



House of Commons  
Welsh Affairs Committee

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# Wales and Whitehall

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**Eleventh Report of Session 2009–10**

*Report, together with formal minutes, oral and written evidence*

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## The Welsh Affairs Committee

The Welsh Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Office of the Secretary of State for Wales (including relations with the National Assembly for Wales).

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## Summary

Devolution in 1999 dramatically changed the way the United Kingdom is governed, in different ways in different nations of the Union. It was also the beginning of a process, especially in Wales, where the scope and scale of devolution is already far beyond the modest change initially envisaged.

In this Report, we recommend a number of structural changes to improve the relationship between Wales and Whitehall. The effective operation of the settlement will be best ensured by mutual knowledge and understanding. Elected politicians, Ministers, civil servants and officials of the two legislatures should all be encouraged and expected to contribute to the building of an effective relationship

### *Inter-governmental relations*

The Memorandum of Understanding which forms the basis of inter-governmental relations between the Welsh Assembly Government (and the other devolved administrations) and the United Kingdom Government was developed during a period when the same political party was in power in both Wales and Whitehall. We believe that a broad review of the machinery for co-ordinating inter-governmental relationships is necessary. It is not enough to rely solely on the strength of informal relationships. An updated Memorandum of Understanding between the Government and the devolved administrations is long overdue. We urge the Government to publish the newly agreed revised version as soon as possible. We recommend that the Memorandum of Understanding be reviewed at the start of every Parliament. The status of Devolution Guidance Notes should be strengthened after appropriate consultation.

We welcome the role of the Joint Ministerial Committee and recommend that it meets on a regular basis. We believe that as well as practical, problem-solving work the Committee has symbolic value in embedding the principle of mutual respect and expectation of proper consultation across Whitehall and with the Welsh Assembly Government. Whilst we recognise that the relationship between the UK Government and the Welsh Assembly Government is not one of constitutional equals, we urge the Cabinet Office to look at the British-Irish Council as an example of effective joint working. On appropriate occasions, consideration should be given to inviting a devolved administration to take the lead on a particular issue.

### *Whitehall responsibility for devolution*

Since the advent of the devolution settlements, overall responsibility for devolution strategy has moved between a number of departments. Currently the co-ordination of government business for Wales is shared between three departments—the Ministry of Justice, the Cabinet Office and the Wales Office. There is an absence of a strong centre in relation to devolution within the Government which prevents a co-ordinated view of devolution. We considered the merits of locating the central responsibility for devolution within the Ministry of Justice because of the constitutional role of that department, but concluded that this was too removed from the centre for day-to-day co-ordination, and we were also

unconvinced that the department has a strong understanding of the devolution settlement embedded in its ethos. We therefore believe that that role belongs to the Cabinet Office, with its position close to the Prime Minister, and we recommend that this should be recognised and developed and appropriate resources allocated for this purpose.

### ***Awareness of the devolution settlement in the Civil Service***

Whitehall has not fully engaged with the complex nature of the devolution settlements. There is a need for a proper understanding of the devolution settlements to be fully embedded within Whitehall departments and a realisation that the differences in constitutional arrangements have implications for policy and legislation. This requires more consistent training (including a formal mechanism for secondments between Wales and Whitehall), a clear department-by-department focus on developing and retaining a knowledge and understanding of devolution, and investment in making the settlement work. The devolved administrations are not just another set of Whitehall departments and the Civil Service needs to recognise this.

Officials in the Welsh Assembly Government have also had to learn new ways of doing things in the last ten years. We have heard criticisms that the Welsh Assembly Government is inward looking, which is perhaps understandable in the first few years of an institution when it is trying to develop its own policies. However, it must now have the confidence to interact with Whitehall and to highlight areas of good practice with a belief that it can play a consistently leading role in the United Kingdom.

A key official player in making the devolution settlement work is, and will continue to be, the Cabinet Secretary and Head of the Home Civil Service. To ensure that devolution remains on the agenda across Whitehall, we recommend that the Cabinet Secretary should give evidence to the Committee annually, to set out what progress has been made in raising awareness of devolution across Whitehall and in the Welsh Assembly Government and to answer questions on the development of the Welsh devolution settlement. We also believe that the Permanent Secretary at the Welsh Assembly Government needs to take a proactive role in explaining developments in Wales to her colleagues across Whitehall. We commend the way that Dame Gillian Morgan has described her role and we recommend that she too should give evidence to the Committee annually in addition to the regular evidence from the First Minister which has become an established part of the Committee's work.

### ***Legislation***

We are concerned about the time it has taken for some Legislative Competence Orders to receive Whitehall clearance. They are frequently not given priority within Whitehall departments, which may affect the delivery of the Welsh Assembly Government's legislative timetable. As we have previously argued, we believe there is a strong case for a more formal reporting system on the Whitehall clearance system.

The Welsh Assembly Government also receives legislative powers through primary legislation. Framework powers are not scrutinised to the same degree as proposed Legislative Competence Orders, either by Parliament or the National Assembly for Wales.

We suggest that it is appropriate for a Welsh Affairs Committee in the next Parliament to provide more oversight of such powers.

We recommend that the Standing Orders of the House should provide for the Speaker to lay before it any formal communication conveyed to him or her from the National Assembly for Wales.

### ***Finance***

The financial settlement constituted by the Barnett Formula does not seem to us to be guaranteed to be sustainable. It needs to be built on an agreed and enduring basis which is demonstrably fair and sensitive to the particular circumstances of Wales. We urge the Government, as a priority, to review the current arrangements and to adopt a needs-based approach to a new financial settlement. As well as bringing about a formula which is fairer to Wales, the need for predictability for some time ahead is of enormous importance and we strongly recommend that any such formula should not be subject to year-on-year or even three-year variations which depend on a contemporary interpretation of statistical information.



# 1 Introduction

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## Background

1. Over the past two parliamentary sessions, the Committee has examined a range of subjects, including the cross-border provision of public services (looking specifically at further and higher education; health; and transport); the impact of globalisation on the Welsh economy; the Legal Services Commission's Cardiff office; the potential benefits of the 2012 Olympics and Paralympics for Wales; English language television broadcasting; digital inclusion; and Welsh ports. Evidence we took during our inquiries indicated that decisions were sometimes being made centrally with no apparent awareness of their potential impact on Wales and an inadequate understanding of the devolution settlement. We therefore decided to undertake an inquiry into the relationship between Wales and Whitehall and to examine the extent and nature of the awareness of the Welsh settlement within the Government.

## Our Inquiry

2. On 23 October 2009, we announced our terms of reference:

- Awareness of the devolution settlement within the civil service and of the protocols which are in place in relation to legislation and policy affecting Wales;
- The role of the Wales Office and the Ministry of Justice;
- The extent of communication between Whitehall, the Welsh Assembly Government, the National Assembly for Wales and Welsh MPs;
- The review of Whitehall guidance on devolution, announced by the Ministry of Justice in response to the Committee's report on the Legal Services Commission;
- Taking forward the findings of the Justice Select Committee in its recent substantial report *Devolution: A Decade On*.

3. Amongst others, we took oral evidence from the Secretary of State for Wales, Rt Hon Peter Hain MP; Carwyn Jones AM, First Minister for Wales; Rt Hon Rhodri Morgan AM, former First Minister for Wales; Sir Gus O'Donnell KCB, Cabinet Secretary and Head of the Home Civil Service; Sir Jon Shortridge KCB, former Permanent Secretary to the Welsh Assembly Government; and Dame Gillian Morgan DBE, Permanent Secretary to the Welsh Assembly Government. We also took evidence from Gerald Holtham; Sir Emyr Jones Parry; and lawyers and academics. We are grateful to everyone who provided oral and written evidence to our inquiry.

## Devolution: a brief history

4. Devolution formed part of the incoming Labour Government's programme of constitutional reform before the 1997 general election. It was described by the then Prime Minister, Rt Hon Tony Blair MP, as "the biggest programme of change to democracy ever proposed".<sup>1</sup> In the United Kingdom, devolved government was agreed to in principle following referendums in Wales and Scotland in September 1997, and in Northern Ireland in 1998. In 1998, Acts were passed to provide for the creation of the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales, with elections to the Scottish Parliament and the National Assembly for Wales following in May 1999, at which point the devolution arrangements were established.

### Asymmetry

5. The most striking feature of the three devolutionary Acts of Parliament of 1998 was the extent of the differences between the settlements for Scotland, Northern Ireland and Wales,<sup>2</sup> catering, in the words of the Ministry of Justice, "for specific demands for new democratic institutions in those parts of the UK [...] while maintaining the sovereignty of the UK Parliament in Westminster".<sup>3</sup> The differing settlements reflected the differences in the political, historical and institutional background of the three nations. Although the Northern Ireland settlement had many features unique to its previously troubled political situation, the settlement for Wales was also quite distinct from the other two. The National Assembly was granted only very limited legislative competence, defined by reference to the pre-existing powers delegated to the Secretary of State for Wales under previous Acts of Parliament. It was also modelled more on local, rather than national government, being established as a "corporate body" in which the Assembly itself governed the country, rather than legitimising and scrutinising a separate government. But the essential difference between the Welsh settlement and those for the other two devolved jurisdictions, which remained even after the settlement was recast in 2006, was that in Scotland and Northern Ireland the powers of the devolved legislatures were defined by exclusion: they had powers over all areas except those that were specified in their founding legislation as reserved to the UK Parliament and Government. In Wales, the scope of devolution was defined (and continues to be after the 2006 changes to the settlement there) by inclusion: the Assembly and Government enjoyed only those powers which have been specifically granted to them by the UK Parliament. We briefly examine the history behind these differences of treatment below.

### Divergent histories

6. In early twentieth century Ireland, "home rule" for the newly created state or "province" of Northern Ireland was a compromise between demands for Irish independence and competing demands for the maintenance of the Union of Great Britain and Ireland, in the

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<sup>1</sup> Speech to Labour Party Conference, 4 October 1994

<sup>2</sup> The Government of Wales Act c.38, the Scotland Act c.46, and the Northern Ireland Act, c.47

<sup>3</sup> Fifth Report of the Justice Committee, Session 2008-09, *Devolution: A Decade On*, HC 529-I

context of rebellion and civil war.<sup>4</sup> For fifty years, from 1921 to 1972, Northern Ireland was a separate jurisdiction within the UK, and its government and parliament operated largely independently of the rest of the country. The Northern Ireland Parliament was the legislature until it was suspended in 1972 as a result of the breakdown of law and order, and formally abolished in 1973 under the Northern Ireland (Constitution) Act 1973. This created in its place a body called the Northern Ireland Assembly, which in turn was abolished in 1974. Although Northern Ireland remained a separate jurisdiction in principle, for the next 25 years it was governed directly by the UK Government, despite a brief attempt at a limited form of quasi-devolution with another Assembly between 1982 and 1986.

7. Scotland was a sovereign state until the Acts of Union of 1707 abolished the Scottish and English Parliaments and established a Parliament of Great Britain. The Acts, however, allowed Scotland to retain many of the distinctive features of a separate jurisdiction: the continuing autonomy of the Scottish legal system, its distinct education system, the Scottish established church, and its organisation of local government. Over the subsequent centuries, all legislation relating to Scotland was made at Westminster by the Parliament of Great Britain (after 1801 of the United Kingdom) but it generally dealt with Scotland separately as a distinct jurisdiction. From the turn of the century, campaigns for “Home Rule all around” had been led by the Scottish Socialist and MP for Merthyr and Aberdare, Keir Hardie. A form of “executive devolution” occurred with the establishment of the post of the Secretary of State for Scotland in 1926. Some campaigning for independence, or for some form of devolution, continued throughout the next 50 years, with the Scottish National Party being founded in 1934 and its first MP being elected to Westminster in 1967. There has been continuous representation since that time.

8. In 1978, Parliament passed the Scotland Act, which provided for the creation of a Scottish Assembly with relatively limited powers. The Act triggered a referendum in Scotland held on 1 March 1979. Although there was a majority in favour of devolution, only 32.5% of the electorate voted for it. The Act required 40% of those eligible to vote to have done so in the affirmative (as well as being the majority of those voting) for it to have statutory effect. The 1978 Act was subsequently repealed by Order in July 1979.

9. England and Wales have, in contrast, formed a single jurisdiction for almost 500 years.<sup>5</sup> Executive devolution to Wales of the kind seen in Scotland from the 1920s onwards was only developed in Wales after the Second World War. The Welsh Courts Act of 1942 addressed not only the language issue but, significantly, the running of courts in Wales. Other developments included the disestablishment of the Church and legislation on Sunday closing. The Welsh Office and the Cabinet post of Secretary of State for Wales were established in 1964. Welsh-specific legislation was made at Westminster in only very limited areas: language and local government being the main ones. In the Welsh devolution referendum of 1979, devolution was decisively rejected by a majority of four to one. The voices advocating devolution in Wales were subdued for a period following the referendum defeat.

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<sup>4</sup> Royal Commission on the Constitution, 1969-73 Vol I, 3

<sup>5</sup> Act of Union 1536

### ***The 1998 settlements***

10. In September 1997, referendums were held in Scotland and Wales on the proposals from the new Labour Government for devolution to each nation. In Wales the referendum endorsed the new Labour Government's proposals for the creation of a National Assembly for Wales by a majority of only 6,721 votes, by 50.3% to 49.7% on a turnout a shade over 50%. In Scotland, 74.3% of those participating voted in a referendum in favour of the Government's proposals for a Scottish Parliament, with a much wider range of powers than had been proposed in 1978.

11. A referendum affirming the principle of a new democratic devolution settlement was held in Northern Ireland in May 1998. The elections to the transitional "new" Northern Ireland Assembly were held in June 1998 (with devolution of powers under the provisions of the Northern Ireland Act 1998 not occurring until December 1999). The Northern Ireland Act 1998 established a new Northern Ireland Assembly as the devolved legislature for Northern Ireland, subject to complex "power-sharing" rules of procedure. It has been suspended for long periods of its existence, with direct rule being re-imposed in these intervals. The Assembly can make law in those areas of competence "transferred" to it under the provisions of the 1998 Act. It cannot legislate in matters which are "excepted" or "reserved". "Excepted" matters would require primary legislation to hand over. "Reserved" matters may be transferred by Order in Council if there is cross-community consent. The last significant transfer of reserved powers (over policing and criminal justice) has been agreed by the Assembly. Westminster legislation will confirm this.

12. The Government of Wales Act 1998 had created the National Assembly for Wales with secondary law-making powers in areas specifically prescribed in the Act (and in a Transfer of Functions Order). The 1998 settlement did not last long and the corporate body model immediately came under strain. During the second Assembly, the Richard Commission was appointed to consider the devolution settlement in Wales. It made a number of recommendations which encompassed some quite fundamental changes. Many of these were accepted by the UK Government, including those for an extension of the Assembly's competence to making quasi-primary legislation ("Assembly Measures") and mechanisms for enlarging the scope of the Assembly's legislative competence to new fields and matters. The Government also accepted the proposal to separate the Assembly from the government, creating a legislature-executive model on Westminster lines (as in Scotland and Northern Ireland).

13. In 2006, a new Government of Wales Act was passed, which gave effect to these changes. The Act also made provision for the possibility of a future referendum on full law-making powers within the devolved fields of competence specified in the Act (subject to the approval of both Houses of Parliament).

### ***Dealing with different devolutions***

14. We heard evidence that the different constitutional arrangements for the four home nations have meant that "it is hard for civil servants in Whitehall to understand exactly what the position is" in each of them.<sup>6</sup> We heard concerns that both ministers and civil

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<sup>6</sup> Q 341

servants in Whitehall either concentrated too much on Scotland or failed to distinguish between the Scottish and Welsh settlements in dealing with devolution. The Rt Hon Rhodri Morgan AM, former First Minister for Wales, saw it as a cultural question, a matter of colonial thinking:

Scotland has always been accepted as not a foreign country but another country [...] The problem about Wales is that it is not seen as another country; it is seen as, if you like, the last colony in the Empire problem, because people still have a perception of an England and a Wales set-up.<sup>7</sup>

Carwyn Jones AM, First Minister for Wales, commented on his early experiences as a Welsh Minister working with Whitehall:

My experience [...] was that Scotland was regarded as something separate and Wales was regarded, as it was suggested to me, as an experiment in devolution and, whilst the situation has improved since then, there is still scope for improvement. It is [...] to do with history in terms of the fact that the Scottish Office goes back to the 19th century, the Wales Office back to 1964, and an understanding that still persists to an extent that Scotland is different.<sup>8</sup>

15. Alan Trench, Honorary Senior Research Fellow from the Constitution Unit at University College London, commented that civil servants often misunderstood the situation in Wales because they “read-across” to the Scottish precedent. As he argued:

The one thing that can be guaranteed not to work is to apply the principles that govern Scotland to Wales [...] Wales is not Scotland; Scotland is not Wales; if you confuse the two you will get things wrong.<sup>9</sup>

16. Witnesses commented that the different constitutional arrangements over the last century had led to Wales having a different profile in Whitehall from that of other nations within the United Kingdom. Dr Jim Gallagher Director General for Devolution at the Ministry of Justice acknowledged that “It is probably fair to say Scotland, being bigger, has had more of a footprint in Whitehall over the years than Wales has”.<sup>10</sup> Alan Trench agreed:

This is something that goes back to the size and strength of the Scottish Office in the period before devolution, the relative authority and strength of Secretaries of State for Scotland, and their ability to get very good deals; which in turn goes back partly to the constitutional position of Scotland within the UK, and partly to the extent to which the SNP is seen as a political threat. That has always highlighted issues relating to Scotland in a way that has not happened in relation to Wales.<sup>11</sup>

Dr Gallagher commented that there was also the wider difficulty of how Whitehall dealt with devolution:

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<sup>7</sup> Q 71

<sup>8</sup> Q 446

<sup>9</sup> Q 341

<sup>10</sup> Q 146

<sup>11</sup> Q 341

... it continues [...] to regard the devolved administrations as the government departments they used to be [...] This is an issue in relation to Wales, and is an issue in relation to Scotland also; helping both government departments and indeed what you might call the political system in general to realise that Wales now enjoys two Governments; that it enjoys two legislative bodies—this Parliament and the Assembly—just as Edinburgh enjoys both pleasures of that sort as well; and is and remains a major educational task.<sup>12</sup>

**17. The way in which the United Kingdom is governed has changed profoundly over the last twelve years, in different ways in different nations of the Union. Whitehall has not fully engaged with the complex nature of the devolution settlements. There is a need for a proper understanding of the devolution settlements to be fully embedded within Whitehall departments. Whitehall must realise that the differences in constitutional arrangements have implications for policy and legislation. The National Assembly for Wales and the Welsh Assembly Government (including both politicians and civil servants) have a major role to play in that learning process which they appear not to have undertaken fully in the last decade.**

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<sup>12</sup> Q 167

## 2 Inter-Governmental Relations

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### Memorandum of Understanding

18. Following devolution, a Memorandum of Understanding and its accompanying Concordats are the basis of inter-governmental relations between the Welsh Assembly Government (and the other devolved administrations) and the United Kingdom Government. The Memorandum of Understanding sets out high-level principles for inter-governmental relations. It also provides for a Joint Ministerial Committee (JMC), an overarching body that involves ministers of the UK Government and ministers of each of the devolved administrations. It is described as a “statement of political intent, and should not be interpreted as a binding agreement [...] it does not create obligations [...] it is intended to be binding in honour only”. It is based on principles of “communication and consultation, co-operation [...] exchange of information, statistics and research and confidentiality”.<sup>13</sup>

19. The Memorandum of Understanding also provides for the four administrations to “prepare Concordats [...] to deal with the handling of procedural, practical or policy matters between them”. These bilateral Concordats are intended to “govern the detailed administrative relationship [...] on matters of mutual interest, and where the parties have executive functions which overlap or bear on each other”, and are intended to give detailed effect to the principles set out in the Memorandum of Understanding.

20. Witnesses differed in their opinion on the importance of the “formality of the machinery” relating to inter-governmental relations.<sup>14</sup> Rhodri Morgan AM commented:

... I do not think the JMC and the Memorandum of Understanding and Concordats are the key thing. The key thing is whether a relationship is warm or cold [...] It is a matter of attitude rather than the formality of the machinery...<sup>15</sup>

The Secretary of State for Wales agreed that the success of inter-governmental working did not depend solely on the formal structures in place:

... you can design the most beautifully geometric relationship and processes and guidance notes, structures and committees and goodness know what, but actually what it depends on is human relationships and the warmth of these human relationships.<sup>16</sup>

21. The Welsh Assembly Government, however, stressed that it was essential to have clear ground rules in order to promote the functioning of inter-governmental relationships.<sup>17</sup> Dame Gillian Morgan, Permanent Secretary to the Welsh Assembly Government expanded on this point in oral evidence to the Committee: “good strong governance and

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<sup>13</sup> <http://www.justice.gov.uk/guidance/docs/odpm-dev-600629.pdf>

<sup>14</sup> Q 57

<sup>15</sup> Q 57

<sup>16</sup> Q 604

<sup>17</sup> Ev 146

good clear arrangements are at the heart of solving problems [...] the things you write down for governance are not for times of peace but for times of trouble”,<sup>18</sup> and Sir Gus O’Donnell, Cabinet Secretary and Head of the UK Civil Service, commented that:

If the formal structures get in the way then, no matter what the strength of the relationships, it is going to be difficult. If you have a set of formal structures which allow you to operate effectively together then, again, I would say that is necessary but by no means sufficient for things to work. If you have good structures and people do not try and make them work and the relationships are poor, then I think you will come up with poorer outcomes [...] if the structures are poor you will still try and do the best within poor structures; but if you have poor relationships, whatever the structures, it is not going to work.<sup>19</sup>

### ***Non-statutory status***

22. The informal, non-statutory nature of inter-governmental relations has not yet been tested by political administrations from wholly different parties in Whitehall and Wales. Sir Emyr Jones Parry, Chairman of the All-Wales Convention reminded the Committee that “there has been this privileged position that it has been the same party in power predominantly in Cardiff and that has facilitated things”.<sup>20</sup>

23. Rhodri Morgan AM commented that “it is a very British way of doing things to try to operate in an informal capacity”, which in Welsh terms is the equivalent of “a gair bach yn y set fawr”.<sup>21</sup> While Alan Trench felt it would be “constitutionally impossible” to have a “more detailed, quasi-legal document”,<sup>22</sup> he was clear that the principles of the Memorandum of Understanding had to be respected and was not convinced that they always were:

... if you are going to have an agreement that is binding in honour only it must be binding in honour; and, frankly, that seems not always to be the case.<sup>23</sup>

He also felt it was important it was reviewed regularly “because it would focus the minds of politicians and civil servants on how those relationships were meant to work, and would mean that they would have to revisit and understand these things in a current context rather than simply having what was put on the table many years before”.<sup>24</sup>

24. Since the completion of our evidence sessions, a revised and updated Memorandum of Understanding has been agreed by all four administrations at a meeting of the Joint

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<sup>18</sup> Q 524

<sup>19</sup> Q 573

<sup>20</sup> Q 239

<sup>21</sup> Qq 61- 63 Translation: Having a private word.

<sup>22</sup> Q 344

<sup>23</sup> Q 344

<sup>24</sup> Q 345

Ministerial Committee (Domestic) on 10 March.<sup>25</sup> It must now be ratified by each administration.

### **Devolution Guidance Notes**

25. The Devolution Guidance Notes, issued by the Ministry of Justice and made publicly available, set out advice on working arrangements between the UK Government and the devolved administrations. They are an introduction to the main principles involved in the managing of the devolution settlements, bilateral relations, correspondence, parliamentary business, legislation and concordats.<sup>26</sup> Alan Trench commented that they were “often the only place in which key principles of devolution are noted or articulated”.<sup>27</sup>

26. In our report on the Legal Services Commission Cardiff Office,<sup>28</sup> published on 1 May 2009, we recommended that Devolution Guidance Note 4 be amended in order to clarify and strengthen references to the key role of the Secretary of State for Wales and the Wales Office regarding the principle of timely consultation on policy matters that might affect Wales. While we received assurances from the Secretary of State that it was in the process of being revised and Cabinet clearance was being sought, we are disappointed that this has still not been published by the time of this Report.

27. Some witnesses argued that the status of devolution guidance notes was not clear, as they were regarded by the UK government as internal guidance notes that, although published, were issued by one government for the benefit of its own officials. Alan Trench felt that their status was higher than this:

These are not simply internal matters relating to the affairs of one government, but record important principles of how devolution works more generally.<sup>29</sup>

In oral evidence to the Committee he elaborated on this point and stated that he wanted to see:

... some of the material that is presently set out in Devolution Guidance Notes in a successor intergovernmental agreement, a sort of manual for managing intergovernmental relations ...<sup>30</sup>

28. The Welsh Assembly Government agreed with attempts to raise the profile of the Devolution Guidance Notes but noted that “it is important that the results are acceptable to the devolved administrations,” and that “Guidance to officials in Whitehall and in Wales has to be mutually compatible”.<sup>31</sup>

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<sup>25</sup> [http://www.cabinetoffice.gov.uk/newsroom/news\\_releases/2010/100310-devolution.aspx](http://www.cabinetoffice.gov.uk/newsroom/news_releases/2010/100310-devolution.aspx)

<sup>26</sup> <http://www.justice.gov.uk/guidance/devolutionguidancenotes.htm#five>

<sup>27</sup> Ev 127

<sup>28</sup> Seventh Report of the Welsh Affairs Committee, Session 2008-09, *Legal Services Commission Cardiff Office*, HC 374

<sup>29</sup> Ev 127

<sup>30</sup> Q 362

<sup>31</sup> Ev 146

29. The structures for inter-governmental relations with Wales were developed during a period when the same political party was in power in both Wales and Whitehall. There will be times when relationships between the Government and devolved administrations come under strain, and during periods of “cohabitation” between different parties in government at the two levels they can be at greater risk. Adequate machinery must be in place to enable extensive negotiation and conciliation to occur between the Government and the devolved administrations. It is not enough to rely solely on the strength of informal relationships.

30. Formal machinery is necessary but not sufficient. Often its effectiveness lies in the informal relationships it allows to develop underneath it. Strong relationships develop if there is the political will to make them work. It is important that arrangements exist to promote and maintain strong relationships between Members of Parliament and Welsh Assembly Members. This will ensure that we learn about and understand each other’s priorities.

31. We believe that a broad review of the machinery for co-ordinating inter-governmental relationships is necessary. An updated Memorandum of Understanding between the Government and devolved administrations is long overdue. We urge the Government to publish the agreed revised version as soon as possible. We recommend that the Memorandum of Understanding be reviewed at the start of every Parliament. The status of Devolution Guidance Notes should be strengthened after appropriate consultation.

### Joint Ministerial Committee

32. The Memorandum of Understanding provides for a Joint Ministerial Committee (JMC). It provides a formal consultation role with Ministers from devolved administrations on a wide range of matters where there is an interaction between reserved and devolved policy matters.<sup>32</sup> The Joint Ministerial Committee did not meet at ministerial level between 2002 and 2008, but was re-convened on 25 June 2008.

33. There are two sub-committees of the Joint Ministerial Committee, on Europe and on domestic affairs. The Joint Ministerial Committee (Europe) (JMC(E)) has operated successfully from the outset of devolution. It meets four times a year, prior to each European Council. The Joint Ministerial Council (Domestic) (JMC(D)) is chaired by the Secretary of State for Wales, in his capacity of senior Minister for inter-administration relations, and discusses issues of mutual interest to the devolved administrations and the Government. Its inaugural meeting was held in March 2009, to discuss welfare reform, and met again in May 2009 to discuss managed migration.<sup>33</sup>

34. Rhodri Morgan AM described the JMC as a “problem solving body, not a disputes arbitration body”.<sup>34</sup> He commented that a “huge fuss was made”<sup>35</sup> about the Joint Ministerial Committee when it was first established:

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<sup>32</sup> Ev 129

<sup>33</sup> Ev 129

<sup>34</sup> Q 80

The Prime Minister always attended. Then Robin Cook or John Prescott chaired it and then it stopped meeting altogether. [...] in the first couple of years it was a very good thing to have these rotating meetings in Scotland and Wales [...] it never did meet in Belfast; but having the meetings here and in Scotland, with the Prime Minister chairing them, probably was a good kick-off for devolution. In a way the downgrading then of the Prime Minister's attendance to Robin Cook's attendance or John Prescott's attendance was taken as a sign, 'Things are going fairly well; we do not really need the Prime Minister to be devoting his time to this question'.<sup>36</sup>

Both Mr Morgan and the Secretary of State for Wales told us that they saw the absence of plenary sessions of the JMC as a measure of the success of the devolution process. The Secretary of State for Wales commented that there was "no particular imperative for it to meet," with "no clamour from either Cardiff or Edinburgh [...] for it to meet in order to solve a problem that could not otherwise be solved".<sup>37</sup>

35. The newly re-convened Joint Ministerial Committee's terms of reference are:

- i) to consider non-devolved matters which impinge on devolved responsibilities and devolved matters which impinge on non-devolved responsibilities;
- ii) where the UK Government and the Devolved Administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in the different parts of the United Kingdom;
- iii) to keep the arrangements for liaison between the UK Government and the Devolved Administrations under review; and
- iv) to consider disputes between the administrations.<sup>38</sup>

36. Rhodri Morgan AM welcomed the re-establishment of the JMC, particularly following the arrival of a SNP government in Scotland:

I thought that was a good thing because you now have an SNP administration in Scotland, and I thought it helped to warm up again relationships which had got pretty frosty, particularly between the Scottish administration and the Westminster and Whitehall Government.<sup>39</sup>

Carwyn Jones AM, First Minister of Wales, recognised the JMC's role as "exceptionally important" as a forum where devolved issues could be raised and dealt with effectively.<sup>40</sup> Sir Jon Shortridge welcomed it as a "way of leading and driving the operationalism of the settlement".<sup>41</sup>

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<sup>35</sup> Q 65

<sup>36</sup> Q 65

<sup>37</sup> Qq 582-583

<sup>38</sup> [http://www.cabinetoffice.gov.uk/newsroom/news\\_releases/2008/080619\\_joint\\_committee.aspx](http://www.cabinetoffice.gov.uk/newsroom/news_releases/2008/080619_joint_committee.aspx)

<sup>39</sup> Q 64

<sup>40</sup> Q 444

<sup>41</sup> Q 52

37. In explaining the value of the Joint Ministerial Committee, Alan Trench said:

The particular value that I have always seen to the Joint Ministerial Committee is that it signals the engagement of the UK Prime Minister, the highest political levels of UK Government, in understanding what devolution is about and in managing the territorial structure of the UK. That then sends a very powerful signal across Whitehall that this is something that matters to the Prime Minister; that if something goes wrong someone as important as the Prime Minister will be paying attention to it.<sup>42</sup>

He further noted:

I think the engagement of the JMC at the highest level is a very powerful way of indicating to Whitehall that it needs to pay attention to devolution matters that will cascade throughout Whitehall and hit everybody who has got a routine devolution issue sitting on their desk; that they do not put the devolution side of that as the last and least of the things that they worry about just before they tie up the final loose ends.<sup>43</sup>

38. The Joint Ministerial Committee has already achieved some “tangible success” since it was re-convened.<sup>44</sup> On 27 November 2008, it was announced that following a plenary meeting of the JMC and further negotiations, an agreement had been reached on a UK wide approach to marine planning. The Secretary of State for Wales commented that the JMC had “helped to bring all the parties together to secure a framework power for marine planning in what was a very good example of joined-up working”.<sup>45</sup>

39. While welcoming the work of the Joint Ministerial Committee, Dame Gillian Morgan spoke of the need for “parity of esteem” between the UK Government and the devolved administrations.<sup>46</sup> With four fully devolved services, she questioned the need for the UK civil service to “always lead the work at times of trouble”.<sup>47</sup> She contrasted the situation within the JMC with the British-Irish Council,<sup>48</sup> which had a shared secretariat, and where each country takes the lead on issues of particular relevance or interest:

... Wales has provided a lead on language because of the challenge. [...] There is a lot of mutual understanding that comes out of that shared work which happens by officials on behalf of ministers. It is the type of equality where you are sharing out things because you are all equal, you all have the same sort of view, I would like to see that become a characteristic of the JMC rather than the assumption that on fully devolved matters the UK should automatically lead. [...] it should be based within

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<sup>42</sup> Q 346

<sup>43</sup> Q 346

<sup>44</sup> Q 584

<sup>45</sup> Q 584

<sup>46</sup> Q 524

<sup>47</sup> Q 524

<sup>48</sup> The Council was created under the Agreement reached in the Multi-Party Negotiations in Belfast in 1998 to promote positive, practical relationships among its Members, which are the British and Irish Governments, the devolved administrations of Northern Ireland, Scotland, Wales and Jersey, Guernsey and the Isle of Man

the concept that our view and our opinion on current devolved matters is equally as important and valuable as the view of any of the other countries.<sup>49</sup>

**40. We welcome the re-convening of the Joint Ministerial Committee and recommend that it continues to meet on a regular basis. We believe that as well as practical, problem-solving work the Joint Ministerial Committee has symbolic value in embedding the principle of mutual respect and the expectation of proper consultation across Whitehall and with the Welsh Assembly Government. This should not be regarded as an alternative to direct relationships between Assembly and Whitehall departments, in which best practice should be pursued.**

**41. Whilst we recognise that the relationship between the UK Government and the Welsh Assembly Government is not one of constitutional equals, we urge the Cabinet Office to look at the British-Irish Council as an example of effective joint working. On appropriate occasions, consideration should be given to inviting a devolved administration to take the lead on a particular issue.**

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<sup>49</sup> Q 525

### 3 Whitehall responsibility for devolution

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42. Since the advent of the devolution settlements, overall responsibility for devolution strategy has moved between a number of departments. It initially rested with the Cabinet Office, moving to the Office of the Deputy Prime Minister in 2002. In June 2003, the then Prime Minister announced a number of machinery of government changes. A new Department for Constitutional Affairs was formed by the merger of the Wales Office, the Scotland Office and the Lord Chancellor's Department.<sup>50</sup> The resources and other assets of the Wales Office transferred to the new department, although accountability remained with the Secretary of State for Wales. Responsibility for devolution strategy was also transferred. In May 2007, following further machinery of government changes, the Department of Constitutional Affairs became the Ministry of Justice.

43. Dr Jim Gallagher, appointed as Director General of Devolution in September 2007, indicated that there were three aspects to the work of central government in relation to Wales post-devolution:

- first, to ensure that the interests of Wales were represented within the UK Government;
- second, the co-ordination of government business and the management of the relationship with the devolved institution; and
- third, responsibility for devolution policy and strategy.<sup>51</sup>

These functions are now spread across three institutions: the Wales Office, the Cabinet Office and the Ministry of Justice. Dr Gallagher commented that: “This allocation of responsibilities I would freely admit is something which is historically contingent: it has grown up like that”.<sup>52</sup>

#### The Ministry of Justice

44. The Ministry of Justice is the lead department within the UK Government on constitutional matters. Devolution within the Ministry forms part of the Departmental Strategic Objective of “strengthening democracy, rights and responsibilities”.<sup>53</sup> The Secretary of State for Wales described the Ministry of Justice's role as having:

... responsibility for devolution strategy [...] able to consider the overall position of Wales within the constitutional framework of the United Kingdom.<sup>54</sup>

The Secretary of State for Justice provides an overview of Government's handling of devolution.<sup>55</sup>

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<sup>50</sup> Q 116

<sup>51</sup> Q 113

<sup>52</sup> Q 113

<sup>53</sup> Ev 129

<sup>54</sup> Q 585

<sup>55</sup> Q 585

45. Alan Trench of the Constitution Unit at University College London stated that the Ministry of Justice’s role had been “beefed-up” in 2007:

... to try and take a more synoptic overall view of devolution [...] It was directly in response to the election of the SNP Government in Scotland and the political challenge that seemed to represent. There has been a huge amount of initiative that has focussed on Scotland; and, as far as I can make out, that has been the main focus of the Ministry of Justice’s concerns since then as well.<sup>56</sup>

46. During this period, the post of Director-General for Devolution Strategy was established. Although some witnesses welcomed the role, we have found it difficult to see what value the post has added. Dr Gallagher described his role as “essentially a Civil Service line management post for the territorial offices, including the Wales Office”.<sup>57</sup> He described his regular meetings with opposite numbers in the Cabinet Office, the territorial offices and colleagues from the Treasury Office to ensure that devolution issues were recognised across government, but acknowledged that there was “no guarantee we spot them all every week”.<sup>58</sup> He explained that there were two full time staff in the Ministry of Justice dealing with devolution policy, neither of whom were wholly allocated to Wales.

47. Alan Trench criticised the current role of the Ministry of Justice, saying it: “simply does not have the resources or the weight to try and deal with the sorts of issues that a more general coordination would call for”.<sup>59</sup>

### **Legal Services Commission**

48. We have previously criticised the Ministry of Justice for not fully understanding the devolution arrangement. In May 2009, we published a report on the Legal Services Commission, criticising its proposal to reduce the operation of the Commissions’ Cardiff office, with functions being transferred to process centres in England. Our report concluded that:

The Legal Services Commission failed to include the Wales Office in any form of consultation regarding the proposed changes to its Cardiff office. This is unacceptable and betrays a poor understanding of the devolution settlement on the part of the Commission.<sup>60</sup>

49. We also noted that:

This is not the first time that the Ministry of Justice (or in this case one of its agencies) has demonstrated a surprising lack of awareness about the devolution

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<sup>56</sup> Q 355

<sup>57</sup> Q 123

<sup>58</sup> Q 128

<sup>59</sup> Q 355

<sup>60</sup> Seventh Report from the Welsh Affairs Committee, Session 2008-09, *Legal Services Commission Cardiff Office*, HC 374, para 18

settlement and the protocols which are in place in relation to legislation, and, as the Department has overarching constitutional responsibilities, we find this disturbing.<sup>61</sup>

We recommended that “the Ministry of Justice undertake a review of the protocols in relation to the devolution settlement and its observation throughout government”<sup>62</sup> and that “no change to the function of the Cardiff office should be implemented until thorough consultation has taken place to determine its likely impact of levels of service”.<sup>63</sup>

50. The Government’s response and a letter from Lord Bach, the Parliamentary Under-Secretary of State at the Ministry of Justice were received on 23 June 2009. The Government response noted that:

More care could have been taken by the LSC in considering who to consult during the decision making process and lessons will be learned from this. The LSC acknowledges that it failed to include the Wales Office in any form of consultation, and also apologises for this.<sup>64</sup>

51. As part of this inquiry, we revisited the case of the Legal Services Commission. Both written and oral evidence from the Legal Services Commission referred to greater levels of “engagement, consultation and liaison with stakeholders”<sup>65</sup> and regular meetings with the Welsh Assembly Government and Wales Office. **We welcome the new level of engagement taking place between the Legal Services Commission, the Welsh Assembly Government and the Wales Office. However, we would note that this new level of engagement seems to be a direct result of our intervention in this matter, and had the matter not been raised, it is unlikely that such engagement would have been forthcoming.**

52. We were keen to hear further about the Legal Services Commission’s restructuring plans. The letter from Lord Bach received on 23 June 2009 noted that:

The LSC has postponed the planned removal of processing work from the Cardiff Office from 2009-10 to 2010-11. This will enable sufficient time for them to conduct further discussions with the Wales Office and the Welsh Assembly Government, to fully explain the proposals and ensure that appropriate measures are in place to maintain the quality of service for Welsh clients and providers.<sup>66</sup>

53. Written evidence from the Legal Services Commission received in January 2010 stated that plans to restructure the organisation had been delayed due to a number of factors, including the redefinition of IT proposals, additional procedures in the process for

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<sup>61</sup> HC (2008-09) 374, para 18

<sup>62</sup> HC (2008-09) 374, para 20

<sup>63</sup> HC (2008-09) 374, para 21

<sup>64</sup> Sixth Special Report from the Welsh Affairs Committee, Session 2008-09, *Legal Services Commission Cardiff Office: Government Response to the Committee’s Seventh Report of Session 2008-09*, HC 825

<sup>65</sup> Q 529

<sup>66</sup> HC (2008-09) 825

securing funding from the Ministry of Justice, additional work volumes, further budgetary challenges and external reviews, including the Magee Review.<sup>67</sup>

54. In oral evidence, Mr Phil Lambert, Executive Director of Business Support from the Legal Services Commission, confirmed that the Legal Services Commission is “in a holding pattern”<sup>68</sup> and that “No decisions have been made and therefore it is pretty much business as usual as we speak for the Cardiff office”.<sup>69</sup> When pressed, Mr Lambert stated that “our earlier plans in terms of the numbers that automation will take out of our business” were “still on course but [...] further down the line”<sup>70</sup> with the number of clerical positions to be lost estimated at 15.

55. Concerns were raised regarding the Legal Services Commission’s understanding of issues relevant to Wales by the Law Society and the Legal Services Commission Trade Unions. The latter stated in written evidence that “although the LSC have not provided any indication as to when they plan to re-announce redundancies in the Cardiff office, it seems clear that they are still planning to remove all ‘business delivery’ work from the Cardiff office some time after April this year [2010]”.<sup>71</sup>

**56. We are convinced that the people of Wales—and the wider interests of the people of England and Wales—would be best served by a Legal Services Commission office in Wales, particularly now that there is a growing body of distinct Welsh legislation. We await clearer answers from the Legal Services Commission on their future proposals, which must meet our concerns and the concerns of the legal community and wider civil society in Wales. The office could take on work generated in England if the Welsh case load was not thought high enough.**

57. Finally, we asked Mr Lambert about the lessons learnt by the Legal Services Commission and any thoughts on the awareness of devolution in government departments in general. Mr Lambert acknowledged that lessons were learnt not just in the Legal Services Commission “but also in MoJ as well. There was an element of confusion around what a non-departmental public body could do. We were autonomous; we made our decisions; we told people, and away we went”.<sup>72</sup> The Secretary of State for Wales stated that “It is a good example of a failure—I would hold up my hands to that, and we need to learn from it. The Commission has learnt from it, the MoJ has certainly learnt from it and all these glitches that occur from time to time are points of improving the situation”.<sup>73</sup>

**58. The case of the Legal Services Commission serves as a timely reminder for all government departments and arm’s length bodies that awareness of the devolution settlement is an element of their work that must not be neglected.**

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<sup>67</sup> In October 2009 the Ministry of Justice announced a review of legal aid, to be conducted by Sir Ian Magee. Sir Ian will assess the delivery and governance arrangements of the legal aid system and make recommendations on how it can be improved. The report is expected to be delivered to the Government in early 2010.

