriwyd y cyfarfod rhwng 15:32 ac 15:41.
The meeting adjourned between 15:32 and 15:41.*

Ymchwiliad Llais Cryfach i Gymru: Sesiwn Dystiolaeth 2 A Stronger Voice for Wales Inquiry: Evidence Session 2

[114] **Huw Irranca–Davies:** Welcome to the second part of this afternoon's session of the Constitutional and Legislative Affairs Committee. We're moving on to our session now with Sir Paul Silk. You're very welcome indeed; thank you very much for coming in and spending some time with us. We hope it's going to be a very interesting session this afternoon. It's part of our inquiry looking at inter-institutional working in all its myriad functions and purposes—those we see in front of us and those that are hidden behind the scenes—entitled 'A Stronger Voice for Wales'.

[115] I wonder whether we can begin, Sir Paul, just referring to the immense work that you did under the Silk commission and the Silk report, too, where you came forward with quite a range of recommendations on inter-governmental arrangements. And they were quite wide-ranging: they covered good practice, reviewing existing guidance notes, a statutory code of practice and many other aspects—I won't list them all here, but there were many of them. I wonder whether you're aware now, this much further on, which, if any, of them have been taken forward. Which, if any, of them are being negotiated behind the scenes? What progress have we seen?

[116] **Sir Paul Silk:** Thank you very much, Chair. It's a pleasure to be here again. One of the strange things about doing something like this commission is that you, as it were, father children, you send them off into the world and then you don't find out anything about what happens to them afterwards, so

I've been a rather negligent father, in that sense. [*Laughter.*] So, you don't get any formal reports back on what progress has been made in implementing any of the recommendations that, as a commission, you make. So, I'm as dependent as the next citizen on finding these things out from people I talk to and contacts I make.

[117] I have no particular knowledge of anything that's happened, but I obviously have retained an interest in seeing some of these things as they move forward. So, the fact that the Government, the UK Government, has promised to review the memorandum of understanding and the sort of progress that I think has been made by things like the more frequent meeting of the Joint Ministerial Committee are some things that I have noticed, but, no, I certainly haven't had any report back on the internal workings inside Government, although I do understand from people I've talked to that a lot of things have been knocked off course by the decision on 23 June last year.

[118] **Huw Irranca-Davies:** Yes, indeed. The recommendations that you made there, as the father to those recommendations—do you still stand by them as the father? Do you still think that the range of recommendations that you had was good and sound, or are any of these errant children that you now want to disown? [*Laughter.*]

[119] **Sir Paul Silk:** You should never pursue a metaphor too far, should you? [*Laughter.*] In the broad range of those recommendations, I think some of them I'm prouder of than I am of others, but I think that we spent some two years as a group of people working together and thinking together, and I think we would all be pretty satisfied that, across the board, the set of recommendations we came up with was coherent and, most importantly, followed the principles that we articulated. What we tried to do in our report was to start with the basis of principle and then to come to some conclusions or recommendations—of course, in our case, to the UK Government—of what they should do.

15:45

[120] **Huw Irranca-Davies:** Yes, okay. You mentioned there that you welcome the fact that it seems that, behind the scenes, there's work going on on the memorandum of understanding and so on. I wonder if I could flag up, because your recommendations were so clear and so specific, just a couple of them. One of them was the creation of an arbitration mechanism for

resolving disagreements. Ideally, you would want to avoid the use of an arbitration mechanism, but there is a final backstop there. That arbitration mechanism, whatever it should be, should then be binding, and it's there so that you avoid having to go to the expense, the time and the complexity of other legal challenges and so on. We have moved on, subsequently, with the Wales Act 2017, as it now is, and so on, but do you still think that there is a need, ultimately, beyond the JMCs, beyond whatever else is there, for an arbitration mechanism?

[121] **Sir Paul Silk:** On the arbitration mechanism, I think I'm right in recalling that the recommendation that we recommended—the arbitration that we recommended—was in the case of disputes about whether something was lawfully within the powers of the Assembly or not. So, we specifically said that that should be done by somebody like a retired justice of appeal. I think that that idea, if I'm correct, was taken up by the Lords Constitution Committee, and I think also it was rejected by the UK Government in their response to the Constitution Committee. So, I think that that idea is pretty dead in the water.

[122] **Huw Irranca-Davies:** Okay. You also had the concept of a Welsh inter-governmental committee that would be chaired at that very senior level as well. Do you still see merit in that?

[123] **Sir Paul Silk:** Yes, I do. I think I'm right in saying that the UK Government, and maybe the Constitution Committee, has been more in favour of multilateral dealings. I think that we thought that the relations between the—if you like, the intertwined-ness of Wales with England meant that there was a place for bilateral relations distinct from the multilateral. So, both need to be done—multilateral relations between the four Governments of the United Kingdom, but also bilateral relations between the UK Government and the Welsh Government. Having that in some sort of more formal and more transparent mechanism was something that I think we were very enthusiastic about. I don't want to disclose too much of the private deliberations of the committee, but it was something that Jane Davidson was particularly keen on, after all, with her experience as a Minister here.