<sup>68</sup> Q 529

<sup>69</sup> Q 529

<sup>70</sup> Qq 532-3

<sup>71</sup> Ev 123

<sup>72</sup> Q 547

<sup>73</sup> Q 587

## Cabinet Office

59. The Cabinet Office has “responsibility for co-ordination of policy [...] it [...] sits at the centre of Government, co-ordinating policy and getting clearance for cross-departmental policy agreements”.<sup>74</sup> Sir Gus O’Donnell KCB, Cabinet Secretary and Head of the Home Civil Service, described the Cabinet’s Office role as a “brokering role,” not only between Whitehall departments but between the devolved administrations on devolved and non-devolved issues.<sup>75</sup>

60. Gus O’Donnell agreed that the Cabinet Office’s role was a “developing process”.<sup>76</sup> He used the example of the establishment of the National Economic Council in 2008 to provide a new approach to co-ordinating economic policies across Government:

It was an issue where we were trying to bring in devolved authorities in an area where they may not have been involved previously. That worked quite well. We learned from each other the different approaches to those particular programmes for helping business during a recession.<sup>77</sup>

## Wales Office

61. The Wales Office is “responsible for maintaining the relationship between UK Government and the Welsh Assembly Government and addressing policy issues that have an implication for Wales”.<sup>78</sup> In its written evidence, the Wales Office stated that it did not “just play a reactive role, but [...] is a proactive negotiator, facilitator and broker”.<sup>79</sup> Witnesses welcomed this role, Carwyn Jones AM commenting that the “Wales Office is crucial in terms of its ability to talk to other Whitehall departments”.<sup>80</sup>

62. While recognising the role played by the Wales Office, witnesses agreed that this could not replace direct bilateral relations between the Welsh Assembly Government and Whitehall departments. Rhodri Morgan AM stated:

... you cannot say, ‘The Wales Office will do this all for you’, because otherwise the only awareness that Whitehall departments have of what is going on in Wales is the Wales Office’s awareness of it, and really you have to use the Wales Office as a channel, but you also have to have direct access to the Department for Transport or the Department for Environment, Food and Rural Affairs, or whatever it might be. You have to use both. You cannot have a monopoly on communications between us and Whitehall and Westminster being via the Wales Office, that will not work.<sup>81</sup>

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<sup>74</sup> Q 585

<sup>75</sup> Q 565

<sup>76</sup> Q 566

<sup>77</sup> Q 565

<sup>78</sup> Ev 129

<sup>79</sup> Ev 129

<sup>80</sup> Q 442

<sup>81</sup> Q 75

Carwyn Jones AM agreed, noting that “It is essential that we have direct contact [...] with Whitehall departments, but quite often the Wales Office adds that extra support to a point that we might make to a Whitehall department”.<sup>82</sup>

63. The Government of Wales Act 2006 gave the Wales Office and the Secretary of State for Wales a specific role in “piloting” Legislative Competence Orders through Parliament and in checking, through representation on the Ministerial Committee on Legislation, that any “outstanding issues with the Welsh Assembly Government regarding the Welsh content of Parliamentary Bills or draft Bills are resolved before introduction or publication”.<sup>83</sup> Carwyn Jones commented on its importance in this role:

The Wales Office is absolutely essential, given the current settlement. It is very difficult to see how Legislative Competence Orders could be progressed without the Wales Office being there to take the Legislative Competence Orders through Parliament, it is difficult to see what other mechanism might exist that would have the same kind of drive [...] so the situation we have at the moment where we have Legislative Competence Orders does very much require the existence of both the Wales Office and the position of Secretary of State for Wales in order to ensure that LCOs have a smooth and timely passage through Parliament.<sup>84</sup>

We agree, although the focus of the Wales Office should be to speed up the processes in Whitehall as Parliament has dealt expeditiously with each proposal presented to it.

64. Alan Trench questioned the influence the Wales Office could have, given the size of the Office in relation to Whitehall departments:

With the best will in the world a free-standing Wales Office is a small and not high-ranking department in Whitehall. It is therefore inevitable that this structure will lead to Welsh devolution remaining at best a secondary consideration in Whitehall.<sup>85</sup>

The Secretary of State for Wales disagreed, and said that:

The Wales Office is a midget in Whitehall terms but it is a pretty feisty, powerful midget in batting for Wales [...] we are always fighting Wales’ corner and that is true for all our officials.<sup>86</sup>

65. Sir Jon Shortridge, former Permanent Secretary of the Welsh Assembly Government stated that he had “always seen the Wales Office as having a temporary role”,<sup>87</sup> although this was not a view shared by the majority of our witnesses. He argued that while a strong Welsh presence had been important in the early years of the devolution settlement, it would not be the case in the future:

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<sup>82</sup> Q 452

<sup>83</sup> Ev 146

<sup>84</sup> Q 450

<sup>85</sup> Ev 127

<sup>86</sup> Qq 599- 600

<sup>87</sup> Ev 125

I do think that, as the settlement matures, the need for the Wales Office diminishes, with this one exception about Legislative Competence Orders where they have a big role. If the process around Legislative Competence Orders is maintained [...] then I can see that there is a role for the Wales Office around those; but then there may be a referendum in years to come and at that point if the Assembly were able to get full primary legislative powers, the Wales Office's role in relation to LCOs by definition would fall away.<sup>88</sup>

66. In describing his role, the Secretary of State explained that:

My primary duty is to support the Welsh Assembly Government in making sure that objectives which it sets and the Assembly wants to achieve are supported in Whitehall. That is my main responsibility in respect of the Welsh Assembly Government; it is not my job as Secretary of State to second guess the Welsh Assembly Government.<sup>89</sup>

However, Alan Trench identified the future danger of the politicisation of the role of the Secretary of State, and the Wales Office if there were governments of different political hues in Wales and Whitehall, and compared it to the current situation with the Scotland Office:

Since 2007, and particularly since 2008, the Scotland Office has become increasingly politically active and assertive, taking on more emphatically the role of the voice of the UK Government in Scotland. Its work has come to be seen as increasingly party-political, and therefore as involving opposition to the present Scottish Government [...] It is seen by the Scottish Government as being a political adversary, and so not only Scotland Office ministers but the officials working for them are trusted very much less [...] It would be seriously destabilising constitutionally, and cause serious damage to the working of devolution and so the delivery of public services, if the work of the Wales Office were to be compromised in a similar way.<sup>90</sup>

## A missing centre?

67. Alan Trench argued that there was “an absence of any ‘strong centre’ relating to devolution within UK Government”.<sup>91</sup> He described the current arrangements for the co-ordination of government business relating to devolution as a “fragmentation of responsibilities”<sup>92</sup> between the Ministry of Justice, the Cabinet Office and the Wales Office:

The lack of any one office within government with responsibility for devolution overall is, in my view, a serious deficiency in how the UK Government deals with devolution.<sup>93</sup>

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<sup>88</sup> Q 32

<sup>89</sup> Q 608

<sup>90</sup> Ev 127

<sup>91</sup> Ev 127

<sup>92</sup> Ev 127

<sup>93</sup> Ev 127

68. Dame Gillian Morgan, Permanent Secretary to the Welsh Assembly Government, highlighted the three types of relationships that the Welsh Assembly Government had with Whitehall due to this fragmentation:

There is a big constitutional issue which is where does devolution go, which is the type of debate we should have with the Ministry of Justice. There is the nitty-gritty debate we have on a day-to-day basis with the Wales Office and individual departments and then there is a strategic co-ordination role sitting in the middle which is no different really from devolution in pulling together what happens between DEFRA and DECC in terms of the different perspectives around energy policy or animals.<sup>94</sup>

69. The Secretary of State for Wales defended the current settlement, stating that the different roles of the departments worked well together with the “MoJ focusing on the strategy of devolution and the Cabinet Office focusing on the co-ordination, almost day-to-day and certainly week-to-week, of policy development”.<sup>95</sup>

70. Many witnesses argued that a lack of a single office prevented the UK from taking a co-ordinated view of devolution, with Rhodri Morgan AM commenting that there was a danger of Wales becoming the “hypotenuse in a Bermuda Triangle” between the different departments in Whitehall.<sup>96</sup> The Welsh Assembly Government stated that:

... somewhere in between general constitutional policy and inter-governmental relations there should be a focus within Government for its policy on devolution. The means of ensuring that [...] issues are considered in the round is not transparent.<sup>97</sup>

71. Dr Jim Gallagher admitted that there were alternative ways of organising devolution across government “which would be potentially at least as good, or even potentially perhaps better, than what we have got”.<sup>98</sup>

72. Sir Jon Shortridge stated that he felt that the focus of devolution within the UK Government should sit in the Cabinet Office.<sup>99</sup> Alan Trench also considered that the Cabinet Office could be the strong centre of devolution in government. Although he had some initial reservations about the Cabinet Office as a policy centre, rather than its current role as process management and co-ordination, he saw the possibility of a devolution secretariat, similar to the current European secretariat.<sup>100</sup>

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<sup>94</sup> Q 511

<sup>95</sup> Q 585

<sup>96</sup> Q 80

<sup>97</sup> Ev 146

<sup>98</sup> Q 117

<sup>99</sup> Q 39

<sup>100</sup> Q 358

### *Single Constitutional Minister*

73. In 2003, in its report *Devolution: Inter-Institutional Relations in the United Kingdom*, the Lords Constitutional Committee recommended that a single ‘department of devolution,’ or ‘department of the nations and regions’ be established.<sup>101</sup> This would combine the Scotland and Wales Offices and relevant parts of the Ministry of Justice and Cabinet Office. Alan Trench felt that this would allow a “broader, more synoptic view of devolution as a whole to be taken at UK level, while maintaining (and even developing) the expertise on the specific settlements that exists within the Wales and Scotland Offices by incorporating them within the new department”.<sup>102</sup> He also believed that as a department with a larger remit “it would be more likely to carry the necessary weight within government and around the UK Cabinet table”.<sup>103</sup>

74. Carwyn Jones AM recognised that this development was a possibility as the “role of the Wales Office would change significantly if the Assembly had primary powers because, of course, there would then be no need to take forward the Legislative Competence Order process, and much of the work that the Wales Office does now would not need to be done”.<sup>104</sup>

75. The Secretary of State for Wales commented:

There would still be a need for a Wales Office, whether it is sited within the MoJ or sited elsewhere. There will always be a Wales Office, even if there were to be an activation of the Part 4 powers in the 2006 Act after a successful referendum.<sup>105</sup>

Sir Jon Shortridge recognised the need to ensure that there was a minister to represent Wales in addition to the devolved administrations “so that their voice is heard within government”.<sup>106</sup> Carwyn Jones AM also commented on the importance of ensuring that Wales’s interests were represented in Whitehall “when it came to the financial settlement and in terms potentially of non-devolved areas”.<sup>107</sup>

**76. In the period since the devolution settlements of 1999, departmental responsibility for devolution strategy and policy has moved around between different departments. It has involved the Cabinet Office, 10 Downing Street, the Ministry of Justice, the former Department of Constitutional Affairs, the former Office of the Deputy Prime Minister, the Wales Office and the Ministry of Justice. This development has been historically contingent and has taken place in a haphazard fashion.**

**77. There is an absence of a strong centre in relation to devolution within the UK Government. Currently the co-ordination of government business for Wales is shared**

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<sup>101</sup> Lords Constitution Committee, Second Report of Session 2002-03, *Devolution: Inter-Institutional Relations in the United Kingdom*, HL 28, para 68

<sup>102</sup> Ev 127

<sup>103</sup> Ev 127

<sup>104</sup> Q 493

<sup>105</sup> Q 622

<sup>106</sup> Q 51

<sup>107</sup> Q 493

between three departments—the Ministry of Justice, the Cabinet Office and the Wales Office. The lack of a single office prevents the UK from taking a co-ordinated view of devolution. An effective hub is needed in central government for it to manage effectively the devolution settlement. We considered the merits of locating the central responsibility for devolution within the Ministry of Justice because of the constitutional role of that department, but concluded that this was too removed from the centre for day-to-day co-ordination, and we were also unconvinced that the department has a strong understanding of the devolution settlement embedded in its ethos. We therefore believe that the role belongs to the Cabinet Office and we recommend that this should be recognised and developed and appropriate resources allocated for this purpose.

78. We recognise that there are arguments for a single Department of the Nations and Regions although we make no specific recommendation on this. As the devolution settlement matures, the role of the Secretary of State for Wales may decrease. This would certainly be the case if the outcome of a referendum on primary legislative powers for the National Assembly for Wales proved in favour of such powers. The Government of Wales Act 2006 gave the Secretary of State for Wales a role in legislating for Wales and any proposals under the current settlement would need to take this into consideration. However, Wales would still need a strong voice in Whitehall to represent its interests across a range of policy areas and any new arrangements should ensure that this includes Cabinet-level representation.

79. An implication of the establishment of a single Department of the Nations and Regions would be that the current three national scrutiny committees would be reduced to one. However we feel that arrangements will be required for the Government to account to Parliament in respect of matters affecting Wales, Scotland and Northern Ireland.

## 4 Awareness of the devolution settlement in the Welsh Assembly Government and Whitehall

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### Current awareness of the devolution settlement

80. Many of our witnesses stressed the need to ensure that ministers and officials in both the UK and Welsh Assembly Governments were fully aware of the devolution settlement, and understood how to make it work effectively. The First Minister, Carwyn Jones AM, summarised the ideal relationship: “My intention, of course, is to work as closely as possible with the Wales Office and, of course, to work as closely as possible with parliamentarians and, indeed, ministers here in London. What is important is that we ensure firstly that we receive information on policy development in sufficient time, policy development that will affect Wales”.<sup>108</sup>

81. Some witnesses were sceptical as to how far these aims were being achieved. For Alan Trench of the Constitution Unit, the processes of contact and consultation between the Welsh Assembly Government and Whitehall:

... remain reliant on a sequence of *ad hoc* interactions, usually driven by Whitehall policy priorities, rather than those in Wales (though this has changed somewhat with the existence of Legislative Competence Orders). They are largely at relatively low levels and remain largely informal ...<sup>109</sup>

Sir Jon Shortridge, until 2008 the Permanent Secretary to the Welsh Assembly Government, complained about a “lack of strong leadership” in Whitehall on devolution matters.<sup>110</sup> Whether this observation was a function of inadequate advice or even absence of advice at the time from the Permanent Secretary himself is open to question.

82. Andrew Davies AM, with long service as an Assembly Minister, was in contrast more impressed with the way devolution had been established:

Certainly my experience overall was very positive. When you consider that devolution was the biggest change in governance in the UK since—taking a benchmark—the introduction of universal suffrage or any other change, the scale of change was truly huge. The way in which it has been managed I think was testimony to the commitment of both the UK Government, Parliament and the Assembly and civil servants in making it work. [...] given the scale of change, I think the whole process has been managed remarkably smoothly.<sup>111</sup>

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<sup>108</sup> Q 443

<sup>109</sup> Ev 127

<sup>110</sup> Ev 125

<sup>111</sup> Q 176

Mr Davies, however, also gave us a persuasive analysis of the shortcomings of both ministers and civil servants in delivery of the devolution settlement:

The preoccupation of politicians and civil servants is largely policy-making and they think that policy-making and legislation is the hardest part. Actually it is not. It is leading, managing and delivering services [...] Because of the narrow preoccupation on policy the wider management of relationships is not seen as a priority. [...] There is an obsession on process and compliance with process ...<sup>112</sup>

83. We heard a range of evidence about the awareness of devolution among ministers and civil servants both in the Welsh Assembly Government and in Whitehall. We also heard about the effect of this awareness—and in some cases lack of awareness—on the performance of the bodies involved—at both ends of the M4. A number of problems were indeed common to both Welsh Assembly Government and some departments in Whitehall.

84. According to Welsh Women’s Aid (WWA):

Devolution is a complex area which is not fully understood by Governments, NGOs and other agencies. [...] WWA has experienced difficulties regarding engagement, including not being invited to key meetings which affect our member groups and their service users, as well as Welsh citizens not being consulted on policies which will affect them.<sup>113</sup>

85. The Wales Council for Voluntary Action had a similar view, urging that responsibilities should be made much clearer:

Communication between the WAG and Whitehall needs to be improved to ensure that there is clarity over who is responsible for what and exactly how policies will affect Wales. Earlier communication will also allow for any unnecessary confusions or problems to be mitigated including any potential cross-border issues. UK Government consultation documents should clearly state whether they apply to Wales and must take account of WAG policies in related areas.<sup>114</sup>

86. Welsh Women’s Aid also expressed concern about the handling of issues that are part-devolved and part non-devolved:

WWA regularly experiences difficulties resulting from a lack of understanding of devolution, as some policy areas relating to violence against women (VAW) are devolved, some are non-devolved, and some overlap. [...] In some areas relating to VAW, the overlap between Wales and Whitehall and lack of clarity regarding responsibility between the two Governments has sometimes led to a negative impact upon some of our most disadvantaged services users.<sup>115</sup>

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<sup>112</sup> Q 197

<sup>113</sup> Ev 158

<sup>114</sup> Ev 140

<sup>115</sup> Ev 158

87. **The Government, in conjunction with the Welsh Assembly Government, needs to make consultation exercises more sensitive to the facts of devolution and the limited resources of key organisations. It should, for instance, not be the responsibility of Welsh interest groups—some of them small voluntary bodies—to work out for themselves whether a policy proposal in a green paper relates to reserved or devolved matters.**

88. However no improvements in process will make much difference unless the wider environment is right. Rhodri Morgan AM told us that he believed that “a culture change at ministerial and civil service level” was needed to make things work better between Cardiff and Whitehall.<sup>116</sup> This view was echoed by the First Minister, Carwyn Jones AM, who identified a significant difference between the level of awareness of ministers and officials in both the Assembly Government and Whitehall:

My experience as a minister has also been that the ministers have been far more aware of the nature of the devolution settlement in Wales and what that entails than officials sometimes are, and I have had experience where I have discussed many matters with ministerial colleagues and they have understood the situation, whereas it is not always the case with officials.<sup>117</sup>

In addition, Rhodri Morgan AM considered that there were significant differences between the ministerial and Civil Service perspectives.<sup>118</sup>

89. Andrew Davies AM was also critical of what he considered to be the lack of a “strategic view” from the Civil Service, right across the board:

The Civil Service I think generally both at Whitehall and in Wales is not very good at long-term planning; is not strategic in its thinking. It tends to be short-term, and that is both in policymaking and in terms of financial planning. In developing a longer term strategy at an official and political level in terms of relationships, say, between Wales and Whitehall and Westminster and Wales and other devolved administrations, we should have paused and reflected but I think at the time, as I said, the major preoccupation was establishing the legitimacy of the institution.<sup>119</sup>

90. Dr Jim Gallagher of the Ministry of Justice suggested that, in the final analysis, the level of commitment to increasing awareness of devolution in Whitehall and in the Welsh Assembly Government depended on the attitude of Ministers and the political environment more generally. We do not agree. **Civil servants cannot absolve themselves of responsibility for awareness of, and sensitivity to, devolution issues in both policy-making and service delivery. Whilst we fully acknowledge the principle of ministerial responsibility we must observe that, practically speaking, Ministers cannot be expected to monitor everything their departments do. We also note the value of strong links between Assembly Ministers and Regional Ministers, who are often closer to local cross-border issues.** We return to this issue below.

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<sup>116</sup> Q 62

<sup>117</sup> Q 449

<sup>118</sup> Q 57

<sup>119</sup> Q 183

## Whitehall

91. Some of our witnesses were more specifically critical of the level of Whitehall's awareness of the Welsh devolution settlement. Sir Jon Shortridge told us that “awareness of the Welsh devolution settlement in Whitehall remains poor”.<sup>120</sup> It is not clear whether that was self-criticism of his own apparent passive role in awareness raising. He complained of problems he had encountered in the management of routine business between Whitehall departments and the Assembly Government, with Whitehall more often to blame but did not seem to recognise that he might have been part of the problem:

The sorts of issues which emerged early, and I think continue to emerge, are press releases being issued from Whitehall departments which are not making it clear that the policy they are referring to applies to England only; confused policy documents—to take a recent example—a fair chunk of [the policy document] *Building Britain's Future* is about building England's future. If you were not actually an insider and thinking about devolution and you were just an ordinary member of the public, would you necessarily realise that?<sup>121</sup>

92. The written evidence we received from the Welsh Assembly Government distinguished the different types of risk which are, in their view, present when Whitehall departments are not alert to the needs of Wales and the details of the devolution settlement. Among these were:

- failing to recognise where a subject is ostensibly non-devolved (such as social security or defence) but impacts on devolved subjects (for example skills, economic development, health, education);
- broad brush assumptions that where substantial parts of a subject are non-devolved (eg. energy, employment law), all of it is;
- assuming that what goes for Scotland goes for Wales;
- treating the Welsh Assembly Government like another government department; and
- failing to recognise geographic boundaries: establishing, in respect of non-devolved functions, new administrative structures which do not take account of the existence of Wales as a territory with its own distinct administrative identity.<sup>122</sup>

93. The Wales Office accepted that Whitehall departments could vary in the quality of their handling of questions which touched on devolution: “the level of engagement can vary from department to department and [...] more work can be done in some areas to ensure that devolution is considered at the inception of policy-making rather than later on in the process”.<sup>123</sup>

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<sup>120</sup> Ev 125

<sup>121</sup> Q 9

<sup>122</sup> Ev 146

<sup>123</sup> Ev 129

94. The Cabinet Secretary and Head of the Home Civil Service, Sir Gus O'Donnell, admitted that he and his colleagues in Whitehall had to “up our game” on devolution. Speaking of departmental performance he said:

... I think it is patchy. At its best it is very good. There is a group of people that were around when the first settlement was sorted out and who have seen the Government of Wales Act and they are involved in issues where they have to think about Wales all the time. That is a group which probably gets it. What I worry about is those people where it is not part of their everyday work and then suddenly an issue comes up where it is really important to take the devolved arrangements into account and they do not naturally get it right first time. These are sins of forgetfulness really and that is the part where I think we need to up our game.<sup>124</sup>

It might sometimes be a matter of “forgetfulness” as suggested by Sir Gus, but we could reasonably argue that this is a structural Whitehall deficiency or even active obstruction.

95. Sir Gus gave as an example deficiencies in Whitehall’s record on Welsh language issues. “I know when it came to Welsh language issues this Committee played a particularly important role in sorting out some tricky issues. That is an area where you did very well and where we need to do better, to be frank, in terms of handling those issues”.<sup>125</sup> For instance, the Government gave assurances that Whitehall departments would follow the requirements of the Welsh Language Act 1993 and develop Welsh Language Schemes. Currently only a small number have done so. **We recommend that the Cabinet Office oversees the development of Welsh Language Schemes for all government departments.**

96. Some departments were, on the other hand, considered by our witnesses to be doing a generally effective job in dealing with devolution. The Secretary of State for Wales said that “Some departments have set very high standards—I would say the Department for Environment, Food and Rural Affairs [...] would probably be at the top of my tree. The Department for Children, Schools and Families is a good performer”.<sup>126</sup> But for the First Minister, the quality of Whitehall’s knowledge of devolution depended on individual awareness rather than the extent to which departments were experienced in dealing with devolved issues:

It is also fair to point out that there is a good understanding of devolution in some departments that primarily deal with non-devolved areas, and the Home Office is an example in that regard. So it is not a question of does the Department deal regularly with devolved administrations or not and does that affect their understanding of the Welsh devolution settlement, it does not work that way. Much depends on the interpretation quite often of individual officials in terms of what is devolved and what is not.<sup>127</sup>

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<sup>124</sup> Q 556

<sup>125</sup> Q 552

<sup>126</sup> Qq 588-589

<sup>127</sup> Q 492

97. These problems have arisen in spite of the development of extensive machinery for consultation and co-ordination. The Welsh Assembly Government was critical of Whitehall's record on engagement:

There are over 100 forums where Welsh Assembly Government and Whitehall officials meet. Despite this and despite 10 years of devolution, there are still many instances of lack of timely consultation on major policy announcements which have implications for Welsh Assembly Government policies and programmes or which leave unclear for audiences what the position is in Wales.<sup>128</sup>

98. Some of our witnesses also testified to failures by Whitehall departments to involve important external interest groups in Wales. The Welsh Local Government Association for example criticised communication with Welsh local authorities:

Some difficulties can occur when dealing with a non-devolved policy area that nonetheless depends on devolved areas of responsibility for delivery. An example of this would be the development of policy relating to asylum seekers and immigration or migration. Often, policies are developed at Whitehall but will require the active involvement of local authorities in its implementation.<sup>129</sup>

99. Rhodri Morgan AM said it could be difficult for the Assembly Government to trace the source of problems in UK departments and put those problems right. A major reason seemed to be the size and complexity of many departments: "If there was a negative reaction in Whitehall to something that we were doing, or wanted to do, it was quite difficult for us to guess where the problem lay",<sup>130</sup> he told us. But Mr Morgan went so far as to express concern that in some cases both ministers and officials in London had actively obstructed the development of devolution in Wales:

Lack of awareness is something you can deal with; that is simply a matter of filling in the information gap in Whitehall or Westminster. It is negative awareness that you do not want; in other words, where somebody is watching you like a hawk to try and prevent a development happening that they see as inconvenient for Whitehall or Westminster. Whether that is civil servants doing it off their own bat, or whether it is civil servants doing it with ministerial authority, or whether it is ministers actually saying, 'They have had their Assembly now; that is their lot, they are not having anything else'.<sup>131</sup>

100. Sir Jon Shortridge, speaking of his time as Permanent Secretary to the Welsh Assembly Government up to 2008, suggested that there was a lack of interest in devolution at the highest official level; he could "recall very few occasions when the issue of devolution was discussed at plenary meetings of Permanent Secretaries; perhaps two or three occasions either on a Wednesday meeting or one of our away-days at Sunningdale".<sup>132</sup> Whether this was because Permanent Secretaries from the devolved administrations failed

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<sup>128</sup> Ev 146

<sup>129</sup> Ev 156

<sup>130</sup> Q 60

<sup>131</sup> Q 68

<sup>132</sup> Q 5

to raise devolution at such gatherings is open to question. The culture of the Civil Service, which can mean frequent job moves within or even between departments, was also seen as a potential weakness. Andrew Davies AM said:

The organisational memory within the Civil Service can often be lost by people moving on. That is one of the paradoxes I think of the Civil Service—that you have a permanent Civil Service but, nevertheless, its retention of organisational memory, its ability to learn and innovate I think is often not good.<sup>133</sup>

101. Later in this chapter, we propose some solutions to the problems raised by our witnesses.

### ***The Welsh Assembly Government***

102. Not all the problems, however, can be laid at the doors of Whitehall departments. The civil servants of the Welsh Assembly Government also have had to learn new ways of doing things in the last ten years. Sir Jon Shortridge was prepared to admit that, with the benefit of hindsight, he would have done things differently: “I think that I would perhaps have made myself more vocal and sought to get [...] issues discussed more regularly at the Permanent Secretaries’ group”.<sup>134</sup>

103. Alan Trench described the Welsh Assembly Government as a growing and increasingly confident body. The Civil Service in Wales has for instance doubled in size since 1999, and taken on significantly broader responsibilities:

That is not a great wonder given the dramatic change in its role and its organisation and, from what I have seen also, its self-confidence since 1999. [The Welsh Assembly Government] has moved from being essentially a transmission belt for initiatives and policies largely decided in London to something that is implementing, developing different policies, having had policy development capacity as a result, implementing those policies as well as simply delivering a wide range of public services ...<sup>135</sup>

104. But according to Andrew Davies AM this process of development has brought its own problems in respect of liaison with Whitehall: “Very little policy-making went on in the old Welsh Office. Clearly, the big challenge for the Assembly in its first term and a bit was making policy; so it is almost inevitable I think, as the institution grew, new people came in who had not been civil servants and the emphasis was making policy in Wales; maybe those links with Whitehall were attenuated”.<sup>136</sup>

105. Capacity constraints can also cause problems with Cardiff’s ability to develop policy. Dame Gillian Morgan, the present Permanent Secretary to the Welsh Assembly Government, noted the imbalance between the number of staff available to the Assembly Government and those available to Whitehall departments:

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<sup>133</sup> Q 178

<sup>134</sup> Q 13

<sup>135</sup> Q 370

<sup>136</sup> Q 179

... for the whole of the policies that we do around health effectively we have 23 senior civil servants who do the policy work, they manage the implementation, they follow through the performance. The Department of Health has 260 people carrying out relatively similar work. So we have not a capability issue but a capacity issue in the sheer numbers and the sheer seniority of people that we can feed into some of the programmes.<sup>137</sup>

106. Perhaps partly because of the constraints of time and resources, civil servants in Cardiff may sometimes neglect the rest of Wales, according to some of our evidence. Andrew Davies AM voiced concern that there was “a bit of a bunker mentality at Cathays Park”, because “for me the jury is still out in terms of the wider engagement of civil servants with wider civil society in Wales. I do feel that civil servants need to get out more and engage more fully, whether it is with local government, the voluntary sector or others”.<sup>138</sup> Carwyn Jones AM also urged the Civil Service in Wales not to “become insular in its thinking. It is absolutely essential that we have secondments, not just to Whitehall departments and vice versa but to local government and public bodies and, indeed, to private organisations as well”.<sup>139</sup>

107. One potential pressure on the official machine in Cardiff results from the logistics of the Westminster and Whitehall legislative process. Before the changes introduced by the Government of Wales Act 2006, the Assembly Government would be part of the process of discussion in preparing the Queen’s Speech. As Carwyn Jones AM told us, “There was a time when we would have been, as it were, via the Wales Office, bidding for space in the Government’s legislative programme”.<sup>140</sup> Now, Mr Jones said, the Welsh Assembly Government does not get a preview of the Queen’s Speech. He noted what was in effect a constitutional shift:

... the Queen’s Speech is a matter for the UK Government. Where policies have been worked on so there is a White Paper clearly we would have an input at that stage, or if there is a Green Paper, so we have an idea of what is proposed in terms of policy, but the Government announces the legislative programme of course via Her Majesty, and what we will do is see what the Government programme is and then obviously see if there is any application in terms of legislation, in the same way as our legislative programme is announced in July and that announcement of course is made to the Assembly itself.<sup>141</sup>

108. We were therefore pleased to hear from the Permanent Secretary to the Welsh Assembly Government that part of the change programme is aimed at improving legislative skills, including flexible working to “make available teams with a set of skills around legislation to another department when the LCO moves over there”.<sup>142</sup> Dame

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<sup>137</sup> Q 497

<sup>138</sup> Q 209

<sup>139</sup> Q 493

<sup>140</sup> Q 464

<sup>141</sup> Q 463

<sup>142</sup> Q 497

Gillian also told us how she was working to correct another perceived failing of the Civil Service, by improving the quality and reach of strategic thinking:

In terms of looking forward, strategic planning and understanding the five-year dimension, because that is one of the opportunities the Civil Service can bring, we have actually brought in a lot more over the last 18 months economic modelling, forecasting and testing out scenarios as part of the way that we work as a senior team at director general and at director level. Every couple of months we have a whole day where we take a theme and just worry it through in terms of what it will mean in ten years for Wales, to check that what we think about this year is actually robust in getting us to where we want to be in the longer term.<sup>143</sup>

109. Despite their modest numbers the quality of civil servants in Wales was said by some of our witnesses to be good. The First Minister noted that:

The one thing I have noticed over the past ten years is that there are a number of very talented young civil servants now who are working for the Welsh Assembly Government and they are people who would not have gone to the old Wales Office because it did not do very much as far as they were concerned; there was not the opportunity for policy development or the opportunity for them to develop their talents ...<sup>144</sup>

110. It was also seen as important to reinforce Cardiff's links with Whitehall and other UK administrations. One key to this is a self-confident pride in the good work going on in Wales, a belief that the Assembly Government can play a consistently leading role in the United Kingdom. As Dame Gillian put it: "What we have tried to do over the last year is be much more assertive about what we do well, inviting people down, sending material on things when we think we have leading edge stuff, of which there is a lot, and trying to generate a reputation in Whitehall because we do things well not because we just whinge when people forget about us".<sup>145</sup>

111. We welcome Dame Gillian's approach, and we come back to these problems, and offer some solutions to the problems raised by our witnesses, below.

## Raising awareness of the devolution settlement

112. Most witnesses agreed on the need to raise awareness of the devolution settlement in Whitehall. Sir Jon Shortridge commented that in the immediate aftermath of the devolution settlement and the establishment of the National Assembly in 1999, a "serious attempt" was made to ensure that Whitehall departments understood the nature of the settlement and the implications for the conduct of government business. However, he went on to say that "following this initial burst of activity, the level of knowledge and understanding diminished rather than grew, and the Civil Service as a whole failed to keep pace with the rapid evolution of the Welsh settlement".<sup>146</sup> However, there appear to be

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<sup>143</sup> Q 496

<sup>144</sup> Q 493

<sup>145</sup> Q 502

<sup>146</sup> Ev 125

some signs of renewal recently. Dame Gillian Morgan reported that there had been a “sea-change” by the leadership of the Civil Service to improve awareness of devolution in Wales. This was being led by Sir Gus O’Donnell, who had provided leadership “in terms of thinking about devolution and keeping devolution on the agenda”.<sup>147</sup> The current situation is one of improvement and engagement, but this needs to be embedded throughout the Civil Service both in Whitehall and in the Welsh Assembly Government. Continued improvement should not be reliant only on individuals.

### **Training programmes**

113. The Ministry of Justice jointly leads on devolution awareness-raising with the Cabinet Office. These include modules run through the National School of Government, the development of e-learning and awareness events.<sup>148</sup> Sir Gus O’Donnell spoke of trying to improve knowledge “at the right stages”:

We have now [...] got something called Base Camp where all SCSs [Senior Civil Servants] when they become members of the Senior Civil Service go off on a two-day course. Most recently Sir John Elvidge [Permanent Secretary to the Scottish Executive] was the key Permanent Secretary delivering that and I went to speak to each tranche. One of the things we emphasise is the need to understand the nature of the devolution settlements and how they evolve ...<sup>149</sup>

114. The Wales Office outlined the “ongoing programme of meetings” on which they were leading within the civil service to promote awareness of the devolution settlement, in partnership with the Welsh Assembly Government. In addition:

Building on these meetings the Wales Office, again in partnership with the Welsh Assembly Government, has presented seminars to staff in Whitehall departments promoting devolution awareness and providing advice on how to ensure that work respects the devolution settlement. Two events have been held so far, at the Department for Culture, Media and Sport and the Department of Energy and Climate Change. These events have proved successful with a good turnout and positive feedback from attendees.<sup>150</sup>

Dr Jim Gallagher, Director General of Devolution in the Ministry of Justice, compared the constant effort to improve knowledge to “painting the Forth Road Bridge”.<sup>151</sup>

115. Mr Andrew Felton, Head of Constitutional Affairs and External Liaison Team at the Welsh Assembly Government outlined the importance of hosting officials from Whitehall in Cardiff and Welsh Assembly Government offices in Wales for them “to sample and see devolution in action”.<sup>152</sup>

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<sup>147</sup> Q 503

<sup>148</sup> Ev 129

<sup>149</sup> Q 560

<sup>150</sup> Ev 129

<sup>151</sup> Q 114

<sup>152</sup> Q 517

Recently we had devolution strategy officials from the Ministry of Justice come down partly for a day of strategic thinking and how we can move forward but also to come and see First Minister's questions [...] Similarly, next week we have the devolution strategy people from BIS coming down and they will hear the Assembly Plenary debate as well as having some strategic review meetings about the relationship going forward, so we have done quite a lot in the last six months.<sup>153</sup>

116. Sir Gus O'Donnell outlined the efforts that were being made with the Permanent Secretaries Group to improve their knowledge. He had held two discussions on the issues with all Permanent Secretaries in recent months and a Permanent Secretaries Group meeting had been held in Cardiff "to actually get the people at the top involved".<sup>154</sup>

117. Other witnesses spoke, for example, of the need to "get the particular features of the Welsh settlement embedded as far as we can in the Whitehall mind-set so at least everybody has a general alertness and understanding".<sup>155</sup> Sir Gus O'Donnell agreed but also argued that it was necessary for the message to filter from the top down. He contended that "if the leaders are not giving this consistent message it will not happen" but recognised it was "necessary but certainly not sufficient" for the managers at permanent secretary level to understand it.<sup>156</sup>

### **Departmental devolution experts**

118. Sir Jon Shortridge advanced the case for ensuring that awareness of the devolution settlement was raised and performance improved by "every Department to have someone who would as part of his/her responsibilities be their expert on all Welsh (and probably other) devolution matters".<sup>157</sup> He advocated:

... someone with sufficient seniority in the organisation or the department who would, as part of their responsibilities, be expected and required to have an up-to-date understanding of the devolution settlement in Wales, the political issues, the substantive issues in Wales, particularly those related to that department's responsibilities, so they would know what the department needs to know ...<sup>158</sup>

119. Sir Emyr Jones Parry, Chairman of the All Wales Convention, said that:

If I take the European Union, for example, every government department used to have an EU department and then over time they said, 'Well why are you introducing this extra level, what we ought to have is mainstream EU knowledge into all bits of a department and then you do not need that department and everybody should be aware of this dimension.' You cannot make everybody aware of all dimensions, but

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<sup>153</sup> Q 517

<sup>154</sup> Q 560

<sup>155</sup> Q 517

<sup>156</sup> Q 563

<sup>157</sup> Ev 125

<sup>158</sup> Q 17

the fallback ought to be that every department ought to have somebody who is alive to the interests of devolution and can if necessary say, ‘Hang on a minute.’<sup>159</sup>

120. Under the arrangements envisaged by Sir Jon Shortridge:

... when a desk officer suddenly discovered that he/she had to deal with a Welsh legislative or policy issue he/she would immediately have someone to turn to for advice. It would be essential for these Departmental ‘experts’ to spend some time in Wales on a regular basis to build up their knowledge and to establish contacts.<sup>160</sup>

Dr Jim Gallagher Director General of Devolution at the Ministry of Justice admitted that “we have found that an obvious indicator of better performance is a senior champion inside the department for the operation of devolution, which makes sense. All departments have some institutional way of dealing with devolution: a senior champion seems to work best of all”.<sup>161</sup>

121. Alan Trench, however, raised questions about the effectiveness of official “champions” in departments where ministerial support and commitment may be lacking. He said:

In principle devolution experts exist. It is some time since I looked at this in any detail, but when I did in the early 2000s, about 2003-04, what I found was that every department had a departmental contact and, in principle, that person was the devolution expert; and in reality they received circulars and were supposed to pass them on to the relevant individuals; sometimes they did and sometimes they did not. The extent to which they were an engaged departmental devolution expert was very, very limited, with the exceptions I mentioned already of the Foreign Office, MoD and the Home Office.<sup>162</sup>

122. While many witnesses were in favour of devolution experts in relevant departments, they agreed that such a position should be the “fallback” position and should not take the place of general awareness of devolution with government departments. Sir Jon Shortridge himself clarified:

... it is not my intention or expectation that this expert will do all the work; the expert will be there to provide assurance that the person doing the work in the department concerned was doing it in an appropriate and properly informed manner.<sup>163</sup>

## Secondments

123. The Cabinet Secretary acknowledged the need to ensure that closer relationships and improved performance were reinforced and consolidated by permanent mechanisms. Both he and the Welsh Assembly Government Permanent Secretary agreed on the importance of secondments between Whitehall and the Welsh Assembly Government. Admitting that

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<sup>159</sup> Q 255

<sup>160</sup> Ev 125

<sup>161</sup> Q 136

<sup>162</sup> Q 361

<sup>163</sup> Q 25

neither administration had been as proactive as it could have been in the past, Dame Gillian Morgan stated that they were now looking to have a more systematic approach to secondments.<sup>164</sup>

124. Sir Jon Shortridge agreed on the valuable experience that secondments provided particularly as, after the initial transfer of staff from the Wales Office to the National Assembly for Wales took place in 1999, “civil servants in Cardiff do not have the same degree of experience of operating physically from Whitehall than happened in the old Welsh Office days”.<sup>165</sup> He commented that it was important to:

... maintain a sufficient critical mass of people working in Cardiff who have worked in Whitehall, understand Whitehall ways and have got good contacts built up in Whitehall in that way.<sup>166</sup>

125. The Wales Office has 56 staff.<sup>167</sup> Currently, a third of these are on secondment from the Welsh Assembly Government.<sup>168</sup> Individuals are also on secondments to the Cabinet Office and the Foreign and Commonwealth Office.<sup>169</sup> Dame Gillian Morgan identified that the Welsh Assembly Government was looking at “sending more secondments to departments like the Treasury”.<sup>170</sup>

126. Sir Gus O’Donnell expressed disappointment in the number of secondments that had currently taken place from Whitehall to Cathays Park and that:

I am certainly trying to encourage civil servants in Whitehall to get out and spend some time working in the Welsh Assembly Government because I think it is a really good development experience for them to learn about, particularly the joining up and the different relationships between the Welsh Assembly Government and the rest of the public sector in Wales.<sup>171</sup>

Andrew Davies AM commented that there was a reciprocal lack of interest in Wales in undertaking secondments to Whitehall. Sir Gus O’Donnell and Dame Gillian Morgan identified possible reasons for the small number of secondments undertaken such as the “basic economics of living in London and house prices. It is very expensive and I think that is a negative factor”.<sup>172</sup> It was also recognised that there had to be a benefit to a career and, as Alan Trench noted, “if you are going to make secondments attractive to individuals [it needs to be clear] what the gain to their personal career profile is going to be if they go and they spend six months, three years, or whatever it is in Whitehall”.<sup>173</sup>

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<sup>164</sup> Q 514

<sup>165</sup> Q 22

<sup>166</sup> Q 28

<sup>167</sup> Figure for actual staff 2008-09, Wales Office Annual Report 2009, June 2009

<sup>168</sup> Q 551

<sup>169</sup> Q 551-Q 503

<sup>170</sup> Q 514

<sup>171</sup> Q 551

<sup>172</sup> Q 563

<sup>173</sup> Q 364

127. Dame Gillian Morgan stated that the Welsh Assembly Government was also eager to make secondments attractive to Scotland, Northern Ireland, Brussels and the wider public sector: She told us that there was “significant interest from people in doing these sorts of secondments”:

We run for our own staff a couple of times a year not a taster but a market-place and at the last one I went to which had our Brussels people coming we had about 60 Welsh Assembly Government civil servants in the room who were being coached in how to apply. It is about that sort of attendance each time so there is significant interest from people in doing these sorts of secondments.<sup>174</sup>

### Current review

128. In late 2009, the Permanent Secretaries Management Group commissioned all departments to “examine rigorously their current systems and behaviours in relation to devolution”.<sup>175</sup> Sir Gus O’Donnell acknowledged that this was a self-assessment “and that is a strength and a weakness in that what you would ideally want is third party views on how well you think this is being done”.<sup>176</sup> When appearing before us, the Cabinet Secretary was not able to provide findings from the review as some departments had not met the end of January deadline. However, he sent an outline of the preliminary findings to us and confirmed that the key themes to emerge surrounded the issues of resources, knowledge, internal communications and training, and relationships with the Welsh Assembly Government.<sup>177</sup> Once the results of the review were known, remedial measures would be put in place to help the departments improve, if necessary. He stated:

That is the whole purpose of this. Can we identify from that failure what are the issues: is it quality of staff, is it training, is it induction, and then have an action plan to try and improve matters ...<sup>178</sup>

**129. We welcome the preliminary work of the review of departmental awareness of devolution. We expect its findings will be discussed by all Permanent Secretaries and looked at collectively and we expect to be informed of what actions are being taken to deal with any deficiencies. We urge both governments to ensure that the Welsh Assembly Government is fully involved in implementing actions arising from the current review of Whitehall’s awareness and performance on devolution.**

### Way forward for the Civil Service

**130. It is clear that awareness of the Welsh devolution settlement is not uniform across Whitehall. An attempt was made to educate Whitehall after the establishment of the National Assembly for Wales but after an initial burst of activity, there was no concerted effort to ensure that a satisfactory level of knowledge was maintained. We**

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<sup>174</sup> Q 516

<sup>175</sup> Ev 129

<sup>176</sup> Q 558

<sup>177</sup> Ev 164

<sup>178</sup> Q 559

welcome an acknowledgement of Whitehall's failings in this area and the importance of a concerted training programme. We recommend that devolution awareness should form a core part of the training for all senior civil servants.

131. We recommend that devolution experts, or 'senior champions' are established in relevant departments, and are expected to have an up-to-date understanding of the devolution settlement in Wales. Their role must be clearly defined and they must not be or become a substitute for ministerial support.

132. Secondments provide valuable knowledge and experience to individuals and to the institutions where they are placed. We recommend that a formal mechanism for secondments between Wales and Whitehall and other devolved administrations is established. We believe that it should be seen as a positive benefit to the development of a career in the Civil Service. However this should not detract from efforts to ensure that devolution awareness is mainstreamed throughout the Civil Service.

133. In this context, we would also welcome a more structured approach to secondments and exchanges between the House and the National Assembly. There are good examples of this in the past, from which we as a Committee have benefited. However, such arrangements have been *ad hoc*. We recommend that the House of Commons authorities seek to establish a programme of secondments and exchanges with the National Assembly for Wales and to make adequate funds available for this to have effect.

134. It is important to avoid failures of organisational memory which are always a danger in a service where staff move on frequently from job to job. This problem was highlighted in the Communities and Local Government Committee's inquiry into the 2009 Departmental Annual Report, which suggests that on average, an official in the department can expect to have been in his or her particular post for just 0.8 years (about 9 months). We believe that this is an example of poor management of service delivery which is wide-spread in Whitehall. The culture needs to change.

135. The Welsh Assembly Government must strive to establish good working relationships with Whitehall and wider civil society in Wales. We have heard criticisms that the Welsh Assembly Government has been inward looking, which is perhaps understandable in the first few years of an institution when it is trying to develop its own policies. However, it must now have the confidence to interact with Whitehall and to highlight areas of good practice with a belief that it can play a consistently leading role in the United Kingdom.

136. The Welsh Assembly Government must develop its long-term strategic thinking in policymaking and financial planning. We endorse the views of Andrew Davies AM that leading, managing and delivering services and the wider management of relationships are crucial rather than seeing policy-making and legislation as the hardest part of the role.

137. Although ministers in both London and Cardiff take the leading roles on devolution, a key official player in making the devolution settlement work is, and will continue to be, the Cabinet Secretary and Head of the Home Civil Service. We welcome Sir Gus O'Donnell's leadership in this matter and his clear commitment to making

devolution work, as demonstrated for example by the review of departmental arrangements he has put in hand. But more is needed to ensure that continuity is not lost, and we therefore recommend that the Cabinet Secretary should give evidence to this Committee annually, perhaps at the same time as the Committee's autumn evidence session on the Wales Office annual report. This would be an opportunity for the Cabinet Secretary for example to set out what progress has been made in raising awareness of devolution across Whitehall and in the Welsh Assembly Government and to answer questions on the development of the Welsh devolution settlement. We also believe that the Permanent Secretary at the Welsh Assembly Government needs to take a proactive role in explaining developments in Wales to her colleagues across Whitehall. We commend the way that Dame Gillian Morgan has described her role and we recommend that she too should give evidence to the Committee annually in addition to the regular evidence from the First Minister which has become an established part of the Committee's work.

### Civil Service Code

138. The Civil Service Code governs the behaviour of civil servants in Wales, England and Scotland.<sup>179</sup> The latest version of the Code was published in 2006. It sets out the duties and responsibilities of all civil servants, whatever their jobs. These are focused on four "core values": integrity, honesty, objectivity and impartiality. Those working in the Scottish Executive and the Welsh Assembly Government and their agencies have their own versions of the Code, which emphasise the accountability of these civil servants to their own ministers rather than ministers of the central UK Government, but are otherwise similar.

139. In its 2009 Report *Devolution: A Decade On*, the Justice Select Committee concluded that a common Civil Service Code should continue to be observed by all the administrations of Great Britain. It further recommended that "the code should be one of the means by which the details and implications of the devolution settlements are experienced and promulgated, together with the fundamental principles of public service which are a shared inheritance of the whole of the United Kingdom".<sup>180</sup>

140. Since the Government's response to the Justice Select Committee's Report did not address this point,<sup>181</sup> we asked our witnesses whether awareness of the devolution settlements could form part of a revised Civil Service Code in future. Dame Gillian Morgan, Permanent Secretary to the Welsh Assembly Government, noted that supplementary guidance had recently been issued to all civil servants in relation to their duties under the Freedom of Information Act. She thought that universal guidance on devolution should also be promulgated.<sup>182</sup>

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<sup>179</sup> There is a unified civil service in Wales, Scotland and England. Northern Ireland has a separate service and issues its own civil service code in similar terms.

<sup>180</sup> Justice Committee, Fifth Report of Session 2008-09, *Devolution: A Decade On*, HC 529-I, para 87

<sup>181</sup> Ministry of Justice, *Devolution: A Decade On: Government Response*, Cm. 7687, July 2009

<sup>182</sup> Q 517

141. Other evidence cautioned that, whilst an understanding of devolution was important for civil servants, any guidance should be interpreted flexibly to suit individual circumstances. The Farmers' Union of Wales stated that it "would not wish to see the adoption of a code that undermines current engagement between Welsh departments and stakeholders, through the introduction of bureaucracy and protocols [...] We would therefore advocate a code that allows devolved departments to operate flexibly and maintain and improve relationships, while simultaneously ensuring that devolution is properly recognised by all departments".<sup>183</sup>

142. Sir Gus O'Donnell, Cabinet Secretary and Head of the Home Civil Service, agreed that the nature of the devolution settlement could affect the job of civil servants wherever they worked, whether in a department, a devolved administration or the agencies of either central or devolved Governments, and that guidance should be issued accordingly:

... the question really is how much of that goes in the Code and how much of it goes in other documents. I am anxious not to change the Code every five minutes but, you are right, it is an important matter. When we next come to change it I think we should look at this and come to a decision about that. For me the important point is that people read this and actually act on it ...<sup>184</sup>

**143. Civil servants throughout the United Kingdom need to be aware of the implications of devolution for their work which must be seen in the context of its relationship with outside bodies more generally. This principle should be enshrined in core guidance issued to the Civil Service. We welcome the Cabinet Secretary's agreement to consider including an awareness of devolution as part of the Civil Service Code next time it is reviewed.**

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<sup>183</sup> Ev 112

<sup>184</sup> Q 572

## 5 Legislation

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144. The Welsh Assembly Government has to ask for powers and has to work with Whitehall in its rolling out of the devolution programme in two principal ways: with regard to Legislative Competence Orders where the National Assembly for Wales is given decision-making powers—legislative competence—over new areas of policy; and through powers granted in primary legislation (Acts of Parliament).

### Legislative Competence Orders

145. In January 2010, we published a report *Review of the LCO Process*,<sup>185</sup> in which we gave consideration to the LCO process. While we concluded that many aspects of the process are now working well, we noted that procedural problems persist, notably the lack of transparency in the Whitehall clearance process. We examined this further during this inquiry.

146. The Secretary of State for Wales admitted that, as a new settlement, the legislative competence order process had taken some time to bed down: “both sets of officials at Welsh Assembly Government level and in Whitehall had to get up to speed and there was slowness and shortcomings at both ends at the beginning,”<sup>186</sup> but believed that the process was now “delivering enormously for Wales”.<sup>187</sup> The Welsh Assembly Government believed that the “process has been a learning curve for everybody. We have sought to take the learning from each case and build on experience each time”.<sup>188</sup>

147. Witnesses commented that at the beginning of the new process, there had been a lack of joint working between the Welsh Assembly Government and Whitehall. The Secretary of State for Wales felt that:

At the beginning there was a sense in the Welsh Assembly Government, both at ministerial level in the coalition Government—and of course the coalition Government coincided with this new era you will recall—and at official level that they wanted to play their cards a little more closely to their chests than perhaps had always been the case, and therefore in the case of some of the LCOs they were fully drafted before we had a chance to have a process of interaction to deal with issues of scope and technicalities. We are now working in a much more joined-up fashion ...<sup>189</sup>

The Welsh Assembly Government listed the principal factors that now facilitated smooth handling between themselves and Whitehall:

- a formal start to the process, through the relevant Welsh Minister writing to their counterpart;

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<sup>185</sup> Fifth Report from the Welsh Affairs Committee, *Review of the LCO Process*, Session 2009-10, HC 155

<sup>186</sup> Q 617

<sup>187</sup> Q 589

<sup>188</sup> Ev 146

<sup>189</sup> Q 617

- identification of a senior lead official in the Whitehall department responsible for the policy area in question, to co-ordinate the UK Government’s input;
- sharing of information on the intended scope of the Order, in advance of discussions on the draft of the proposed Order itself; and
- the communication of target timescales early on in the process.<sup>190</sup>

148. Dr Jim Gallagher noted that the effects on Whitehall of the new process were two-fold:

The first couple of these did cause distress; there is no doubt about that. They caused difficulty as people struggled with understanding the difference between the transfer of legislative competence and some kind of mechanism that might look like shared responsibility for legislation. [...] As time has gone on, and a few more Orders have come along, the first effect has been that we have learned how to do them better. The second—and I would not say this is a big effect but it is a real effect, I think—is that Wales has become, in competence terms, a little more like the Scottish settlement; it has a bit more legislative competence, and that has raised its profile inside Whitehall, no doubt about that. When a body like the Assembly has legislative competence its impact, or potential impact, on Whitehall and indeed on Westminster is greater and therefore its salience, if you like, is increased.<sup>191</sup>

149. Carwyn Jones AM did not feel yet that the LCO process had led to greater understanding of the devolution settlement in Whitehall and that there was still much variation between departments:

It has led to closer working between the Welsh Assembly Government and Whitehall but there have been occasions where there have been some intense negotiations in terms of what can and what cannot be devolved. [...] the approach taken by various Whitehall departments and, indeed, within different parts of Whitehall departments can vary quite significantly in terms of their understanding of the Welsh devolution settlement.<sup>192</sup>

150. The First Minister commented that the Welsh Assembly Government looked for the “most efficient avenue” in which to gain legislative powers:

We will look at what the Queen’s Speech says every year and identify whether there are any Bills there where it would be appropriate for us to have measure-making powers. Clearly, that is a swifter process than the Legislative Competence Order process so where [...] there is a bus going in the right direction we will try and jump on that bus [...] [if] there is no bus going in the direction we want[...] we have to build our own, and that is the Legislative Competence Order.<sup>193</sup>

151. Witnesses also commented on the lack of understanding within Whitehall of the need to prioritise Legislative Competence Orders. The Welsh Assembly Government noted that:

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<sup>190</sup> Ev 146

<sup>191</sup> Q 152

<sup>192</sup> Q 474

<sup>193</sup> Q 454

... it was not always easy at first to convey the sense that these Orders are critical to delivery of the Welsh Assembly Government legislative programme, in the same way that the preparation of parliamentary Bills is time critical. [...] We have tried to tackle this, partly by setting out clearer expectations at the outset, with tighter project management, and partly thanks to the support and efforts of the Wales Office in endeavouring to secure clearances which recognise that the Welsh Assembly Government also has to timetable its legislative business in the Assembly. However the fact remains that the process does demand time and resource at all stages, even for relatively straightforward Orders. It puts particular pressure on those points through which all LCOs pass, given that they do currently all follow the same process whatever their scale.<sup>194</sup>

Rhodri Morgan AM felt that delays occurred because it was not part of a civil servants 'normal day job':

Because one individual civil servant in Whitehall is in charge of writing a Bill, steering a Bill, getting it into useable form, and has probably never dealt with an LCO before and may never have dealt with Wales before, the machinery does creak when that civil servant realises, 'Oh, my God, I have got to deal with something that has come in from Wales. What am I going to advise my ministers?' I think it is quite likely to have gone into the pending tray [...] because it is something new and unique and, therefore, you do not find a lot of enthusiasm. People think, 'Can't I get back to my normal day job?' [...] That is how human beings work. They have got what they think of as a day job and suddenly a new fish lands in the net and they think, 'What am I going to do with that?'<sup>195</sup>

152. A lack of transparency in Whitehall was also highlighted as a particular concern. The Wales Council for Voluntary Action commented:

Our members' experience to date is that the role of Whitehall in the Legislative Competence Order (LCO) process is not transparent. Organisations in Wales may have lobbied hard for an LCO and engage in all of the relevant steps in the process in Cardiff Bay but when the LCO goes to Whitehall it appears to go into a black hole. Things seem to get held up there for a long time and it can be hard to know what is happening or when it might be possible to try to engage with the LCO again.<sup>196</sup>

Mr Huw Williams of the Law Society agreed that:

... from the outside looking in, there is no clarity as to what happens with some aspects of the pre-legislative scrutiny of these things. The environment LCO is a classic example. [...] when it came to its formal stages in Cardiff Bay and, also in this House, it went through relatively speedily but, of course, there was two years when it sat somewhere in the governmental machine between Cardiff and Whitehall.<sup>197</sup>

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<sup>194</sup> Ev 146

<sup>195</sup> Qq 89 and 90

<sup>196</sup> Ev 140

<sup>197</sup> Q 412

He commented on the need to “open up to the light of day this process that evidently goes on between government in Cardiff and in Whitehall at the pre-legislative stage in terms of the shape of the drafting and, in particular, what is carved out and what are the concerns”, and added:

... it might do no harm on a suitable occasion to try and have a good, hard look at what went on at that stage before an LCO saw the light of day and actually get officials from the relevant Whitehall departments that have had input into the drafting of the LCO to come and talk to you about what they saw as being their role. I think that would certainly lend a degree of transparency into how these things get formulated.<sup>198</sup>

**153. We continue to have concerns about the time it takes for Legislative Competence Orders to receive Whitehall clearance. They are frequently not given priority within Whitehall departments, which may affect the delivery of the Welsh Assembly Government’s legislative timetable. In contrast, the House of Commons has shown an ability to deal expeditiously with such proposals.**

**154. As we recommended in our earlier report, *Review of the LCO Process*, we believe that there is a strong case for a more formal reporting system on the Whitehall clearance system. This Committee has made clear its intention to scrutinise the process from the point when a Legislative Competence Order is sent by the Welsh Assembly Government to Whitehall. The Wales Office has now agreed to provide this Committee with a monthly update on the progress of all proposed Orders together with an explanation of any delays. In the event of this Committee being dissatisfied with progress, we intend to call ministers and officials from Whitehall departments to attend a meeting of the Committee along with a minister or official of the Wales Office in order to identify the issues that remain unresolved, and to provide transparency about the process.**

### **Secretary of State’s role**

**155. Under the Government of Wales Act 2006 c.95, once the pre-legislative scrutiny process is complete, the First Minister sends a draft LCO, with notice of the Assembly’s resolution to the Secretary of State, who has 60 days to either lay the draft LCO before Parliament or refuse to lay it before Parliament and give notice of refusal, with reasons to the First Minister. To date, the Secretary of State for Wales has not refused to lay a draft Legislative Competence Order before Parliament.**

**156. During the Justice Select Committee’s inquiry on *Devolution: A Decade On*, Mike German AM expressed concern about the role of the Secretary of State in “determining whether or not he will lay a Legislative Competence Order before both Houses of Parliament [...] There are not ground rules. The Government of Wales Act does not specify when the Secretary of State should say yes and when the Secretary of State says no”.<sup>199</sup> In its conclusions, the Justice Select Committee expressed concern about the lack of**

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<sup>198</sup> Q 418

<sup>199</sup> Justice Committee, Fifth Report of Session 2008-09, *Devolution: A Decade On*, HC 529-I, para 143

transparency of the role of the Secretary of State and recommended a protocol outlining the principles that would inform a decision by the Secretary of State whether or not to lay a draft order.

157. Some witnesses argued that, theoretically, a judicial review could be applied for if the Secretary of State did not lay a Legislative Competence Order before both Houses of Parliament. However, Mr Huw Williams of the Law Society commented that:

My feeling for it would be that if such a claim were mounted (a) it would be part of a wider controversy that had a political element to it. Secondly, I suspect, on the basis of the lines taken by the courts in other instances (the GCHQ case comes to mind) is that they would probably agree that in principle they had power to review to the Secretary of State because, at the end of the day, he is a Minister and not laying is a Ministerial act, but I suspect that they would then reach the threshold at which the courts would say: ‘We are now into the matter of politics’ and would probably tread very carefully unless the Secretary of State had done something totally egregious.<sup>200</sup>

158. Rhodri Morgan commented that in order for the LCO process to work it was:

... for Whitehall ministers to have the ability in their DNA to say, ‘I do not like what legislation is going to emerge back in Cardiff from the transferring of this power, but I still accept that it is appropriate for Whitehall to release the legislative power to Cardiff for a purpose that I disapprove of.’<sup>201</sup>

Mr Morgan acknowledged that a “big cultural change was needed” in order for ministers, while not agreeing with the purpose to which the LCO would be put, to recognise that it was appropriate for the Welsh Assembly Government to have the power to legislate in a particular area. He equated the process with the Salisbury Convention in which the House of Lords will not oppose the second or third reading of any government legislation promised in its election manifesto and stated: “there is no moral authority or political authority behind an LCO bid that has not been mentioned in a manifesto”.<sup>202</sup> Exceptions to the need for a declaration in a manifesto were public health emergencies or animal health crisis. He argued that backbench LCOs were also in a different category:

It is just a matter really for the Westminster and Whitehall machine to decide how brutal, how co-operative, how trendy or how warm they want to be to the backbench LCO concerned. So far the record is not bad.<sup>203</sup>

**159. We are concerned about the lack of transparency of the role of the Secretary of State in determining whether or not he would lay a draft Order before both Houses of Parliament. We recommend that the Secretary of State produce a protocol outlining the principles that would inform such a decision, and to present it early in the new Parliament. This should not omit consideration of the status of backbench Legislative Competence Orders.**

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<sup>200</sup> Q 428

<sup>201</sup> Q 100

<sup>202</sup> Q 104

<sup>203</sup> Q 106

### *Laying of Legislative Competence Orders before Parliament*

160. In his submission, Sir Jon Shortridge proposed the novel idea that “once the Assembly has formally resolved to secure a Legislative Competence Order, it should make its submission directly to Parliament—as one legislature to another—rather than to the UK Government”.<sup>204</sup> He expanded on this idea in oral evidence to the Committee:

The practical implications would be that Parliament would have to change certain of its basic conventions because by convention Bills are introduced by the Government into Parliament. Legislative Competence Orders are legislation, so I think Parliament would have to provide a different device for taking Legislative Competence Orders through Parliament [...] If that procedural hurdle could be overcome, then it would make life easier for the UK Government because they could decide through a transparent political process what they were going to support and whether they were going to support it. There would also be the merit from the Cardiff point of view that you would not need to go through two sequential sets of negotiations, one to get the Government’s agreement and then Parliament’s agreement. Obviously, if you get the Government’s agreement then I would say it diminishes the opportunity of Parliament to challenge because you have got majority support for it as it goes through.<sup>205</sup>

161. Some witnesses considered it an “attractive proposition” but felt that “the executive impact of Legislative Competence Orders when they are proposed is an essential aspect of it”.<sup>206</sup> Professor Richard Wyn Jones Director of the Wales Governance Centre commented on the proposal that:

... instinctively, I warmed to [it] immediately because I think that that is how I would like to think democracy works and I would very much like to see backbench Members of this place, in a sense, act as champions of the sister parliament in Cardiff.<sup>207</sup>

However, he added:

... I do worry about the practicalities of that, to be honest as it would, I suspect, inevitably be executives who do all the work in the end, but symbolically I could certainly see the value.<sup>208</sup>

162. Carwyn Jones AM also recognised the need for executive support in the process through the UK Parliament and expressed concern about the timetabling of Legislative Competence Orders:

Clearly, in order for a Legislative Competence Order to be timetabled it needs the support of government, and from our point of view, if it was to be a legislature-to-

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<sup>204</sup> Ev 125

<sup>205</sup> Q 49

<sup>206</sup> Q 414

<sup>207</sup> Q 419

<sup>208</sup> Q 419

legislature transfer, there would have to be a great deal of thought given to ensuring that Legislative Competence Orders were taken forward in a timely fashion. Obviously with the support of the UK Government that can be done but without the support of the UK Government it is difficult to see how the process could be taken forward.<sup>209</sup>

We accept this point, but we do not believe it is impossible to develop a process whereby a Legislative Competence Order is passed directly from the Assembly to Parliament for oversight.

## Framework Powers

163. It has been argued that, to date, Wales has received more powers by means of clauses in Westminster Bills ('framework powers') than through the LCO system.<sup>210</sup> Carwyn Jones AM referred to them as "measure-making powers".<sup>211</sup> For example, the Marine and Coastal Access Act 2009 included provisions which conferred executive powers on Welsh Ministers in relation to marine licensing, marine nature conservation and fisheries, bestowed new marine planning functions on the Welsh Ministers and provided Measure-making powers for the Assembly on coastal access.

164. Witnesses expressed concern regarding the lack of scrutiny available to the National Assembly for Wales in relation to powers proposed to be granted to Assembly Ministers in UK Bills, which "at present [...] is taken entirely behind closed doors between the WAG and Whitehall—there is no involvement of the National Assembly for Wales or Welsh stakeholders".<sup>212</sup> The Wales Governance Centre stated that:

The structure of the Assembly is such that it appears that reliance is mainly made by the Assembly on the reports produced by the Subordinate Legislation Committee<sup>213</sup> on Bills going through Parliament which proposed to give executive powers to the Assembly Government and legislative powers to the Assembly. [...] However the Committee also have other important functions to carry out under the standing orders applicable to them. [...] The result is that the Committee is unable to report to the Assembly on all Bills giving powers to Welsh Ministers or legislative powers to the Assembly.<sup>214</sup>

Alan Trench compared this to the situation in Scotland where all conferrals of legislative power on the Scottish Parliament (and of executive powers on the Scottish Ministers) required the approval of the Scottish Parliament. He commented:

I cannot see any logical reason for the position in Wales to be different when the key issue is the route by which legislative powers are conferred on the Assembly rather than the substantive outcome. Ensuring that the Assembly approved all conferrals of

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<sup>209</sup> Q 476

<sup>210</sup> Ev 143

<sup>211</sup> Q 458

<sup>212</sup> Ev 140

<sup>213</sup> Now called the Constitutional Affairs Committee.

<sup>214</sup> Ev 143

such powers, regardless of means, would contribute significantly to the strengthening of the elected arm of the devolved Government of Wales.<sup>215</sup>

165. Professor Richard Wyn Jones of the Wales Governance Centre, commented that this was “an unintended consequence of the system but it is leading to a very powerful executive in Wales which is not particularly tightly controlled by the legislature”.<sup>216</sup>

**166. We are concerned that framework powers are not scrutinised to the same degree as proposed Legislative Competence Orders, either within Parliament or the National Assembly for Wales. We suggest that it is appropriate for this Committee to provide more parliamentary oversight of such powers and will investigate the most effective way of doing this. It is not appropriate for two legislatures to be entirely beholden to their executives in order to converse formally, and the National Assembly for Wales should have the opportunity to make observations on any proposal to legislate at Westminster in relation to devolved matters. It is our intention to explore the development of practice in this area.**

167. The Scottish Affairs Committee recommended in their recent report that there should be provision made in the House’s standing orders for the Presiding Officer of the Scottish Parliament to convey formal decisions of that Parliament to the Speaker of the House of Commons and for the Speaker to lay any such communications before the House. **We recommend that the Standing Orders of the House provide for the Speaker to lay before it any formal communication conveyed to him or her from the National Assembly for Wales.**

## Welsh Statute Book

168. In giving evidence to the Justice Committee’s inquiry on *Devolution: A Decade On*, John Osmond, the Director of the Institute of Welsh Affairs, identified that one consequence of the new legislative arrangements was the emergence of a plethora of sources of the law that related specifically to Wales:

- i. Acts of Parliament applying to England and Wales as a single jurisdiction.
- ii. Wales-only Acts of Parliament.
- iii. Provisions in Acts of Parliament that apply to Wales, including framework powers.
- iv. Orders in Council approved by Parliament, including Legislative Competence Orders.
- v. Measures made by the Assembly modifying or supplementing existing legislation (including Acts of Parliament) or making new provision.

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<sup>215</sup> Ev 127

<sup>216</sup> Q 388

- vi. Subordinate legislation made by Welsh Ministers implementing Community law under Designation Orders made under the European Communities Act 1972, s.2(2).
- vii. Subordinate legislation made by Whitehall for England and Wales as a single jurisdiction.
- viii. Subordinate legislation made by Whitehall specifically for Wales.
- ix. Subordinate legislation made by the Assembly under Acts of Parliament or, exceptionally, under Whitehall subordinate legislation, prior to 2007.
- x. Subordinate legislation made by the Assembly Government (or jointly with Whitehall) under provisions of Acts of Parliament.
- xi. Subordinate legislation made by the Assembly Government under powers delegated by Assembly Measures.

169. Witnesses identified that the divergence in law between Wales and England was making it difficult to identify the law as it applied to specific issues. As a result, the Welsh Local Government Association explained that “the process of preparing legal advice now requires complex and time consuming searches of the Welsh Assembly Government website in an attempt to identify what legislation actually exists, even before its impact can be assessed”.<sup>217</sup> The Law Society commented that it had lobbied on the provision of a Wales Statute Book during the passage of the Government of Wales Act 2006. It argued that it wanted a Welsh Statute Book “provided as a public service: access to justice is a matter for the state and the complexity of the devolution settlement requires action on this”.<sup>218</sup> Ms Tessa Shellens from the Law Society highlighted the difficulties the lack of a Welsh Statute Book caused:

... yes we can ascertain the LCOs; where we are having more difficulty is in ascertaining the various Acts with various powers in them, and it is almost impossible to scrutinise whether powers are going to be taken up by the Assembly or not and whether they are going to be left redundant, and is England moving one way and are we not moving anywhere at all?<sup>219</sup>

170. An initial response to this concern has been developed by Cardiff University, in the form of Wales Legislation online,<sup>220</sup> funded “partly with the support of the Assembly Commission, to a lesser extent by the Assembly Government and by Cardiff University itself” but Professor Richard Wyn Jones commented that this “is a hand-to-mouth operation”.<sup>221</sup> The Welsh Local Government Association welcomed its work but commented that it was not sufficient:

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<sup>217</sup> Ev 156

<sup>218</sup> Ev 119

<sup>219</sup> Q 435

<sup>220</sup> <http://www.wales-legislation.org.uk/>

<sup>221</sup> Q 386

... the facility is not widely known and it does not deal with the common law, nor is there legal text support as found in published reference material.<sup>222</sup>

**171. The accessibility of the law in relation to Wales and the creation of a single comprehensive reference of legislation impacting on Wales is important. We encourage the Government to support the Welsh Assembly Government to achieve this objective.**

## 6 Finance

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172. The final aspect of the relationship between Wales and Whitehall that we examined was in the area of finance. The amount of money received by the Welsh Assembly Government, referred to as the “Welsh block grant” is determined by the Barnett Formula, named after Joel (now Lord) Barnett, who introduced the system in 1978. It was initially intended as an interim measure, but has been in use in Scotland and Northern Ireland since 1979 and in Wales since 1980. Lord Barnett has said himself that the formula was temporary and not expected to last “a year, or even twenty minutes”.<sup>223</sup>

173. There have been a number of recent reviews of the Barnett Formula and the fiscal settlement across the UK. The Calman Commission on Scottish Devolution, which was established by the Scottish Parliament to examine the Scotland Act 1998 and to make recommendations enabling the Scottish Parliament to serve the people of Scotland better, looked at finance in Scotland. The Commission did not look at the means of calculating block grants to the devolved administrations across the UK but stated that “the present system of calculating block grant by the Barnett formula is not well related to need”.<sup>224</sup> In December 2008, a House of Lords *ad hoc* Select Committee was appointed to examine the purpose, methodology and application of the Barnett Formula and concluded that “the Barnett Formula should no longer be used to determine annual increases in the block grant for the United Kingdom’s devolved administrations”.<sup>225</sup> In May 2009, the House of Commons Justice Committee concluded that the Barnett Formula was “overdue for reform”.<sup>226</sup>

174. In 2008, the First Minister and Deputy First Minister for Wales and Minister for Finance and Public Services Delivery appointed Mr Gerald Holtham as Chairman of the Independent Commission on Funding and Finance for Wales, often referred to as the ‘Holtham Commission’. The Commission’s terms of reference were to “look at the pros and cons of the present formula-based approach to the distribution of public expenditure resources to the Welsh Assembly Government, and to identify possible alternative funding mechanisms including the scope for the Welsh Assembly Government to have tax varying powers as well as greater powers to borrow”.<sup>227</sup>

175. The Commission’s first report was submitted to the Welsh Assembly Government in July 2009. It acknowledged that “in recent years, the financing of public spending in the devolved administrations has become increasingly contentious”<sup>228</sup> and recommended that “Barnett must ultimately be superseded by a needs-based formula” with “any new needs-

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<sup>223</sup> First Report of the Independent Commission on Funding and Finance for Wales, *Funding devolved government in Wales: Barnett & beyond* para 2.4

<sup>224</sup> Final Report of the Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21<sup>st</sup> Century*, June 2009, para 3.86

<sup>225</sup> House of Lords Select Committee on the Barnett Formula, First Report of Session 2008-09, *The Barnett Formula*, HL 139

<sup>226</sup> Justice Committee, Fifth Report of Session 2008-09, *Devolution: A Decade On*, HC 529-I, para 31

<sup>227</sup> First Report of the Independent Commission on Funding and Finance for Wales, *Funding devolved government in Wales: Barnett & beyond* preface

<sup>228</sup> First Report of the Independent Commission on Funding and Finance for Wales, *Funding devolved government in Wales: Barnett & beyond*, para 1.4

based funding model [...] jointly agreed by Ministers from both the UK Government and all the devolved administrations concerned”.<sup>229</sup> A working paper was published in December 2009, setting out how this could be achieved. A particular issue in these discussions has been the question of “convergence”: that is the tendency identified by some analysts for the Barnett formula to bring the per capita level of public spending in Wales closer to that of England, despite the very different economic, social and geographical situations of the two countries.

176. On 26 November 2009, the Secretary of State for Wales announced that he had secured a commitment from the Treasury that Wales would receive a “fairer funding agreement” than that provided by the Barnett formula. The new arrangements are that:

- the Government agree that the Barnett formula could lead to convergence<sup>230</sup> to an extent that would be regarded as unacceptable although further convergence is not currently expected in the coming years;
- the Government will make a full assessment of the extent of convergence with consideration of Wales’ position relative to other parts of the United Kingdom as part of each spending review; and
- following this assessment the Government would be prepared to take action if appropriate to ensure Wales is not disproportionately disadvantaged.<sup>231</sup>

177. In oral evidence, the Secretary of State for Wales noted that this commitment “recognised [...] that there was an issue here”<sup>232</sup> and was recognised by the First Minister, by the former Finance Minister Andrew Davies AM and by Mr Holtham as a major achievement. The Secretary of State for Wales stated that “The formula will stay for the foreseeable future but I think we have now got the basis for establishing a mechanism which would ensure that in periods of greater and increased public spending Wales’ position is protected”.<sup>233</sup>

178. The Welsh Assembly Government was:

... glad that the UK Government has agreed, with regard to Wales, that the Barnett formula could lead to convergence to an extent that would be regarded as unacceptable (although it maintains that further convergence is not currently expected in the coming years); and its undertaking to make a full assessment of the extent of convergence [...] and take action, if appropriate, to ensure Wales is not disproportionately disadvantaged. [...] However this undertaking does not go far enough. It is fundamentally important to recognise that the level of resource required

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<sup>229</sup> First Report of the Independent Commission on Funding and Finance for Wales, *Funding devolved government in Wales: Barnett & beyond*, para 3.9

<sup>230</sup> Public spending per head is higher in Wales and the other devolved administrations than it is in England. However, additional allocations to the budgets of the devolved administrations through the operation of the Barnett Formula are the same per head as those in England. For this reason, overall relative spending per head in the devolved administrations should converge over time towards the English level of spending per head on comparable programmes.

<sup>231</sup> HC Deb, 26 November 2009, col 101WS

<sup>232</sup> Q 626

<sup>233</sup> Q 627

in Wales to achieve an equitable level of public services compared with England—in other words—an equivalent outcome, is higher than a straightforward population share, given the higher levels of deprivation in Wales and other factors such as demographics and sparsity.<sup>234</sup>

**179. The Barnett Formula is overdue for reform. Recent reviews have highlighted its deficiencies, and the Holtham Commission has put forward a needs-based formula. Whilst we recognise the commitment given to the Secretary of State for Wales from HM Treasury that Wales will not be disadvantaged by convergence under the Barnett Formula, we urge the Government to review the current arrangements and to adopt a needs-based approach to a new financial settlement. As well as bringing about a formula which is fairer to Wales, the need for predictability for some time ahead is of enormous importance and we strongly recommend that any such formula should not be subject to year-on-year or even the three-year variations which depend on a contemporary interpretation of statistical information. This should be treated as a priority.**

180. The role of HM Treasury also came under scrutiny. There have been calls for an independent advisory body to administer the Barnett formula. The Welsh Assembly Government commented that:

... the UK Government, in the shape of the Treasury, currently acts as judge and jury in the case of disagreement over how the Barnett formula operates. [...] for the purpose of reviewing the formula and addressing any anomalies that arise, there needs to be an adjudicating body which can command the respect of the devolved administrations and representatives of the bodies governing England as well as of the UK Government.<sup>235</sup>

Andrew Davies AM commented that:

... the way in which it [the Barnett Formula] is administered [...] decisions are made by the Treasury with which we have to live without recourse to any appeals mechanism [...] it needs to be put on a different footing.<sup>236</sup>

181. Mr Holtham said in oral evidence that the devolved administrations “do not want to be end-run as it were by the Treasury; they do not want to be in a situation where they are confronted with something at the eleventh hour and there is very little realistic opportunity to change it”.<sup>237</sup>

182. Evidence also suggested that HM Treasury has a more general lack of devolution awareness and sensitivity. The Holtham Commission noted that:

...at present, fiscal arrangements are implemented in a way that more than reflects the primacy of the UK Government over the devolved administrations. The

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<sup>234</sup> Ev 146

<sup>235</sup> Ev 146

<sup>236</sup> Q 218

<sup>237</sup> Q 323

settlement is applied as if the devolved administrations were mere departments of the UK Government, without a democratic locus of their own. A reformed relationship is required which recognises the primacy of the UK Government and its responsibility for taking final decisions but which provide sufficient flexibility for Welsh Ministers to set their own priorities, coupled with adequate fora for discussion and resolution of disputes.<sup>238</sup>

Alan Trench agreed that:

The role played by the Treasury is central, as it is solely responsible for taking practically all decisions relating to finance. Despite this central role, it has little awareness of the wider nature of its role and the sensitivities that attach to it. [...] It appears ill-equipped to develop the sort of system that is needed to ensure that the financial system for devolution matches the constitutional nature of devolution ...<sup>239</sup>

**183. That such a central department as the Treasury has been criticised for a lack of awareness of and engagement with the devolution settlement is worrying. We recommend that the Treasury actively seeks to increase its awareness of the devolution settlement and its own role in that settlement. Given the concern expressed by various organisations, we support the recommendation for an independent body to administer the Barnett formula.**

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<sup>238</sup> First Report of the Independent Commission on Funding and Finance for Wales, *Funding devolved government in Wales: Barnett & beyond*, para 5.1

<sup>239</sup> Ev 127

## 7 Conclusion

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184. Devolution in 1999 was a dramatic change to the British constitution which has necessitated a new way of doing politics in the UK. It was also the beginning of a process, especially in Wales, where the scope and scale of devolution is already far beyond the modest change initially envisaged.

185. Whitehall has, after an initial burst of concentration, lost a focus on the devolution settlement. In particular, knowledge and understanding of the specificities of the Welsh settlement has too often been poor. There is an absence of a strong centre at the heart of the UK which is managing the complexities of the devolution process. In this report we have identified the need for remedial action in the following areas.

### *Inter-governmental relations*

186. At ministerial level, the Joint Ministerial Council needs to maintain its momentum as a serious body where the problems and opportunities of devolution can be addressed and kept at the heart of the governmental process. Ministers at all levels also have the duty to be alert to the impact of policy and legislation which they propose on the devolved jurisdictions.

### *Civil Service*

187. The Civil Service needs to remind itself of the significance of devolution, and ensure that it has equipped itself to address devolution aspects of all parts of its work. It needs more consistent training, it needs a clear department-by-department focus on developing and retaining a knowledge and understanding of devolution, and it needs to invest in making the settlement work. The devolved administrations are not just another set of Whitehall departments and the Civil Service needs to recognise this.

### *Legislative arrangements*

188. Parliament and the National Assembly for Wales also need to play their parts in maintaining the effectiveness of the settlement, through scrutiny and co-operation. The settlement could be strengthened by clearer statements of the discretion afforded to Ministers and by proper channels of formal communication being established. The role of the Secretary of State in promoting legislation relating to the devolution settlement should be more transparent.

### *Finance*

189. The financial settlement constituted by the Barnett formula does not seem to us to be guaranteed to be sustainable. It needs to be built on an agreed and enduring basis which is demonstrably fair and takes into account the particular circumstances of Wales.

### ***Effective relationships***

190. We have recommended a number of structural changes, but it must not be forgotten that the effective operation of the settlement will be best ensured by mutual knowledge and understanding. Elected politicians, Ministers, civil servants and officials of the two legislatures should all be encouraged and expected to contribute to the building of an effective relationship.

191. The devolution settlement has worked, but it could work better. Over the coming decade it may come under strain. We hope that the recommendations we have made in this report will contribute to the effective maintenance of the UK's new constitution.