[124] **Huw Irranca-Davies:** Okay. There are only a couple of other areas that I want to briefly highlight, because the recommendations that came forward were quite wide-ranging at that time. Time has moved on a little bit, but it's interesting to see what has been put in place and what hasn't been taken forward. One of them in a different area was a suggestion—a

recommendation—that the Welsh and UK Governments, along with those other devolved administrations and Governments, should actually do more on the publication and the comparison of data and analysis of outcomes across the different nations and regions. I think that that is something that we still wrestle with today—different data sets and different ways of measuring analysis. Is that still something that you think would help to underpin these inter-institutional relations?

[125] **Sir Paul Silk:** Our basis for that was not so much that it would underpin the inter-governmental relations, but that those who wanted to see whether the health service was working better in England than in Wales, and so on, would have the ability to do that and, therefore, to hold the Government to account. It's about the transparency of government to the public. I think that that was something that we, again, deduced from the evidence, that people felt that the fact that you couldn't readily say whether a particular service was working better in England than in Wales, or better in Scotland than in Northern Ireland, was something that ought to be more open and more transparent.

[126] The difficulty with that, of course, is that the very nature of devolution is that the territory has its own powers to do things in its own way. If those ways of doing things mean that you can't count things, if you like, in the same way on the two sides of the border, then that's inherent in devolution.

[127] **Huw Irranca-Davies:** Indeed. And we certainly see that in several areas of policy where the argument will be put that it's hard to actually compare datasets across the nations. The only other item I wanted to touch in my opening remarks—because it's quite fascinating as we do this inquiry, because we're looking slightly backwards in order to learn the lessons going forward, and because your inquiry and your recommendations were so wide-ranging, they may be helpful to us. One of those recommendations was about identifying, learning from each other, what works well in policy and delivery to improve public services and the economy, and involving within that the Wales Office and the National Audit Office. From this little bit further on now, do you think that that has happened?

[128] **Sir Paul Silk:** Whether it's happened, I can't answer. I don't know that. I think it was the Wales Audit Office we suggested, rather than the Wales Office in that—the National Audit Office and the Wales Audit Office.

[129] **Huw Irranca-Davies:** The Wales Audit Office, yes.

[130] **Sir Paul Silk:** Again, I believe that this was something that was regarded favourably by the Constitution Committee in the House of Lords, and they recommended something similar. Again, I believe it was something that had some cold water thrown on it by the UK Government, and it's a rather late and rather perfunctory response. And I say this in the presence of a member of the House of Lords, but you know, the Constitution Committee of the House of Lords is a pretty senior committee with some very good members on it.

[131] **Lord Elis-Thomas:** Absolutely. [*Laughter.*]

[132] **Huw Irranca-Davies:** Well, thank you very much. I'm going to pass now on to Nathan.

[133] **Nathan Gill:** Thank you, Chair. Sir Paul, the Wales Act 2017 has been passed but it doesn't contain the statutory code of practice on inter-governmental relations that was recommended by the Silk commission. Do you have any idea or thoughts as to why the UK Government would leave this out?

[134] **Sir Paul Silk:** Well, I'm not surprised that it was left out and I don't think it was something, if I remember rightly, that the Welsh Government was particularly keen on either. Now, I would guess—I don't know, but I would guess—that the idea of having an extra opportunity to have a judge over your shoulder and judicial review of what either Government were doing in their bilateral relations was not something that would have been particularly favoured by either Government. I suspect that's why a statutory code wasn't included. But, I think that we felt that, if you like, as the constitution is advancing in a federal sort of direction, that the sorts of ways in which arbitration happens between the states and central government in proper federations is something that has to be susceptible to judicial review. But I'm not at all surprised that the Government didn't share that view.

[135] **Nathan Gill:** Okay. One of the Silk commission's recommendations was to seek to simplify the existing devolution model and taking forward the process of moving to a reserved-powers model. Now, the reserved-powers model has been delivered in the Wales Act 2017. What impact do you believe that this will have on any inter-governmental relations going into the future?

[136] **Sir Paul Silk:** Well, I suppose this gets to the issue of whether what is

reserved under the reserved-powers model adds more to the clarity of the powers of the Welsh Government and the UK Government. What we were hoping for when we produced our report was that, if you like, all the pieces would be thrown up in the air again and that the Government in London, working co-operatively with the Government in Cardiff, would, on the basis of principle, decide what should be reserved and what should not be reserved. And, well, as has been pretty well documented really, what happened at the beginning was that there was a flipping over.

[137] All of the things that were conferred were—there was an attempt to describe those and to reserve as much as possible to London. Now that, in the process of the way in which the Bill was considered—and I think there's a lot of credit to Stephen Crabb for going through a pre-legislative scrutiny process, which threw up reports from the committee that Mr Melding chaired, from the Welsh Affairs Committee, from external bodies—it was somewhat whittled back, what was going to be reserved, but still there's an awful lot of reservations. I read the evidence that Lord Murphy gave to this committee before, where I think he described some of those reservations as piffling.