# Conclusions and recommendations

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## Devolution

1. The way in which the United Kingdom is governed has changed profoundly over the last twelve years, in different ways in different nations of the Union. Whitehall has not fully engaged with the complex nature of the devolution settlements. There is a need for a proper understanding of the devolution settlements to be fully embedded within Whitehall departments. Whitehall must realise that the differences in constitutional arrangements have implications for policy and legislation. The National Assembly for Wales and the Welsh Assembly Government (including both politicians and civil servants) have a major role to play in that learning process which they appear not to have undertaken fully in the last decade. (Paragraph 17)

## Memorandum of Understanding

2. The structures for inter-governmental relations with Wales were developed during a period when the same political party was in power in both Wales and Whitehall. There will be times when relationships between the Government and devolved administrations come under strain, and during periods of “cohabitation” between different parties in government at the two levels they can be at greater risk. Adequate machinery must be in place to enable extensive negotiation and conciliation to occur between the Government and the devolved administrations. It is not enough to rely solely on the strength of informal relationships. (Paragraph 29)
3. Formal machinery is necessary but not sufficient. Often its effectiveness lies in the informal relationships it allows to develop underneath it. Strong relationships develop if there is the political will to make them work. It is important that arrangements exist to promote and maintain strong relationships between Members of Parliament and Welsh Assembly Members. This will ensure that we learn about and understand each other’s priorities. (Paragraph 30)
4. We believe that a broad review of the machinery for co-ordinating inter-governmental relationships is necessary. An updated Memorandum of Understanding between the Government and devolved administrations is long overdue. We urge the Government to publish the agreed revised version as soon as possible. We recommend that the Memorandum of Understanding be reviewed at the start of every Parliament. The status of Devolution Guidance Notes should be strengthened after appropriate consultation. (Paragraph 31)

## Joint Ministerial Committee

5. We welcome the re-convening of the Joint Ministerial Committee and recommend that it continues to meet on a regular basis. We believe that as well as practical, problem-solving work the Joint Ministerial Committee has symbolic value in embedding the principle of mutual respect and the expectation of proper consultation across Whitehall and with the Welsh Assembly Government. This should not be regarded as an alternative to direct relationships between Assembly

and Whitehall departments, in which best practice should be pursued. (Paragraph 40)

6. Whilst we recognise that the relationship between the UK Government and the Welsh Assembly Government is not one of constitutional equals, we urge the Cabinet Office to look at the British-Irish Council as an example of effective joint working. On appropriate occasions, consideration should be given to inviting a devolved administration to take the lead on a particular issue (Paragraph 41)

### The Ministry of Justice

7. We welcome the new level of engagement taking place between the Legal Services Commission, the Welsh Assembly Government and the Wales Office. However, we would note that this new level of engagement seems to be a direct result of our intervention in this matter, and had the matter not been raised, it is unlikely that such engagement would have been forthcoming. (Paragraph 51)
8. We are convinced that the people of Wales—and the wider interests of the people of England and Wales—would be best served by a Legal Services Commission office in Wales, particularly now that there is a growing body of distinct Welsh legislation. We await clearer answers from the Legal Services Commission on their future proposals, which must meet our concerns and the concerns of the legal community and wider civil society in Wales. The office could take on work generated in England if the Welsh case load was not thought high enough. (Paragraph 56)
9. The case of the Legal Services Commission serves as a timely reminder for all government departments and arm's length bodies that awareness of the devolution settlement is an element of their work that must not be neglected. (Paragraph 58)

### A missing centre?

10. In the period since the devolution settlements of 1999, departmental responsibility for devolution strategy and policy has moved around between different departments. It has involved the Cabinet Office, 10 Downing Street, the Ministry of Justice, the former Department of Constitutional Affairs, the former Office of the Deputy Prime Minister, the Wales Office and the Ministry of Justice. This development has been historically contingent and has taken place in a haphazard fashion. (Paragraph 76)
11. There is an absence of a strong centre in relation to devolution within the UK Government. Currently the co-ordination of government business for Wales is shared between three departments—the Ministry of Justice, the Cabinet Office and the Wales Office. The lack of a single office prevents the UK from taking a co-ordinated view of devolution. An effective hub is needed in central government for it to manage effectively the devolution settlement. We considered the merits of locating the central responsibility for devolution within the Ministry of Justice because of the constitutional role of that department, but concluded that this was too removed from the centre for day-to-day co-ordination, and we were also unconvinced that the department has a strong understanding of the devolution settlement embedded in its ethos. We therefore believe that the role belongs to the

Cabinet Office and we recommend that this should be recognised and developed and appropriate resources allocated for this purpose. (Paragraph 77)

12. We recognise that there are arguments for a single Department of the Nations and Regions although we make no specific recommendation on this. As the devolution settlement matures, the role of the Secretary of State for Wales may decrease. This would certainly be the case if the outcome of a referendum on primary legislative powers for the National Assembly for Wales proved in favour of such powers. The Government of Wales Act 2006 gave the Secretary of State for Wales a role in legislating for Wales and any proposals under the current settlement would need to take this into consideration. However, Wales would still need a strong voice in Whitehall to represent its interests across a range of policy areas and any new arrangements should ensure that this includes Cabinet-level representation. (Paragraph 78)
13. An implication of the establishment of a single Department of the Nations and Regions would be that the current three national scrutiny committees would be reduced to one. However we feel that arrangements will be required for the Government to account to Parliament in respect of matters affecting Wales, Scotland and Northern Ireland. (Paragraph 79)

### Current awareness of the devolution settlement

14. The Government, in conjunction with the Welsh Assembly Government, needs to make consultation exercises more sensitive to the facts of devolution and the limited resources of key organisations. It should, for instance, not be the responsibility of Welsh interest groups—some of them small voluntary bodies—to work out for themselves whether a policy proposal in a green paper relates to reserved or devolved matters. (Paragraph 87)
15. Civil servants cannot absolve themselves of responsibility for awareness of, and sensitivity to, devolution issues in both policy-making and service delivery. Whilst we fully acknowledge the principle of ministerial responsibility we must observe that, practically speaking, Ministers cannot be expected to monitor everything their departments do. We also note the value of strong links between Assembly Ministers and Regional Ministers, who are often closer to local cross-border issues. (Paragraph 90)
16. We recommend that the Cabinet Office oversees the development of Welsh Language Schemes for all government departments. (Paragraph 95)

### Current review

17. We welcome the preliminary work of the review of departmental awareness of devolution. We expect its findings will be discussed by all Permanent Secretaries and looked at collectively and we expect to be informed of what actions are being taken to deal with any deficiencies. We urge both governments to ensure that the Welsh Assembly Government is fully involved in implementing actions arising from the

current review of Whitehall's awareness and performance on devolution. (Paragraph 129)

### Way forward for the Civil Service

18. It is clear that awareness of the Welsh devolution settlement is not uniform across Whitehall. An attempt was made to educate Whitehall after the establishment of the National Assembly for Wales but after an initial burst of activity, there was no concerted effort to ensure that a satisfactory level of knowledge was maintained. We welcome an acknowledgement of Whitehall's failings in this area and the importance of a concerted training programme. We recommend that devolution awareness should form a core part of the training for all senior civil servants. (Paragraph 130)
19. We recommend that devolution experts, or 'senior champions' are established in relevant departments, and are expected to have an up-to-date understanding of the devolution settlement in Wales. Their role must be clearly defined and they must not be or become a substitute for ministerial support. (Paragraph 131)
20. Secondments provide valuable knowledge and experience to individuals and to the institutions where they are placed. We recommend that a formal mechanism for secondments between Wales and Whitehall and other devolved administrations is established. We believe that it should be seen as a positive benefit to the development of a career in the Civil Service. However this should not detract from efforts to ensure that devolution awareness is mainstreamed throughout the Civil Service. (Paragraph 132)
21. We recommend that the House of Commons authorities seek to establish a programme of secondments and exchanges with the National Assembly for Wales and to make adequate funds available for this to have effect. (Paragraph 133)
22. It is important to avoid failures of organisational memory which are always a danger in a service where staff move on frequently from job to job. This problem was highlighted in the Communities and Local Government Committee's inquiry into the 2009 Departmental Annual Report, which suggests that on average, an official in the department can expect to have been in his or her particular post for just 0.8 years (about 9 months). We believe that this is an example of poor management of service delivery which is wide-spread in Whitehall. The culture needs to change. (Paragraph 134)
23. The Welsh Assembly Government must strive to establish good working relationships with Whitehall and wider civil society in Wales. We have heard criticisms that the Welsh Assembly Government has been inward looking, which is perhaps understandable in the first few years of an institution when it is trying to develop its own policies. However, it must now have the confidence to interact with Whitehall and to highlight areas of good practice with a belief that it can play a consistently leading role in the United Kingdom. (Paragraph 135)
24. The Welsh Assembly Government must develop its long-term strategic thinking in policymaking and financial planning. We endorse the views of Andrew Davies AM that leading, managing and delivering services and the wider management of

relationships are crucial rather than seeing policy-making and legislation as the hardest part of the role. (Paragraph 136)

25. Although ministers in both London and Cardiff take the leading roles on devolution, a key official player in making the devolution settlement work is, and will continue to be, the Cabinet Secretary and Head of the Home Civil Service. We welcome Sir Gus O'Donnell's leadership in this matter and his clear commitment to making devolution work, as demonstrated for example by the review of departmental arrangements he has put in hand. But more is needed to ensure that continuity is not lost, and we therefore recommend that the Cabinet Secretary should give evidence to this Committee annually, perhaps at the same time as the Committee's autumn evidence session on the Wales Office annual report. This would be an opportunity for the Cabinet Secretary for example to set out what progress has been made in raising awareness of devolution across Whitehall and in the Welsh Assembly Government and to answer questions on the development of the Welsh devolution settlement. We also believe that the Permanent Secretary at the Welsh Assembly Government needs to take a proactive role in explaining developments in Wales to her colleagues across Whitehall. We commend the way that Dame Gillian Morgan has described her role and we recommend that she too should give evidence to the Committee annually in addition to the regular evidence from the First Minister which has become an established part of the Committee's work. (Paragraph 137)

### Civil Service Code

26. Civil servants throughout the United Kingdom need to be aware of the implications of devolution for their work which must be seen in the context of its relationship with outside bodies more generally. This principle should be enshrined in core guidance issued to the Civil Service. We welcome the Cabinet Secretary's agreement to consider including an awareness of devolution as part of the Civil Service Code next time it is reviewed. (Paragraph 143)

### Legislative Competence Orders

27. We continue to have concerns about the time it takes for Legislative Competence Orders to receive Whitehall clearance. They are frequently not given priority within Whitehall departments, which may affect the delivery of the Welsh Assembly Government's legislative timetable. In contrast, the House of Commons has shown an ability to deal expeditiously with such proposals. (Paragraph 153)
28. As we recommended in our earlier report, *Review of the LCO Process*, we believe that there is a strong case for a more formal reporting system on the Whitehall clearance system. This Committee has made clear its intention to scrutinise the process from the point when a Legislative Competence Order is sent by the Welsh Assembly Government to Whitehall. The Wales Office has now agreed to provide this Committee with a monthly update on the progress of all proposed Orders together with an explanation of any delays. In the event of this Committee being dissatisfied with progress, we intend to call ministers and officials from Whitehall departments to attend a meeting of the Committee along with a minister or official of the Wales

Office in order to identify the issues that remain unresolved, and to provide transparency about the process. (Paragraph 154)

29. We are concerned about the lack of transparency of the role of the Secretary of State in determining whether or not he would lay a draft Order before both Houses of Parliament. We recommend that the Secretary of State produce a protocol outlining the principles that would inform such a decision, and to present it early in the new Parliament. This should not omit consideration of the status of backbench Legislative Competence Orders. (Paragraph 159)

### Framework Powers

30. We are concerned that framework powers are not scrutinised to the same degree as proposed Legislative Competence Orders, either within Parliament or the National Assembly for Wales. We suggest that it is appropriate for this Committee to provide more parliamentary oversight of such powers and will investigate the most effective way of doing this. It is not appropriate for two legislatures to be entirely beholden to their executives in order to converse formally, and the National Assembly for Wales should have the opportunity to make observations on any proposal to legislate at Westminster in relation to devolved matters. It is our intention to explore the development of practice in this area. (Paragraph 166)
31. We recommend that the Standing Orders of the House provide for the Speaker to lay before it any formal communication conveyed to him or her from the National Assembly for Wales. (Paragraph 167)

### Welsh Statute Book

32. The accessibility of the law in relation to Wales and the creation of a single comprehensive reference of legislation impacting on Wales is important. We encourage the Government to support the Welsh Assembly Government to achieve this objective. (Paragraph 171)

### Finance

33. The Barnett Formula is overdue for reform. Recent reviews have highlighted its deficiencies, and the Holtham Commission has put forward a needs-based formula. Whilst we recognise the commitment given to the Secretary of State for Wales from HM Treasury that Wales will not be disadvantaged by convergence under the Barnett Formula, we urge the Government to review the current arrangements and to adopt a needs-based approach to a new financial settlement. As well as bringing about a formula which is fairer to Wales, the need for predictability for some time ahead is of enormous importance and we strongly recommend that any such formula should not be subject to year-on-year or even the three-year variations which depend on a contemporary interpretation of statistical information. This should be treated as a priority. (Paragraph 179)

34. That such a central department as the Treasury has been criticised for a lack of awareness of and engagement with the devolution settlement is worrying. We recommend that the Treasury actively seeks to increase its awareness of the devolution settlement and its own role in that settlement. Given the concern expressed by various organisations, we support the recommendation for an independent body to administer the Barnett formula. (Paragraph 183)

# Formal Minutes

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**Tuesday 16 March 2010**

Members present:

Dr Hywel Francis, in the Chair

Mr David Jones

Mark Pritchard

Mr Martyn Jones

Hywel Williams

Alun Michael

Mark Williams

Draft Report (*Wales and Whitehall*) proposed by the Chair, brought up and read.

*Ordered*, That the Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 191 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Eleventh Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

Written evidence ordered to be published on 11, 19 and 28 January, 4 February and 2 March was ordered to be reported to the House for printing with the Report.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[The Committee adjourned

# Witnesses

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## Monday 11 January 2010

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<b>Rt Hon Rhodri Morgan AM</b> , former First Minister for Wales	Ev 9

## Tuesday 19 January 2010

<b>Dr Jim Gallagher</b> , Director General of Devolution, Ministry of Justice	Ev 19
<b>Mr Andrew Davies AM</b> , National Assembly for Wales	Ev 27

## Tuesday 26 January 2010

<b>Sir Emyr Jones Parry</b> , Chair, <b>Mr Aled Edwards</b> , Executive Committee Member, and <b>Mr Paul Valerio</b> , Executive Committee Member, All Wales Convention	Ev 36
<b>Mr Gerald Holtham</b> , Chair, Independent Commission on Funding and Finance for Wales	Ev 49

## Tuesday 2 February 2010

<b>Mr Alan Trench</b> , Honorary Senior Research Fellow, Constitution Unit, University College London	Ev 54
<b>Professor Tim Jones</b> , Swansea Law School, University of Wales, Swansea, <b>Professor Richard Wyn Jones</b> , Director, <b>Ms Christina Palko</b> , Wales Governance Centre, <b>Ms Tessa Shellens</b> , and <b>Mr Huw Williams</b> , The Law Society	Ev 63

## Thursday 4 February 2010

<b>Mr Carwyn Jones AM</b> , First Minister for Wales, and <b>Dame Gillian Morgan DBE</b> , Permanent Secretary, Welsh Assembly Government	Ev 74
<b>Dame Gillian Morgan DBE</b> , Permanent Secretary, <b>Ms Kate Cassidy</b> , Head of Constitutional Affairs and Policy Support Division, and <b>Mr Andrew Felton</b> , Head of Constitutional Affairs and External Liaison Team, Welsh Assembly Government	Ev 83

## Tuesday 9 February 2010

<b>Mr Paul Davies</b> , Wales Director, and <b>Mr Phil Lambert</b> , Executive Director Business Support, Legal Services Commission	Ev 91
<b>Sir Gus O'Donnell KCB</b> , Cabinet Secretary and Head of the Home Civil Service, and <b>Mr Robin Fellgett</b> , Deputy Head, Economic and Domestic	Ev 95

Affairs Secretariat, Cabinet Office

**Rt Hon Peter Hain MP**, Secretary of State for Wales, **Ms Fiona Adams-Jones**, Director, and **Mr Glyn Jones**, Head of Legislation and Deputy Director, Wales Office

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## List of written evidence

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3	Written evidence from the Farmers' Union of Wales (FUW)	Ev 112
4	Written evidence from Professor Tim Jones and Ms Jane Williams, School of Law, Swansea University (submitting as individuals)	Ev 115
5	Written evidence from The Law Society Wales	Ev 119
6	Written evidence from Legal Services Commission	Ev 121
7	Written evidence from the Legal Services Commission Trade Unions	Ev 123
8	Written evidence from the Public Services Ombudsman for Wales (PSOW)	Ev 123
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# Oral evidence

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## Taken before the Welsh Affairs Committee on Monday 11 January 2010

Members present

Dr Hywel Francis, in the Chair

Mrs Siân C. James  
Mr David Jones

Alun Michael  
Hywel Williams

*Witness:* **Sir Jon Shortridge KCB**, Former Permanent Secretary, Welsh Assembly Government, gave evidence.

**Q1 Chairman:** Good morning, Sir Jon. Welcome to this the very first session of our inquiry into Wales and Whitehall. For the record, could you introduce yourself?

**Sir Jon Shortridge:** Good morning, I am Jon Shortridge. I was Permanent Secretary in Wales from 1999 until I retired in May 2008.

**Q2 Chairman:** Could I thank you on behalf of the Committee for your very helpful and very frank paper; it was extremely helpful to us in preparing for today's session. Prior to you being Permanent Secretary in the Welsh Assembly Government, what were you doing? You were Permanent Secretary in the Welsh Office.

**Sir Jon Shortridge:** Yes. Perhaps I should explain. At the election in May 1997, that coincided with my being appointed Director of Economic Affairs at the Welsh Office and I was given responsibility then to establish the Assembly; so I spent two years, amongst other things, working on the establishment of the Assembly. Then in March 1999 I became Permanent Secretary for the Welsh Office so I took the Welsh Office through devolution. At the time I was both Permanent Secretary of the Assembly and the Welsh Office.

**Q3 Chairman:** You were therefore in a very pivotal position. Were there similar senior civil servants in similar positions across the United Kingdom, particularly in Scotland?

**Sir Jon Shortridge:** In Scotland my colleague was Muir Russell, and he was going through an identical process to the one I went through, although he had been appointed Permanent Secretary of what was then the Scottish Office quite a lot earlier than me.

**Q4 Chairman:** I was intrigued in your paper that you mentioned it was your view that the new Wales Office should only have a kind of temporary existence. Does its continued existence—not disappoint you—mean a failure on your part that it is still there?

**Sir Jon Shortridge:** No, I think there was always going to be a Welsh Secretary of State and therefore a Welsh department of state in Whitehall once devolution got underway in Wales; but my personal view is that, as the settlement matures, the engagement will be increasingly with the individual departments of state, policy departments, and that the need to have a Wales

Office, which in part has a role for brokering relationships between policy departments, should just wither away.

**Q5 Chairman:** In your period how frequently were Permanent Secretaries meeting to discuss devolution and the part that you could play in raising awareness amongst Permanent Secretaries?

**Sir Jon Shortridge:** I can recall very few occasions when the issue of devolution was discussed at plenary meetings of Permanent Secretaries; perhaps two or three occasions either on a Wednesday meeting or one of our away-days at Sunningdale. Obviously, when a particular devolution issue arose which was either of concern to me or of concern to my Permanent Secretary colleagues, that would be raised at a Wednesday morning meeting, but again rarely because normally issues of concern were bilateral issues of concern and they would be dealt with bilaterally between me and the other Permanent Secretary. What did happen increasingly was that the top officials of the three devolved administrations of Northern Ireland, Scotland and Wales came together for seminars about twice a year latterly in my time. Those were very valuable occasions because this was an opportunity for us to take the learning not so much from how devolution was being administered in our three countries, but how we were tackling common problems, often in a different way, so that we could learn from each other about whether or not we should be taking a different approach to certain policy issues, informed by what had been successful elsewhere.

**Q6 Chairman:** In the very early days, particularly just prior to the setting-up of the National Assembly, would it be the case—certainly according to anecdotal evidence it was the case—that the main preoccupation in Whitehall was the future of the union and the relationship with Scotland, and that Wales was something of an afterthought?

**Sir Jon Shortridge:** I think it has always been the case that Whitehall's focus has been much more on Scotland than on Wales.

**Q7 Chairman:** What would your role have been, then, given that you were the new Permanent Secretary, in raising awareness very sharply if that was a lacuna?

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**Sir Jon Shortridge:** I do not know whether I would necessarily describe it as a lacuna; that was a fact of life and I do not think I am ever going to change the fact that for ministers and for the media, and therefore for senior civil servants, their focus is always much more on Scotland than on Wales. My approach was to accept the reality of that, but then to use my influence and my increased status, I suppose, within the Permanent Secretaries' group, to make sure that any issues of concern that I had were being raised and dealt with effectively.

**Q8 Chairman:** Can you give us an example of problems caused by Whitehall officials' lack of knowledge of the Welsh settlement and failures of liaison generally, particularly in the early days? How did you address that? In a way, I suppose, we are asking you not only to be frank but also to be self-critical.

**Sir Jon Shortridge:** The problem I have on that is that I tend not to bear grudges, and I was always looking to the future rather than the past, so there were a number of occasions when others here and I got really angry, but I do not think I can recall them sufficiently to put them on evidence here. What I can say is that—

**Q9 Chairman:** Organise your grumbles.

**Sir Jon Shortridge:** The sorts of issues which emerged early, and I think continue to emerge, are press releases being issued from Whitehall departments which are not making it clear that the policy they are referring to applies to England only; confused policy documents—to take a recent example—a fair chunk of *Building Britain's Future* is about building England's future. If you were not actually an insider and thinking about devolution and you were just an ordinary member of the public, would you necessarily realise that? That is a continuing problem.

**Q10 Chairman:** Did you and the ministers in the Welsh Assembly Government make representations about that?

**Sir Jon Shortridge:** *Building Britain's Future* was after I left as Permanent Secretary in Wales, but ironically it was issued when I was Interim Permanent Secretary in a Whitehall department, and certainly at official level things were being said, but I think there was just a ministerial override on the consonance, or whatever it is, around the title, so something that they really just wanted to retain.

**Q11 Chairman:** You became Interim Permanent Secretary in that department?

**Sir Jon Shortridge:** No, this was a Number 10 publication. I became Interim Permanent Secretary in the Department of Innovation, Universities and Skills in May. It was abolished shortly after I arrived—I am sure there was no causal connection—and I became Interim Secretary in the Department of Business, Innovation and Skills, and I stayed there throughout the summer and then left. *Building Britain's Future* was issued at that time. I was aware that the title did not properly convey the content of

that document. That is an illustration of the sorts of continuing problems that exist. If I could just continue the answer, another thing that would cause irritation was when a Whitehall department would introduce a devolved delivery structure for part of its non-devolved policies but not respect the boundary of Wales. That was pretty much a nonsense. There were lots of problems, as I am sure the Committee is aware, around Legislative Competence Orders. Finally, there was the failure to inform us in advance of major announcements, and that is obviously a difficult area. Sometimes it was safe to inform us about major announcements and they just forgot; other times there would be, I am sure, a political override and the sensitivities were such that ministers did not want to risk a leak-back from Wales on a major announcement and I think that is understandable. It goes to the heart, I suppose, of how you make the devolution settlement work; you just have to have sufficient trust and understanding on both sides so that officials on both sides are prepared to take the risk of releasing information on a need-to-know but not-to-be-divulged basis.

**Q12 Chairman:** In your early days I recall that the strategy was not unconnected with your own approach of development of a kind of democratic partnership, presumably based on what you have just said, on trust.

**Sir Jon Shortridge:** Yes.

**Q13 Chairman:** Looking back now on that ten years, I suppose you could be a lot more self-critical about the fact that we have not achieved that fully, given what you have just said!

**Sir Jon Shortridge:** Certainly, with the benefit of hindsight, I would have done a number of things differently. I think that I would perhaps have made myself more vocal and sought to get the issues discussed more regularly at the Permanent Secretaries' group, and I think with hindsight I would have pressed for the sort of thing I put in my memorandum to you about trying to get a network of experts across Whitehall departments. I do think with hindsight that it is unrealistic to expect the majority of civil servants in Whitehall, amongst everything else they have to be thinking about and doing, to retain and maintain a full appreciation of the governance of Wales and what it means for their work. Getting just a few people whose job it is within a department to keep up to date with the Welsh settlement and the politics of Wales means that when something crops up on someone's desk they had some opportunity to raise this with one of them; and that could have been introduced earlier, and that would have been better. I should say to the Committee that I produced my memorandum at some speed over my Christmas holiday. I subsequently spoke to Gillian Morgan and I think that perhaps, since I departed, the Cabinet Office has become much more active in providing leadership on issues like this, so when you take your evidence from Gillian Morgan she will be able to amplify hopefully some of the points I have put in my evidence, which are now slightly out of date.

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**Q14 Alun Michael:** Just on the point about officials having confidence to take risks, your answers to the last few questions moved between comments about ministers and officials. Would you accept that the lack of trust between departments is deeply embedded in the culture of Whitehall and the depth of that distrust of other departments is not just of previously the Welsh Office and now the Assembly but inter-departmentally is part of the problem?

**Sir Jon Shortridge:** Yes, I think that the departmentalism in Whitehall means that it is built in to certain civil servants' DNA that they have to be very cautious about what they say to each other. That is amplified, I think, when they realise they are talking to officials in a different jurisdiction.

**Q15 Alun Michael:** When Defra was created we discovered there was a team of people within the old DETR—I think it was DETR, the initials change from time to time—whose main responsibility was keeping an eye on the Ministry of Agriculture, finding out what they were about to do and stopping them, whatever it was. That obviously is not a devolution issue. You make the suggestion that each department should have a devolution expert who should be available to advise. Can you describe the expertise you think that person should have and how would you ensure that they would ask for advice when it was needed?

**Sir Jon Shortridge:** I am sorry, to help me I did write down what expertise I thought I was looking for and I cannot find it in my notes here. I think the expertise I would be arguing for is a good understanding of the existing settlement and the politics of Wales. That means an active engagement with what is going on in the political life of Wales.

**Q16 Alun Michael:** Is not the problem that very often people are not aware that there is a question to be asked? They are focused on whatever the policy is that the department is producing and they can see as far as the boundaries that they are responsible for, and unless they realise and have a good understanding of devolution, they are not going to realise that they need to ask the question. To put it in another way, if you have an expert with that responsibility, does that not give permission to everybody else to abrogate responsibility for understanding the necessary relationships?

**Sir Jon Shortridge:** I think where I am coming from is that in the real world in which we are operating, the majority of civil servants in Whitehall will not be, as part of their normal working day, seeking to keep themselves up-to-date with Wales, not least because if they are just relying on the London-based media, they will be told nothing.

**Q17 Alun Michael:** I am trying to get clarity about the role. Does that mean you are envisaging somebody who would have a responsibility to challenge people within that department about whether on any particular policy area they have understood the knock-on effect or the implications?

**Sir Jon Shortridge:** I think challenge may come into it as well. I have in mind someone with sufficient seniority in the organisation or the department who would, as part of their responsibilities, be expected and required to have an up-to-date understanding of the devolution settlement in Wales, the political issues, the substantive issues in Wales, particularly those related to that department's responsibilities, so they would know what the department needs to know; and then the expectation would be that if you were some luckless desk officer who suddenly has a Welsh issue across their desk, rather than making it up as they go along or putting it to one side because it is all too difficult, you would know the first thing you had to do was go and talk to this person and get his or her advice on how to handle it.

**Q18 Alun Michael:** With respect, in your own evidence it is suggested it was a lack of understanding of the settlement and the nature of the relationship rather than specific Welsh issues coming out of the woodwork that is the issue. Is it not mostly an issue of day-to-day activity rather than a big issue emerging? You said somebody senior. Are you talking therefore of the person with that responsibility being like at director-general level within the department?

**Sir Jon Shortridge:** I would think certainly at director level, to provide the necessary leadership, and he or she would have someone on the staff who would have a more operational role. Perhaps I was not communicating sufficiently clearly in my submission, but I was really talking about a Welsh issue that emerges. It could be that someone finds themselves caught up in a piece of Welsh legislation, or it could be that there is a very difficult, non-devolved issue that they are having to deal with which actually affects Wales. A good civil servant will probably, or might well, be competent to deal with that, but I think, with the benefit of my experience, there needs to be someone in the department who just has the knowledge and expertise associated with Welsh settlement who that person can engage with so that it is dealt with in a consistent and appropriate manner. We have had lots of experiences where things have gone wrong because people who have had to deal with the issue at the Whitehall end have not sufficiently understood the context and the circumstances.

**Q19 Alun Michael:** Just to balance that, you did say that officials in Cardiff should do more to build up relationships with their key opposite numbers in Whitehall. I was reflecting on your career. In fairness to you, you were normally kept back in Cardiff because there was a crisis and you were the person to handle whichever crisis was on at the time; but do you think you left your experience of Whitehall a little late?

**Sir Jon Shortridge:** Me personally?

**Q20 Alun Michael:** Yes.

**Sir Jon Shortridge:** I started off in Whitehall in 1969 as a researcher, left government and became a local government planner in 1975, and returned to the

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Welsh Office as a direct entrant in 1984; and so from 1984 all my Whitehall experience was in Cardiff, if I can put it that way.

**Q21 Alun Michael:** That is my point.

**Sir Jon Shortridge:** Although I did spend 18 months supporting Secretaries of State in the House.

**Q22 Alun Michael:** Would you and the Welsh Office have benefited had you had a period working in a Whitehall department in the sense at least of knowing the enemy? Perhaps I should not put it in those terms!

**Sir Jon Shortridge:** Possibly. There are two things on that. I think that it is good for organisations occasionally to grow their own leaders and that could be more helpful than having someone parachuted in from outside. I do think, though, looking forward, that there is a potential problem that civil servants in Cardiff do not have the same degree of experience of operating physically from Whitehall than happened in the old Welsh Office days. I think this is something which Gus O'Donnell and Gillian Morgan are seeking to address, and you may want to ask Gillian Morgan about that.

**Chairman:** We will want to ask Gus O'Donnell as well.

**Q23 Hywel Williams:** I should say first that I have no experience of the Civil Service, possibly thankfully so, but I have been the Welsh person on a UK committee in the past, several times. One of the difficulties is that you have to have a person who has not only knowledge of the workings of departments but also how things are back in Wales, back at the ranch as it were, and you are looking for someone with a highly developed grasp of things; so you are looking at a fairly senior person as you said earlier on.

**Sir Jon Shortridge:** Yes.

**Q24 Hywel Williams:** But as you also said earlier on, within departments there is not sufficient priority given to Welsh affairs anyway, so are you looking for the impossible there, that is a person who is sufficiently senior to grasp both ends, but that person would not exist anyway?

**Sir Jon Shortridge:** I am not looking for perfection; I am looking for a significant improvement on what we have here. My basic approach or position is that a solution which is seeking to train the majority of civil servants in a government department to be able to deal competently and confidently with Welsh issues is more likely to fail than one where you have just a very few people in the department who have that expertise; then they are deploying that expertise for the benefit of the whole department.

**Q25 Alun Michael:** That is fair enough. I just want to ask a supplementary very quickly. If a person or persons are nominated as the people with this particular expertise, is there any danger bunker walls would be built around them fairly quickly and would they be isolated as being either a person who is suspect because they have this knowledge or,

otherwise, the person on whom all the responsibility is devolved? If there is a Welsh issue, "Well, Mr Jones will deal with these and we can go on our merry way", and they ignore it all.

**Sir Jon Shortridge:** I hope there is not that risk. Certainly it is not my intention or expectation that this expert will do all the work; the expert will be there to provide assurance that the person doing the work in the department concerned was doing it in an appropriate and properly informed manner.

**Q26 Mr David Jones:** Sir Jon, is it fair also to say that there is an insufficient understanding at ministerial level of the Welsh dimension and the consequences of devolution?

**Sir Jon Shortridge:** I think "probably" is the answer to that, although I do not have sufficient evidence really to comment on the relative knowledge of government ministers on the Welsh settlement; but I do indicate in my evidence that I think if there is a better knowledge and expertise available to ministers at an official level in departments, then they are likely to get better-informed advice when those issues emerge. I do think there is a general problem that in the United Kingdom as a whole Wales just tends not to feature much outside Wales. If you read, as I do, the London-based newspapers—I read *The Times* every day—to the best of my knowledge the only occasion in which *The Times* has acknowledged that Carwyn Jones is now the First Minister in Wales was last week when there was an article when he was identified as one of the five political figures to watch; but there has never been a news article in the London *Times* about Carwyn Jones. That would just not happen in the case of Scotland. When I was in Scotland, the day after the Scottish Government published its draft budget, it was the lead article on the front page of the Scottish edition of *The Times*. There has never been article in the London *Times* about the Welsh budget. That encapsulates the fact that Wales is always going to be on the back foot when important issues are being discussed in Whitehall and Westminster that affect it.

**Q27 Mr David Jones:** Is that not a fault of the media rather than a fault of government?

**Sir Jon Shortridge:** I am certainly making a pretty significant criticism of the media because I think the media tends to widely lead debate. I suppose other things could be done to compensate in Whitehall and Westminster for a media that is failing in this regard.

**Q28 Mr David Jones:** Your memorandum is not only critical of Whitehall and Westminster but is also critical of Cardiff. You say in your memorandum: "Ideally officials in Cardiff should do more to build up relationships with their key opposite numbers in Whitehall but often the sheer range of these and their own work pressures in Wales make this far from easy." To what extent would you say that apparent unwillingness to make contact with their opposite numbers is sometimes prompted by a reluctance to

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give priority to building up such relationships because they wish to emphasise the separateness of Welsh policy pursuant to devolution?

**Sir Jon Shortridge:** I am not aware of any evidence that is the case. It may be the case to some extent, but I am not aware of any evidence. I think it is the physical barrier of two and a half hours there, two and a half hours back, and lots of pressure on you to be dealing with business here and then the fact that if you are a desk officer in Wales, you are dealing with issues which are the responsibility of a substantial number of desk officers in Whitehall by definition; so it is a big ask actually for officials to build the kind of relationships that are ideally required for those two reasons. Having said that, I think it would be wrong of me to be sitting here and saying problems about Cardiff/Whitehall relationships are all down to failures in Whitehall; clearly they are not. There are things which could be done like officials here being given greater encouragement to spend time in London or invite people back from London, and for more leadership around secondments to Whitehall so that we maintain a sufficient critical mass of people working in Cardiff who have worked in Whitehall, understand Whitehall ways and have got good contacts built up in Whitehall in that way.

**Q29 Mr David Jones:** I recall this Committee taking evidence from the Welsh Transport Minister some months ago when he told us that there had been no liaison or co-ordination of road freight policy between Cardiff and the Department of Transport in Whitehall, which appears extraordinary given that most road-freight journeys either end or begin in England. In that particular case would the fault be on the part of officials in Cardiff who did not seek to co-ordinate policy or is it the case that they were simply being overlooked in Whitehall?

**Sir Jon Shortridge:** I cannot comment on a particular case like that, but I would acknowledge that in Cardiff we could deal with certain things better.

**Q30 Mr David Jones:** There appears to be a degree of co-ordination and liaison between Cardiff and Defra for example, where there is a large overlap of functions, so possibly officials in both departments find it more natural to work together. Is it possibly more difficult to achieve that level of co-ordination in other departments where contact between Cardiff and Whitehall might be much less frequent?

**Sir Jon Shortridge:** In the case of Defra, as Mr Michael will know, one of the things that has always driven that strong set of relationships is the fact that a lot of the policies we implement here in agriculture are driven by the European Union and, therefore, as far as possible there needs to be a consistent and unified approach across the United Kingdom to dealing with agriculture matters. That is what has driven that set of relationships. In other cases where there is less of an external need imposed upon departments and upon us, it is much more down to personalities, I think, saying, "Yes, we will have regular meetings on health and social care matters either across the four jurisdictions or bilaterally with Whitehall, and, similarly, with the Treasury on financial matters." If

ministers, in particular, but also top officials feel that that would be necessary and useful, it will happen in those cases. Where there is a change of personnel there are examples of meetings like that ceasing to happen and wither away.

**Q31 Alun Michael:** You refer to the experience with Defra. You may recall that immediately before the Assembly came into being the discussion between the four departments that were then responsible for agriculture were sometimes very negative experiences, with the officials in particular at the Ministry for Agriculture resenting having to have any discussion with their counterparts in Wales, Scotland and Northern Ireland. It was not anti-Welsh; it was against everybody outside London, one rather felt. That was at an official level. Can you show us how we managed to move from that situation to a situation where clearly you have been very positive about the relationships that have been built up in that topic over 12 years; and are there lessons to be learnt there for the way that other policy areas are dealt with?

**Sir Jon Shortridge:** Oh dear! I think when MAFF was running agriculture, relationships were not good. I think at official level there were quite serious problems within MAFF. It was one of the reasons why MAFF ceased to exist. Since then, there has been this continuing relationship, which is really a requirement because of the EU issues, it seems to me, and on some occasions the relationship has been better than others. When people change, that will always affect a relationship, but sometimes the new personnel have not been able to get back to the level of trust and understanding that existed before; and then sometimes there are political issues like the way decisions were being taken in Whitehall on foot and mouth, which temporarily caused a real freeze in those relationships. It is the real world intervening in what might be an idealised model. You are never going to get it perfect all the time.

**Q32 Mrs James:** Turning to the role of the Wales Office, you say in your memorandum that you see it as a temporary role, but in the memorandum from the Secretary of State he calls it "absolutely pivotal". Do you think there might be a danger that if we did reduce the amount of work that the Wales Office did, that would add to the burden in some way, that we would become sidelined and possibly there would be a neglect of Welsh matters on a Whitehall level?

**Sir Jon Shortridge:** I think that is a risk. The other way of looking at it is that at the moment, if you are sitting in Cardiff, you have got at least two sets of relationships to manage with Whitehall: one is the Wales Office and one is the policy department. That creates, or can create, some ambiguity and complexity, which from your own personal perspective you may think is an unnecessary complication and you just want to get on talking to the Department of Health about this issue and you do not really see that it is necessary for the Wales Office to organise the meeting for you. I think there is an issue there. I have expressed a strong personal view. You tell me that understandably the Secretary of State has expressed his official view. We will just have to see how

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the debate goes. I do think that, as the settlement matures, the need for the Wales Office diminishes, with this one exception about Legislative Competence Orders where they have a big role. If the process around Legislative Competence Orders is maintained—and I have given a comment on that—then I can see that there is a role for the Wales Office around those; but then there may be a referendum in years to come and at that point if the Assembly were able to get full primary legislative powers, the Wales Office's role in relation to LCOs by definition would fall away.

**Q33 Mrs James:** What about the overlapping in policy? Speaking as the ex-director of Welsh Women's Aid, I read with interest their memorandum about the Westminster drag and the position that they were in particularly with domestic abuse issues and protection of women. There is one set of legislation for England and one set of legislation for Wales and then there are overlapping areas of legislation. How do you see the role of the Wales Office ameliorating that and making it easier?

**Sir Jon Shortridge:** On the technical issue about legislation, officials and parliamentary counsel can determine as a matter of fact how that should be managed. If there are any residual issues they need to be dealt with politically, so I do not see necessarily there is a particular role for the Wales Office there. In terms of advocacy for Wales within Whitehall and Westminster, clearly there is a role for what is now a Secretary of State for Wales. The issue is whether the ministerial advocate for Wales needs to have an exclusive department for Wales.

**Q34 Alun Michael:** Siân James and I are members of the Justice Select Committee, and that Committee called for the Ministry of Justice to have a clearly recognised and developed holistic role in constitutional issues in respect of devolution matters within the UK. What is your view? Do you think the Department for Justice should be given such a strengthened role, and perhaps we ought to ask if they would be capable of fulfilling it?

**Sir Jon Shortridge:** I think one of the things that you will find when you speak to Gillian Morgan and Sir Gus, if he comes before you, is that the Cabinet Office is now taking a much stronger role in relation to the devolution settlement for the United Kingdom. I am very pleased that they are doing that because I have always thought that issues relating to the management of relationships between different jurisdictions in the United Kingdom should come under the umbrella of the Joint Ministerial Committee, and any governance issues associated with the Joint Ministerial Committee should be handled as a machinery of government issue within the Cabinet Office.

**Q35 Alun Michael:** Are you saying that there should not be, therefore, that structured role for the Ministry of Justice, it should be with the Cabinet Office?

**Sir Jon Shortridge:** I am 18 months out of date, so I am giving you what I understand may be the issue, but you need to clarify it. If that is the way it has gone,

then I think that the Ministry of Justice's role in relation to devolution pretty much withers away. It would continue to have a series of roles in relation to constitutional issues.

**Q36 Alun Michael:** But the direct responsibility for constitutional issues, including devolution, lies with the Ministry of Justice.

**Sir Jon Shortridge:** Yes, but my impression is from talking to Gillian Morgan that there have been some initiatives recently where the Cabinet Office has taken back some of those responsibilities. I may be wrong, but if that is the case I would welcome it because I think they sit better within the Cabinet Office.

**Q37 Alun Michael:** In general, you feel the focus on devolution ought to be in the Cabinet Office rather than the Ministry of Justice, the lead responsibility.

**Sir Jon Shortridge:** Yes.

**Q38 Alun Michael:** Does it worry you that, given the responsibilities for devolution in the Ministry of Justice at the moment, they appear to have misunderstood their own responsibilities on a number of occasions in relation to legislation, sometimes thinking things are devolved when they are not and at other times failing to recognise, or their agencies failing to recognise, the need for discussion about the impact on Wales and particular issues?

**Sir Jon Shortridge:** I have not read the Justice Select Committee's Report so I am not aware of particular problems that have arisen. I would say it would not surprise me because I personally do not think that the Ministry of Justice was in the best position to address these issues. If it is now moving back to the Cabinet Office at least to some extent, I think that would be a good thing for settlement.

**Q39 Alun Michael:** I was asking you about things within your period, so that would fit with what you are saying.

**Sir Jon Shortridge:** I was always of the view when I was performing the role here that the Cabinet Office should have this function. The function went to the Ministry of Justice and so my evidence reflects what I thought to be the reality, that the Ministry of Justice had that responsibility. I think you will find that some of this is moving back to the Cabinet Office, which I would welcome.

**Q40 Mrs James:** In your experience have the inadequacies in Civil Service resources in Wales caused a legislative deficit with inadequate consultation, research and a slow timetable for implementation?

**Sir Jon Shortridge:** Are you saying failings in the Civil Service are causing these things?

**Q41 Mrs James:** Having inadequacies. We have touched on a few of them today, have we not?

**Sir Jon Shortridge:** You can always do things better. As a generalisation, I have always taken the view that the quality of the Civil Service in Cardiff is at least as good as in Whitehall, so I do not think personally that one can lay the blame for any inadequacies or

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slowness in process at the door of civil servants here. I think that to a significant extent the problems that have arisen with the settlement, particularly following the latest Government of Wales Act, are down to the complexities that are involved in getting ministers and officials in particular in Whitehall to understand the nature of the new systems that need to be put in place, and being prepared to put the time and effort into handling these issues in a way that meets the timely needs of Wales. That is a big change that, sadly but perhaps inevitably, is taking a considerable time for the culture of Whitehall to adjust to, because this is entirely novel to them. They are not really thinking Wales; they are thinking either England or the United Kingdom.

**Q42 Hywel Williams:** You referred earlier on to secondments from Wales and Edinburgh and perhaps from London down to Edinburgh and down to Wales. Would that be sufficient to address this particular problem? I think you are describing an awareness problem in Whitehall. Does there need to be some more fundamental shift? It seems to me that it is always a one-way street, that Cardiff should be aware of what happens in Whitehall, and it does not work in the other direction.

**Sir Jon Shortridge:** It is easier for us to be aware of what is going on in Whitehall because we read it in the papers every day. Whitehall civil servants do not read in the papers every day what is going on in Wales. That is a reality. I think certain things need to be done to compensate for that reality, and in my memorandum I have given an indication that I think you need to deal with it by just focusing on having a small number of people in Whitehall who at any one time across Whitehall do understand the situation so that they can be used as a resource to facilitate the better management of working relationships and the management of business that affects both Wales and Whitehall.

**Q43 Mrs James:** My fellow member of the Justice Committee has already referred to some of the Justice Committee's proposals, but would you support the proposal for a single Civil Service Code that would be accepted and observed by all the administrations of the United Kingdom?

**Sir Jon Shortridge:** I think essentially there is a single Civil Service Code. The key words are the same in different codes. But you cannot have civil servants in Cardiff owing allegiance to ministers in the United Kingdom Government; so you do have to have subtle changes made to the different codes to reflect the critical ministerial/governmental context in which civil servants are operating in different jurisdictions. Subject to that, I would be very surprised if there is any difference at all in the critical wording which determines the conduct and behaviour of civil servants in the different jurisdictions.

**Q44 Mrs James:** Do you think it is worth promulgating the details and implications of devolution settlement and actually reiterating it as part of it, so reminding everybody at that point that there is this important thing?

**Sir Jon Shortridge:** I need to refresh my memory of the code, but I think if all the codes placed a duty on civil servants to have appropriate regard for whatever that means in the different jurisdictions, that might well help to drive behaviour. In my experience, if you impose a statutory duty on a civil servant, they take that pretty seriously.

**Q45 Mr David Jones:** I take it, Sir Jon, that you are in favour of continuation of a unified Civil Service in this country!

**Sir Jon Shortridge:** Yes, I am, although I am pretty neutral on it actually. The main case for having a unified Civil Service is that it is one of the few things which holds the United Kingdom together, or it is one of the few United Kingdom institutions that still exists, so it is worth it in that sense. I think it also helps these relationships; so if you are a civil servant in Wales talking to a civil servant in Whitehall and vice versa, there is a certain commonality which probably helps that relationship. I would not die in a ditch on it personally; I think there is a strong case for building—and I always have thought this—a stronger Welsh public service. I think the more you can have a unified public service in Wales, that would help to deliver better unified policies in Wales and remove some of the frictions that exist between different organisations in Wales. There are counter-arguments as well. I am neutral on it. I would not be an advocate of getting rid of a unified Civil Service, but I would not regret it that much if it ceased to exist.

**Q46 Mr David Jones:** What strains do you think would be put upon that unified Civil Service if and when there is a change of government in London, and for the first time since devolution there are governments of different hues at either end of the M4?

**Sir Jon Shortridge:** I do not think the strains would be so much on the Civil Service as on the governmental institutions.

**Mr David Jones:** Those seem to exist at the moment. It just occurs to me that they might be exacerbated once there is a change of government.

**Q47 Chairman:** Would you like to declare an interest there?

**Sir Jon Shortridge:** We will see, will we not? As you will know, the Conservative Party is the unionist party or the party that stands for the union, and they would not want to do anything which undermines the union.

**Q48 Mr David Jones:** I understand that but I wanted to know what stresses that would place upon a unified Civil Service. In other words, you have got a Civil Service in Cardiff and Whitehall serving political masters of different hues.

**Sir Jon Shortridge:** We have got civil servants in Whitehall dealing with civil servants in Cardiff who are serving both Plaid and Labour ministers here. I think civil servants are very professional and will get on with it. The strain will be on these issues of trust that we talked about earlier. Certainly in the early days there will be civil servants in Whitehall thinking, "Can I really share this with civil servants

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in Cardiff?” That will happen. If there is the political leadership from Conservative ministers, if what they are saying is, “Yes, we think it is really important that this communication continues at a high standard”, they will be more inclined to take the risks than if the ministers are saying, “You get that wrong and you will be in trouble.” Then they will not take risks.

**Q49 Alun Michael:** You made what seems to me to be a very sensible suggestion in your memorandum that Legislative Competence Orders should go straight from the Assembly to Parliament, rather than to UK Government or a Whitehall department. What would the practical effect of that be from your perspective?