[138] Now, if there had been a coherent and principled approach, perhaps it would have been easier to decide what was reserved and what wasn't reserved. I suspect there are going to be difficulties in the future in making that distinction. I looked at something in the Wales Act earlier on today that says:

[139] 'A provision of an Act of the Assembly cannot make modifications of...the private law.'

[140] It goes on to say what the private law is—that's trusts and property and torts and so on. Then, it goes on to say:

[141] 'Sub-paragraph (1) does not apply to a modification that has a purpose (other than modification of the private law) which does not relate to a reserved matter.'

[142] Well, you know, I think there's going to be a lot of argument about things like that, and the whole Act is scattered with things like that, which are susceptible to discussion and debate in the future, debate between the Governments and, ultimately, I suspect, debate in the courts.

[143] **Nathan Gill:** You touched on it earlier on. Obviously, since 23 June of last year, there's been quite a large sea change, almost, in the way that the public perceive our inter-governmental relations with the EU. I just wondered what your thoughts were about, once article 50 is triggered, which could be within the next couple of weeks, how you think that that's going to affect inter-governmental relationships.

[144] **Sir Paul Silk:** As I said before, the fact that the European Union, in two years or whatever time—it might be longer than that, it might be shorter than that. At some stage in the future, the European Union isn't going to be there. That inevitably complicates, or means that the relations bilaterally between the UK Government and the Welsh Government and the other Governments in the UK are going to have to be rethought, because some of the present relationship is based on us being members of the European Union.

[145] Again, I'm not privy to this, but I suspect very little thought was given before 23 June, either inside the Welsh Government or in the UK Government, to us voting as we did to leave the European Union. Therefore, a lot of ground has got to be made up.

[146] **Nathan Gill:** Do you see, then, a move more towards a federal type of arrangement?

[147] **Sir Paul Silk:** That's a very interesting question. I wouldn't say in any sense that I think this is probable, but the vote last week in Northern Ireland, some commentators have said that's a step in the direction towards a united Ireland. Some people think that Scotland might go down the independence route. It's an interesting question for us in Wales, where we then are in our relationship with London if either of those two events happened.

[148] I'm a member, as is Mr Melding, of a body chaired by Lord Salisbury, which is looking at—it's a constitutional reform group. We're trying to produce what we call the 'act of union', a new way of looking at the relationship between the different countries inside the United Kingdom, and that's posited on a sort of federal model. But I think that as people might not have—. Well, it would have been foolish to predict some of the events that happened last year. I would hesitate to predict where we're going to be in 10 or 15 years' time. But, I do think that our leaving the European Union has removed one of the constants of the last 40 years of British history. I know that for some, it will be a very exciting prospect for the future, but it will

certainly be a different future.

16:00

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

[150] **David Melding:** Welcome, Sir Paul; it's always good to see you. I think us leaving the EU has removed a sphere that required, certainly, the Governments to co-operate within the UK on the speaking note on agriculture, fisheries and environmental policy or whatever, and to a lesser extent, but to some extent, inter-parliamentary work between the legislatures. Looking at your report and recommendations 54 and 55, they seem quite far-sighted, I would say, and perhaps you could argue that it brings these matters into play again in a more critical way. You pointed out the need for inter-parliamentary co-operation and a mechanism where UK legislation has some consideration in the explanatory memorandum, or whatever, of its implications for Wales and then vice versa. Presumably that would've also been a requirement in Northern Ireland and Scotland.

[151] You highlighted that in a geographical entity the size of Britain and Northern Ireland, there are inevitably a lot of things that happen cross-border and that mechanisms there needed to be strengthened. Very interestingly, you did mention the House of Lords in terms of representing, in a more systematic way, Welsh-domiciled people, I think you said, and possibly also wider reform representing Wales more fairly. I think those are very, very interesting and I'd say they've grown even more relevant. But I suppose, to reflect on what you said earlier, aspects of your report don't seem to have shifted the UK Government very much. I think they've been taken up with great determination in the Assembly on all sides, I think—most of them anyway—but there's less purchase on the UK side. But you seem an optimist on the federal direction that would open up the way to a lot of these recommendations you've made, in contrast to you colleague, Rick Rawlings, who I think yesterday said that Britain was just not on course for a federal settlement—it's not happening. So, where are we at the minute in terms of your recommendations and the direction of travel?

[152] **Sir Paul Silk:** You're referring to the recommendations about inter-parliamentary—

[153] **David Melding:** Yes, principally, but I think, through the House of Lords, it leads us on to some of these issues of UK-wide institutions as well.

[154] **Sir Paul Silk:** I know that you'll be in a better position to share with your colleagues on the committee the ideas that are coming out of the Salisbury group about that and the way in which the House of Lords might be reformed to be a Chamber representing the different nations of the UK. We were rather more modest in our report, I think, about our view of the House of Lords—that simply there are too many, perhaps, peers who are domiciled in London and the south-east in comparison with other parts of the UK.

[155] But on the wider question of inter-parliamentary relations, I think this has been something that not just us, but others, have seen as not being as well developed as it ought to have been. I was talking to a former colleague, who is a clerk in the House of Commons, about the way in which the House of Commons deals with the Joint Ministerial Committee. His words were: 'It's a scandal against accountability'. I think that probably applies to all five Chambers of legislature in the UK. So, more, I think, needs to be done to strengthen that process. I think there's been no shortage of reports from committees. I mentioned the Constitution Committee, of course, and more recently the—whatever the committee is called—the Public Administration and Constitutional Affairs Committee in the Commons has produced a report on this. What hasn't happened is that those haven't been followed through by the different parliamentary Chambers. If there's one thing that I could perhaps hope that might happen as a result of this—your deliberations—it's that you might, as a committee, start that process going with sister committees in Scotland, Northern Ireland and the two Chambers in London. This is not something that was in our report, but the model that I've been thinking in my mind about a little since has been something like the COSAC process, in the way in which the different countries of the European Union have got their European scrutiny committees together and do something to hold the European Union to account to member state Parliaments. Perhaps something like that, with some sort of central secretariat, would be something that could be developed. But there have been a lot of words about it and not much action.

[156] **David Melding:** It's an interesting point, actually, that you'd specifically go to that deep level of committee work. I think traditional inter-parliamentary work—. If you take the British-Irish Parliamentary Assembly, for instance, it does very good work, but it has two meetings a year with a grand plenary. There is a committee structure, but it's a fairly weak one, I think. One would have to say it's not fully backed up by a secretariat, and it's a bit ad hoc. But perhaps the wider picture—the serendipity of meeting

people, exchanging best practice—. But it's not quite, as you were saying there, in terms of if you did have a permanent secretariat, and this thorough under-the-surface working by committee co-operation. That would be a more robust model, you think.

[157] **Sir Paul Silk:** I think so. I was one of the first clerks to be involved, when I was in the House of Commons, with what was then called the British-Irish Inter-Parliamentary Body, and of course, as you will know, it was started as a means to bring politicians from Westminster and politicians from the Dáil together, and help the peace process. It has morphed into something very different and more substantial now, and I think it still has the benefit, I understand, for Westminster, of people from Westminster meeting and talking to people from Dublin. I think that's been very beneficial. But growing with the devolved Assemblies, and of course the Channel Islands and the Isle of Man, too, has been beneficial. But I think it's made it a little more awkward for it to be used as a United Kingdom body, having the islands and the republic in it as well. I'm not familiar with how it's operating now, but I suppose that that could operate in a United Kingdom mode and in a wider mode as well. That's obviously a basis for the way in which inter-parliamentary relations could be developed in the future. But I do believe—. I've done some work in recent years in the Arab world, and they talk about committees as the kitchen, where everything gets cooked properly, rather than cooked up. That is true in any Parliament—that committee is the place where the real work is done. So, it is that inter-committee work that I would see as something that could be developed in the future.

[158] **David Melding:** There have been some developments in inter-parliamentary committee work. Having been here since the start in 1999, we've gone from where it was mission impossible for a Westminster and Assembly committee to meet to do joint scrutiny to—well, now that does happen. Not very often, I don't think, but it can happen. But presumably, it's not just extending the culture that we could do joint work; it's actually putting into the timetable something that expects it, and therefore provides the resources and time for it to happen. Is that what you would be driving at?

[159] **Sir Paul Silk:** I think there are two things there. There's the joint work between two committees. I came to the committee when you were with the Welsh Affairs Committee and that seemed to be a very successful format. So, where that's appropriate, that should be done more widely. I can't see a reason, in principle, why—let's say it's an agricultural matter—the committee responsible for agriculture here and the committee responsible for

agriculture at the House of Commons shouldn't be able to meet together if they wanted to do it. So far as the scrutiny of intergovernmental relations is concerned, then I'd envisage something more structured where the committee responsible for it here and the committees responsible for it in Scotland, Northern Ireland and the two Houses at Westminster would have some sort of regular meetings and regular contact with one another.

[160] Now, one of the things that bedevils this is, of course, that people are busy here, they're busy in London and they're busy in Edinburgh, and fitting in extra meetings and the travel time and all the rest of it is difficult. But meetings don't have to be done physically, they can be done virtually. It's perfectly possible to envisage doing these sorts of things in a way that suits those involved. You have the advantage, in this committee, of being a very small committee. Therefore, you, presumably, are more versatile, in the way in which you're able to meet and so on, than a very large committee. I mean, goodness knows how the poor Brexit committee in the House of Commons manages ever to do anything with 23 members, or whatever it's got.

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

[162] **Huw Irranca-Davies:** Thank you. It's a fascinating line of examination, because there is such good practice in various areas and there have been so many words written on this of good intention. A point that's been put to us, I think, on more than one occasion is that you also have to do it by example. You have to just get on with it and do it. I think that's one of the themes of this inquiry is that we need to, as we're doing this inquiry, also extend the joint working, as well. But you also had recommendations on the inter-parliamentary working about the willingness of Ministers both from this place to appear up there and from that place to appear down here; you were quite clear on that.