**Sir Jon Shortridge:** I should say first that this is a personal view and I do not think I ever managed to persuade anyone in my formal organisation of its merits! But I still hold to it. The practical implications would be that Parliament would have to change certain of its basic conventions because by convention Bills are introduced by the Government into Parliament. Legislative Competence Orders are legislation, so I think Parliament would have to provide a different device for taking Legislative Competence Orders through Parliament, and that would be a matter for the Speaker, who would have to decide who he wanted to nominate to undertake that role. If that procedural hurdle could be overcome, then it would make life easier for the UK Government because they could decide through a transparent political process what they were going to support and whether they were going to support it. There would also be the merit from the Cardiff point of view that you would not need to go through two sequential sets of negotiations, one to get the Government’s agreement and then Parliament’s agreement. Obviously, if you get the Government’s agreement then I would say it diminishes the opportunity of Parliament to challenge because you have got majority support for it as it goes through. It is an idea that is worth thinking about, but it is pretty radical, I suppose.

**Alun Michael:** It is interesting because in many ways it addresses some of the issues that this Committee has been concerned about.

**Q50 Chairman:** That applies equally to the Welsh Assembly Government, does it not? If there were a situation where the Assembly spoke to Parliament and Parliament spoke to the Assembly, that raises the question whether or not the Welsh Assembly Government could step to one side and allow the straight passage—straight in.

**Sir Jon Shortridge:** What I am saying is that Legislative Competence Order proposals coming from either Assembly members themselves or from the Assembly Government, should go straight to Parliament and should not go via the UK Government.

**Q51 Mr David Jones:** You have touched previously on the issue of whether or not the functions of the Wales Office would wither away in due course.

Would you be in favour of a single constitutional minister to take over the responsibility for the function of devolution, or would you think that is a task best left to the Cabinet Office as we discussed previously?

**Sir Jon Shortridge:** I would be very disappointed if there was not a Cabinet minister responsible for the wider constitutional issues, including devolution. I think there is a case in addition for having a minister who is representing in our case Wales but also ministers representing Scotland and Northern Ireland so that their voice is heard within government. Where a department for constitutional affairs exists, I do not know. My own personal preference would be to have it out of the Ministry of Justice and either freestanding or associated with the Cabinet Office, but these are political judgments and are not really ones for me.

**Q52 Mr David Jones:** Do you think that the revival of the operation of the Joint Ministerial Committee for devolution with a new responsibility for promoting dialogue will help improve the Government’s relations with devolved administrations?

**Sir Jon Shortridge:** I think there is a continuing role for the Joint Ministerial Committee. I think, though, from my perspective as a civil servant the greater value would be if the Joint Ministerial Committee had put in place stronger official structures under it, and officials from the four jurisdictions would in effect be instructed to manage the complexity of devolution and the operational aspects of devolution more effectively and report back into the Joint Ministerial Committee. I think the Joint Ministerial Committee itself—the person sitting behind me will be better able to comment than I am—cannot do much business, can it, because if Wales has a particular issue with the UK Government, it is not going to raise it at a Joint Ministerial Committee meeting with Northern Ireland and Scotland sitting there? I do not think the Joint Ministerial Committee has much of a practical role, but the fact that it exists as a way of leading and driving the operationalism of the settlement is a good thing. If the Devolution Guidance Notes are being amended or if the Memorandum of Understanding is being updated, then obviously the Joint Ministerial Committee needs to sign that off, and it can probably be signed off in correspondence unless there are contentious issues.

**Q53 Mr David Jones:** Your last observation, it seems to me, is a good argument for the retention of the Wales Office to give Wales more clout in the heart of Whitehall.

**Sir Jon Shortridge:** There is obviously a case for the retention of the Wales Office, and I would not disagree with that. It is a judgment to be made. I think unless everyone is certain that the Wales Office is going to continue to exist for all time, it is well worth making contingency plans within government for how you would operate without it.

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**Q54 Mrs James:** Turning to the review of Whitehall guidance on devolution that you mentioned in your memorandum, you say how the original Concordats work at departmental levels between the devolved administration and the departments; but given this constant flux of changes in departments, et cetera, do you think there is a need to maintain the overarching Memorandum of Understanding, making sure that on a day-to-day basis civil servants heed it and maintain it?

**Sir Jon Shortridge:** At the time of course the value of the Concordats forced everyone to think what the establishment, in my case, of the Assembly meant for the conduct of business in Whitehall; so the production of the Concordats threw up issues and created a basic level of understanding that was really important. I thought their value was in the process rather than in the product, so I do not think people now continually refer back to Concordats, and rightly so because you should be just establishing ways of working and getting on with it. For me the most important documents are having the Memorandum of Understanding and the Devolution Guidance Note, or whatever it is called, underneath it. Those documents have to be kept up

to date. I think a requirement, or pretty close to a requirement, on all civil servants to comply with them is really important.

**Q55 Mrs James:** How do we maintain it?

**Sir Jon Shortridge:** I would maintain it by having leadership coming from the heart of the jurisdictions, the governments, so that these things are maintained and kept up-to-date on behalf of the Joint Ministerial Committee. That is why I think there is a role, not a particularly onerous role, for the Joint Ministerial Committee; but if there is nothing at the heart of the governance of the United Kingdom that is taking ownership and giving clear leadership on all of this, it will just wither away because people will be doing what they regard as following more important political priorities.

**Q56 Chairman:** Thank you very much, Sir Jon, for your evidence this morning. It has been a most productive session. Thank you for your written memorandum. In the light of evidence given later on further down the road, you may wish to give more written evidence, but we shall see.

**Sir Jon Shortridge:** The Clerk will be in touch with me if she wants me to do more. Thank you.

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*Witness:* **Rt Hon Rhodri Morgan, AM**, former First Minister of Wales, gave evidence.

**Q57 Chairman:** Good morning. Welcome to the Welsh Affairs Committee for this particular evidence session on Wales and Whitehall. For the record, could you please introduce yourself, Rhodri?

**Rhodri Morgan:** (In Welsh: no interpretation): I think this is an absolutely fascinating subject you have chosen. What I am not quite sure about is how you are going to give marks out of ten for the quality of consultation and co-operation between Whitehall and Westminster on the one side and the Civil Service and the political world of the Assembly Government, of the Assembly and the wider legislative body down here. Let me make just one very brief opening remark at your inquiry. That is, looking back over the past ten years you may want to look at some of the official formalities of the Joint Ministerial Committee and the Memorandum of Understanding, but really I do not think the JMC and the Memorandum of Understanding and Concordats are the key thing. The key thing is whether a relationship is warm or cold, and that is what is so hard to measure. It is a matter of attitude rather than the formality of the machinery, and that is quite difficult to get at. The political perspective, the ministerial perspective, may well be quite different from the Civil Service perspective, and that is why I was very interested to pick up on the memorandum that Sir Jon Shortridge has given to you, and also his answers to some of your questions. I was hearing him refer from time to time to the fact that my perspective might well be different from his on political matters, and I think this is the difficulty. I do not think Sir Jon can talk with all that much authority on inter-ministerial relationships at the

political level any more than I can really talk with any great authority from my past experience about Civil Service relationships. I think that is difficult. The key thing is that the benefits of devolution as we saw them were that we could evolve different policies, which were then part of the four living laboratories that would be available within the United Kingdom, for different solutions to different problems. That to us is a good thing because in the USA you have 50 living laboratories, and we have got four living laboratories in the United Kingdom. On the other hand, as well as the advantage of the different policies that are available and that have been generated through Scotland, Wales and Northern Ireland, having the ability now through their democratic machinery and their Civil Service to generate different policies, that is a good thing because then each person, each different dispensation, can copy or follow another dispensation, and you do not have to re-invent the wheel. On the other hand, you have also got the issue that it can be seen as a threat as well as a challenge to the authority of the United Kingdom Government; and then you get a negative effect.

**Q58 Chairman:** Rhodri, you have anticipated most of the questions I was about to ask you; but could I ask you to pause for a moment and reflect on what you have just said! Basically, you are saying that in terms of inter-government relations, the fact that they are non-binding and non-statutory is not of as great importance as what I would describe and characterise as a culture change that is necessary as

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a consequence of what you have characterised as the four living laboratories. That is essentially what you are saying.

**Rhodri Morgan:** Yes.

**Q59 Chairman:** There is a culture shift that needs to take place.

**Rhodri Morgan:** Yes.

**Q60 Chairman:** Reflecting on your time, how do you measure that over the last ten years? Have you achieved much in getting that culture shift in the light of what Sir Jon said in terms of the difficulty in Whitehall understanding what we mean by devolution?

**Rhodri Morgan:** We were never sure. If there was a negative reaction in Whitehall to something that we were doing, or wanted to do, it was quite difficult for us to guess where the problem lay. In other words, was the problem rogue behaviour by middle-ranking civil servants who had a bit of a thing against devolution because they thought it was a threat to the English regions or something like that; or had they had ministerial instructions to be pretty obstreperous or suspicious of Welsh initiatives or Welsh wishes? It is quite hard. How are we supposed to know whether it is a matter for Sir Jon to take up with the Permanent Secretary in Whitehall and say, "Hey, haul off that person there who is blocking something or other on this initiative because surely this has not got ministerial backing"; or should they call a particular minister in, or worst of all call me in if I was First Minister, and ring the Prime Minister or possibly Jack Straw or whoever is in charge of inter-governmental relations, saying, "We have a problem in the relationship between one of our departments and one of your departments and we do not know whether it is political or it is in the Civil Service or how high up the Civil Service, or if it is rogue behaviour at a middle-ranking level."

**Q61 Chairman:** In the light of that, you started off by saying that these *ad hoc* arrangements would suffice as long as we have a culture shift but, that said, given that there are still problems, is it surprising that the Memorandum of Understanding has not been altered since 1999 to take account of that?

**Rhodri Morgan:** No. To be honest, it is a very British way of doing things to try to operate in an informal capacity. We do not have a written constitution. We do not have a constitutional court that rules on disputes. The Privy Council does a little bit of it more recently, and the ONS has been prayed in aid to act as a body responsible now to Parliament and not to Government and to rule on figures; but by and large Westminster wishes to adhere, and will do for a long time I believe, to the idea that if you are elected and you have a majority you are basically in charge for the next four or five years. The elected dictatorship idea—and therefore a government, provided it has a majority in Parliament—does not want to submit to anybody else for ruling on whether a devolved body is right or whether they are right on a definition of something where there is a financial resource issue or whether it is a "who should do what" issue. I think

the only way round that is to establish what is called a good broad working relationship and try to take the heat out of issues as best as you can; or you make an entire shift to the kind of constitution that we wrote for the Germans in the immediate post-war period, and we wrote it all down very, very formally for them because it was seen as part of the de-Nazification. We do not need de-Nazification in the United Kingdom; we have muddled through very well since the 1688 Bill of Rights, and long may we continue to do so; but I do not rule out, however, having a written constitution at some stage. I think you either have informal methods or you have formal methods. If you have informal methods, as we do, then—I am not saying it does not matter a damn about the Memorandum of Understanding—that is not a key to warm or difficult relationships. The warm or difficult relationships mean a culture change at ministerial and Civil Service level.

**Q62 Chairman:** It sounds a little bit like what we would call in Welsh *cael gair bach* [having a little word].

**Rhodri Morgan:** Yes, indeed.

**Q63 Chairman:** And reflecting on the great Glanville Williams in his descriptions of the Tudor Court.

**Rhodri Morgan:** Yes, *cael bach yn y set fawr*—after the service is over, yes.

**Q64 Mr David Jones:** The plenary session of the Joint Ministerial Committee did not meet for about six or seven years. What effect, if any, did it have on relations between Cardiff and Whitehall?

**Rhodri Morgan:** Not very much. I do not think it either hindered relationships nor did it mean that everybody was getting on with the job. You had probably the same amount of success or difficulty over misunderstandings or disagreements over policies whether you did have a formal meeting of the JMC or not. It has now come back into action. We had a meeting in the bowels of the House of Commons three or four months ago. The Prime Minister and Jack Straw chaired it. The Prime Minister attended for about half of it. I thought that was a good thing because you now have an SNP administration in Scotland, and I thought it helped to warm up again relationships which had got pretty frosty, particularly between the Scottish administration and the Westminster and Whitehall Government. I do not think the absence of a formal JMC would make that much difference.

**Q65 Mr David Jones:** Would you think that a potential change of government at Westminster would make the continuation of plenary sessions all the more important, or again would you think it would make little difference?

**Rhodri Morgan:** I always envisaged at the start of my period in charge down here that you wanted the devolution settlement to be robust to cope both ways, with a change of leadership down here and a continuing Labour Government in Westminster, or the other way round. I hoped it would not happen during my tenure but, on the other hand, we did have

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to have a robust enough system to be able to cope with it. There is no point in having a devolution system that could not cope with cohabitation, to use the French expression. Obviously, Scotland has had it; we have not. We have had a coalition obviously for half of the last ten years, but we have not had a non-Labour or non-Labour-led administration; we have not had a non-Labour government in Westminster, but we have now got that for Scotland so that probably was a good reason for reinstating the JMC machinery. My memory of the JMC plenary is that we made a huge fuss about it in the first couple of years. The Prime Minister always attended. Then Robin Cook or John Prescott chaired it and then it stopped meeting altogether. In a way that was a sign that things in devolution terms were going fairly well, and therefore it did not need this formal machinery; but in the first couple of years it was a very good thing to have these rotating meetings in Scotland and Wales. At that time the Northern Ireland settlement was in abeyance so it never did meet in Belfast; but having the meetings here and in Scotland, with the Prime Minister chairing them, probably was a good kick-off for devolution. In a way the downgrading then of the Prime Minister's attendance to Robin Cook's attendance or John Prescott's attendance was taken as a sign, "Things are going fairly well; we do not really need the Prime Minister to be devoting his time to this question".

**Q66 Mr David Jones:** You have touched on this briefly already, but if during your time as First Minister you or any of your ministers had any policy or legislative concerns, practically would you approach the Wales Office or the relevant minister in Whitehall; or would you approach possibly the Ministry of Justice? What were the practical ways that you could deal with it?

**Rhodri Morgan:** I do not think we ever approached the Ministry of Justice. My civil servants may have done. It would be jointly: you would not approach the individual ministry without mentioning it to the Wales Office; but certainly you would not rely usually on the Wales Office alone; you have to get to the source of the problem, and the source of the problem usually in a particular ministry. Therefore, you would approach the particular ministry and usually pray in aid the Wales Office at ministerial or Civil Service level to give you a hand as well to find out where the source of the problem is and see if it is a really difficult issue or not.

**Q67 Mr David Jones:** You had the advantage as an Assembly Member and as First Minister of, previously having been both a civil servant and a Member of Parliament, so you would have had the opportunity of building up networks and contacts which, as you have already said, are extremely important in oiling the machinery of relations. We are now moving to an era where senior Welsh ministers, including the First Minister, have no experience of Westminster at all. Do you think that

will be a disadvantage and, if so, what could be done to improve relations between Welsh ministers and Whitehall?

**Rhodri Morgan:** My civil service experience really was only minimally relevant because I stopped being a civil servant in 1972, so that is a long time ago, although it did teach me this lesson about the different ways in which Scottish and Welsh interests are regarded and the way in which Scottish civil servants appear to me to be aiming to be promoted because they have given Whitehall a bloody nose, whereas Welsh Office civil servants aim to get promoted on the basis that they have not caused any upset in Whitehall. I think that is probably still true today. It taught me that, but that is a long, long time ago. In terms of my departure, what has happened was always going to happen, as it did in Scotland much earlier after the resignation of Henry McLeish. I do not know whether there are a few MPs left, but they are certainly not in senior governmental positions. Alex Salmond is an MP; sorry, on the Labour side. After Jack McConnell came in, although there were ex-MPs around, they were not in senior ministerial positions. It is going to happen. I think it was useful that 10% of the Assembly were ex-MPs or were MPs when we started off ten and a half years ago; but it was always going to happen that there would be a growing-away from that. That was a transitional phase, and now that that phase is over I do not think it is going to be a problem. Lack of experience can also be assumed to mean that you are a captured agency as well. You could equally be open to that accusation; so in a way eventually you know that it is going to be Assembly Government ministers who have not really been part of the culture of the hallowed halls of Westminster. We knew that was going to happen, and now it has happened.

**Q68 Hywel Williams:** We have had evidence from a couple of voluntary organisations about what they see as a patchy awareness of devolution in Whitehall. One of them said, for example, that at a consultation event held here in Cardiff the civil servants had not taken devolution into account and would not answer the questions relating to devolution. Do you think there is a lack of awareness of devolution in Whitehall, or perhaps even a lack of interest; and, if so, what problems does that provide for the administration here?

**Rhodri Morgan:** I do not think that ever caused us a problem. I noted that point in Sir Jon's memorandum. Lack of awareness is something you can deal with; that is simply a matter of filling in the information gap in Whitehall or Westminster. It is negative awareness that you do not want; in other words, where somebody is watching you like a hawk to try and prevent a development happening that they see as inconvenient for Whitehall or Westminster. Whether that is civil servants doing it off their own bat, or whether it is civil servants doing it with ministerial authority, or whether it is ministers actually saying, "They have had their Assembly now; that is their lot, they are not having anything else", that kind of attitude, which we did perceive in one or two departments back in 1999, it

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is the avoidance of negative awareness that to me has always been the key issue. If it is there, what do you do to solve it?

**Q69 Hywel Williams:** Years ago, when Gareth Edwards started to play for Wales, I recall a BBC commentator saying, “This man will be a bloody nuisance for years.”

**Rhodri Morgan:** An English commentary.

**Q70 Hywel Williams:** Precisely! Is there a case for the administration here being—

**Rhodri Morgan:** I do not remember anything about Gareth Edwards. Will Carling said about Jonah Lomu: “The sooner that man is packed off to Rugby League the better.”

**Q71 Hywel Williams:** I was just thinking of the case of him being more of a “bloody nuisance”, you were talking about negative awareness.

**Rhodri Morgan:** This is looking at cultural questions. You see, Scotland has always been accepted as not a foreign country but another country; and, therefore, if they do something different from what happens in England, it is not a problem because there is no read-across between Scotland and England. The problem about Wales is that it is not seen as another country; it is seen as, if you like, the last colony in the Empire problem, because people still have a perception of an England and a Wales set-up. Of course that is not really compatible with devolution 100%, so this is the difficulty, since they see there is read-across from Wales but no read-across from Scotland. If Scotland does something different; the Scots have always done something different. If Wales does something different, then people will point the finger and say that people will use this to say: “You should be doing in England what they are in Wales”, whether it is the foundation phase, the Baccalaureate or free prescriptions or whatever. If Scotland did that, they would not worry about it because Scotland is perceived as another country. If you have devolution and you do not want devolution to be a talking shop and you want it to be doing something, not just talking about things, then inevitably from time to time Wales will come up with a policy that is different from England, or England will make a shift in policy that Wales does not follow, which has probably been more common over the last ten years. The problem is the read-across because people still have an “England and Wales” psychology. Sometimes it is an England and Wales policy on policing and law and order, but in other areas not. The psychology is still there of being worried about the read-across to England or finger-pointing by people in England who do not agree with the policy in England and say, “They have done it in Wales, why can’t you do it in England?” which they do not say about Scotland. That is the problem really, and that is not fully compatible with devolution.

**Q72 Alun Michael:** It is just a matter of attitude, though, in the sense that the geography is quite different. In relation to Scotland and the northern

parts of England, there is a narrow border, and cross-border issues arise perhaps in places like Berwick but not really to any large proportion of either the Scottish or the English population. However, we have a long border where, as a Gog myself, I can say my family lived abroad for three generations in Birkenhead but had not left North Wales in terms of attitude and understanding. You remember that that sort of issue came up when we discussed health, when you were before us not so long ago.

**Rhodri Morgan:** Yes.

**Q73 Alun Michael:** This Committee has been looking at cross-border issues specifically because there are communities on either side of the border or sometimes straddling the border. Is it just a question of Whitehall attitudes and differences of perception? Are there not some real issues about the way in which we make the border a positive attribute rather than a negative one?

**Rhodri Morgan:** Absolutely. There is every reason for us learning good practice, successful initiatives, in England and importing them shamelessly into Wales, as there is for either English regions, or England as a whole, by way of the United Kingdom Government importing shamelessly ideas in Wales, or letting them run for a bit to see if they are successful. With the foundation phase, nobody can say that that is a success already—it has only been rolled out for sixteen months—so let it roll for a while and then see if you want to do it in England. Shameless copying seems to me to be part of this advantage of having the four living laboratories. Let me take another example of the BSE epidemic. It was of enormous value that we had four separate dispensations in crisis management in BSE when the BSE epidemic was believed by United Kingdom Government scientists to have transmitted itself to sheep, to have made the big jump that everybody had feared from cows to sheep, and BSE had become TSE. But it was our ability to challenge that which detected the fact that the alleged sheep brain stored in a laboratory in Edinburgh was, in fact, a cow brain mislabelled as a sheep brain. We do not know what the incalculable consequences would have been had there not been devolution around at that time, insisting, “I want that re-tested. My minister will not let me back over the border into Wales if I do not get that alleged sheep brain re-tested.” They did re-test it and found it had been a cow brain all along with the wrong label on it. That could have had incalculable consequences if people had believed in the end that BSE had jumped to become TSE because you could have had to wipe out the entire sheep flock of the United Kingdom, if not Europe as a whole, and start off again with clean stock from Australia. Luckily, because it was not one dispensation we had in the United Kingdom but four, one of which insisted on the sheep brain being re-tested to see if it really was one, unfortunately finding out it was a wrongly-labelled cow brain, which meant obviously that BSE had not jumped. That is an example of the benefits of having different ministerial responsibilities, different

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administrations, all of which have the right to say certain things of that kind in terms of dealing with a crisis.

**Q74 Mrs James:** Turning to the role of the Wales Office, you mentioned earlier one take on the relationship, but do you think the Wales Office continues to have a role to play in the devolution settlement, or does the existence of a Wales Office hamper efforts to deal directly with government departments?

**Rhodri Morgan:** The Wales Office has a far greater role than the Scotland Office because it has a role in legislation. The broad roles of the Scotland Office and the Wales Office have been the Government's voice in Wales and Scotland; and Wales's and Scotland's voices in the Cabinet are comparable, similar. On the other hand, in terms of the legislative function of the Wales Office, that is a function that is unique to it and does not exist for Northern Ireland or the Scotland Office. So it does have a specific issue, which would have to be replaced if you took away the Wales Office; somebody else would have to do that job as regards LCOs. What the consequences of that are on the broader issue of whether the Wales Office has got a long-term future as a full-time Cabinet job or as a solo Cabinet job, not shared with other roles, I do not know. It is for others to judge.

**Q75 Mrs James:** Do you think the Wales Office is taking the lead in ensuring that the Civil Service in Whitehall has a greater awareness of the devolution settlement?

**Rhodri Morgan:** It is one of their absolutely key jobs, but they cannot do it if our civil servants and our ministers do not have direct access to the actual function or the department where the problem may be lying. In other words, you cannot say, "The Wales Office will do this all for you", because otherwise the only awareness that Whitehall departments have of what is going on in Wales is the Wales Office's awareness of it, and really you have to use the Wales Office as a channel, but you also have to have direct access to the Department for Transport or the Department of the Environment, Food and Rural Affairs, or whatever it might be. You have to use both. You cannot have a monopoly on communications between us and Whitehall and Westminster being via the Wales Office, that will not work.

**Q76 Mrs James:** It cannot act as a filter. It is very important that if we are to grow devolution and we are to get that maturity that there has to be that interaction, does there not? The Wales Office cannot act as a filter.

**Rhodri Morgan:** Not as a filter, no, not as a blocking filter; but as an enhancement of the relationship, because they are Whitehall but they are Wales. Therefore, they can put a Welsh perspective on it and get to the source of the problem and say, "That is the person you need to see"; or "That is a political problem; you are not going to get that because the minister is not going to let you have it"; or "It is the

civil servants acting off the wall here, so therefore just get hold of the minister and tell their civil servants to back off".

**Q77 Alun Michael:** Can we look now at the way Whitehall engages with its own responsibilities with regard to devolution at a strategic level? It has been suggested that the Ministry of Justice should have a clearly recognised and developed holistic role in constitutional issues in relation to devolution right across the UK. Do you agree?

**Rhodri Morgan:** I do not think it matters all that much really because in a way the Prime Minister has got a *primus inter pares* role on the broad shape of the British constitution. If there was a decision to go for a written constitution at some stage, that clearly would not be a matter for the Ministry of Justice. They would probably have to execute it, but it is Cabinet Office ministers. I do not think you can say the Ministry of Justice has some huge over-arching obligatory role that could not be done by anybody else.

**Q78 Alun Michael:** It does include the old Department of Constitutional Affairs, which is why, I suppose, we start off being pointed in that direction; they have a director-general with specific devolution responsibilities.

**Rhodri Morgan:** I was just going to say that you have a choice in a way. If you did say at some point that you cannot have a Wales Office, a Scotland Office and a Northern Ireland Office as full-time jobs in Cabinet, then you have two choices: whether you have a Secretary of State for constitutional affairs who is Wales, Scotland, Northern Ireland and maybe English regions as well in the future, or you have part-time Secretaries of State from Wales, Scotland and Northern Ireland. There is always going to be a difficulty because the mainstream parties do not stand there, but you will have at least in Wales and Scotland a part-time Secretary of State, as we did for three years between 2004 and 2007 whenever it was that Peter Hain and Jim Murphy went back to being full-time Secretaries of State in Gordon Brown's cabinet.

**Q79 Alun Michael:** Jon Shortridge emphasised that his experience may be a bit out of date, but he suggested there is a shift to a greater role for the Cabinet Office; and neither he nor you appear to have seen the Justice Department as being crucial in the relationships you referred to as being important. Does that argue for a building-up of the role of the Cabinet Office, do you think?

**Rhodri Morgan:** The Cabinet Office is always going to have a critical role because they are responsible for being at the centre of Government for the smooth functioning of all Government machinery, not the constitution but the smooth functioning of inter-departmental co-ordination, inter-administration co-ordination. If there is something wrong, the Cabinet Office is supposed to put it right and make sure the wheels are oiled. They will always have a role. Between the Prime Minister, the Cabinet Office and the Ministry of Justice there are three

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responsibilities here, so big changes in the constitution are inevitable. For example, moving to a written constitution would inevitably be a matter for the Prime Minister. Oiling the wheels of Government is the Cabinet Office and the constitution, strictly speaking, is the Ministry of Justice. It is not for me. I cannot get into the nitty-gritty of who should carry that responsibility; it would all depend on what the particular issue was at some point in the future, would it not?

**Q80 Alun Michael:** I suppose so, but after a period of years as First Minister it is interesting that you do not seem to have a very strong view about where the lead should lie, and rather indicate that it is in a kind of Bermuda Triangle between the Department of Justice, the Cabinet Office and Number 10. Would that be a reasonable characterisation?

**Rhodri Morgan:** Yes. We do not want to be the hypotenuse in a Bermuda Triangle, definitely. It is perfectly appropriate if you have JMCs or the plenary session of the JMC should be chaired by the Secretary of State for Justice and the Lord Chancellor, Jack Straw. I think that is right and proper. It is a problem-solving body, not a disputes arbitration body. Initially the Prime Minister attended all and then did not attend any. He did attend for part of the last meeting to show that the Prime Minister is interested in making sure that relations with Wales, Scotland and Northern Ireland are as good as they can be. I am not trying to say that the Department of Justice is not working or not doing its job; I think it is doing its job, but they are not going to take over the Cabinet Office function for oiling the wheels of inter-departmental or inter-administration machinery. They have to have that role.

**Q81 Alun Michael:** You mentioned a moment ago the English regions, and the likelihood of responsibility for English regions and the responsibility linked to the devolved administrations being in the same place. Going back to your reference to living laboratories earlier, we do have a living laboratory in London, as was pointed out by the Justice Select Committee. It has got a far greater population than Wales, and a lot of resources; indeed greater than Scotland. As First Minister, did you regularly study what was happening in the living laboratory of the London Government in order to—

**Rhodri Morgan:** The Livingston laboratory!

**Q82 Alun Michael:**—inform thoughts in Wales? Did you borrow things from there?

**Rhodri Morgan:** No, I do not think we did. I have given evidence to a session of the Greater London Assembly. Links with the Mayor's Office have been very, very thin indeed. It is quite difficult for us to work out, vast though London is in comparison with the Welsh population, and far bigger than Scotland's population as well—but should we be seeing it as another form of devolution or should we be seeing it as simply a ginormous unit of local government? I am not sure. Clearly, we do not have the option of a directly-elected First Minister; that is seen as a local

government option. Ceredigion voted against it in the same way that London voted on it and voted for it, and any local government unit in the United Kingdom so far as I know can opt to have an elected mayor like London. They would have to have a scrutiny committee of some sort. It is so big, bigger than Wales or Scotland, but it is still given a structure more like local government, so it is a bit like “neither fish nor fowl” from which we have not really sought to borrow, and they have no legislative functions at all so cannot pass bye-laws.

**Q83 Alun Michael:** I cannot resist asking whether you think it would make the UK more interesting if we had another eight or nine living laboratories in the English regions!

**Rhodri Morgan:** Undoubtedly. To a very modest extent, it was a terrible shame that the north-east of England crashed in the way that it did, as Wales did in 1979, and it would have been great to have the north-east. Then maybe if they had voted for it, perhaps Yorkshire and Humberside would have said, “If they are having one, we would like to have one as well”; we do not know what would have happened. One way or another, they did not come close, in exactly the same way as we did not come close back in 1979.

**Q84 Chairman:** I would like to follow up with a supplementary in relation to the performance of the Ministry of Justice. You seem to me a little coy about choosing between the Cabinet Office and the Ministry of Justice. This Committee is quite unequivocal in its criticism of the Ministry of Justice's failure of the devolution test over the Legal Services Commission, and there is almost a conflict of interest really that they decided against Wales on that matter, although the jury is still out. What are your observations on all of that?

**Rhodri Morgan:** That is a different issue really because that is non-constitutional; that is in their operation function in terms of running the legal aid system, that they took no account of the potential that a Wales office would have, or that a substantial presence in Wales would have. They did not take account of the fact that if you are going to have fewer regional offices, then you can run an area of England from Wales much more easily than you can run Wales from an area of England, where they will have no idea about any distinct features of Wales. Obviously, if you run it from Wales, they can very easily pick up on what is happening in mainstream England. They just did not understand that until a huge hoo-hah had to be created to help them understand that, which caused a partial reversal of the original decision. That is in respect of their operational function; but I do not think there is read-across between that and what the split between them and the Cabinet Office ought to be on constitutional coordination.

**Q85 Mr David Jones:** Returning to the practicalities of Government, as First Minister, how were you able to ensure that Welsh interests were taken fully into

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account in Parliament's legislative programme, for example in relation to the inclusion of framework powers in Bills?

**Rhodri Morgan:** We would be given an early sight or an early warning—which probably in terms of civil servants was an early sight—whether ministers were given an early sight of what the department was bidding for. Each year, very early in the year, possibly February or March, for the following November's Queen's Speech, departments are starting to trawl through their wish-lists of ideas. Two-thirds of those are not going to make it into the Queen's Speech. There are usually about 75 bids and about 25 Bills appear in the Queen's Speech. It was quite a mish-mash in terms of departments at the stage where they have still got 75 ideas coming forward, although they know two-thirds of those are not going to get there. Our civil servants would have an awareness of what was in those 75 likely bids, and they would tell us, as ministers, if they could see some potential. You were very reliant on civil servants and their intelligence mechanisms with opposite numbers in Whitehall and being able to tip off ministers whether there was the potential for a desirable framework power if this Bill went through this Darwinian process, when they went from 75 bids to 25 successful bids being in the Queen's Speech. I thought we had pretty reasonable intelligence on those. In the end, it is not a matter for us as to which Bills make the cut and which two-thirds get thrown back and they say, "We are not doing that" or "Leave that until next year."

**Q86 Mr David Jones:** Is it fair to say that sometimes this process did not work as smoothly as you would have liked? I recall in particular the Planning Bill, which did contain Welsh framework powers, but they were not included in the first draft of the Bill and did not appear until well on in the committee stage. They were only briefly debated. I think that Alun Michael was a member of the same committee. They were not debated at all at the Report stage and Third Reading. Is it fair to say that in that particular case, and possibly in others, the system did not work as smoothly as it might?

**Rhodri Morgan:** I think probably that question of looking back to see whether that is a typical example or an atypical example is better directed to Hugh Rawlings, as a civil servant who would have been in charge of our unofficial specifically network or intelligent network in communication with Whitehall departments. I think that example you quote was atypical, but it is probably best not to put that question to me.

**Q87 Mr David Jones:** To what extent would you rely on and liaise with the Wales Office on what was included in Bills?

**Rhodri Morgan:** It is an absolutely critical role.

**Q88 Mr David Jones:** Again, would you expect the Wales Office to be proactive in that regard and draw your attention to these opportunities?

**Rhodri Morgan:** I would not expect them to be proactive but simply to be a very useful transmission device to say, "The Assembly government would like to put in a bid for some framework powers to be included in this area of potential legislation, which is now forming itself within the Whitehall machinery."

**Q89 Mr David Jones:** Turning to the LCO procedure, would you say that has created greater understanding between Cardiff and Whitehall?

**Rhodri Morgan:** I think it probably has created an understanding. Because one individual civil servant in Whitehall is in charge of writing a Bill, steering a Bill, getting it into usable form, and has probably never dealt with an LCO before and may never have dealt with Wales before, the machinery does creak when that civil servant realises, "Oh, my God, I have got to deal with something that has come in from Wales. What am I going to advise my ministers?" I think it is quite likely to have gone into the pending tray on the ground, "I have never come across one of those before, and if I can avoid dealing with it I will, and I hope it will go away", because it is something new and unique and, therefore, you do not find a lot of enthusiasm. People think, "Can't I get back to my normal day job?"

**Q90 Mr David Jones:** Is that a common state of affairs?

**Rhodri Morgan:** I think it is an inevitable state of affairs. That is how human beings work. They have got what they think of as a day job and suddenly a new fish lands in the net and they think, "What am I going to do with that?" They have to be told, "Right, do it by Friday afternoon", because otherwise it will go into the pending tray because it is not part of the norm. I think you have to accept that.

**Q91 Chairman:** Does that raise the more general point about transparency of relationships between Whitehall and the Welsh Assembly Government? A classic example is that we were concerned about the length of time it took to deal with the Environment LCO. If we had greater transparency, the public would be able to make a better judgment of the process.

**Rhodri Morgan:** Yes. The Environment LCO was far bigger and broader than all the other LCOs and always intended to be a test case for how it would be if a really significant, broad-thrust LCO were presented to the Whitehall machine. You have two lead ministries in that, the DTI, as it was when it began, and DBIS at the end and the Environment. Those had a huge interest in it. There was no lead ministry, but we knew we were taking a big risk in producing a big LCO alongside a much narrower one. We knew there was a risk that we were taking but that we would have to take it to the machinery in Whitehall. Occasionally you would solve the problem on the Environment side and think it is going swimmingly, and then somebody in DTI or DBIS would throw up a block and say, "I am not advising my minister to transfer those legislative powers to Wales." You solve that problem, and then suddenly another civil servant within Environment

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would say, "I am not advising my minister to transfer that bit." We knew that was a risk if we had a broad LCO, and it is the only broad LCO we put in, but it was essential to try out the theory on a broad issue of that kind.

**Q92 Chairman:** You are describing a hidden process. If you just take another example, the fire sprinkler LCO, that took an inordinate length of time.

**Rhodri Morgan:** Yes, the fire sprinkler, the backbench one, yes.

**Q93 Chairman:** That took a long time.

**Rhodri Morgan:** Yes, it did.

**Q94 Chairman:** Surely, if there was greater transparency, politicians and civil servants would sort themselves out? This is just a suggestion. Do you think that is a possibility? I am giving an illustrative example of a more general point about the need for greater transparency of the relationship between the two governments.

**Rhodri Morgan:** I am finding it difficult to put a meaning on the word "transparency" with regard to LCOs; in other words, I cannot imagine an investigative reporter from the *Western Mail*, the BBC or the *Daily Post* going to somebody's desk in Whitehall, looking in the pending tray and saying, "That has been sitting there for three weeks now and you have not done anything with it."

**Chairman:** Do not underestimate it. They seem to be more obsessed with that than anything else.

**Q95 Alun Michael:** Would not one answer be to take up the suggestion that Sir Jon Shortridge made, which is that Legislative Competence Orders should go straight from the Assembly to Parliament?

**Rhodri Morgan:** I think in the end the machinery has laid its eggs and given birth to a fair bit of legislation, or a fair bit of LCO power, which is now in the process of being turned into legislation. I do not know whether there is sufficient concern about the blockages or the length of time or the trimming back of the initial proposals to say therefore you need to re-write it and take out the role of the Secretary of State. It is something for the future. As a learning process it has creaked, but it has given birth and has worked in the end, and the more frequently we use it and the better the oiling of the machinery, the speedier it will become. You will have the chance of people having dealt with two LCOs rather than one civil servant in Whitehall, working in Whitehall in the bowels of the Government machine for 40 years, who will only deal with one LCO ever.

**Q96 Alun Michael:** The Chairman pointed out that the delay, for instance, in the fire sprinkler LCO was the best part of a year.

**Rhodri Morgan:** It was the first backbench LCO.

**Q97 Alun Michael:** The point is that if once something is agreed by the Assembly it goes to Parliament, then there would be the transparency over the processes in Whitehall which have caused a problem in relation to other LCOs.

**Rhodri Morgan:** I see.

**Q98 Alun Michael:** This Committee already said it is going to take oversight of that process.

**Rhodri Morgan:** I do not think that is a matter for me because in a way what you are then saying is that the Civil Service concern would be not working for government ministers and—

**Q99 Alun Michael:** I am not saying that at all.

**Rhodri Morgan:** How would the transparency work? This is not a matter for me, it is a matter for Whitehall and Westminster, but I am just trying to picture it now. It goes straight to Parliament, but it has to have some sort of winnowing out of the weaknesses as perceived by the department of Whitehall that is responsible for transferring the power or advising on the transferring of the power at a technical level, but they are not working for ministers in this respect, they are working for Parliament.

**Alun Michael:** They would come forward as ministerial recommendations to be considered by Parliament, which is effectively what happens but without the transparency at the present time.

**Chairman:** This Committee has a particular view especially in relation to the housing LCO and the Welsh language LCO. Certainly we have the view that it was we who did the work and not Whitehall and elsewhere, but there we are, that is rather subjective.

**Q100 Hywel Williams:** Could I draw your attention to one particular way that things might be going wrong and might be improved. The Government of Wales does not specify when the Secretary of State should say "yes" or "no" to a particular LCO being laid before the Houses of Parliament. Is that a weakness? They disappear into the black hole and nobody knows when they are going to reappear. If they were specified, would that be better?

**Rhodri Morgan:** We have the culture issue. I have always said, and I have said it so many times that I am sick of saying it really, that in the end the culture change you have to achieve for the LCO system to work in the way it is intended is for Whitehall ministers to have the ability in their DNA to say, "I do not like what legislation is going to emerge back in Cardiff from the transferring of this power, but I still accept that it is appropriate for Whitehall to release the legislative power to Cardiff for a purpose that I disapprove of." That is much as in the House of Lords: when there is a Labour Government it holds its nose, and provided that it is in the party manifesto of the Labour Government, it abides by the Salisbury Convention and does not block things of which it disapproves, it nevertheless says, "It was in your manifesto; you can proceed and we are not blocking it." Likewise, it is the holding of the nose culture: "We do not like it, but we think it is appropriate for legislation in this field to be done in Cardiff rather than in London".

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**Q101 Hywel Williams:** I like the analogy of how it works between the House of Lords and the Commons; one is directly elected by the people and the other is appointed. It is that element of democratic support that, from my understanding, leads to the House of Lords holding its nose. Here we have two possibly competing democratically elected bodies.

**Rhodri Morgan:** Yes. Before the Salisbury Convention and the constitutional crisis of 1910 over the Lloyd George People's Budget, the House of Lords did consider itself the full equal of the House of Commons and they would block finance Bills or block legislation merrily as a complete legal House; and following that, to avoid social revolution in the streets or abolition of the House of Lords, they said: "Okay, we will find a very British way round it; we will not block Bills that have got the backing of the party manifesto that has won a majority in the election." Likewise, it cannot be exactly the same; for us we need a similar culture change in which ministers do not have to agree with the purpose to which you are putting it, but to answer the question of whether it is more appropriate for legislation in this area to be done "down there in Cardiff, even though we do not like what they are probably going to do with it, than for it to continue to be done in Westminster", that is quite a big cultural change, but it is an essential part of the cultural change of making the LCO system work.

**Q102 Hywel Williams:** Lloyd George brandished quite a large cudgel at the House of Lords to get them to agree after all with the creation of—

**Rhodri Morgan:** I cannot recall personally, Hywel! There were two general elections, I think, to do it, were there not?

**Q103 Hywel Williams:** The creation of lots of peers. If that did happen, if there was a government of a different hue down in London and a different one in Cardiff and there was a dispute, could a judicial review be brought against the Secretary of State's decision? There are all kinds of implications, not least the possible politicising of the judiciary—heaven help us! How would you see that working out?

**Rhodri Morgan:** During my time—I am not First Minister now—we would never have contemplated the idea of judicial review against a minister. I am not sure it is possible. In any case, it is not the right way for administrations to conduct their relationships. You want to see a culture change, but—

**Q104 Mr David Jones:** Taking on the Salisbury Convention analogy, if Westminster is to hold its nose and allow the bid to go through, would that presuppose that in those circumstances the intention to bid for such powers as are comprised in the LCO bid should have been flagged up in the manifesto of the relevant party?

**Rhodri Morgan:** Yes, unless there was an emergency LCO not based on a manifesto commitment. No, there is no moral authority or political authority behind an LCO bid that has not been mentioned in a manifesto. Agreed, that with proportional representation in the Assembly elections, the likelihood of a majority government—we did do it in

2003, sort of—in the Assembly will be a relative rarity and, therefore, that you could say it needs to be in the manifestos of both parties in a coalition to say that is sufficient authority, but I think that would be seen as rather a narrow point, given the difference between proportional representation systems and first-past-the-post systems in Westminster.

**Q105 Mr David Jones:** I am intrigued by your reference to an emergency LCO. I find it hard to comprehend how the LCO process could ever work sufficiently quickly to cope with any emergency.

**Rhodri Morgan:** I am thinking of public health crises, animal health crises, something of that sort. Agreed, the speed with which LCOs have been passed in the past has not made it a very promising route for dealing with a crisis, but—

**Mr David Jones:** That is more likely to be the—

**Chairman:** There are too many supplementaries now.

**Q106 Hywel Williams:** Could I ask you about the moral authority of a backbench LCO, which has not been mentioned in either party's manifesto and might be entirely novel.

**Rhodri Morgan:** Backbench LCOs are in an entirely different category. They are making progress. It has been slow. You will be aware of the fire sprinkler one—you have mentioned it—and the mental health one, which I think is one that the Assembly Government took over in effect. It is just a matter really for the Westminster and Whitehall machine to decide how brutal, how co-operative, how trendy or how warm they want to be to the backbench LCO concerned. So far the record is not bad. There is some recognition that if you have a private member's Bill at Westminster, this is the equivalent of a private member's Bill but without the power to do it and, therefore, you have to get the power from Westminster. I do not think the record of those has been too bad.