[163] **Sir Paul Silk:** Yes.

[164] **Huw Irranca-Davies:** I think that's another strand to this inter-parliamentary working. Yes, we need the devolved nations and regions committees working together and yes, we need greater links, and we've done that, in fact, recently, with the Wales Bill, where we went up and met with the Lords Constitution Committee, as well, and it was a very good, productive and effective session. But let me put this to you: for example, if there were—I'm not saying there will be, okay, because we've just been through one—in five years, 10 years, post everything else that we're doing at the moment,

another major constitutional reform going on in the UK, what would be your ideal model of how that should come about and how it should be taken through? What would be the genesis of this? Who should come up with it? Who should come up with that idea that there should be an agreed form of constitutional reform? And then, how do you take it through so that there is genuine mutual engagement and some degree of parity?

[165] **Sir Paul Silk:** Well, obviously, the Welsh Government's policy, I think, is still that there should be a constitutional convention to look at a whole range of constitutional issues. The problem with a constitutional convention, it seems to me, is that it can get enormously lengthy and can veer into all sorts of issues, because they are constitutional issues and it can take years to come up with a set of recommendations that are promptly forgotten. So—

[166] **Huw Irranca-Davies:** But that's not something—

[167] **Sir Paul Silk:** I say they're promptly forgotten, but, you know, some of the ideas that Kilbrandon had are still being discussed, are still on the table and still happening, and anyone who—. I studied ancient history at one time and you know, these things take a long time before they come to effect.

[168] **David Melding:** You need to be careful. There are a few people here who read the Kilbrandon report.

[169] **Lord Elis-Thomas:** Some of us gave evidence.

[170] **David Melding:** Well, there we are, yes. [*Laughter.*] There can't be many rooms in the kingdom where you can have that situation.

[171] **Huw Irranca-Davies:** We might come back to that in a moment, but it's quite interesting that there are some things that committees like ours, and other thematic committees, can, in a sense—if there was a will there and there was some mutual reciprocity at the end of it—get on with it with Northern Ireland colleagues, with Westminster and so on, but there are other things that are much more fundamental, and one of them is constitutional reform. But we might come back to that in a moment.

16:15

[172] **Sir Paul Silk:** Perhaps if I may, Chair, just mention something that I think the McKay commission suggested—a devolution committee in the

House of Commons, which I thought was a good idea from the McKay Commission, but why couldn't that be extended—? Well, in Parliament it'd be a joint committee, but why not extend it even further to be a committee that has both Houses and the other three legislatures as members of it?

[173] **Huw Irranca-Davies:** Indeed. Indeed. And the curious thing is, whilst we might not want to revisit this immediately, I think the history of devolution has told us that there is a process, and the better the mechanisms in place, as well as the interpersonal relationships that can take that forward, clearly the better. But I just wanted to ask you: on the issue of the inter-parliamentary relations between committees, between parliamentarians, between Ministers in different institutes, do you have a feel for whether there is that mutual parity of esteem, or is there—in the old, what is it, the Ronnie Barker and John Cleese, there's a sort of, 'We look down on him' sort of thing—? Is there that parity, or are we still scrabbling towards it?

[174] **Sir Paul Silk:** I think, if I was frank, we're still scrabbling towards it. You have recently been in the House of Commons, and you'll have a better feel than I do for what your colleagues would have thought there. There are certainly people who will have a proper parity of esteem, they'll have people who admire what this place does, what the Scottish Parliament does, but many who've had no acquaintance with it at all. And, after all, if you're representing a seat in Essex, why would you be interested in what goes on in Cardiff or at Edinburgh? I gave evidence to Patrick, not Patrick Jenkin—I'm old as well [*Laughter.*—the other Jenkin's committee, when they came down to Cardiff, and I said that you might have to hold your breath before some Members of the House of Commons would be interested in devolution issues, and it was exactly people who come from places far distant from Wales, Scotland and Northern Ireland, who—frankly, asking them to turn up to a body that was interested in devolution or interesting themselves in devolution questions, is a pretty hard ask, I think.

[175] **Huw Irranca-Davies:** Fascinating. Absolutely fascinating. Let's move on. Dafydd, over to you.

[176] **Yr Arglwydd Elis-Thomas:** Wel, **Lord Elis-Thomas:** Well, a very warm Syr Paul, croeso yn ôl. welcome back, Sir Paul.

[177] Paul is used to me speaking English to him privately and Welsh in public, so why break the habit of a lifetime?

[178] A gaf i ofyn yn arbennig, yn dilyn y drafodaeth ynglŷn â'r berthynas rhyng-seneddol—a gaf i ofyn cwestiwn ynglŷn ag effeithlonrwydd y drefniadaeth yng Nghyd-bwyllgor y Gweinidogion? Oherwydd mae'n fy nharo fi mai un o fannau gwan difrifol gweithredu datganoli yw'r ffaith, fel y dwedodd y Prif Weinidog—Prif Weinidog Cymru, felly—wrth y Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol yn y lle hwn ar 6 Chwefror, nad oedd y JMC, fel y'i gelwir, yn lle defnyddiol—ei fod yn lle defnyddiol i drafod, ond nid yw'n cytuno dim byd, a nad oes i'r strwythur o fewn Deyrnas Unedig rhynglywodraethol, nid oes dim strwythur i gael cyngor Gweinidogion priodol i ddatrys materion. A fyddet ti'n cytuno gyda hyn?

May I ask particularly, given the discussion on inter-parliamentary relations—may I ask a question on the efficiency of the arrangements in the JMC? Because it strikes me that one of the true weak points of the implementation of devolution is the fact that, as the First Minister said to the European and External Affairs Committee in this place on 6 February, the JMC, as it's called, wasn't—or that it was, rather, a useful place for discussion, but that it agreed nothing, and that, within the UK intergovernmental structure, there is no structure to have the advice of appropriate Ministers to resolve issues. Would you agree with his comments?

[179] **Sir Paul Silk:** The resolution of disputes inside the JMC.

[180] **Lord Elis-Thomas:** The general discussion within the JMC on constitutional issues on inter-governmental matters does not reflect a proper ministerial structure for the United Kingdom in terms of inter-governmental discussion.

[181] **Sir Paul Silk:** Of course, I've never been privy to what goes on inside a JMC meeting. I think there's been some evidence that they're more transparent. There was a communiqué after this most recent meeting in Cardiff, and that must be a good thing, but in the past we've not seen that sort of transparency happening. For some years, the JMC didn't meet at all. One thing that I think that the present Prime Minister has done, apparently, is breathe some extra life into the JMC process.

[182] I think one of the problems is, or has been in the past, that the agenda is very much driven by London, that the meetings have been short, that they haven't been as productive as they might have been. I believe that the Jenkin

committee found that the Scots were happier with the way in which the JMC operated than our Ministers were here in Wales. They suggested that that might be because, as it were, more attention is paid to Scottish issues by Ministers in London than is paid to Welsh issues. Therefore, our Ministers were more unhappy with their comparative sidelining.

[183] So, without being privy to how these discussions take place, I can imagine that that is the case—that we are, as it were, the poor relations inside the JMC, as perhaps we are in other manifestations of inter-governmental working.

[184] **Yr Arglwydd Elis-Thomas:** Ond, o edrych i'r dyfodol, yn enwedig yn nhermau ein perthynas â'r Undeb Ewropeaidd, onid oes yna le i ddadlau yn gyfansoddiadol ynglŷn â ffurfioli a gwella'r berthynas rhwng Cymru a Lloegr yn y drefn ddatganoledig newydd, yn yr ystyr bod yna gydnabyddiaeth gliriach i swyddogaeth Gweinidogion Cymru ac, yn lle ein bod ni'n cael y sôn parhaus yma am faterion ar draws ffiniau, ein bod ni yn derbyn nad oes ffin wedi bod rhwng Cymru a Lloegr ers methiant Clawdd Offa, ac nad oes unrhyw fwriad i ddod ag unrhyw beth felly yn ôl, ac felly bod yn rhaid i ni gael dealltwriaeth well o'r prosesau sydd yn gyffredin rhyngom ni yn ogystal â'r prosesau a'r polisiâu lle mae yna wahaniaeth?

Lord Elis-Thomas: But, in looking to the future, particularly in terms of relations with the European Union, isn't there an argument to be made constitutionally in terms of formalising and improving the relationship between Wales and England in the new devolved context, in the sense that there is a clearer recognition of the functions of Welsh Ministers and, rather than having this constant talk of cross-border issues, that we accept that there has not been a border between England and Wales since the fall of Offa's Dyke, and that there is no intention of bringing anything of that type back into existence, and therefore we need a clearer understanding of the processes we have in common as well as the processes and policies where there is divergence?

[185] **Sir Paul Silk:** I certainly think that the formalisation—and that was something that we recommended in the Welsh inter-governmental committee. We recommended—. There are dangers in a formal structure, of course. That can ossify things and can make the flexibility that you need in Government more difficult to achieve. But a formal process with formal decision making, supported in a regular way by dedicated officials and being transparent in what it does and accountable for what it does, is something

that was entirely consonant with the principles that we set down and, I think, is also part of good governance.

[186] Now, there's got to be a lot of bilateral dealings. I think, again, Lord Murphy said to this committee that a lot of the inter-governmental work is dependent on personalities—people who know one another, whether they're officials or Ministers, dealing with one another in a co-operative and workmanlike way. But, when you get to the stage of the JMC, then having some more formality in the structure is, I would have thought, desirable.

[187] **Lord Elis-Thomas:** Of course, we can't legislate for personalities.