**Q107 Mrs James:** Looking at the other way the law-making powers come to the Assembly, there is the role of the Supporting Legislation Committee. They consider the powers proposed to be granted. Are you concerned that there is no formal mechanism for its findings to be brought to the attention of the relevant committees either in the House of Commons or here at the Assembly?

**Rhodri Morgan:** I am not sure I am the best person to answer that question, to be honest. In a year's time I will have much more experience of legislation committees and the work of backbenchers. I have not yet acquired that experience, so ask me again in a year. I am starting tomorrow.

**Q108 Mrs James:** It is something the Wales Government sent us in their memorandum. Going to the Civil Service capacity in Wales, how do you think the Civil Service has changed over the last ten years in Wales?

**Rhodri Morgan:** I think it has become much more attuned to the idea that there may be legislative answers to social problems, maybe. It did not have that consciousness before in the way that the

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Scottish Civil Service has always had, because even before there was a Scottish Parliament or in the 297-year long gap between the old Scottish Parliament and the new Scottish Parliament, there was never a lack of consciousness that there should be legislative answers to problems, and they would throw up five Bills a year before devolution. In Wales it was one Bill every five years, so it was a rarity for the Welsh Office civil servants in their legislative way of thinking. They are much better now than they were. In relation to Whitehall, I think we have a greater capacity now to generate really good quality civil servants and to maintain and keep those good quality civil servants so that they rise gradually through the tree, whereas, being in London, Whitehall suffers from the problem that when there are boom times in the economy, and the City especially, they lose a lot of their really good civil servants at 30. When the City is doing badly obviously they recruit and maintain good civil servants in Whitehall, but they certainly cannot in the boom times.

**Q109 Mrs James:** Are you happy that there is sufficient capacity to deal with the legislative process as more and more powers transfer to Wales?

**Rhodri Morgan:** It is incomparably greater than it was ten years ago.

**Q110 Mrs James:** Are those inadequacies in the Civil Service resources? A few people have been telling us about the legislative deficit with inadequate consultation and poor research and timetables of implementation. Is that something you recognise?

**Rhodri Morgan:** No government is perfect. I am sure there are examples of all of those things, but I do not think it is common in Wales. I would have said we have built up our capacity. This is the point I was

making right at the beginning. When you build up your capacity in the Civil Service, we regard that as a good thing, but if you regard transferring powers to Wales as a threat, that is a bad thing because we are saying, "We have built up the Civil Service capacity". I believe we have built up the legislative capacity of backbenchers as well to scrutinise legislation, as I hope I will find out starting from tomorrow, as I will be one of them! If you regard that as a threat, not as an opportunity, to transfer more powers to Wales, then that is a problem. As far as we were concerned, we would like to use devolution to solve problems in Wales, and that requires building a bigger, better, higher capacity pool of ability in ministers, backbenchers, lawyers, draftsmen or women, and civil servants who think in that way. If you do that, then you could take on more powers. But there is a school of thought in Whitehall that people who have not made the culture change say, "We do not want that to happen. They have got their devolution and that is their lot." That is the culture change we have to be working against, this idea that it is not a good thing for Wales to be building up its capacity to be more like Scotland, if you like, because they do not want to see any transfer of powers post the setting-up of the Assembly in 1999.

**Q111 Chairman:** *Diolch yn fawr.* Thank you for your evidence this morning and this afternoon. The fact that we have overrun is an indication of the success of the session. I was intrigued at the outset when you characterised the culture challenge in terms of recognising Wales as a country. I am sure you would agree with me that all senior civil servants and politicians should have as recommended reading that premature devolutionist, as the English would describe him, Raymond Williams's seminal work *Border Country*.

**Rhodri Morgan:** *Diolch yn fawr.*

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**Tuesday 19 January 2010**

Members present

Dr Hywel Francis, in the Chair

Mr David Jones  
Alun Michael

Albert Owen  
Mark Williams

*Witness: Dr Jim Gallagher*, Director General of Devolution, Ministry of Justice, gave evidence.

**Q112 Chairman:** Good morning and welcome to the Welsh Affairs Committee and this inquiry on Wales and Whitehall. For the record, could you please introduce yourself?

**Dr Gallagher:** My name is Jim Gallagher. I am the Director General of Devolution working for the UK Government principally in the Ministry of Justice.

**Q113 Chairman:** By way of background, I want to begin by posing you this very first question: putting it in the context of our earlier inquiry into the Legal Services Commission, a sense of uncertainty really that Whitehall was not quite sure of what it was doing in terms of devolution—putting it at its politest level; also the Justice Committee's recent very good report; and identifying we also shared a concern, namely that responsibility, as the Justice Committee said, for the devolution settlement sitting with the Ministry of Justice and, at the same time, an apparent coordinating role of the Cabinet Office; can you explain to us the practical difference between those two responsibilities?

**Dr Gallagher:** I think, Chairman, probably the best way to address that question is to think of the tasks and responsibilities that the UK Government has for Wales post-devolution. There are a number of things that any central Government would have to do in respect of Wales. Firstly, it has to look out for the interests of Wales—that is part of the central government's responsibility. Secondly, it has to manage the relationship with the devolved institution, and that principally concerns ensuring that the interaction between those powers which are devolved at Cardiff and those powers which remain with the UK Government is properly and successfully integrated, if you like. I think I would start by putting my hand up and saying that we have not always got that perfectly right. Thirdly, there is the responsibility of managing the devolution settlement—the constitution of Wales, if you like. Those functions are spread across Government. They are spread across essentially three institutions: the first is the Wales Office—which we can talk a little bit about later if you like—which in particular is responsible for looking after the interests of Wales inside the UK Government, and for the management of the constitutional settlement; and between the Cabinet Office and the Ministry of Justice. The Cabinet Office is a coordinating department; that is what it does for a living. It coordinates inside Government and it coordinates, insofar as it has responsibility for the Joint Ministerial Committees—again which

we can talk about more if you wish—across Governments, and across the UK Government and the devolved administrations. The Ministry of Justice, where I principally work, is responsible for the constitution, and to the extent that there is an overall strategy for devolution across the UK in Wales, Scotland and, to some degree, Northern Ireland, the Ministry of Justice takes responsibility for that. This allocation of responsibilities I would freely admit is something which is historically contingent; it has grown up like that.

**Q114 Chairman:** It sounds very grand, the way you describe it. Could I give you two examples where, even at the simplest level, the Ministry of Justice has failed in terms of the Legal Services Commission and the inadequacy of its raising of the profile and understanding of devolution; and, secondly, the fact that you still do not have a Welsh language scheme. How would you explain that, given that you have this very grand responsibility and yet at the most basic level you are not discharging those responsibilities particularly well?

**Dr Gallagher:** The Ministry of Justice in this context has two sets of functions, if you like. Firstly, it is a Justice Ministry for England and Wales; and, like every other Whitehall ministry that has responsibilities in England and Wales or in England, Wales and Scotland, it has to take account of devolution in discharging its own business. Secondly, it has this, as it were, strategic role in relation to devolution itself. I think it would be fair to say that some Whitehall departments and some parts of Whitehall departments do better than others in ensuring that devolution is reflected in their daily business; and I think we would have to put up our hands particularly in relation to the business of the Legal Services Commission that we did not get that one right, and that is regrettable. I think it is fair to say that we would hope to do better in the future. You might reasonably ask what we are going to do about that. Just as the Ministry of Justice is a Whitehall department, it is part of a programme that we are running at present, which is a bit like painting the Forth Road Bridge, of constantly trying to improve the knowledge and understanding of Whitehall departments of devolution. I think, again, it is fair to say that some departments do better than others; but, more particularly, some bits of some departments do better than other bits of the same ones. In the Ministry of Justice case we got that one wrong—no doubt about that.

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**Q115 Chairman:** If I could pursue that. You say that some departments do better than others, but surely you should be amongst the best?

**Dr Gallagher:** I would accept that, yes.

**Q116 Chairman:** To come back to the original question about the difference between the role of the Cabinet Office and the Ministry of Justice, I am still unclear as to why after ten years there seems to be some confusion of the roles?

**Dr Gallagher:** The allocation of responsibilities has changed over that ten years and certainly has not been the same throughout it. As it were, policy responsibility for devolution originally rested in the Cabinet Office in 1997–99, when the devolution settlements were created; it remained there for a while. I then moved to the Office of the Deputy Prime Minister, and I think that would be about 2001–02—although I stand to be corrected on that. When that Office was abolished, responsibility moved to the then Department for Constitutional Affairs and the policy responsibility then became part of the Ministry of Justice when that ministry was created. For most of that period, however, the Cabinet Office retained responsibility for the Joint Ministerial Committees, which for a good part of the period were not particularly active.

**Q117 Albert Owen:** You said quite honestly that you had not got integration right, and you explained early on that the Cabinet Office had that lead role. What do you say today to the argument, and pursuing what you have just said, that the Cabinet Office because of its close links with the Prime Minister is a better place for devolution to sit, particularly with the revival of the Joint Ministerial Committees with all its services?

**Dr Gallagher:** My answer to that would have to be, first of all, that the allocation of ministerial responsibilities is not for me—it is for the Prime Minister—and you will understand that. There would certainly be alternative ways of organising devolution across Government which would be potentially at least as good, or even potentially perhaps better, than what we have got. Nevertheless, the same functions have to be discharged; the same things have to be done. In particular, the official structure has to support the ministerial responsibilities that there are. The present Government has pursued since 1997 a policy of constitutional reform, of which devolution is an important part and it is still going on, as you will understand. Of course, Parliament is considering a constitutional reform Bill at the moment. There would need to be on any view quite a close integration of work on devolution with work on the constitution, as well as a close integration between the coordinating work of the Cabinet Office who have the opportunity to look across Government and see what is going on and spot issues which might have a devolution aspect. There is nothing new or unique, I am afraid, in issues connected with Wales—or indeed for that matter Scotland or Northern Ireland—being sometimes not spotted early enough. This has not been created by

devolution. Wales has had a relationship with Whitehall since before devolution and the same issues, I am entirely sure, arose then as arise now.

**Q118 Albert Owen:** Could I put this to you then: what you are saying is there is a cumbersome department called the Ministry of Justice, which was called the Department of Constitutional Affairs, which has a huge workload but you have a Cabinet Office with a Minister without portfolio who can perhaps spot these things quicker, deal with it quicker in the machinery in Whitehall?

**Dr Gallagher:** Of course I would never call the Ministry of Justice “cumbersome”—certainly not—but it is a big department, there is no doubt about that, and its main business is running the justice system in England and Wales; but it does also have the constitutional responsibility, which is important in its own respect. As far as ministerial responsibility is concerned, the prime ministerial responsibility for issues in relation to Wales undoubtedly rests with the Secretary of State for Wales; because managing the relationship between Westminster and Whitehall and Cardiff, or between Wales and Whitehall to use the title of your inquiry, is something which has both an official and a political dimension. We should not think of it only as a piece of bureaucratic machinery; it is very properly a political relationship too.

**Q119 Albert Owen:** I think we have pursued that long enough. What are the main current issues for the Ministry of Justice in relation to devolution in Wales?

**Dr Gallagher:** I would regard the two main strategic issues for Welsh devolution as, first of all, the question of whether there should or should not be and when there might be a referendum in relation to the transfer of legislative competence. That is obviously a major issue. The initiative with that, as you well understand, lies in Wales—lies in the Assembly—first of all. That is a big strategic issue. Alongside that, we have the present system under the Government of Wales Act and the learning process that we have gone through on how better to make work the transfer of legislative competence in chunks through legislative incentives. There is that bundle of issues about legislation. The second big policy issue, which again has been initiated in Wales obviously, is the funding system. That is a major political and policy question. On a day-to-day basis, however, there is a whole range of policy issues that emerge, sometimes in Government departments, sometimes externally; but there is a Welsh dimension that has to be managed. Sometimes that is done purely bilaterally between the devolved bodies in Wales and the relevant Government department; sometimes that involves the intervention of the Wales Office, or indeed potentially also the Cabinet Office.

**Q120 Albert Owen:** So it is those three big issues. The big issue is obviously the Wales Office. So they would be dealing predominantly with, and liaising with, yourselves?

**Dr Gallagher:** Yes.

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**Q121 Albert Owen:** I ask specifically if the Ministry of Justice is concentrating on those three big issues?

**Dr Gallagher:** It slightly depends what you mean by the Ministry of Justice. If you mean the Ministry of Justice in its constitutional role—what I do for a living—then those are the issues that worry me.

**Q122 Alun Michael:** As a background, I do not think we should be too surprised that the Department of Justice was pretty dysfunctional after a major change in departmental organisation and responsibilities; and that perhaps we see signs of recovery after that period, as often happens.

**Dr Gallagher:** I am glad to hear that you do!

**Q123 Alun Michael:** I am an optimist by nature! In the evidence we heard from Sir Jon Shortridge he was extremely dismissive of the role of the Department of Justice; in fact what he told us was that when he was Permanent Secretary he only engaged with the Ministry of Justice very rarely on Welsh matters, and essentially said it really just provided pay and rations for the Wales Office staff. Do you think that is a fair assessment; and what value do you think the Department of Justice adds in respect of Wales?

**Dr Gallagher:** At the mechanical level, first of all, it does indeed provide pay and rations, which is not a trivial thing. A very small department like the Wales Office or its counterpart the Scotland Office needs a big brother to do that kind of stuff. Secondly, for the last two and a half years or so the Ministry of Justice—which it did not before—has contained my own post, which is essentially a Civil Service line management post for the territorial offices, including the Wales Office. There are, as I was saying to Mr Owen, some quite deep and complicated policy connections inside the constitutional arm of the Ministry of Justice; but in terms of pursuing the development of the Welsh settlement or the coordination of Welsh policy—policy as it affects Wales in Whitehall—I would not regard the Ministry of Justice as the main actor in that. You are looking slightly puzzled, Mr Michael. Have I not quite answered your question correctly?

**Q124 Alun Michael:** I suppose one would hope the Department of Justice would be joined up in itself. What disturbs me—and I know a number of other MPs and members of the House of Lords—is that, for instance in dealing with the Department of Justice’s own legislation, there have been times where officials do not seem to understand the settlement. The example I would give would be the legislation to protect NHS staff. Granted it is another bit of the department rather than yours, but it was deeply disturbing that they did not seem to have a clue and effectively cut out Wales in respect of what was a criminal justice issue, rather than a matter of devolution.

**Dr Gallagher:** Was that the Ministry of Justice?

**Q125 Alun Michael:** Yes, too right it was! It took a bit of digging to discover that. What happened in that was, there was a clause in the Bill which was

creating a new offence in order to protect NHS staff and the eventual outcome was quite right, which was that the use of the clause could be triggered in England by a request from the Department of Health from the NHS in England, and triggered in Wales by a request from the NHS in Wales and devolved ministers. So the outcome was fine but it was just not in the Bill and was actually picked up in the House of Lords; it had not been spotted because of the rather curious drafting. That leads one to ask: if the Ministry of Justice, which has responsibility for devolution, cannot get its act together in terms of understanding its own legislation, how can it properly lead understanding in other parts of Whitehall?

**Dr Gallagher:** I regard that as an entirely fair criticism, although when one looks at this again in an “historical perspective” (and I have been on both sides of the devolved and reserved boundary here) devolution is only one of many issues that someone promoting a particular policy initiative—and let us take the example of protection health workers—has to bear in mind now. Of course, they should bear it in mind, and they should bear it in mind at the right time. Nevertheless, one can understand—perhaps under political pressure or perhaps under pressure of time—why devolution gets left until quite near the end, and sometimes it falls off the end; but that is wrong and undesirable, I have no doubt about that. I do not think the Ministry of Justice is any worse than other departments in that respect. I would hope that by continuing, as I say, to paint the Forth Road Bridge we would ensure that it was at least as good as any other department, if not better.

**Q126 Alun Michael:** I think we would probably say all power to your elbow in sorting out the other silos in the department, and good luck with it

**Dr Gallagher:** I am grateful for that.

**Q127 Alun Michael:** Do you actually meet your opposite numbers in the Cabinet Office and the Wales Office to discuss how you take issues forward? Do you do that with both of them at the same time?

**Dr Gallagher:** Yes.

**Q128 Alun Michael:** How do you avoid duplication or issues falling between perhaps three stools on the assumption that the Wales Office will do it all? Or is the assumption that the Cabinet Office will do it all?

**Dr Gallagher:** I think that is an entirely sensible question to ask because we have this distribution responsibility. At a very simple level, every week I meet with the territorial offices, the Cabinet Office, colleagues from the Treasury and a number of others to make sure that we have spotted as many of the issues as we can. I do not guarantee we spot them all every week.

**Q129 Alun Michael:** That happens as a matter of regular course?

**Dr Gallagher:** It happens every week—this afternoon, as it happens.

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**Q130 Alun Michael:** Just for the record, I wonder if you could tell us how many of the staff who work in your team deal specifically with Welsh issues, and what sort of proportion that is of your team?

**Dr Gallagher:** In the Ministry of Justice?

**Q131 Alun Michael:** Yes.

**Dr Gallagher:** There are two full-time staff in the Ministry of Justice dealing with devolution policy; neither of them are wholly allocated to Wales.

**Q132 Alun Michael:** Are both of them engaged to some extent?

**Dr Gallagher:** To some extent, yes.

**Q133 Mr David Jones:** Dr Gallagher, the Wales Office in its memo to this inquiry has acknowledged that some Whitehall departments are better than others in dealing with the implications and consequences of devolution. Who or what instruments have been set up to monitor the quality of departments' handling of devolution issues?

**Dr Gallagher:** I think it would probably be fairer to say that some bits of some departments are better than others. The most obvious risk is where a department or a part of a department does not frequently interact with the devolved system, and there the risk is highest; and that is particularly true, I think it is fair to say, of arm's length bodies of departments. You gave the example earlier on of the Legal Services Commission. What we are currently doing—this does not quite answer your question, I realise—is we have invited (and by “we” I mean the Ministry of Justice and the Cabinet Office, with the authority of the Head of the Civil Service) all Whitehall departments to review both their own performance and their capability for dealing with devolution issues. We have asked them to complete that work in the next month or so. That will give us an assessment of both performance and capability across Whitehall.

**Q134 Mr David Jones:** This has relatively recently been instituted?

**Dr Gallagher:** That is right, yes.

**Q135 Mr David Jones:** Is my inference correct then that there was no mechanism set up beforehand to monitor the quality of departments' handling of devolution issues?

**Dr Gallagher:** I would not describe the way in which we previously sought to catch the balls that might otherwise be dropped as a monitoring of quality, but it was certainly a monitoring of what went on. I would not claim that we had given Whitehall departments marks out of ten for performance in this. Our principal aim over the last 18 months or so has been to increase awareness and to coordinate better. I could not give you a league table of departments' performance.

**Q136 Mr David Jones:** You mentioned that of course this process has now been established to examine various departments' handling of

devolution. Are you able to say what sort of findings are emerging from that study at the moment?

**Dr Gallagher:** Superficially, because this is based on work not yet completed, I think the issues that we have seen arising are, first, as I said earlier, it is those part of departments which have infrequent cause to address themselves to devolution questions, whether in respect of Scotland or Wales, which are at the greatest risk of tripping over something. Second, I think we have found that an obvious indicator of better performance is a senior champion inside the department for the operation of devolution, which makes sense. All departments have some institutional way of dealing with devolution: a senior champion seems to work best of all.

**Q137 Mr David Jones:** That in fact is something that Sir Jon Shortridge last week suggested to this Committee, that there should be a senior official in each department dedicated to considering the implications of devolution so far as it affects that department?

**Dr Gallagher:** Yes.

**Q138 Mr David Jones:** Do we know yet how the results or the findings of this examination will be acted upon? Has that been decided yet, or are you awaiting the findings first?

**Dr Gallagher:** First of all, we need to see the findings. This is, as it were, an official exercise rather than a political one; although I am in no doubt that it has the blessing of ministers. I am entirely clear that when this work is done each department will act upon the recommendations it has made to itself, as it were. They will be discussed before long at the regular meeting of Permanent Secretaries, where the work was commissioned in the first place.

**Q139 Mark Williams:** Could I move you more generally to the issue of raising awareness. In the written submission we had from the Wales Office it clearly said the Ministry of Justice is leading on awareness-raising with the Cabinet Office; and it detailed some of the devices used; the National School for Government modules, the development of e-learning and awareness events and things like that. Are there clear and measurable objectives across Whitehall for awareness?

**Dr Gallagher:** I would not describe the objectives as “measurable” because I am not quite sure how one would measure awareness, but it is worth reflecting on whether that is something we ought to do actually.

**Q140 Mark Williams:** It strikes me you have got the strategy in place; you have got the devices in place; but at the end of the day how are we to judge their success?

**Dr Gallagher:** I suppose what you are suggesting to me is: should we do some kind of dipstick every so often and find out if people do in fact have a clue.

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**Q141 Mark Williams:** Absolutely.

**Dr Gallagher:** It is not a bad idea at all!

**Q142 Mark Williams:** Following on from that, the awareness-raising work is shared between the territorial offices, between the Cabinet Office and the Ministry of Justice. Who is going to be accountable for that work, which Permanent Secretary?

**Dr Gallagher:** That is a good question. It reflects the distributed responsibility, and ultimately I think I am responsible for that one.

**Q143 Mark Williams:** The Civil Service is facing severe and growing financial challenges. If you are the man responsible, how can you be sure that in that environment the awareness-raising we have spoken about will be carried forward vigorously?

**Dr Gallagher:** Ultimately this is a question of the priority afforded to the task. You are absolutely right to say that, along with the rest of the public sector, the Civil Service will face really quite stringent financial constraints. Within those constraints, those tasks to which priority is given are the ones that will get done. In the end that is a matter of political choice. If ministers think that this matter deserves priority then it will be given priority. Is it possible, you are implicitly asking, to ensure that we do more here with less? Yes, it is possible to do that. That might involve slightly different ways of working. It might involve organisational change to use our resources more efficiently. It is easy, as I said earlier on, to think of this as purely a bureaucratic task; and of course there is bureaucratic machinery that has to be created to run it; but ultimately the relationships between elected bodies are political relationships, and they are relationships which have evolved over time and almost certainly will evolve further as politics moves on and the complexion of the administration changes. We have just seen, for example, a change of First Minister in Wales. What I think is pretty clear to me is—that as the devolution settlement for Wales, and indeed for Scotland, embeds itself further in the constitution—just how obvious the need to manage that relationship will become clearer to politicians on both sides, and that will translate itself into priority given to officials for the task.

**Q144 Mark Williams:** I think that is the key to it, is it not? I think it is not just as you alluded to in your answer to Mr Jones' questions—if you like, the event-driven awareness—it is embedding that much more deeply. It is hard to quantify; it is hard to measure; but it is nonetheless fundamental to the debate we are having, is it not?

**Dr Gallagher:** Yes, I agree with you.

**Q145 Albert Owen:** You considered yourself earlier on as a sort of line manager across the nations with regard to devolution. Can you tell us: what are the main problems of Whitehall in dealing with Welsh devolution matters, and how these compare with Scotland and Northern Ireland?

**Dr Gallagher:** Let me start with the second half of your question because that takes us into the first half. How do the issues that emerge in relation to Scotland compare with those in relation to Wales?

**Q146 Albert Owen:** And Northern Ireland.

**Dr Gallagher:** And indeed Northern Ireland. Let me start with Scotland and Wales, and come back to Northern Ireland. First, the Scottish devolution settlement is wider in scope and, in some respects, better established, particularly because of the legislative powers that the Scottish Parliament enjoys; and, particularly the legislative part of it, that gives rather greater salience to Scottish issues at the centre, because we have to think about how they impact on the UK's legislative programme. Increasingly, we will have to do that in respect of Wales. It has not been a big issue so far. It is probably fair to say Scotland, being bigger, has had more of a footprint in Whitehall over the years than Wales has. This is not necessarily a devolution issue. It was true when we had a Scottish Office and a Wales Office. I say that, not to suggest that Wales' objective should be to become Scotland-light; this is just a fact of history. The second difference however, between the issues that arise in Scotland and Wales, reflects the facts of geography almost; and that is, there are many more day-to-day cross-border issues in relation to Wales than there are in relation to Scotland. That is just a fact of where the border runs and the proportion of the population. It is quite instructive to compare Wales and Scotland with Northern Ireland. Northern Ireland has always been further away. At least, formally speaking, the bundle of responsibilities that are devolved in Northern Ireland is actually wider in most respects than in Wales and Scotland. For example, formally speaking, social security is devolved in Northern Ireland where, as a matter of practice, there is an agreement that it should always be the same; and that is lost in the mists of history. That goes back to 1923 and before that. Northern Ireland is in some respects on a daily basis less impacted by Whitehall issues than either Wales or Scotland. I suppose one of the lessons I draw from that is, in a sense, the same point as I was making in relation to Mr Williams' question, and that is that ultimately Whitehall is a servant and a creature of ministers, and properly a creature of a political system. It is when there is a requirement politically to manage a relationship that Whitehall gears itself to do what ministers ask it to do. That is true in relation to Wales; and it is true in relation to Scotland. It has been less of an issue in relation to Northern Ireland, because of course the focus there has always been for a number of years now on the creation and sustaining of the devolved institutions, rather than business as usual in devolution, which is what we have in Scotland and Northern Ireland.

**Q147 Albert Owen:** That was a very interesting answer and what you said about the wider scope regarding Scotland, and with Wales the cross-border issues. That is something this Committee has taken very seriously when we have looked into this area.

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Do you think when the devolution settlements were going through Parliament that those cross-border issues were overlooked?

**Dr Gallagher:** I do not think they were overlooked particularly, because if you are going to have devolution to Wales the border is where it is. It would not be possible to create a system in which Wales is allowed to have choice and be different and pursue its own policies without creating some issue to be managed across the border, just because of the distribution of population. It would not be fair to say they were overlooked, because no other answer could have been given, other than there will be such problems or issues—let us not call them problems. Such issues are inevitably much more important for the devolved institution than they are for the UK, simply because of the size. It is a much more significant proportion of the Welsh population that might be affected by a cross-border issue than proportion of the English population. Having the facts of Wales, the geography of Wales, and the nature of the place of the border and the distribution of people around it, it is a fact which the devolved administration has to take account of; and indeed so does the UK but it is much more important, understandably, for Cardiff.

**Q148 Albert Owen:** But it is important to those regions on the border?

**Dr Gallagher:** Of course it is, yes.

**Q149 Albert Owen:** What you are giving to me I think is a London-centric view of things. That is what I am asking. As devolution has progressed, perhaps that was the missing link for those borders and those regions close to the border?

**Dr Gallagher:** It is a long time since I have been called London-centric, but that is fair enough.

**Q150 Albert Owen:** Your accent does not say it!

**Dr Gallagher:** You have got the hint there! This is quite a difficult one, because when we look at the border regions we are looking typically not at the functions of central Government (which I admit to being obsessed by) but at the functions of local government. There may well be some work to do there on helping those local authorities who abut the border on both sides to think of how they manage across the border. Given the salience of this issue for the Welsh Assembly and the Welsh Assembly Government, I would not be surprised if the initiative for that arose there rather than here.

**Q151 Albert Owen:** We actually did the inquiry into instigating it and it was very helpful—the Welsh Assembly Government’s attitude to it. The other thing you touched on was the Government of Wales Act and the Legislative Competence Orders that come from that. Since those have been place, and I know it is developing, do you think Whitehall has become a better place with regard to Wales and Welsh legislation?

**Dr Gallagher:** A better place?

**Q152 Albert Owen:** My words.

**Dr Gallagher:** Indeed. Of course, every day, in every way we are getting better. I think what is happening is that the LCO system is unique, and it is certainly unique inside the United Kingdom. The first few times we tried to make it work were quite difficult because we were learning. It seems to me that the system has got rather slicker and we have got a bit better at doing it. It is not the simplest system in the world but it has been made to work successfully. The effects on Whitehall I think are two-fold. The first couple of these did cause distress; there is no doubt about that. They caused difficulty as people struggled with understanding the difference between the transfer of legislative competence and some kind of mechanism that might look like shared responsibility for legislation. The system, as a matter of law, is the first one of those, although politically one can understand why it might share the characteristics of the second. As time has gone on, and a few more Orders have come along, the first effect has been that we have learned how to do them better. The second—and I would not say this is a big effect but it is a real effect, I think—is that Wales has become, in competence terms, a little more like the Scottish settlement; it has a bit more legislative competence, and that has raised its profile inside Whitehall, no doubt about that. When a body like the Assembly has legislative competence its impact, or potential impact, on Whitehall and indeed on Westminster is greater and therefore its salience, if you like, is increased.

**Q153 Albert Owen:** I used the word “better” and you used the word “slicker”. Can we suggest that it has “improved”?

**Dr Gallagher:** Yes, I think it has improved.

**Q154 Alun Michael:** Just on the point of the LCO, I must say it is quite exciting, and would be to most ministers, to think of the concept of Whitehall gearing up to fulfil the will of ministers! To a degree that happens, but can I put it to you: that may be true when an issue is live, but the problem in relation to devolution is that the gearing up is not so apparent once an issue is no longer live. I do not know if you are familiar with the novels of Terry Pratchett but there is the concept of small gods where if they are not thought of by people then they cease to exist; and there are areas of policy which fall out of Whitehall’s agenda because they are not being lifted back up by ministers. When ministers have moved on they think that is settled; in fact it very often is not embedded into the Whitehall mindset. Would you agree that that is a problem with some aspects of the devolution settlement in Wales?

**Dr Gallagher:** I think that is not an unfair description of how public business is in general discharged. Of course, where you stand depends on where you sit on this. If you are a civil servant of course you tend to think you do nothing but what ministers want; and when you are a minister—as you will remember, Mr Michael—essentially you wonder

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what the devil these people do all day! Nevertheless, you are right to say that if the eye of political attention moves off an issue it is only a human reaction that it gets less priority; and it is the nature of prioritisation that something has to move down the list. I think it might be a fair criticism of the overall Whitehall system that after the first flush of enthusiasm for devolution in 1999 that everybody across Whitehall was very well aware of what happened, perhaps slightly bemused by it—because it was done at a great pace between 1997 and 1999. Nothing very much seemed to go wrong. There was political congruence in Cardiff and London, and indeed in Edinburgh and London, and perhaps attention did move off it for a while. A number of things I think have come together to change that. Obviously there is political change in Edinburgh and that has increased the attention given to Scottish issues; and the recognition in the period up to the Government of Wales Act that what we had done in Wales in 1999 did not quite work, was not quite right, upped the attention again. It took us a while collectively to get the machinery of the Government of Wales Act working. It is now working and the issue of potential further legislative competence is now in the political domain, and of this you are all very, very well aware. That I think will, for now at least, ensure that political attention is given to Wales in a way which it might not have been, let us say, in 2003.

**Q155 Alun Michael:** Would you say then—in the way you have described the LCO process has turned out to be a success story—it is one of the factors that actually has kept up awareness of the development settlement in Whitehall?

**Dr Gallagher:** It is undoubtedly the case that we have managed to make LCOs work. When I arrived in my present position just two years ago we had not actually done a successful LCO; so the fact that we have now done a good number—as well as, you understand, legislating in primary legislation to transfer legislative competence—is something of an achievement. It has undoubtedly caused a ripple here and there in Whitehall—of course it has; because what the process does is transfer power from one place to another, and the transfer of power is inevitably something which attracts attention.

**Q156 Chairman:** I was trying to pick up on the verb you used about the LCOs. You said you “did” them or you had “done” them? Did you say that?

**Dr Gallagher:** I cannot remember exactly what verb I used; but what I meant was they had been done—let us go into the passive.

**Q157 Chairman:** We also had a role in that as well.

**Dr Gallagher:** Indeed. I am very well aware of that.

**Q158 Mr David Jones:** Just pursuing the discussion, of course the transfer of competence by the LCO procedure and indeed by the framework power procedure is not the end of the road; the next step clearly will be for the Assembly to legislate through Assembly Measures?

**Dr Gallagher:** Yes.

**Q159 Mr David Jones:** Relatively few of those have actually been passed to date?

**Dr Gallagher:** Yes.

**Q160 Mr David Jones:** Clearly as time goes by there will be more. To what extent does your Department interface with the Welsh Assembly Government over the process of Assembly Measures? Clearly, as we discussed a few moments ago, there will undoubtedly be impact not only within Wales but across the border, because of the fact, as you said, that the populations of Wales and England are so much closer together than they are between England and Scotland. Clearly your Department will be concerned, I imagine. I wonder to what extent you liaise with the Assembly Government over the progress of Assembly Measures?

**Dr Gallagher:** The answer to your question is: not a great deal for two reasons. One, there have not been very many Measures yet and the system is still only at its beginning. Secondly, this is, however, an example of what you might call asymmetry in the situation. Most of the problems which have concerned you in the relationship between Wales and Whitehall are the unwanted impact or the imperfect design of some piece of UK policy as it affects Wales. Mr Michael gave an example about NHS workers. As the Assembly gains particularly legislative competence there will be a risk of Assembly Measures having an unwanted consequence in the other direction. So far that has not been a big issue. As competence gets bigger it will be an issue that requires to be managed, but as of now it is not something we have devoted much time or energy to.

**Q161 Mr David Jones:** Do you anticipate that you will have to do so?

**Dr Gallagher:** I think we will have to devote a little more. Obviously it depends on the rate of transfer of power, the breadth of the powers that are transferred and the Measures that are chosen.

**Q162 Mr David Jones:** The concern is that Cardiff and London legislate in silos without being certain of what is happening on the other side of the border?

**Dr Gallagher:** Indeed. What is sauce for the goose is sauce for the gander in this. If it is appropriate for Whitehall to consider the impact of its actions on devolved responsibilities, so it is appropriate for the devolved institution to consider the impact particularly of its legislative Measures on reserved responsibilities.

**Q163 Mr David Jones:** There is no machinery at all being set up?

**Dr Gallagher:** Not as yet because it has not been a major issue so far. I may say, just to complete that question, it is a more major issue in respect of Scotland. The machinery does exist to deal with that.

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**Q164 Alun Michael:** The Chairman earlier referred to the issues regarding the Legal Services Commission and the Cardiff Office. As a result of that, there was agreement that there should be a review of the Devolution Guidance Note No. 4, indeed in response to our recommendation in this Committee's report. Can you tell us what progress has been made on that review?

**Dr Gallagher:** It is still going on, Chairman. I am just looking to my notes to see exactly how much work has been done. It is not yet complete, but it is still in hand. I would hope that we would have it completed in the first quarter of this year. I would hope that.

**Q165 Alun Michael:** I think we were hoping that it would be completed a little more briskly than that so that this Committee would be able to see what the outcome of the recommendation was?

**Dr Gallagher:** We shall do our best to meet your needs.

**Q166 Alun Michael:** That is helpful. Again, the Chairman, referred to the proposal to close the Legal Services Commission Cardiff Office. You referred earlier to the fact that very often an understanding of the settlement is perhaps a little more vague in the arm's length bodies of government departments, and this was a case in point. Indeed, I think it is fair to say that in the evidence that we took the Minister who was in attendance, Lord Bach, effectively had to rescue the officials of the Legal Services Commission from continuing to dig a hole even deeper. You have made a number of efforts to put things right. What progress has been made, and what remains to be done?

**Dr Gallagher:** This goes back I think to Mr Jones' or Mr Williams' question: just how do we know how successful we have been? An obvious measure is: do we foul up again? At some point, whether it is in an arm's length body of the Ministry of Justice or somewhere else in Whitehall, somebody will foul-up again. As I said earlier, devolution is only one of many issues that people have to deal with. What we have to try and do is minimise the number of occasions in which that happens, and ensure that when it does we can fix it pretty quickly. I think what I would claim for Whitehall as a whole is that when it realises it is in a hole it usually does manage to stop digging.

**Q167 Alun Michael:** I think one of the concerns as well in that particular case was that the consultation and communication with Welsh Members of Parliament was particularly poor. Indeed, we sometimes have occasions when a department or an agency seem to feel there is a need to have some dialogue with the Assembly and that is welcome, but then to overlook the need to be well connected with Parliament. Do you think you are making progress in overcoming that tendency to ignore Members of Parliament?

**Dr Gallagher:** I would hope so. I think it is a symptom of a slightly wider difficulty which in some ways epitomises what we are talking about here. A number of people have made the valid criticism of

how Whitehall deals with devolution; that it continues—and we continue sometimes—to regard the devolved administrations as the government departments they used to be. I think there is a kind of almost default bureaucratic assumption that falls into that space, and they are not; they are separate bodies with their own accountability; with their own democratic mandate and so on. Conversely, just as they are not merely the government departments they used to be, nor are they government departments. There are bits of the UK machinery which deal with Wales both inside Government and here in Westminster which retain their authority and responsibilities too. This is an issue in relation to Wales, and is an issue in relation to Scotland also; helping both government departments and indeed what you might call the political system in general to realise that Wales now enjoys two Governments; that it enjoys two legislative bodies—this Parliament and the Assembly—just as Edinburgh enjoys both pleasures of that sort as well; and is and remains a major educational task.

**Q168 Alun Michael:** Would it be true to say that actually there is a problem in helping Whitehall and officials who have not had direct experience of understanding the way in which to relate to Parliament? You feel sometimes that some officials within Whitehall regard Parliament as something strange, and MPs as remote gods to be propitiated rather than people to engage with in a shared process?

**Dr Gallagher:** Yes, that might well be so. For most officials, most of the time, Parliament is something they hear about rather than interact with; and that is a problem. For many, many officials, the vast majority of civil servants involved in the delivery of public services, Parliament is something which sets the framework for their business but something at which they might well spend their entire career and only ever read about in the newspapers.

**Q169 Alun Michael:** So they miss out on the fun of a direct relationship with Parliament and with MPs?

**Dr Gallagher:** That opportunity is certainly denied them.

**Q170 Chairman:** For those of us who are enthusiastic supporters of democratic devolution, would you take away this thought in relation to the review of the Devolution Guidance Note No. 4, and it is this: now Wales has the experience of ten years of democratic development, surely it is very capable of actually administering a part of England, and that is not a facetious remark. It follows up on a point Mr Owen made about London-centric and so on. In the nature of the dynamic of devolution we are more than capable of actually running from Cardiff a part of England in relation to the Legal Services Commission. Is that beyond the bounds of possibility?

**Dr Gallagher:** I guess it is not beyond the bounds of possibility. It rather depends whom you mean by "we". I think you mean it in a very general sense, that is to say that it would be conceivable that the

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administration of legal services would be run from Cardiff but cover a wider geographical area than Wales.

**Q171 Chairman:** Could I end with a question in relation to the evidence given to us last week by Sir Jon Shortridge. Were you surprised by his observations about Whitehall?

**Dr Gallagher:** I know Jon of course and have worked with him, and he is a man who would not say in public what he has not already said in private, so in that sense I was not surprised at the tone of some of the things he had to say. I think there are some things he said with which I would agree. As I said a moment ago, helping everyone to understand that the Welsh Assembly is not a government department, it is not the Welsh Office as was, it is a different institution, remains a bit of a challenge. I think we are over the hump and most people do understand that, but occasionally one defaults into behaving as if it were. Some things he said, however, I do not agree with.

**Q172 Chairman:** Could you elaborate?

**Dr Gallagher:** At one point Jon said that he had always been of the view that the Wales Office would “wither on the vine”. That does not seem to me to be self-evidently true at all, because just as the Welsh

Assembly Government is not a government department, there nevertheless remain governmental functions that require to be discharged in relation to Wales. They are both political and administrative, and they will require to be done—functions that we started talking about at the beginning: management of the relationship; the development of the settlement; looking out for the interests of Wales. Those will all remain responsibilities that the UK Government in some form or other will have to discharge. Whether that is called a Wales Office is a different question, but the UK Government will continue to have to do things for and about Wales; and that responsibility will wither not at all.

**Q173 Chairman:** Could I thank you for your evidence this morning. It has raised a number of new questions, no doubt. We shall be writing to Sir Jon Shortridge as a consequence of your evidence and also his evidence last week to clarify some of the points he made. It is also our intention to call Sir Gus O’Donnell the Cabinet Secretary and Head of the Home Civil Service to give his observations on what you have to say and also pose some other questions to him as well. Thank you very much.

**Dr Gallagher:** I look forward to that.

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*Witness:* **Mr Andrew Davies AM**, National Assembly for Wales, gave evidence.

**Q174 Chairman:** Welcome to the Welsh Affairs Committee and this inquiry into Wales and Whitehall. Could you for the record introduce yourself, please?

**Mr Davies:** Thank you, Chairman. Andrew Davies. I am the Assembly Member for Swansea West but I was a Minister in the Assembly Government for ten years; for two years from 1999 to 2002 I was the Business Manager (Trefynydd) for what is now the Leader of the House; from 2002–07 I was Minister for Economic Development, and Transport latterly; and from 2007 to just before Christmas I was the Finance and Public Service Delivery Minister.

**Q175 Chairman:** We are very grateful to you for coming to give evidence, and we are particularly pleased given your experience. I suppose, next to the former First Minister, you are arguably *the* most experienced Minister of the Welsh Assembly Government in relation to Whitehall. When you had concerns, issues, problems, what was your first point of contact in relation to what was happening here in Whitehall and Westminster?

**Mr Davies:** I think we had a series of formal and informal networks. At a formal level, obviously the first point of call as a minister would be to the First Minister, and through that to the Secretary of State for Wales; or there would also be directly to the Whitehall government department and the relevant minister; and of course there were the special advisers as well, which I think play a very important role in Government; as well as of course

at official level an issue would normally get a briefing from officials about their understanding of a particular issue.

**Q176 Chairman:** Last week you will have heard the evidence of Sir Jon Shortridge in which he was critical of the lack of what appeared to be trust—I think he used that word, trust—that existed between London ministers and their counterparts in Wales, and that major UK announcements often took Wales by surprise. Do you agree with that statement?

**Mr Davies:** Maybe Sir Jon is a sort of half glass empty person; I do not know. Certainly my experience overall was very positive. When you consider that devolution was the biggest change in governance in the UK since—taking a benchmark—the introduction of universal suffrage or any other change, the scale of change was truly huge. The way in which it has been managed I think was testimony to the commitment of both the UK Government, Parliament and the Assembly and civil servants in making it work. Inevitably in all big organisations, big institutions, you are going to get tensions. I worked for the Ford Motor Company and there are tensions between Ford globally, Ford of Europe, Ford of Britain and, indeed, individual plants. You will always get these tensions; it is how you manage them I think which is the crucial thing. I come back to my point: given the scale of change, I think the whole process has been managed remarkably smoothly.

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**Q177 Chairman:** Sir Jon had a role in managing that—surely a central role?

**Mr Davies:** Indeed. Obviously he can only answer for himself, but as a minister and as a politician, yes, there were going to be disagreements between Whitehall government departments and individual ministers; but on the whole I have to say my relationship with various government departments was very cordial.

**Q178 Alun Michael:** I just want to follow up because there is an emphasis on the question of whether there was trust between ministers, but actually I thought there was a big emphasis in what Sir Jon said about sometimes a lack of trust between officials in different departments. Could you comment on that aspect? That was a two-way process, obviously; and there needs to be confidence that is a mutual element?

**Mr Davies:** Again, it is very difficult for me to comment, but relationships varied from department to department. Of course, at a political level, on big issues, you have a much greater ministerial turnover in Westminster than you do in the Assembly. For example, as Finance Minister I dealt with three Chief Secretaries to the Treasury—Andy Burnham, Yvette Cooper and Liam Byrne. When I was in charge of energy I dealt with Malcolm Wicks, and I think he said himself publicly he was the seventh Energy Minister there had been; so there is that turnover. Of course, it is also similar for civil servants. I think this is one of the big issues that we need to deal with. The organisational memory within the Civil Service can often be lost by people moving on. That is one of the paradoxes I think of the Civil Service—that you have a permanent Civil Service but, nevertheless, its retention of organisational memory, its ability to learn and innovate I think is often not good. Certainly my experience was where relationships were ongoing; for example when Transport Wales first became an Act, and also the Railways Act 2005, the relationships on the whole were pretty good because they had been established over some time.

**Q179 Chairman:** I take it from the response to Mr Michael's question you are implicitly saying—and perhaps you could make it more explicit—that really the relationship is managed politically and it would be very strange if the lead role is not taken by politicians rather than by the Permanent Secretary; and in this context perhaps Sir Jon is actually exaggerating the role he plays and really he should acknowledge that it is the ministers that are actually managing the relationship politically?

**Mr Davies:** I do not want to appear critical, but obviously the Welsh Office, as was, was a relatively small body in terms of the number of civil servants. I think when the Assembly was established there were 2,500 civil servants in the Welsh Office, now in the Assembly Government; the latest figure is over 6,000. Of course it has gone through several phases. The old Welsh Office had very little policy-making capacity, and that was acknowledged, I think, at

the time. I remember in my previous job, as head of a public affairs organised company, I did various seminars raising awareness about the Assembly and I said this very thing: that I thought devolution was going to be a bigger challenge for civil servants than for the politicians; and unbeknown to me at this seminar there was a civil servant whom I got to know very well later who was actually in the audience; he came up to me and said, “You're absolutely right—it's going to be a huge challenge for us; and of course the other thing is we're going to have to realise there is a Wales outside Cardiff”. I think those challenges still exist. It is about the management of relationships. Very little policy-making went on in the old Welsh Office. Clearly, the big challenge for the Assembly in its first term and a bit was making policy; so it is almost inevitable I think, as the institution grew, new people came in who had not been civil servants and the emphasis was making policy in Wales; maybe those links with Whitehall were attenuated. I think there is another aspect. I remember Sir Jon saying to me very early on in the Assembly's life that he found it extremely difficult getting civil servants to go on secondment to Whitehall, or indeed Brussels. From that I said, “How can we turn that to our advantage?” and that is what became the development of the Welsh public service, but that is another issue. Maybe it is something about culture that the civil servants in Wales are maybe reluctant to go on secondment. I do not know what the latest figures are, but I think it is still a very small number of civil servants on secondment. When I met my colleague in Scotland, Tom McCabe, the First Minister for Parliament, his Private Secretary had spent several years in Whitehall and had an extensive network of contacts; my Private Secretary at the time had spent all her career in the old Welsh Office and did not have those extensive links. I think maybe we have missed a trick as a Government in terms of being more proactive in encouraging those links at official level.

**Q180 Chairman:** Perhaps I should declare an interest because, as you know, I was Special Adviser to the Secretary of State for Wales, Paul Murphy, in that first crucial year. It was a very young institution but, if you cast your mind back, I think that both politicians and civil servants at both ends of the M4 did remarkably well in working very effectively in that period?

**Mr Davies:** Absolutely. Soren Kierkegaard the Danish philosopher said, “Life can only be lived forwards, but only can be understood backwards”. Of course, the first two or three years of the Assembly's life it was a matter of survival. Certainly as a Minister, ministers were ducking and diving because it was a very new institution. It was trying to develop its legitimacy and authority. I think that was the major thing. It is only ten years into the Assembly's life and I think we can look back on having established that legitimacy and authority, and also a record in terms of service delivery and policymaking.

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**Q181 Chairman:** On your watch you have been a minister with a portfolio which did not always overlap; the portfolios were not exactly the same. Did that pose a difficulty for ministers in the Welsh Assembly Government?

**Mr Davies:** Overlapping with Whitehall Government?

**Q182 Chairman:** Yes, with Westminster.

**Mr Davies:** No. What struck me, my very first contact with Whitehall and Westminster, was just the sheer size of Government at Whitehall. I was on a ministerial committee chaired by Patricia Hewitt when she was a junior minister in DTI looking at e.government, and the size of Government alone in Whitehall just was staggering. It was always inevitable that Government here at this end would be preoccupied with its own matters. When you have the Home Office itself dealing with prisons, probation and police, just that one department itself was finding it very difficult to talk to each, let alone to other departments, let alone to devolved administrations. Certainly that struck me as one of the big things that has always stayed with me. I think it is almost inevitable that Whitehall is going to struggle with devolution because it is so preoccupied, like most of us, with our day-to-day work.

**Q183 Mr David Jones:** With the benefit of hindsight, what do you think could have been done differently to establish the relationship between the Assembly Government and the Assembly and Whitehall?

**Mr Davies:** I think with hindsight certainly at official level to take a very much more strategic view. The Civil Service I think generally both at Whitehall and in Wales is not very good at long-term planning; is not strategic in its thinking. It tends to be short-term, and that is both in policymaking and in terms of financial planning. In developing a longer term strategy at an official and political level in terms of relationships, say, between Wales and Whitehall and Westminster and Wales and other devolved administrations, we should have paused and reflected but I think at the time, as I said, the major preoccupation was establishing the legitimacy of the institution.

**Q184 Mr David Jones:** We have the benefit in this country of course of a unified Civil Service and you have touched on it in one of your previous answers, but do you think that it would be beneficial to encourage civil servants from both ends of the M4 to be located at the other end, at least for a period? Do you think that a period of location in other parts of the Civil Service would be beneficial for the Civil Service in Wales?

**Mr Davies:** Undoubtedly. Although civil servants from the Welsh Assembly Government who have gone on secondment either to Whitehall or to Brussels, the European Parliament or the European Commission have benefited from the experience, to the best of my knowledge, there have been very few

secondments into the Welsh Assembly Government, either from Brussels or other parts of Europe or indeed Whitehall.

**Q185 Mr David Jones:** Perhaps that might be beneficial too?

**Mr Davies:** Yes, absolutely.

**Q186 Mr David Jones:** Could we turn to the Memorandum of Understanding which of course is what governs—"governs" is possibly not the word—but is meant to regulate relations between Whitehall and the devolved administrations. It is a very fluid document. It is expressed to be binding in honour only, which if I remember rightly was the expression that the Football Pools companies used to use about their relations with their customers. Is it a concern to you that those relations are non-binding and non-statutory?

**Mr Davies:** There was some discussion about the MoUs initially in the Assembly's life but after the first year or two I do not recall them being mentioned very often. I think, as I said, it was more about on-going relationships at political and official level rather than being bound by a particular agreement.

**Q187 Mr David Jones:** Might this become more of a difficulty if for example we have a Government of a different political hue in London from the one in Cardiff?

**Mr Davies:** It might possibly be but I think now we have had ten years of devolution and I think that the devolved administrations, the institutions and legislatures, are mature and have authority and legitimacy, as Dr Gallagher said.

**Q188 Mr David Jones:** Is it your feeling that the Memorandum of Understanding is sufficiently robust or at least sufficiently acceptable to survive the changes of Government at either end of the M4?

**Mr Davies:** I am sure it will be one element of the way in which the relationship is managed. But it may well be that that will have to be looked at or negotiated if the outcome of the general election is as you say.

**Q189 Mr David Jones:** What could be done, in your opinion, to introduce more transparency to relations between the British Government and the devolved administrations, or do you think that transparency is necessarily a good thing?

**Mr Davies:** I think, in general, greater accountability and transparency leads to better decisions. If I could just touch on the Holtham Commission report of course one of the recommendations that Gerry Holtham and his Commission makes is that a Treasury Minister should appear before the Finance Committee of the Assembly to have that element of greater scrutiny and that in terms of greater transparency the administration of the Barnett Formula should be carried out by an arm's length body. Gerry Holtham and his colleagues suggest the Office of National Statistics. In that area of policy I think greater transparency would be very considerable. Dr Gallagher just mentioned the fact

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that Whitehall has tended to see the devolved administrations as government departments, and I think that it is absolutely right. I always felt that as Finance Minister when discussing with the Treasury, certainly the feedback I had from officials was that we were just treated as a Whitehall government department rather than a separate Government with its own legitimacy and its own mandate

**Q190 Mr David Jones:** Again we are coming back to the cultural point.

**Mr Davies:** Absolutely.

**Q191 Mr David Jones:** We need to develop the culture which, frankly, does not appear to have got there yet?

**Mr Davies:** No, but no doubt in Wales many local authorities would make the same criticisms of the Assembly Government that we and other devolved administrations make of the UK Government, which is that it is too inwardly focused and it is too focused on its own business rather than developing and managing those external relationships.

**Q192 Mr David Jones:** Presumably parish councils would make the same criticisms of the local authorities.

**Mr Davies:** Sure; it comes back to my point about the Ford Motor Company. It is in human nature that you will get these tensions. For me it is how you manage those relationships.

**Q193 Mr David Jones:** Do you think that there would be any benefit to reviewing the Memorandum of Understanding, which has not been reviewed since 1999?

**Mr Davies:** Yes, obviously, I am sure that will be so. I am not a member of Government now, I am not a Minister, but I am sure that is being considered. Coming back to the Holtham Commission report, devolved administrations do not sign the statement of funding policy which governs the administration of the Barnett Formula and funding relationships with the devolved administrations. It is signed by the Secretary of State, in our case, for Wales and the Treasury Minister. So again that is a form of Memorandum of Understanding and clearly the Holtham Commission are arguing that that should be put on a new footing.

**Q194 Alun Michael:** I was just reflecting on your comparison with Ford and the relationship between Ford Bridgend, Ford UK, Ford Europe and Ford in Detroit, not least because I had some relationship with all of those during my period as Secretary of State and First Minister, as you will recall. If they were subject to the same public scrutiny and press and media coverage, do you think it would be a particularly interesting story? Would it be as interesting or more interesting than the examination in the media of the relationship between Wales and Whitehall for example?

**Mr Davies:** I am sure it would be a very interesting story. Whether it would be more interesting than the history of devolution I suspect it will not be, but I

think there are certain lessons to be learned. I think there is a danger that we tend to think that the tensions between Wales, Scotland, Northern Ireland and the UK Government are unique; they are not.

**Q195 Mark Williams:** You touched on your experiences of the Treasury and their cultural awareness. Did you find that there were some departments—you have dealt with a range of departments over ten years—that were better at dealing with the implications of devolution than others and could you say a bit more about that? If that is the case, what do you put that down to?

**Mr Davies:** I think the evidence that was given by several of the papers in the written evidence was saying that where (and that was certainly my experience as a Minister and a member of the Cabinet) policies were devolved, education and health particularly, that the relationships between officials and ministers tended to be on a sounder footing than where the policies were either non-devolved or there was a grey area. Certainly my own experience in taking the implications of the Railways Act, whereby the Wales and the Border Rail Franchise was effectively devolved to us, and the Transport (Wales) Act, which gave us powers that we clearly needed, I thought that worked very well, although DfT officials were not as sympathetic as ministers. On one occasion DfT officials were telling my officials that on the Railways Act they were unwilling to concede or grant extra powers and they quoted ministers. On that basis I phoned up the relevant Minister, who happened to be the MP for Pontypridd, and said, “Have you got a problem with this?” and he say, “No, I have not got a problem” so I told my officials that ministers did not have a problem, and my officials told DfT that ministers did not have a problem, so it was sorted. On the whole, relationships were okay on policy. On some cross-border issues, for example on rail, particularly the First Great Western Franchise, the relationship was less constructive.

**Q196 Mark Williams:** Do you relate in any way to what Sir John Shortridge told the Committee about how there was a diminished relationship over the ten years? He talked about a burst of activity in the early stages and then the level of understanding diminished. It may be, as you said, that was about staff moving on. Can you relate to that?

**Mr Davies:** Yes, but there is a danger that somehow Whitehall is blamed for that. As I said in my evidence, I think a lot of the responsibility for those links being weakened was because in the first five or six years of the Assembly’s life inevitably the preoccupation was policy-making in Wales and therefore maybe those relationships were not as strong. Again maybe that is a question you could ask, if you are asking Sir John back, about how those relationships were planned over that period and how did senior civil servants actually think about that and plan for that eventuality.

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**Q197 Mark Williams:** I suppose that partially answers my next question. You have talked about the need for the culture change, and those were Rhodri Morgan's words as well, both at ministerial and Civil Service level in order to improve awareness of relationships between the two. You talked about the reluctance of civil servants in Cardiff to undertake secondments to London. What else could we do to make that closer relationship and closer understanding a reality?

**Mr Davies:** Both Sir John and his successor Dame Gillian Morgan, as Permanent Secretaries, meet with their opposite numbers in the devolved administrations and also in Whitehall government departments on a weekly basis as well as having away-days at Sunningdale on a very regular basis, so clearly at that level there is a very strong connection as well as at the lower official level in terms of on-going links. I think the Wales Office submission itemises the links that are going on at a very extensive level. I am not aware that at any time the senior Civil Service sit back and think about those long-term relationships over a longer period. Again maybe that will be a question for Sir John or Dame Gillian Morgan, but I was not aware as a Minister that that sort of strategic thought or action was ever taken. I remember a consultant doing some work in the Assembly Government coming to see us as ministers, without officials there, and saying to us, "Don't forget senior officials spend most of their time managing you and not their departments." I think that is the problem to a large extent. The preoccupation of politicians and civil servants is largely policy-making and they think that policy-making and legislation is the hardest part. Actually it is not. It is leading, managing and delivering services. I think it is interesting, as somebody said to me once, the passing of legislation is the "end of the beginning"; the hard work starts thereafter. Because of the narrow preoccupation on policy the wider management of relationships is not seen as a priority. The departmental Capability Reviews undertaken of Whitehall Government departments have shown very clearly that there is a deficiency in the Civil Service, not just in Wales but in Whitehall. We were not part of the Capability Review process formally but we had a similar stock-take. There is an obsession on process and compliance with process, not on leadership and management. You asked the question to Dr Gallagher about how that department judged its effectiveness. Very few government departments, as far as I am aware, objectively measure their performance. Performance management has been identified by the departmental Capability Reviews as a real deficiency. I think that is one of the big problems. I think the dog that does not bark in terms of government and service delivery is the performance, or the lack of management performance, across the board. That is going to be increasingly challenging as the financial constraints which we are forecasting over the next five to ten years really begin to bite.

**Q198 Chairman:** Could you elaborate on what you mean by the "dog that does not bark"?

**Mr Davies:** I think Civil Service reform was identified by the then Head of the Civil Service back in 1997 as a major challenge and changing the culture of the Civil Service to one which was based on delivering on strategic outcomes whereby senior civil servants were measured or assessed on their leadership and management of their department. My experience of the Civil Service is that people tend to get promoted on their intellectual ability not on their leadership and management capability. I think the departmental Capability Reviews have identified that. It is fascinating reading to see those reviews. I think that comes through very clearly. Also the departmental Capability Reviews identified an obsession with compliance and process and not outcomes. Certainly my experience as a Minister is that there is a lot more preoccupation with monitoring expenditure than actually measuring outcomes for that expenditure.

**Q199 Chairman:** That is a critique really of the Civil Service that you are familiar with and of the Welsh Assembly Government?

**Mr Davies:** Clearly the departmental Capability Reviews of the Whitehall government departments identified that as a major weakness as well. The other major weakness of Whitehall departments is an unwillingness or an inability to work across departmental and organisational boundaries. Clearly that is true of Whitehall and I think it is a big challenge for the Assembly Government and it is a big challenge for local government as well.

**Q200 Chairman:** It is a general problem rather than specific to Whitehall?

**Mr Davies:** And clearly with what are going to be very significant financial constraints in public expenditure over the next five to ten years these issues are going to be increasingly important.

**Q201 Albert Owen:** If I could turn to the Wales Office, you mentioned earlier on in your immediate response to Mr Williams measuring the value of government departments. In measuring the value of the Wales Office do you see it as playing a continuing and important role in the devolution settlement or do you see it as a hindrance or a barrier to direct relationships with departments?

**Mr Davies:** On the whole I found it very beneficial, most recently on the Constitutional Reform and Governance Bill, which gave the National Assembly powers in terms of scrutiny of the Auditor General and the Wales Audit Office. When I was aware that the UK Government were legislating for powers over the National Audit Office I thought it would be anomalous if we did not have similar powers in Wales over the WAO. Our initial discussions at official level said that that was not going to be possible. However, we made the case to the Secretary of State for Wales and the Parliamentary Under-Secretary and through their offices and at official level I am delighted to say that the Treasury agreed to give us powers through the Constitutional Reform and Governance Bill. Indeed, I came to give evidence to brief members of both Houses only a

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month or so ago. I think that was, from my experience, the most recent evidence of the usefulness of the Wales Office. I am not sure whether we would have got that concession without the Wales Office.

**Q202 Albert Owen:** So you would say those important bilateral meetings between individual government ministers in Cardiff Bay and Wales Office ministers, the Secretary of State and the Parliamentary Under-Secretary, are very valuable links for Welsh legislation as it goes through both Houses here?

**Mr Davies:** Absolutely. In my own view it is a very crucial role given our current powers and the legislative settlement.

**Q203 Albert Owen:** So from your answers, Sir John is wrong to think that the Wales Office is going to wither on the vine?

**Mr Davies:** Certainly my perspective is different from his. Maybe it is because, as the Chairman said, the relationship was at a political level. I certainly found it very, very beneficial.

**Q204 Albert Owen:** Again you touched on your experience as a Minister with regards to the Railways Act and the Transport Act in which you were involved. What role did the Wales Office play in, first of all, helping you to establish that, and how early on is the Wales Office involved in bidding in the legislative programme for Welsh interests?

**Mr Davies:** If I remember correctly, reading the former First Minister's evidence, he was saying there would be an internal bidding round in the Assembly Government. Then through the Wales Office and the Secretary of State that would be part of the bidding process. My understanding is that that role is still extant and still very important.

**Q205 Albert Owen:** So if that Wales Office role was not there, you would say that Wales' interests would be at a complete disadvantage?

**Mr Davies:** Clearly we would have to think through very clearly and carefully about the relationship with the UK Government and how that was to be managed both at political and official level. I am not saying if it did not exist you would have to reinvent it, but we would clearly need some assurance that for Wales' interests, whether it is in terms of legislation or funding, there was a conduit for those discussions and negotiations.

**Albert Owen:** Thank you.

**Q206 Mr David Jones:** Could I return to a point that I put to Dr Gallagher and that was in relation to the development of Welsh legislation in the form of Assembly Measures. Presumably the Welsh Assembly Government would wish to liaise with the British Government on this particular issue. Is that another role, I wonder, for the Wales Office to keep Whitehall and Westminster apprised of what is happening in Cardiff in terms of Welsh legislation?

**Mr Davies:** Certainly my experience is that overall the role of the Wales Office was very important. The written evidence that they have submitted clearly identified the various ways in which both the ministers and officials within the Wales Office sought to raise awareness of issues related to Wales, particularly legislation. I think the role is a very important role.

**Q207 Alun Michael:** You made some interesting comments about the way that relationships have developed over time and you also referred to the very slim nature of officials (not personally but the numbers of officials!) at a policy level as the old Welsh Office disappeared and the Assembly came into being. How do you think the Civil Service in Wales has changed over the period to which you refer?

**Mr Davies:** It has grown. It has gone from 2,500 to over 6,000 people. That is partly of course as a result of the merger or abolition of several of the large quangos such as the WDA (Welsh Development Agency) but not exclusively; that is only part of the explanation. Clearly we did need a lot more lawyers and officials involved in policy-making, so that has also been a major reason for the growth. The other point is that not only has it grown but I think you have people coming in who maybe would not have the understanding of Government that the old Welsh Office civil servants would have, whereby it was very clearly that they were working to the Secretary of State and the junior ministers. Now you have many officials who see themselves working for the people of Wales. At a rhetorical level I can understand that, but clearly they are reporting and working for Government. I think the culture has changed as well as the Assembly itself. The Civil Service has grown.

**Q208 Alun Michael:** I want to put three aspects of the work of officials to you. One is the one that you referred to yourself and that is of policy development. Do you think that the Assembly, both the Government and the Assembly as an institution of scrutiny if you like, now has the relevant resources and competence in terms of policy development and scrutiny?

**Mr Davies:** Yes, I do. For me that is a different issue from whether they are well-used. Some of the challenges in policy-making are the same that Whitehall has identified in terms of the departmental Capability Reviews, that policy does tend to be an in-house job and maybe we need as an institution to look more clearly at how we engage more proactively with civil society in Wales in terms of making legislation. That is not to say that the Assembly as a small institution is not more accessible, we consult extensively, but that consultation is not necessarily the answer in terms of effective policy-making. I think there are questions to be asked about the effectiveness of that.

**Q209 Alun Michael:** The second is a different set of relationships. I remember coming out of the first Committee of the Assembly to which I had given evidence and walking out with an old colleague from

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my days in journalism, and he made the comment that in the first few weeks he had been struck that officials who had come into the Assembly from the old Welsh Office had less experience of having to have a relationship with the general public and a relationship with the politicians than you would expect in relatively junior members of staff in even the smallest district council. Do you think that those relationships are now strong and healthy?

**Mr Davies:** Certainly at the Civil Service level my understanding is that in many departments in the old Welsh Office it would only be grade fives and above who would brief the Secretary of State and the ministers. Clearly as a Minister I would have the relevant policy official, and he or she may be an SEO or grade seven or even an HEO, depending on who led on that, so I think that culture has changed. It may well be true for the old Welsh Office, and comparisons with outward-facing, but of course it was a newer institution and politically it was a very different time as well, from 1979 to 1997 as opposed to post-1999 which was very different. For me the jury is still out in terms of the wider engagement of civil servants with wider civil society in Wales. I do feel that civil servants need to get out more and engage more fully, whether it is with local government, the voluntary sector or others. I believe there does tend to be a bit of a bunker mentality at Cathays Park.

**Q210 Alun Michael:** The third aspect is that of legislation with which of course we have engaged in the development of the LCO system. I think we have seen an improvement in the standard of drafting as some experience has come in. However, it is quite a challenging process. Unless they have been involved in it, people very often do not understand the complexity of moving from policy to legal requirements to actual drafting that does what is intended. Do you feel that that capacity—and it is not capacity just in terms of numbers but in terms of drafting ability—is now fully appreciated and developed within the machinery at Cardiff Bay?

**Mr Davies:** It is difficult for me to comment directly about the LCO process as I never was responsible for sponsoring a particular piece of legislation.

**Q211 Alun Michael:** I was thinking actually that it then goes on in terms of that capacity being needed for the drafting and the processes in relation to Measures as well?

**Mr Davies:** Sure. But I was a member of the Cabinet Committee on Legislation and I realise there was a very steep learning curve for everybody. As former Finance Minister I was most concerned at that stage to make sure that there was financial provision for any legislation that was being brought forward, so whether it was on that or the drafting, I thought it was a very steep learning curve for officials right across Government, but it was a new process. Just as it was a new process for Whitehall, it was a new process for the Assembly Government as well.

**Q212 Alun Michael:** Can I ask on one aspect. There is a tendency now I think to draft *de novo* when the framework powers are given within legislation and the responsibilities lie with the Assembly. One in particular that I noticed was the secondary legislation under the Clean Neighbourhoods Act where Wales lagged more than a year behind the SIs coming in for England, which is a bit ironic because actually the legislation had been designed on the basis of experience in South Wales rather than in parts of England. Do you think there are ways in which we can make the most of the capacity that is available in the new situation and not always starting from scratch?

**Mr Davies:** Absolutely. I always take a very pragmatic view. It is about outcomes and it is outcomes for the people who elect me and my colleagues, whichever is going to be the most effective route for doing that. Just because we have the powers in this case does not necessarily mean we have to do it. I am all for flexibility. Just because we have the power, it does not mean to say we have to have a completely “made in Wales” solution if in terms of outcomes we can piggy-back on what is being done elsewhere. Again it comes back to my point about the Civil Service is not always very good at retaining learning or indeed learning from other institutions.

**Q213 Chairman:** Were you surprised when Sir Emyr Jones Parry’s All Wales Convention report did not recommend an increase in the numbers of Assembly Members if primary legislative powers were transferred to the Assembly?

**Mr Davies:** Again, he may have taken a very practical and pragmatic view that calling for more politicians would not be either a popular or easy-to-defend position. I do not know. I have not spoken to Sir Emyr about why they did not.

**Q214 Mr David Jones:** Could we turn now please to the issue of funding. In your experience, how amicable or otherwise were the negotiations with the Treasury over the allocation of the Welsh block grant?

**Mr Davies:** Always extremely amicable. That did not mean we always got what we wanted! As I said, the relationships I had with the Chief Secretary of the Treasury were always extremely amicable both at an official and informal level. I have no reason for doubting that my predecessors had the same relationship with their colleagues as well.

**Q215 Mr David Jones:** You have mentioned the Holtham Commission. What was the background to the establishment of the Holtham Commission?

**Mr Davies:** There have been concerns about the operation of the Barnett Formula for many years but the direct commissioning of Gerry Holtham and his Commission were a result of the One Wales agreement. It was one of the commitments within the partnership agreement between my party and Plaid Cymru in terms of establishing a coalition

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Government that we would set up an independent review, in this case chaired by Gerry Holtham, to look at Barnett.

**Q216 Mr David Jones:** There have been a number of reviews of the Barnett Formula. There has been the Scottish one, the House of Lords one and the Holtham Commission. Why do we need so many reviews, in your opinion, or do we? Is this an example perhaps of Government not being joined up?

**Mr Davies:** Of course the Calman Commission was a creature of the Scottish Parliament not the Scottish Government. The House of Lords Committee, chaired by Ivor Richard, obviously was a House of Lords Committee, but then of course the Justice Select Committee also looked at the operation of devolution and in so doing looked at the operation of Barnett. Clearly it just reflects different interests in different jurisdictions, but what the outcome has been is that all four of those reviews have said everything from Barnett is wanting through to Barnett is bust, so I think there is a broad consensus that the Barnett Formula and its operation has to be looked at.

**Mr David Jones:** Thank you.

**Q217 Albert Owen:** Just to follow on from that. It is the case that these four reviews that you talked about came to similar conclusions, but has there been an attempt to pull together all these findings for ministers and Governments to have a dialogue on or have they been left in isolation?

**Mr Davies:** No, certainly my discussions with Treasury ministers and the then First Minister and his discussions with both the Chancellor of the Exchequer and the Prime Minister and discussions with the Wales Office have all been about the fact that Calman, Holtham, the House of Lords and indeed the Justice Select Committee have all said broadly the same thing, about the need for reviewing Barnett and the fact that it no longer reflects in the way it operates the devolution settlement let alone the viability of the actual Formula itself.

**Q218 Albert Owen:** The Welsh Assembly Government was very critical of the Treasury being judge and jury in its reviews of the Barnett Formula. Do you agree with that? Secondly, if an independent advisory body were set up, how would it work, which is a recommendation, as you are well aware?

**Mr Davies:** It comes back to the point about transparency. The greater the transparency I think in general the better the outcome in terms of accountability of decision-making. Clearly Barnett was set up as a temporary measure by Joel Barnett when he was Chief Secretary of the Treasury back in 1977 or 1976. It was pre-devolution and clearly it was designed as a temporary measure with the expectation that you would have devolution post-1979 and that would therefore be renegotiated. Clearly it has worked for the last 30 years but certainly in the Welsh context increasingly we would say, particularly the way in which it is administered, the fact that we are not signatories to the statement of funding policy and the fact that decisions are made by the Treasury with which we have to live without any

recourse to any appeals mechanism, other than to the JMC, that it needs to be put on to a different footing. That is indeed what the Holtham Commission recommended, and rather than invent a new independent body they suggest for example the ONS be the institutional body that administers and calculates the Barnett Formula, so it is taken out of the political process if you like.

**Q219 Albert Owen:** Just to finish on that. Would you not think it could get messy, though, because if the Treasury is not in charge down here there are going to be regional elements within England that will say, "Hang on a minute, I want to appeal against that decision about what one of the nations is getting." That is the difficulty. It is all right saying we want an independent advisory body. The issue has still got to be dealt with. How will those sorts of things happen? Do you not think it could get even more messy than having the Treasury making a decision after negotiations with each of those constituent nations?

**Mr Davies:** In my view, no, it would be put on to a much more independent footing and therefore there would still be the same amount of money available but its allocation would be done on a basis which would be more open and transparent than maybe currently people see that it is, and that that may take away a lot of the need for a conflict resolution procedure. At the moment the only way we can appeal is against the JMC, but of course in appealing to the JMC you have almost conceded that you have lost.

**Q220 Albert Owen:** Do you not accept the point that there are some regions within England that are not happy with it and have not had their reviews, and that an independent advisory body would be their opportunity to raise those issues, and that is when it would get more complex?

**Mr Davies:** Certainly the advice of the Holtham Commission and Professor Bernd Spahn, who was a member of the three-man Commission, who is an expert on the funding of regional and provincial Government, was that in most of those there is some form of arbitration or conflict resolution mechanism, which there is not in the way in which Barnett is currently administered.

**Q221 Alun Michael:** I just wanted to express a concern and see what you think about it. I have seen the way that formulae have worked which are intended to bring greater objectivity into the way that money goes for instance to local government but also to the police and also to the Health Service. The problem very often from statistics is they do not always go quite as predicted and you can end up with year-on-year variations. Would you agree with me that you need some sort of system, if there is to be a use of statistics in that way, that makes sure that it is evened out so that, if you like, there is a predictability of finances over the years going forward? Sometimes, as I found in dealing with local government finance, if you have a fairly small change year-on-year it can be very bad for planning whereas if you know what the figure is, it is possible to manage even difficult situations?

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**Mr Davies:** Of course I think that is the benefit of the Holtham Commission, that for the first time we have had a fairly objective assessment of Wales' funding. Of course, what Gerry and his team have done, which I think is very good, is they have taken the Treasury's own formula for allocation of funding to the English regions on health and education and applied that on a Welsh basis. In terms of the bigger picture, clearly in Wales we have different issues about the Barnett Formula than the Scots, and Gerry recognises that, and he says obviously trying to get agreement across the four administrations will be inherently difficult and that is why as a temporary measure to prevent what is called a "Barnett squeeze", which is the funding that Wales gets paid converging towards the English average, he suggests that a floor be put in to prevent any further convergence. That is clearly something that we were discussing at the time with the Treasury and I know my successor is negotiating now with Liam Byrne.

**Q222 Alun Michael:** It is a two-way working. Floors in relation to the police grant for instance have not quite worked as intended and it is the unintended consequences rather than the predictability, so the

answer to it, it seems to me, is, yes, to go to the statistics but then to put in place something which is predictable for a period ahead and only changed with warning for a subsequent period, much greater than the three-year periods that we currently work with.

**Mr Davies:** I fully understand your concerns having dealt with the local government settlement in Wales. You could end up with Murphy's Law of Unintended Consequences by tweaking the formula. What Gerry and his team's point is is that by having a very small number of objective criteria by which you can identify relative need across the UK, by using those, which are standard, long-standing statistical criteria, you can actually devise a robust system, but the wider issue is about getting political agreement to that.

**Q223 Alun Michael:** Robust and predictable are both important?

**Mr Davies:** Absolutely.

**Chairman:** Thank you for your evidence today. It has been extremely helpful to us and will certainly inform how the inquiry develops over the next few weeks.

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**Tuesday 26 January 2010**

Members present

Dr Hywel Francis, in the Chair

Nia Griffith  
Mrs Siân C James  
Mr David Jones  
Alun Michael

Albert Owen  
Hywel Williams  
Mark Williams

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*Witnesses:* **Sir Emyr Jones Parry**, Chair, **Mr Aled Edwards**, Executive Committee Member, and **Mr Paul Valerio**, Executive Committee Member, All Wales Convention, gave evidence.

**Q224 Chairman:** Welcome to the Welsh Affairs Committee and this inquiry into Wales and Whitehall. For the record, Sir Emyr, could you introduce yourself and your colleagues please?

**Sir Emyr Jones Parry:** Thank you very much indeed for the welcome. Emyr Jones Parry. With me are Aled Edwards and Paul Valerio.

**Q225 Chairman:** Could I begin by making a statement about this inquiry. It takes two to tango, Wales and Whitehall. In the first few weeks the spotlight has been on Whitehall. We want to ensure that the spotlight is on both and the inter-relationship. Sir Emyr, we would be interested to know about your own unique position in that you were appointed to lead the All Wales Convention as a distinguished diplomat. Much of what we are looking at is shaped by the events of both 1979 and 1997. Could you tell us where you were at that time in 1979 and in 1997 and whether or not that has any bearing on the way in which you have approached the challenge before you?

**Sir Emyr Jones Parry:** Back in 1979, Chairman, I was just coming back from Canada. I remember it vividly because when my heavy baggage turned up, the driver refused to unload it and there was no-one else to unload it, and I had a seven-months pregnant wife. Let me just remind you that the mortgage rate was 12%. I got my first house in London and within a month the mortgage rate was 16.25%. I remember that vividly, but it had no impact on this. In 1997 I was just about to take over responsibility for the European Union in the Foreign Office so I lived through that period up until 2001 firstly responsible for EU and then as the Political Director in the Foreign Office, the number two in the Foreign Office and, as I said in a previous meeting with some of you, responsible for devolution in the Foreign Office. So I had a hand in how the Foreign Office reacted to the events and I and somebody who represented me sat on the Lord Chancellor's Committee looking at the whole process, so I saw it from the inside. That is where I was. If you want some reflections on Wales in Westminster over that period, having done European affairs for 20 years, the big, striking thing that comes out in the Convention report is the maturity of the Welsh contribution to EU affairs compared to what it was.

**Q226 Chairman:** What are you comparing with what?

**Sir Emyr Jones Parry:** I am comparing through the 1980s where traditionally in inter-departmental discussions in Whitehall the major Welsh contribution from the then Welsh Office tended to be at the end of the discussion, "Mr Chairman, I would like to reserve the position of my Secretary of State," but without having made any contribution prior to that in the debate. What we have seen now in the last two years is a very strong Welsh presence in the formulation of policy, in the negotiation of policy, in the way it is implemented, and a far more interactive approach by Wales, and that has evolved since 1998, but it is particularly true now, and I very much welcome, having seen it at the sharp end in Brussels, and having had a session specifically on EU affairs, there is no question that the maturity of the contribution is much greater than it was.

**Q227 Chairman:** You were talking about 1997 and of course the legacy was the asymmetrical nature of the existing settlement in 1997 and the continued asymmetrical settlement post-democratic devolution. Can you give us some observations on that? I know that you have said publicly that you felt—and I am not sure whether you regretted saying it—that it was a little unfair that Wales did not have what Scotland had but that was the nature of the settlement and that was the nature of the legacy.

**Sir Emyr Jones Parry:** I am not going to apologise for any remarks I have made, Chairman, but you misquote me. Let me be clear, prompted by the BBC, and at the third time of asking, I did describe the settlement as being "incongruous" in terms of the treatment of Wales and Scotland. The incongruity stemmed from the simple choice in any federal arrangement as to whether or not residual power should rest in the centre or should rest in the provinces or the states. We are not in a federal system, of course, but I remember putting out a piece of paper to Robin Cook and saying the key choice now in the Lord Chancellor's Committee is what power does Scotland get? Does Scotland get something or does Scotland get everything less something? And he was quite clear in what he wanted me to argue for. The Welsh situation, as you

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know far better than I, is quite different. I described those two situations as incongruous and I stand by incongruous.

**Q228 Chairman:** Right, so what you are saying is that if we re-visit that period, if a set of arguments had been put that was opposite to what you were doing, then we would not be faced with these sets of challenges that we have today?

**Sir Emyr Jones Parry:** No, I am not saying that at all. We are where we are and there is no point in going back to what happened in 1997–98. We have ended up with two Government of Wales Acts and now the question is how does one move forward on the basis of the more recent Act.

**Q229 Chairman:** Let me just approach it in a different way then. One of the underlying themes of your report is that there is a lack of public understanding, for want of a better phrase, of the devolution settlement. Is that as a consequence of the asymmetrical nature of the devolution settlement of 1997 to 1999?

**Sir Emyr Jones Parry:** I think it is far more complicated than that. It is partly public disenchantment with politics, which I find deeply distressing; the interest in institutions and in politics is much diminished. That is part of it. It is partly that if you came to explain the processes of Westminster they are impenetrable to most people out there. That is part of the nature of our institutions. However, it is the case, as we found throughout Wales and in most of the evidence we got, that people do not understand the present arrangements. One of the things we have flagged up is the risk of embarking on a referendum when the lack of understanding is there and when of course things can be open to misinterpretation very easily. If you ask me, if there is one thing that I wish we had put in the report it would have been to have emphasised the very simple reality that it is easier to oppose in any referendum than it is to make a case for a proposition.

**Q230 Chairman:** You mentioned embarking on a referendum. Are you referring to 1997 or 1979 or the up-coming one?

**Sir Emyr Jones Parry:** Looking forward to a possible referendum.

**Q231 Albert Owen:** I am very interested in what you are saying about the “Scotland-lite” scenario but do you not recall that in 1997 and indeed in my Party’s manifesto, what we were concerned about was an over-centralised state, and that devolution was taking place to London, to Belfast as well as to Edinburgh and Wales, and all those had a different degree of power being transferred, so it was a little bit more complex than just let us have the same as Scotland?

**Sir Emyr Jones Parry:** I am not arguing for the same as Scotland.

**Q232 Albert Owen:** The point I am making is that devolution was not simply about London to Cardiff or London to Edinburgh. It was about breaking up an over-centralised state.

**Sir Emyr Jones Parry:** Let me take that in two parts. Firstly, is the series of constitutional changes post-1997 is probably the greatest in this century. It is not just devolution. It is the Human Rights Act, bringing the ECHR into law; it is devolution; it is the mayoralities, Middlesbrough and three in London, apart from the Mayor of London. Of course they are all changes but they did produce this asymmetry, beyond question, and that asymmetry has consequences. Part of that is that we have anomalies at the borders. Part of it is that the structures are different and therefore not as understood perhaps, but we are where we are.

**Q233 Albert Owen:** It is about democracy as well. A final point on what you were saying, Chairman, we are talking about democratic devolution; it was making London more democratic, having its own Assembly after what had happened in the previous period; it is about making Belfast and Northern Ireland more democratic as well.

**Sir Emyr Jones Parry:** Belfast is an understandable response to the Troubles and the very honourable efforts made by successive Prime Ministers, and today again, to try and get that situation under control. You could argue, Mr Owen, that democracy and better governance was a motive. Some people would say it probably was not the primary motive. The primary interest was actually to assuage growing nationalism and to preserve the unity of the Kingdom. Second to that came whether we would end up with a better system of governance?

**Q234 Albert Owen:** Would you argue that there was a regional element to it as well within England?

**Sir Emyr Jones Parry:** If you look at the English reaction, the rejection of regional authorities and the fact that the bodies that have been set up really have no power as such, they are all nominated. The mayoralities are different. There are not that many of them and of course we have had some cases where they have been rejected by the electorate. If you looked at England as a whole and said what is the quantum change, it is nothing like as great a change in the governance of England as has happened in Scotland and in Wales.

**Q235 Mr David Jones:** You speak of the hazards of proceeding to the referendum given the current level of understanding of the devolution settlement. In the course of your inquiry did you seek to establish to what extent the degree of understanding of devolution had increased since 1997 when the referendum was held on the establishment of the Assembly in the first place? Has this changed at all or has it remained static?

**Sir Emyr Jones Parry:** Certainly support for devolution has consistently increased and has matured at a level of 72% in favour of either what

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they have or would like something else. I do not think I can quantify this precisely but along the way I think knowledge has improved. Civic society is much more aware. There is a big effort made with school children, the Assembly works diligently on that, but we still found that the average person did not understand. I hope we have brought out the extent to which the complexities, as in who is responsible for what, the distinction between what is authorised for the ministers and what is the prerogative of the Assembly, the differences, the nuances are really not understood. Where people are more familiar with and appreciate devolution it tends to be when they come into a specific contact with it. If you are talking about a policy for their school children, if it is how the National Health Service is now managed, they are things that people understand because they come into contact with them, but there is not such a great understanding of the general constitutional nature of it.

**Q236 Mark Williams:** You have answered my first question. I was going to ask you to look back on those evidence sessions and the scale to which there was that lack or perceived lack of understanding of the devolution settlement. You have mentioned that there is a difference between people in their everyday lives, be it the Health Service or education, and the bigger picture. Looking back to those evidence sessions, you were not charged with an educative role in terms of explaining the current system but was that a product of those meetings? Did you feel that people were appreciative of the finer points of the system through your inquiry?

**Sir Emyr Jones Parry:** I think we scratched the surface, to be honest, Mr Williams. I do not think we did much more than that. But we were charged with stimulating a debate. You cannot stimulate a debate without trying to pass out information. You need a certain level of understanding if you are going to have a decent, meaningful debate. We did spend quite a lot of time trying to (i) get the history right, and the early document we produced set out, I think neutrally, a lot of the history and how the whole thing had evolved, and (ii) look forward and try to tease out issues. We tried to set that out as fairly as we could and do justice to it.

**Q237 Mark Williams:** You used the word “impenetrable” earlier on. How impenetrable? Can you quantify that in terms of those meetings and the scale to which people shared that view?

**Sir Emyr Jones Parry:** I think elected representatives know far better than I the perils and the advantages of public meetings. In terms of turn-out we did reasonably well. We tried to hold meetings across Wales but the fact is in terms of turn-out, what do you get at a meeting? You get the committed on one side, and the True Wales “groupies” came with me to almost every meeting I was at. I cannot genuinely tell you how many people in Port Talbot actually came from Port Talbot as opposed to people who set themselves up to come to create a scene.

**Q238 Chairman:** It was about 30 out of 78.

**Sir Emyr Jones Parry:** That is an authoritative view. 37% shall we say. The public meetings are something we needed to do but our consultation was of course much broader. We took large amounts of evidence all around the place. We polled. We tried to give everybody the opportunity. Not many took it, but many more took it than had done previously, including on an interactive website. What we reported is a summation of what we gleaned from all those sources, not just from public meetings.

**Mark Williams:** Thank you.

**Q239 Mrs James:** Turning to inter-governmental arrangements; do you have concerns that inter-governmental arrangements are of a non-binding, non-statutory nature? Are they robust enough to survive different Governments at Whitehall and in the Bay?