[188] A gaf i ofyn yn gyffredinol, a wyt ti yn teimlo bod dy adroddiad wedi symud y broses yn ei blaen, a beth oedd dylanwad yr hyn a elwir yn broses Gŵyl Ddewi a thrawsbleidiol ar hynny, a beth oedd dy argraffiadau di o broses Deddf Cymru 2017, a fyddai—buaswn i'n dadlau—wedi mynd i'r gors oni bai am effeithlonrwydd cyn-Aelod o'r Cynulliad hwn, yr Arglwydd Bourne o Aberystwyth, fel Gweinidog y Llywodraeth, yn achub y Bil o'r tân, fel petai? Fy marn personol i yw hynny, ond mae'n rhan o'r cwestiwn yma ynglŷn â natur y broses rhyngseneddol.

If I could just ask in general terms: do you feel that your report moved the process forward, and what was the influence of what was described as the cross-party St David's Day process on that, and what were your views of the parliamentary passage of the Wales Act 2017, which is a piece of legislation, I would argue, that would have come totally unstuck were it not for the efficiency of a former Member of this Assembly, Lord Bourne of Aberystwyth, as a Minister for Government, in saving the Bill from the fire, as it were? That's a personal view, but it is related to this question on the nature of the inter-parliamentary process.

[189] **Sir Paul Silk:** Well, starting backwards, as it were, I think that—. My observation is that it was a very happy circumstance that Lord Bourne was the Minister taking this Bill through the House of Lords, because, after all, he'd been a member of the commission, he had been a signatory to the report, and fully endorsed the recommendations, as all members of the commission did. Now, I don't think anybody would assume, because of that, that he did anything reprehensible by having to back away from some of those recommendations because the Government in London took a different view, corporately, of things like the devolution of policing, and so on. But I think that he did an extraordinary job in the House of Lords—as, indeed, I

have to say, the House of Lords did in considering the Bill. One of the sadnesses I have is that these sorts of Bills are not as well considered in the Commons, the constitution was not as well considered in the Commons, as perhaps they were when I first went there in the 1970s.

[190] The St David's Day process was, as everybody knows, an opportunity for any of the actors to veto any of the recommendations. So, it was different from our commission's work. We didn't start off from the same place, all of us, but we ended up in the same place together, because we compromised and we came to an agreement that we all were able to endorse. Well, the St David's Day process was different in that I think any one party could say, 'We're not going to go along with that.' And it meant that the result had departed from the principles that we'd tried to articulate. I'm not suggesting—. Going back to the Chair's first question, 'Are any of the children we fathered errant?', well, you know, they weren't all as good as—. Not all of our recommendations were as good as one another, and some of them—. Probably, you could say that some of the things we recommended should be devolved, well, perhaps it wasn't as good a following of our principles as it might have been. But we did start with principles and we did try to test all our recommendations against those principles. And when there was a sort of 'pick and mix' approach to the Saint David's Day process, where—. Well, not quite pick and mix, but anybody was able to veto any one of those. It meant that the end result was not very coherent.

[191] **Lord Elis-Thomas:** People were able to take other people's sweets while not eating them.

[192] **Sir Paul Silk:** Yes. I do think that the fact that the Bill was published in draft for pre-legislative scrutiny was excellent, and was a very good example of the benefits of pre-legislative scrutiny. The Bill that eventually became the Act, when it was first introduced, was much better than the Bill that was published for pre-legislative scrutiny, but there are still many things that are going to be problems, as I said before, in the future. There are probably far too many things that have been reserved because there was a bit of obstinacy in Whitehall departments, rather than looking at the things on the basis of principle. But there were things that—. I'll give an example. In the first Bill, fire safety was going to be a reserved matter. I was involved with the constitution unit and Wales Governance Centre report on the draft bill, and we said—well, we explained—why fire safety was a subject that shouldn't be reserved, and fire safety has been dropped from this reservation. So, that process was a very welcome and very healthy one.

16:30

[193] **Huw Irranca-Davies:** I'm going to bring Dai Lloyd in here, but before we do, just looking back, reflecting on the Wales Bill, one of the things that fascinated us was that, at different ends of the M4, there was evidence being heard and there were opinions being sought. They may have been different opinions, but many of them were very high-quality input to what could shape the Bill. I just wonder whether you have a view on whether it would have been helpful to have—in light of our earlier discussion—more symbiosis between that evidence, flowing both ways, being heard both ways, and perhaps committees sitting together and hearing together what was being said, arguing with it, contradicting it and so on. Because, in effect, what happened was that there was a set of Welsh evidence on which we then went up the M4 and discussed with the House of Lords, and there was other evidence, and yet it was all valid in different ways.

[194] **Sir Paul Silk:** Well, I believe I'm right in saying that there was a joint meeting, when Mr Melding was chairing, with the Welsh Affairs Committee.

[195] **Huw Irranca-Davies:** Indeed, yes.

[196] **Sir Paul Silk:** He would know this much better than me, but to what extent there was an exchange of papers between the two committees and what extent they studied one another's evidence—and it's permissible under the rules of the House of Commons for documents to be changed; it's one of the things where Wales is more advanced than other parts of the United Kingdom, because I don't believe that the Scottish Affairs Committee can exchange its evidence with the committees of the Scottish Parliament—? But that seemed a very productive occasion, and I hope that both committees, which had different majorities and different political make-ups, wouldn't have been expected to come to the same conclusions, necessarily—

[197] **Huw Irranca-Davies:** Absolutely.

[198] **Sir Paul Silk:** —and were able to feed off one another.

[199] **Huw Irranca-Davies:** Yes, indeed. Dai.

[200] **Dai Lloyd:** Diolch, Gadeirydd. **Dai Lloyd:** Thank you, Chair. Just a Dim ond yn fyr, ac yn olaf, ac i droi at very brief question to conclude, and

gysidro effaith Brexit ac effaith Brexit turning to consider the effect of
 ar unrhyw strwythurau Brexit and the effect of Brexit on any
 rhynglywodraethol. A ydyw'r inter-governmental structures. Are
 strwythurau presennol yn addas, the current structures appropriate or
 ynteu a oes angen strwythurau fit for purpose, or do we need new
 newydd erbyn yr adeg y bydd y structures for the time when the
 Deyrnas Unedig yn gadael yr Undeb United Kingdom exits the European
 Ewropeaidd? Neu, yn eich geiriau chi, Union? Or, in your words, does the
 a oes angen i'r tad genhedlu plant father need to have new children?
 newydd?

[201] **Sir Paul Silk:** Well, as I said before, I think that there will inevitably be a need for—in this area, as in so many other areas—a complete rethinking of structures and mechanisms. There are many questions, I think, that Brexit will lead to—I mean, to what extent will the great repeal Bill need a legislative consent motion, for example.

[202] **Lord Elis-Thomas:** A great legislative consent motion, perhaps.

[203] **Sir Paul Silk:** A great legislative consent motion. [*Laughter.*] And to what extent will, so far as—. I understand that the great repeal Bill is going to—. I don't understand this—I read; I know no more than anybody else who reads these things—but a lot of that is going to be done by Henry VIII clauses. Lots of changes to primary legislation will be able to be done by Henry VIII clauses. Well, to what extent does the Assembly have some role in those? There's no concept of legislative consent motions, I believe, for secondary legislation. This is going to be very, very important secondary legislation. These sorts of things have got to be thought through. There are all sorts of resource and policy implications of Brexit that will have to be thought through. You all know this much better than I do. As you return competencies from the European Union to the United Kingdom, where do those competencies lie? The inter-governmental relations—the hammering out of those discussions—. It's obviously a very good thing that the JMC has now got an EU negotiations sub-committee, and the fact that David Davis and Liam Fox were down here in Cardiff. I suppose all was well for the engagement between the Governments, but I think anybody who's a citizen, or certainly you as legislators, must hope and expect that those things are going to be done in a way that fully involves the democratic Assembly here in Wales, and, indeed, the citizens of Wales and Welsh interests.

[204] **Huw Irranca-Davies:** Dai, thank you. I'm very conscious we've run over

time with you, but it's been really interesting and I'm just wondering whether there's anything else you want to put in front of us today before you disappear, as the father or godfather of many of these ideas—these children? Is there anything that we've missed, do you think, that would be pertinent to this inquiry?

[205] **Sir Paul Silk:** Only the plea—well, the suggestion, perhaps, which I think you'll look reasonably favourably on, that if you do think that there is room to set up better inter-parliamentary relations, then start that process here in Wales and start inviting other people and make them be the people who back away from it. So, don't wait for other people to do it, but dare them to do it.

[206] **Huw Irranca-Davies:** It's a very good suggestion—lead by example and do it. Thank you very much indeed, Sir Paul. It's been very interesting indeed, and thank you for your time.

[207] **Sir Paul Silk:** Pleasure.

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

16:37

**Offerynnau sy'n Cynnwys Materion i Gyflwyno Adroddiad arnynt i'r
Cynulliad o dan Reol Sefydlog 21.2 neu 21.3**

**Instruments that Raise Issues to be Reported to the Assembly under
Standing Order 21.2 or 21.3**

[209] **Huw Irranca-Davies:** Very good. We may return to that in a moment, but first of all, if Members are content, if we move on to the next item on the agenda, item No. 4, we have some instruments there that raise no reporting issues under Standing Orders 21.2 and 21.3. So, we have, under paper 3, statutory instruments with clear reports, three negative resolution instruments: the Care Standards Act 2000 et cetera, the Private Dentistry (Wales) Regulations 2017 et cetera, and the Registration of Private Dentistry (Wales) Regulations 2017. I don't think we have any comments from our team here. Any comments from committee Members or are you content to note? Content. Diolch yn fawr.

16:38

**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.

[210] **Huw Irranca-Davies:** If we move on then to item 5: motion under Standing Order 17.42 to resolve now to meet in private. Content? We'll meet in private and please clear out anybody else who's still in the gallery.

Derbyniwyd y cynnig.

Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 16:38.

The public part of the meeting ended at 16:38.