**Sir Emyr Jones Parry:** To go back to one of the things I have felt quite strongly about from the very beginning, it is the extent to which Wales and its bureaucracy is engaged in Whitehall, engaged with Whitehall, and the extent to which that bureaucracy reflects Wales and is acceptable in Wales, which is a dimension, but at the same time is one which is competitive and has the same standards and levels of expertise as Whitehall. So a public service which is every bit as good, preferably better if it could be, as that in Whitehall but, at the same time, responsive, and that is a difficult tension. When I was speaking at the National Eisteddfod in Bala in August I was quite surprised that one of the early questions was from someone who attacked the bureaucracy in Cardiff as being non-representative and not reacting, and everybody in the tent applauded, and I was the one who had to stand up for the bureaucracy. They are in a different position but I think we have had too long a period of not necessarily being as engaged as we should have been. I think that is changing. Why do we need to be engaged? Because—I would say this, would I not—time spent on reconnaissance, as the military say, is never wasted. Lubricating the system of Government permits Government to work. What I mean by that is when proposals are put forward in Whitehall that is normally on the basis of an inter-departmental discussion before and an agreement on what is put forward. The more that officials and ministers in Cardiff are engaged with their opposite numbers in London, the more that is an automatic part of the process, the better will be the proposals that come forward to Parliament for powers, the better drafted will be the LCOs, the quicker they will proceed because there will have been that working. Getting a system which permits all that to function efficiently is very important. Is it resilient enough to cope with different circumstances? Of course, there has been this privileged position that it has been the same party in power predominantly in Cardiff and that has facilitated things, up to a point. It does not follow that it automatically makes things work. Conversely, it is the fact that it seems to me that the Whitehall and governmental response to devolution has evolved markedly, shall we say, in the last three years

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following the changes in Scotland. Whitehall, which had been rather quiescent on devolution and had assumed that it was a comfortable relationship that was working, in confronting the Scottish Nationalist administration in Scotland people became more vigilant and on their guard, and I think that affected officials and it affected ministers in their response to Scotland and with a side-effect as to how they then dealt with Wales.

**Q240 Mrs James:** Coming back to that comfortableness, the Memorandum of Understanding is based on very high principles of co-operation, consultation and communication. It has not changed since 1999. Do you think a review is due? Do you think that the attitude between the Government and the Parliament is more important in that review in growing that comfortable communicative attitude?

**Sir Emyr Jones Parry:** I think it works both ways. You could argue that Cardiff and Wales need to be more engaged in Whitehall. Whitehall certainly needs to be more responsive and conscious and aware of devolution. Again, I think Whitehall, in responding to Scotland and to events, has to sharpen up its act too. Some of that comes out as confrontation. We see this on some of the environmental issues where I am not sure that all of Whitehall necessarily fully understood what was being put in the Government of Wales Act 2006 and that afterwards partly a bureaucrat reaction is that sense of, "I am not sure we wanted to see that power move away from us". Parliament has legislated so the need for officials and ministers to understand that on both sides is very important.

**Q241 Mrs James:** Just as a final supplementary to that, do you consider that the revival of the operation of the Joint Ministerial Committee on Devolution, with a new responsibility for promoting dialogue, will help to improve the UK's Government's relations with devolved administrations?

**Sir Emyr Jones Parry:** The problem with memoranda or occasions is whether they are living documents or living events. I think what is more important at the end of the day is that there is a practice of consultation, of communication, of engagement, and that it happens. You rightly say, Mrs James, that the memoranda have not been updated. My worry about memoranda is that they tend to be things that are negotiated. The risk is that they are put somewhere on the shelf in the cupboard and forgotten about. When we asked some pertinent questions in Cardiff as to how things operated and what was written down, there was a lot of scurrying around and it was not immediately something of which people were conscious. It probably applies more at the London end than it does in Cardiff. What really matters is that when you are working on a policy you know who your opposite numbers are, and for that I say throughout the British Isles, and that actually you are in a process of engagement and working with in a spirit of co-operation and communication, and where we come back then to

what Mr Owen was saying is that you have Government more accountable to local situations profiting from how others do it, deciding what you want to do for yourselves, but doing that in a more dynamic, engaged manner. Of course you have got to have the grandstands but remember no summit or any meeting of that sort is ever successful unless there has been an awful lot of preparation.

**Q242 Mr David Jones:** Sir Emyr, could we return to the non-binding nature of the relations between the Government and the devolved administrations. The concern I have got is where does this leave the citizen, because clearly non-binding arrangements are usually something you cannot rely on in court action, and at some stage the aggrieved citizen may want to take court action against whoever is the provider of the services that he wants to use: and he may not be able fully to exercise those rights because whatever relationship exists between central Government and the devolved administration is in non-binding form. Do you think that this is a weakness so far as the citizen is concerned? Is the citizen being shortchanged as a result of these arrangements?

**Sir Emyr Jones Parry:** I cannot help thinking that the greater problem for the citizen is not whether these arrangements are formal or informal but where the power rests? One of the things we did find was that most people in this state of what I describe as a "fog" did not understand who was responsible, so if you are a member of the public and you did feel aggrieved, the question of to whom you go with that complaint, where is your grievance going to be exercised, I think is a greater problem than whether there is a binding or non-binding relationship between Governments.

**Q243 Mr David Jones:** We have had evidence, for example in our cross-border health inquiry, that the arrangements between the Welsh Assembly Government and the various health trusts and other providers on the other side of the border were in the form of protocols which were obviously non-binding. From a legal point of view, that leaves a missing nexus, so if the aggrieved citizen who is attempting to seek treatment wishes to pursue what he sees are his rights he is going to find that there is a break in the legal relationships between the various bodies that he is dealing with, with the consequence that he probably will not be able to secure those rights. It seems to me—this is a personal point of view—that that citizen probably is being shortchanged as a result of those arrangements.

**Sir Emyr Jones Parry:** We flagged up the risk of being shortchanged. Indeed, it was said to us, especially in Wrexham and Newport, that where people were particularly affected by the border consequences and where perhaps your normal hospital for treatment might have been Hereford, what did that mean for the services you got, and where there was a risk of two queues, the sense that you are in a longer queue, people felt disadvantaged. I suspect the solution to that is less in the binding or other nature but that the authorities in Wales in the

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arrangements that they make for any treatment which is on the other side of the border should take account of the interests of all their citizens and try and avoid what I call in the report the “distortions” that do occur. Can I ask Mr Edwards to comment.

**Mr Edwards:** Going back to the earlier point of the two accountabilities, one of the things that we did pick up in the evidence was the engagement of the third sector in particular. I would say after being on the Third Sector Partnership Council in the Assembly for many years that one of the things that is characteristic of that dynamic is an accountability of values. Going back to the original Government of Wales Act, that led to a certain value base of sustainable development, equal opportunities and also, I am sure you will recall, human rights. I think that there is in that respect an enhanced sense of accountability to a value base, but I concur with what Sir Emyr said about the cross-border issues and it is something that we did set our minds to. If you recall, we pressed in the report for enhanced distribution of those issues and we welcome the endeavours you have made to research that aspect of the work and the divide between the two administrations.

**Q244 Albert Owen:** Just to develop this theme a bit further and your responses to Mrs James and Mr Jones with regards to the evidence that you received on this and the obvious effect of devolution with different policies on both sides of the border, and indeed the unintended consequences, which we have developed in our inquiry. You talk about people being confused by this and you call for a more co-ordinated, more coherent and more transparent system. What can the Welsh Assembly Government and indeed Whitehall do to address that?

**Sir Emyr Jones Parry:** You realise, Mr Owen, better than I that you have done more work on this than we possibly could and I pay tribute to the things you have done.

**Q245 Albert Owen:** It is a whole series of things you have done.

**Sir Emyr Jones Parry:** It is partly as a result of looking at one of your Reports that did not so much set us off on that route but we were stimulated by what people said to us along the border to then follow some of your work. It is something people do not feel very attached to. I cannot easily answer your question. I will tell you why. In the preparation we did coming up to the publication of the report we had a number of exchanges with the Welsh Assembly Government but it did include a fairly lengthy letter I sent posing some questions to the Permanent Secretary and it included, I remember: “What is my answer to the lady who says her problem with health, *et cetera*, is . . .” and I have to tell you that I did not get a clear answer to that. I got a repetition of what was policy. There is a need clearly to (i) recognise there is a problem and (ii) then with the providers of the service to try and work out a means by which, while respecting the differences in which the NHS operates on both sides, where people because they happen to live in an area distant from Swansea

traditionally used the Liverpool hospital, that is recognised. I think more and more that is being done, but I think the obligation is strongly on ministers and officials to see where there is a distortion which discriminates disadvantageously so that should be taken account of, yes.

**Albert Owen:** I understand that you do not want to encroach on devising policies or solutions to this, but what I am saying is from your report you talk about the need for greater transparency; how can that be achieved? Are you talking about greater notes from Welsh Assembly ministers when they meet with departmental ministers? The media is not very helpful in this in that the television sometimes shows policies that do not apply to people when they are watching, so the confusion is sometimes in the way it is delivered by the media. Although we have the broadcasting, we do not really have the transparency.

**Q246 Chairman:** Could I illustrate that by a recent newspaper article which perpetuated that confusion unnecessarily in which it was reported that Whitehall, or Westminster, were the cause of two years’ delay in the fire sprinkler going through. In fact, it had absolutely nothing at all to do with the process.

**Sir Emyr Jones Parry:** Thank you, Chairman. Of course in this report we were generous in our interpretation of our terms of reference, so we did stray onto areas which might have come as a surprise to those who asked us to embark on this task, but we did it precisely because they were issues that people raised with us. We did not in the time available and because of the lack of expertise, and it was not our job, try and formulate policy responses, of course not, but we did flag up a number of things which we felt deserved attention. I hope very much as this report is debated now in the Assembly that it is not just focused on a referendum which, after all, was not for us to recommend (and we did not recommend one) but all those other recommendations we made which I think address particular issues and concerns. I hope somebody does follow those up because I think they are worthy of it. We were of course, Chairman, as you have been in the past, quite critical of the media because of the coverage that we managed to get. We were unstinting in our efforts but it was very difficult. I have often said that I wrote to 42 newspapers very succinctly just explaining what we were going to be doing, and six were prepared to publish that letter, and they were tailored to each particular newspaper. By the end we got all 42 to do something, but it was a huge effort and getting them to recognise an obligation of public service, to actually talk about politics and talk about things that really matter is not at all easy, and that is part of the problem. In our report we were not trying to castigate anyone as being responsible. What we were saying was partly because of individuals’ own volition and lack of interest in politics and partly because of what they are fed and partly because the Government as a whole has not

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done enough between all of us, the end result is one which we did not think was good for the body politic in Wales or the Kingdom.

**Q247 Albert Owen:** I am referring more to the broadcast TV and radio rather than the newspapers which do have a local dimension. For instance, somebody who is watching *Newsnight* might hear of a policy which is England-only and it is not explained, that type of thing. My question really is: would greater transparency between Whitehall departments and Welsh Assembly Government dispel some of those differences or misunderstandings?

**Sir Emyr Jones Parry:** It depends how you are going to define transparency. If it is a clearer delineation of power I think that would help.

**Q248 Albert Owen:** I am quoting your report. You called for it.

**Sir Emyr Jones Parry:** I am not naive enough to suggest that there should be greater transparency in the contacts between the Welsh Assembly Government and Whitehall. That is the way Government operates and certain of those things, by definition, need to be confidential. However, in principle, for the citizen, it comes back to Mr Jones' point about how does one address a grievance, and we think that having some clearer view of who is responsible for what and where power resides would be helpful.

**Q249 Chairman:** I think Mr Owen is driving at what appears to be in the report an over-simplification of the legislative process. The legislative process is complex, it is confusing, so to try somehow or other to imply, as you do in the report, that it can be simplified is in itself confusing and misleading. Is that a fair comment?

**Sir Emyr Jones Parry:** I am afraid I do not think it is, Chairman.

**Q250 Chairman:** To what extent have you and your members any direct experience of the legislative process? Have any members of your Committee any experience of the legislative process?

**Sir Emyr Jones Parry:** Are you talking about in the United Kingdom or in Wales?

**Q251 Chairman:** Anywhere.

**Sir Emyr Jones Parry:** Elected representatives, yes they were. Mr Valerio, on my right, has been. We have the leaders of the 22 local councils of Wales on with us. Mr Edwards for his part has worked in the Assembly. He has direct experience of it not as an elected representative. My experience of Government is perhaps naive but it is reasonably extensive. Yes, we have some knowledge of these things, but we were set up precisely as a collection of individuals to report, which we have done fairly. It is totally fair. I think we have said it in the report, that Westminster and its processes are not understood either. Fine. It is the same as saying that people are disillusioned with politics in England as they are in Wales. I do not draw any satisfaction from either of

those statements. I would wish that people had a greater interest in and awareness of and knowledge of the democratic process and how it proceeds, but the difference about understanding is—and I have read your comments as well, Chairman, as a Committee—you have got to draw a distinction between a legislative process that is not fully understood and a secondary process which is a precondition to the legislative process which is, by the way, this is how power rests and we are not very clear about where it rests but if you want to change that distribution of power, there is a process which most people do not understand and a process which itself is perceived by most of the people who gave evidence to us as being somewhat lengthy and a bit opaque. You have been very clear in the comments you have written and said that is not true. I must beg to differ on that, but what I am clear about is that the perception of how this operates is widely felt to be one which is reflected in our report.

**Q252 Hywel Williams:** We have talked at a number of points this morning about the degree of understanding in Whitehall and in Cardiff amongst the Civil Service about the devolution settlement. Sir Jon Shortridge gave us evidence a few weeks ago and he said that initially there was if not enthusiasm then at least an active understanding in Whitehall of what was happening and that has declined over the years. You said a moment ago that there has been a change over the last three years due to the change in Government in Cardiff.

**Sir Emyr Jones Parry:** I think Scotland was the trigger.

**Q253 Hywel Williams:** Scotland, sorry, but also that there was a certain amount of misunderstanding of the nature of the 2006 Government of Wales Act. Can you just give us your broad impression of the degree of understanding of the devolution settlement, both by the Civil Service in Whitehall and in Wales?

**Sir Emyr Jones Parry:** What I do not think we are in a position to do is try to give you any definitive or numerical idea of who understands what. Mr Williams, I would not want you to take too much out of context what I said about the bureaucratic retrenchment and perhaps surprise at what was agreed in the detail of the 2006 Act. That is not the same as saying people did not understand the Act or devolution. What I am hinting at was the suggestion, "Did we realise we gave that away potentially?" That is a different point, but I do think in the run-up to the adoption of an Act in the process of finalising that Act, the sponsors of the Act—this is a personal view—did rather well to get into that Act what they did, but I am not sure that everyone quite understood what was being put in the Act. That is what I am saying. The broad understanding of devolution is there. On a daily basis do people understand how it impacts? No. I think my former department is probably as good as anyone, especially out there, in representing the Kingdom and its different bits. Whether or not the average department understands the complexities, I do not

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know. It is something that you have drawn attention to very effectively, which is the unintended consequences; that because people are not as aware as they perhaps ought to be, they do not do a check and think how is this going to affect it or sometimes just the assumption that they are responsible and they are not. There are of course cases of that. On both sides of Offa's Dyke, the need to up that understanding at the official level and I would argue in Wales it must be of public interest that there should be more appreciation of how we are governed in Wales and how the system operates, that has got to be good for our democracy at the end of the day.

**Q254 Hywel Williams:** In the reports, when you refer to the problems affecting Wales arising out of the language issue, you say that arises more from insufficient thought and knowledge than deliberate policy. If there is a lack of understanding, is it broadly one of omission or one of commission, do you think? I should say, by the way, that Sir Jon Shortridge referred—I do not know if this is relevant or not—to ministers here not telling colleagues down in Cardiff about key appointments because they were not sufficiently trustful of colleagues down in Cardiff, that the cat might be let out of the bag, for example. I do not know if that is relevant. It was very striking when he said that. Is it a commission or omission?

**Sir Emyr Jones Parry:** This week of all weeks, Mr Williams, I am not going to comment about which ministers can be trusted to be told what. I pass on that question. Again, what Sir Jon is referring to is better addressed by having the sort of relationship and engagement between two administrations which actually—I used the phrase, let me repeat it—lubricates the system, delivers communication and an understanding and that people work these things out together. For too long both sides did not do enough. I think that is being righted, but in the end if you are going to get legislation through, it is not just what happens with the elected representatives—this comes back partly to your question, Chairman—it is actually all that is done before in the formulation of drafts so you increase the chances of what is proposed from, say, Cardiff arrives in London and is more likely to be accepted, to be expeditiously handled if, in fact, it has all been cleared in advance and that is what is now tending to happen, but you need to do that.

**Q255 Hywel Williams:** You pointed previously to the difficulties that arise when there is too much dependence on individuals within departments having an awareness and knowledge and when those individuals move on perhaps the departments are unsighted on issues. Would you say there needs to be a cultural change rather than perhaps the suggestion made, again by Sir Jon Shortridge, that we would have a devolution expert in each department, and that would be the person to turn to? Is it a broad change that is needed or some sort of technical fix?

**Sir Emyr Jones Parry:** There is always this issue, is there not, with expertise. If I take the European Union, for example, every government department

used to have an EU department and then over time they said, "Well why are you introducing this extra level, what we ought to have is mainstream EU knowledge into all bits of a department and then you do not need that department and everybody should be aware of this dimension". You cannot make everybody aware of all dimensions, but the fallback ought to be that every department ought to have somebody who is alive to the interests of devolution and can if necessary say, "Hang on a minute". It would be better if people dealing with policy were clear. If you are sitting in the Department of the Environment, or Defra now, and if you know that actually much of your competences are in Scotland handled entirely differently and in Wales somewhat differently, that you are in a relationship with your opposite numbers in Edinburgh and in Cardiff and the problem does not arise in that way because if you are drafting a Bill in London for England primarily then you are aware of the implications and if you have been sensible you have spoken to your colleagues in the devolved administrations and worked out where you ought to be going. This comes back to transparency of how it is being handled. I should have come back at you when you used the phrase on the language, that occasionally things crop up inadvertently, it is lack of thought. I think that pertains particularly to the section on law and how different aspects of that were handled. Let me be clear, that section was gone through at the highest level of the legal authorities of England and Wales.

**Chairman:** We do have a large number of other questions if, with respect, I could ask you to be a bit more brief in your responses.

**Q256 Mr David Jones:** In terms of being mindful of the devolution settlement, would you say that there is something to be said for each relevant Whitehall ministry having a minister who is charged specifically with taking devolution into account because it seems to me at the moment that is an aspect that is lacking?

**Sir Emyr Jones Parry:** I am not sure that all need—

**Q257 Mr David Jones:** I said relevant ministries.

**Sir Emyr Jones Parry:** For the relevant ones, there certainly ought to be an awareness at ministerial level. Yes, I suppose you can argue putting one there. It is more fallback territory for me. I would hope that any minister, knowing that the subject area, the competences, were devolved in part would actually factor that in, but there certainly needs to be somebody making sure, if you like, simply on any submission that goes to ministers that there is a paragraph which says, "Devolved implications" and somebody is working through them.

**Q258 Nia Griffith:** Could I take you up on that? I actually do not think it is the departments that deal mostly with devolution which need it most, I think it is some of the others. When you say there could be exceptions, to give you an example I think when we have seen Defra at work on the Marine Bill or on the Flood and Water Bill it starts right from the word go because they know there is a vast complex of

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different things that are devolved in different ways to Scotland and Wales. I think to exclude any department could be very dangerous. To give you an example, if you look at provision for service wives or something like that, okay you say it is MoD but it may have a knock-on effect to what would be DCLG in England and obviously would be devolved in Wales. Would you not think that every department regardless should take responsibility very seriously for this and yes let us maybe have a minister or somebody who has ultimate responsibility but with something like equality you cannot just have one person who believes in it, it has got to be imbued, like you said about the EU dimension, across a whole department, we have just got to up the stakes and say everybody needs to be trained right across Westminster.

**Sir Emyr Jones Parry:** You make a persuasive case, Ms Griffith, but the extent to which you need to be trained does vary with each department. The case I was thinking of, Ministry of Defence, was the exception because there is no devolution in defence. There may be implications of the sort you have mentioned that ought to be touched on, yes, I cannot argue that case.

**Mr Edwards:** Can I just quickly reply to something that was said earlier on. My experience of observing how the third sector has dealt with the legislative process in the first ten years would tell me that your point has a validity. I have looked at Defra and felt comfortable with the way that Defra has approached devolution. I have been challenged, for example, over the issue of the way in which the Home Office has been aware of the need to do ID cards through the medium of the Welsh language, for example, and have bilingual cards. It would have been extremely helpful if there had been a lead in that department of government that would have been aware of not only devolution but of distinctively Welsh legislation that predates devolution.

**Q259 Alun Michael:** The question of scrutiny and the task that the Assembly Members have, there are three separate bits in a way, are there not? There is the scrutiny of the Welsh Assembly Government, scrutiny of ministers and the actions of the Executive, there is the constructive role the committees play in looking at a particular issue and coming forward with recommendations and then, although this has been very slow to develop, there is the legislative side. They have played a part, and a very constructive one, in relation to the LCOs but we have not seen very much as yet in terms of the Measures which will flow from those LCOs so that is going to be an increasing area. Nevertheless, given that it is a fairly small group of backbenchers once you have taken on the party leaderships and the ministerial roles, you do not recommend increasing the number of Assembly Members. Why do you think the current number of 60 is sufficient for the scrutiny and constructive roles that I have just referred to? Is there not some evidence that people are stretched?

**Sir Emyr Jones Parry:** I think, Mr Michael, there is certainly evidence that people are stretched. Within the times currently allocated it is not easy to make all the arrangements. I took part in the debate with the Establishing Committee on the terms of reference for the Convention and there was a clear view there that the Convention should not address the number of Members currently in the Assembly but we should take as a given that there were 60.

**Q260 Alun Michael:** Any consideration of numbers was put outside your terms of reference?

**Sir Emyr Jones Parry:** It was not included, let me put it like that. I thought the greatest service that I could do was to ensure that we did not address that issue in terms which might be divisive.

**Q261 Alun Michael:** Given that the issues that you did address carry an implication for the capacity of the Assembly, could you share with us what conclusion you might have come to if you had not been so constrained by your terms of reference?

**Sir Emyr Jones Parry:** No, because deliberately, Mr Michael, we did not go down that route and I do not want to speculate. What I can tell you is that we were quite clear in our recommendations that there ought to be more systematic, regular scrutiny, that you had to put it on a basis not unlike the EU committees in both Lords and Commons here where there is an obligation to look within a time at certain proposals. More systematic, more resources dedicated to it, both by elective representatives and in support of them, but we did lots of probing and we were assured by all, the Assembly, the ministers and officials, that the present membership could cope.

**Q262 Alun Michael:** Was that view shared by the current backbenchers?

**Sir Emyr Jones Parry:** All backbenchers were given an opportunity, as was everyone else, to make their views known.

**Q263 Alun Michael:** But you asked that question of ministers and officials.

**Sir Emyr Jones Parry:** In evidence sessions and put it quite deliberately to the Assembly itself. We had a long session with the Chairman of the Legislative Committee which was quite useful in terms of what she believed.

**Q264 Alun Michael:** Essentially you had confirmation of the view that there should not be an increase from those who had excluded that from the terms of reference in the first place?

**Sir Emyr Jones Parry:** No, confirmation that they could cope within the existing numbers is the way I would put it.

**Mr Valerio:** Can I just add a little bit to that? Clearly it is never a good time to advocate creating more jobs for politicians but, nevertheless, the previous Richard Commission did clearly say they felt there should be an increase in numbers to 80. That was done at that time because of the evidence that we had taken on the basis of examining the workings of the Assembly and scrutiny, we felt at that time, was

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deficient. In the intervening years, when we looked at it again with the Convention, it has clearly improved, there is definitely a far better system of scrutiny. They are more experienced at it, they understand the system and it is evolving, although I would say that my opinion is a personal opinion, I still think there are grounds for creating more members. I believe the importance of good legislation is paramount and that can only be done if there is sufficient time and sufficient scrutiny. If you compare the Assembly in Wales with any of the other assemblies of devolution, you will find we are under-represented.

**Q265 Chairman:** Because you were constrained you were not allowed to make any observation at all on that?

**Mr Valerio:** No, we reacted to public opinion and I can honestly say I do not think any member of the public ever advocated to us that we needed more AMs.

**Chairman:** Could I suggest to you that there is a degree of irresponsibility in that because you will know, Mr Valerio, I assume given your own particular background in 1979 and maybe in 1997, and Mr Edwards also on the other side, that one of the biggest weapons against devolution was cost in 1979 particularly but also in 1997. I think there is a degree of irresponsibility to avoid that issue today. You must have engaged in a debate over the terms of reference. It is a little naïve to think that, never mind about politicians, the great unwashed out there, the public, could be misled, could be confused. They would not be confused; they would know that extra powers lead to more politicians.

**Q266 Albert Owen:** Sir Emyr, you said in the beginning that the people who gave you the responsibility to carry out this report would be surprised and were surprised by some of the outcomes. I am surprised that nobody has raised this as an issue, either positively or negatively, that there should be more than 60 Members. If that was the case, have you excluded it? You said it was not, but that was part of the debate as you were gathering evidence. Part of the debate was the cost element and also the numbers. I am very surprised that this was not gathered in your evidence.

**Sir Emyr Jones Parry:** Can I be clear, Chairman, you used the phrase were we allowed or not allowed, which is not a phrase I recognise. We had terms of reference and we interpreted them as we wished and were independent to do that. Naivety is not a charge which I think is fair because if we had addressed full frontal and come up with a recommendation for 80 Members then the charge of naivety would have been, "Why on earth did you do that when, given what Richard had said, the Government of Wales Act 2006 deliberately did not take it up". You know and I know how divisive that issue would be because of its implications for, among other things, Westminster representation. So faced with that, the political advice, and our remit came from your colleagues, some of whom from this House were represented on that Committee, was very clear that

they did not want that issue to be raised. The fact that we followed it should give succor to those from those parties who felt very strongly that we should not raise it.

**Q267 Albert Owen:** I am just surprised that nobody raised it in your evidence sessions.

**Sir Emyr Jones Parry:** People raised the question of cost, yes, and it is there as an element, I cannot pretend it is not, but also, as I robustly said in public sessions, democracy and systems of government bring costs. Devolution has a cost, and we quantified it, but it is a cost which if you believe, your question earlier, in better governance, that is why we pay more for it because of the benefits it brings.

**Q268 Albert Owen:** Could I just go back to an issue you were asked about and responded to Mr Hywel Williams with regard to civil servants and their attitude has changed. Is there sufficient capacity in Wales, do you think, to deal with the level of policy development and legislation of the programme that is taking place in both Cathays Park and Whitehall? We talked about attitudes, is there sufficient resource? That is the nub of the question.

**Sir Emyr Jones Parry:** One of the more difficult debates we had when we were drafting the report was on something I put in the first draft which drew a comparison between the resources available in Cardiff and in London. The simple comparison I made was that if you were expecting Welsh Assembly Government officials to match Defra, where Defra might have five or six people at deputy secretary level and yet in Cardiff there was one deputy secretary who was covering five similar departments, person for person you have a difficulty of how do you match up time and expertise, *et cetera*. That was amended in discussion because some took it as a slur on the calibre of people in the Welsh Assembly Government and that was not how it was intended or drafted, but there was a sensitivity about that. Simply on numerical grounds there is a difficulty of competence because you are covering more and you are a smaller administration but yet you are having to deal with somebody with bigger competences. Is Wales sufficiently well-served by its public service is a very big question, but what I do want to say as a personal view very strongly is that Wales needs and deserves a public service of the highest level and that an insular Welsh public service is not in my view the direction to go. What I want is one that has the same equality of standard, of merit driven British wide and delivers for Wales the service it is entitled to.

**Q269 Albert Owen:** I respect that view, but is there a legislative deficit which slows up the process in your opinion?

**Sir Emyr Jones Parry:** We pointed to a deficit in the drafting of legislation. In this House it is assumed there is a seven year apprenticeship before anybody is technically able to be a draftsman because of the particular skills it brings. I think certainly at the earlier stages—I will come back to you, Chairman, with the word naivety—there was a degree of perhaps naivety and lack of experience at the Cardiff

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end, but that is improving and again we flagged up that more needs to be done. I think it was recognised one of the additional costs would be in that very specialist legal area. On the policy area, person for person, it comes close to matching.

**Q270 Hywel Williams:** Briefly, I am a member of Plaid Cymru, one of three MPs trying to deal with the huge range of material that we have here in Westminster, and I have a great deal of sympathy with single Assembly officials trying to deal with the five or six people here. Were you able to draw on the experiences elsewhere in Scotland and Northern Ireland as to how this structural problem is coped with and were there any lessons for Wales?

**Sir Emyr Jones Parry:** We did not pursue the Northern Ireland example, no. There were some discussions with the Scottish side but none that gave us any real help on this.

**Q271 Hywel Williams:** Magic bullet.

**Sir Emyr Jones Parry:** It comes down to, as you know, the resource and expertise you can deploy given how few there are to do it. It is a dilemma.

**Q272 Mr David Jones:** The supplementary I want to raise in terms of the issue of legislative capacity in the Assembly and cost is might not one solution be to require Assembly Members to work similar hours to Members of Parliament?

**Sir Emyr Jones Parry:** I could not possibly comment.

**Q273 Mr David Jones:** It does seem to me that given they only work two or two and a half days a week as opposed to the four Members of Parliament do, you could actually avoid needing to increase their numbers from 60 to 80.

**Sir Emyr Jones Parry:** I think the transcript will show that in my first answer I said “in the time allocated to it”.

**Q274 Mr David Jones:** I would like to turn, please, to the Wales Office and your view of the future of the Wales Office? We took evidence recently from Sir Jon Shortridge who spoke in terms of ultimately the role of the Wales Office withering away. Do you think that he is right or do you think that the Wales Office has a continuing role in the devolution settlement?

**Sir Emyr Jones Parry:** I think it is a question for any Prime Minister as to how the interests of the individual nations of the Kingdom are reflected in Cabinet and whether there is a need to have a Secretary of State for each or someone with the same responsibilities. I think it is inevitable myself that there should be a Secretary of State who has responsibility. It may not be that person's only responsibilities but there has to be somebody, both legally and politically, I think that is necessary. The role of the Wales Office potentially as the arbiter, the lubricator of a system of presenting, partly selling proposals but convening meetings as necessary, that has been working and where perhaps a minister in Cardiff is not necessarily solving it directly with the competent ministers in Whitehall, the role of the

Wales Office Minister can be helpful. Does it wither on the vine? I think there is a residual interest there and it is not dissimilar from the suggestion that a number of you have made in that there should be somebody in a department with an interest in Welsh Affairs, in devolution, perhaps the same for Government as a whole, that there should be a member of the Government and an office doing that for Government. Can I just say the potential problem I see is where you are asking a Secretary of State who may be of a different political persuasion to the party or parties making the proposal, if that person is the one who is charged with selling it and if they have no sympathy at all for it then that may well raise a particular problem as to who is going to do that.

**Q275 Mr David Jones:** Do you think it is important that Wales should retain a distinctive voice in Westminster and Whitehall or would you be content to see, for example, an Office of the Nations established which did not give Wales that distinctive voice it enjoys at the moment?

**Sir Emyr Jones Parry:** I am old enough, unfortunately, to remember when the Minister for Local Government had added to it “and Welsh Affairs” and I always took that—without being unduly nationalistic—as something of an insult to my nation.

**Q276 Mr David Jones:** For “Wales” read “England”?

**Sir Emyr Jones Parry:** Yes. That is why I said legally there was a decision taken to abolish the post of Lord Chancellor and that lasted a day because it became apparent you could not abolish the post. I think you might find there are some residual legal arguments why you need a Secretary of State with functions. I certainly think the politics make it rather important that the Government of the day in London for the Kingdom as a whole ought to have representatives specifically charged with responsibility for the different nations. How you work that out for England, that is a different question altogether, I can bore you at length about that, but in terms of specifically our interests in Wales I think politically somebody with that responsibility for Wales is desirable.

**Q277 Mr David Jones:** You have acknowledged the need for a better level of communication between the Welsh Assembly Government and Whitehall. To what extent do you feel that the Wales Office should play a proactive role in this or should it merely be a conduit for such communications? Should a Secretary of State for Wales regard it as part of his duty proactively to go out and improve those communications and facilitate those communications?

**Sir Emyr Jones Parry:** Facilitate, ensure it happens, may not be that person's role specifically to be the conduit, but with an interest in stimulating both sides. Both sides are going to tango, so ensuring that each side is engaged, committed, yes, a responsibility.

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**Q278 Mr David Jones:** For example, if the Welsh Assembly Government were to wish to deal with a Whitehall Department, do you think it important that the existence of that communication should be communicated at the same time to the Wales Office so the Wales Office can make sure that process continues actively?

**Sir Emyr Jones Parry:** I think in practice you could not. If we were talking about something at ministerial level there is a case for it. I go back to when I first started working on European Union affairs and I spent most of my day on the telephone making sure that across a range of different issues there was a British Government position. There was no way that all those contacts would have been reported to anybody, but at the end of the day what it meant was we had policies across the whole range of the internal market, regional policy or whatever. In the same way my vision would be that the desk officer in Cardiff and the desk officer in Whitehall or Edinburgh, they are in such regular contact you do not need to have that communication passed on to anybody but the crucial thing is that it is happening and that it informs decisions and recommendations in the different places.

**Q279 Mr David Jones:** Who monitors that it is happening?

**Sir Emyr Jones Parry:** The monitoring comes when you see what the result of the policy is and whether or not there is an unintended consequence or whether it is clear that the policy put forward on the Marine Bill, for example, actually reflects the interest of Wales and that powers as they may be moved as a result of that Bill reflect what is known and wanted by the Welsh Assembly Government, by the ministers and so on, all of that.

**Q280 Mr David Jones:** Can I give you an example of my concerns? We had some Wales only clauses in the Planning Bill last year. Those were not actually introduced into the draft Bill until after second reading and, in fact, until after the committee stage was well underway. It seems to me that if somebody had been there proactively liaising between Whitehall and the Welsh Assembly Government, those clauses would have been on the face of the Bill when it was first published and when it came up to be debated at the second reading. As it was, it seems to me that the people of Wales, if you like, again were short-changed because their Wales only clauses were not as fully debated as other clauses in the Bill and I think that might have been a role possibly for the Wales Office.

**Sir Emyr Jones Parry:** It might well have been but it also exposes, does it not, the problem of powers affecting Wales coming through framework Bills which are not the subject of scrutiny in the same way. Of course, they are subject to the scrutiny of this House and in the Lords but the fact of the matter is that it may not be knowingly considered in Wales or if it is it is by an official or two. You have to get all those things hopefully in line. It may be that the Wales Office could contribute to that, but a greater transparency at the beginning, given we are talking

about a devolved area potentially, greater awareness of what is intended in legislation here. It is inappropriate to suggest that the Assembly should be scrutinising what happens here, but certainly the Assembly and the Government in Cardiff ought to have a greater awareness of what is intended at an early enough stage to be able to flag it up when it appears in the draft and that comes back to fundamental communication at all stages, including the early drafting of what is intended.

**Q281 Mr David Jones:** That, it appears to me, would be an appropriate role for the Wales Office. I personally feel the Wales Office should have made it its business to ensure that those clauses were on the face of the Bill.

**Sir Emyr Jones Parry:** I do not want to disagree with that but I would say that the final responsibility ought to be with the people who were originating that Bill knowing where competences rest and they should have made absolutely certain that they had consulted.

**Q282 Alun Michael:** Could I turn to the process of Legislative Competence Orders. You have said to us today very clearly that the processes of Westminster and Whitehall are impenetrable, and if they are impenetrable to a diplomat of your experience then it must be true. Yet in the report have you not treated the process of legislation at Westminster as if that is very simple and as if the Legislative Competence Order process is complex and opaque? I would suggest to you there is a particularly misleading table in the report. Would you like to comment on the way the LCO processes have developed and matured over the past year or so?

**Sir Emyr Jones Parry:** I do not think, Mr Michael, I necessarily share your interpretation of the report and the way you put the question. We have spoken previously. I agree that the chart which shows what happens in Cardiff is not accompanied by the same degree of complexity here. I did say earlier in response to a question—

**Q283 Chairman:** You paused there, Sir Emyr, and you put your hand up. You mean you acknowledge that?

**Sir Emyr Jones Parry:** I acknowledge that we were not trying to set out the Westminster procedure.

**Q284 Chairman:** We need to put that on the record.  
**Sir Emyr Jones Parry:** I am quite open about that.

**Q285 Chairman:** You paused and put your hand up, but we will not have visual aids in the record.

**Sir Emyr Jones Parry:** What I was going on to say was, in my earlier response, I did concede the complexity in both places, and I said I derived no particular pleasure from the fact the complexity is not understood either in what happens in Westminster or in Cardiff. I have described it as a fog, I have described it as impenetrable, I hope by now I have demonstrated that I have some awareness myself of how it works, and I have tried to reflect that in the report. Of course, the LCO

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process has evolved. One of the things I did early on in Cardiff, before I had any members of the Convention with me, was to convene every civil servant who had been involved in any LCO process and sit down for two hours to talk through how it works. That was the first time it had happened in Cardiff to try and share experience, just to see what is good practice, what did not work so well and how could it be improved. It has improved the level of engagement in Cardiff, at the Whitehall end, and I think the scrutiny done in the Assembly is better than it was, and, Chairman, your own processes, as you reflected in your report, have been amended and modified as you have gone along. It would be only natural.

**Q286 Alun Michael:** Could I ask you a question about the transparency of the processes. There was a suggestion made by Sir Jon Shortridge when he gave evidence to us that the Legislative Competence Orders should be submitted directly from the Assembly to Parliament, in other words elected body to elected body. Do you think that would help the transparency of the process?

**Sir Emyr Jones Parry:** I am not convinced it would make much difference.

**Q287 Alun Michael:** Would you accept just one further point on it which is, if we did not have a Legislative Competence Order process, the process of devolution would remain stuck at the point that it was, if not in 1998, certainly at the point it reached in 2006, and that the transfer of powers we have seen through what will shortly be 13 Legislative Competence Orders in a fairly short period of time is a very significant addition to the powers of the Welsh Assembly and the clearance of those powers indeed?

**Sir Emyr Jones Parry:** Mr Michael, I cannot but deny there is an absence of any primary legislative power for the Assembly, and if incrementally it was given some that would be an infinite increase.

**Q288 Alun Michael:** But this is in addition to the powers which have actually been transferred through framework powers in primary legislation in a series of pieces of legislation, not least on the environment, which has been particularly significant, both through the LCO process and through the framework powers process.

**Sir Emyr Jones Parry:** I think it is one and a half times as many have come through framework powers as have come through the LCO process, with the attendant advantages and disadvantages of that system. Let me repeat, as you know better than I, pre-2006 there was no primary legislative power, so anything afterwards has to be increased, but I have to also point out that on the evidence we received, and the comments we have done on the basis of an evidence-based report, we have described how people view the LCO process and how they view the present arrangements.

**Q289 Alun Michael:** Yes, evidence based on views rather than evidence based in terms of what has actually been happening?

**Sir Emyr Jones Parry:** There is always the problem whether evidence is fact or whether it is what we agree with.

**Q290 Alun Michael:** I suggest to you it is very clear to see the distinction between the two.

**Sir Emyr Jones Parry:** It may be but if it is what we are offered, it has to be reflected because that is the public perception. It is not always the case that we like what we hear.

**Alun Michael:** Indeed, reflecting perception is reflecting perception.

**Q291 Chairman:** Sir Emyr, I am just referring to your document. There is a perception, an opinion, quoted in here as fact. There is someone from Monmouthshire I think who refers to the process as Byzantine and then it gets embedded in the report and it becomes reality. So suddenly this issue of confusion has a real life because someone in Monmouthshire has described it as Byzantine and you have given it credibility. Would you like to make an observation on that?

**Sir Emyr Jones Parry:** I think you are following a path of logic I cannot share, Chairman.

**Q292 Chairman:** Someone offers an opinion not based on fact, it is an opinion, one does not know who that person is in terms of his or her professional experience; it is just a person who is quoted. I looked in the Index at the end and there was no evidence who that person was; it was just a name.

**Sir Emyr Jones Parry:** The British system of justice with juries does not assume you need to have people actually there who have a particular expertise. We have heard evidence, some of it perception, some of it fact, but there is a perception, which was in our view backed up by a considerable amount of what you would call factual evidence, that the system is complicated. I know you have asserted, "This is not true", but what I would like to say to you is that the judgment we made on the basis of evidence is that in our view the system is, you have used the word, complex. I would not use myself the word Byzantine, it is not a word I normally use, but complex I will use and say that people regard it as complex for two reasons. Firstly the process itself is difficult to understand and it is involved. We have made progress on the Environment LCO and people are attached to the progress which has been made, but it took two and a half years to get to that level. Is it unduly slow? Absolutely not, it is untrue to assert that, yet it is two and a half years to get the actual power potentially to transfer. So the confusion is two-fold; it is partly the way the power rests and how power is then changed, and then what happens as to how you go about legislation. The ordinary person in Wales, believe me, does not readily understand that the LCO process is not to get a law. This is the frustration that some of the NGOs and others feel, that they follow this process which some of them do regard as Byzantine—it is not just Mrs Jones in Monmouth, it is a number of others—and they say, "At the end of that, we lost it, and anyway we do not have the resources to do that".

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**Q293 Chairman:** With respect, I think you have added to that confusion because you have conflated the negotiations between ministers which took over two years with the actual LCO process which barely took a few weeks.

**Sir Emyr Jones Parry:** Chairman, if you expect the people of Wales to understand that a draft LCO put down in July 2007 which leads to an Order which was passed by the Assembly on 3 December 2009, and the people of Wales are supposed to understand that the LCO process, as you would wish to define it, is actually something which only took weeks but meanwhile the draft took all this period. Let me stress, this is not some sort of game to attribute who is responsible for the delay, but the fact is that the draft was put down in July 2007 and has it now been approved? Done. So it has taken 30 months. Is that unduly delayed?

**Q294 Mark Williams:** Another criticism you noted on LCOs was that raised over the fact that the Secretary of State has discretion as to whether he should lay an LCO before Parliament for approval or not. The Government of Wales Act does not specify when the Secretary of State should say “yes” or “no” as to laying Legislative Competence Orders before Parliament. Is that a big weakness? You noted those criticisms, how wide were those criticisms?

**Sir Emyr Jones Parry:** I think a number of people who criticised were concerned about the potential use or non-use of the powers of the Secretary of State for Wales. Frankly, my personal view is that I regard that as being something of a red herring and that a responsible Cabinet minister with an efficient Wales Office actually dispatches business and has both a legal and a political obligation to do that. I do not think, in my experience, there has been any effort to obstruct. It may be, as Mr Jones argues, that there might have been a more proactive effort to facilitate and encourage progress.

**Q295 Mark Williams:** You have talked about ministerial responsibility, could you envisage a situation where we have different Governments in Wales and Whitehall, the potential for judicial reviews against decisions of the Secretary of State?

**Sir Emyr Jones Parry:** Potentially the judicial route is there to review a whole series of decisions and that must be there theoretically. I am not going to speculate whether that becomes more likely in the circumstances you comment on.

**Q296 Mark Williams:** The concerns raised were more of a fear that this could happen rather than concerns over the lack of clarity in terms of when the Secretary of State might agree to lay an Order before Parliament or when he would not?

**Sir Emyr Jones Parry:** I think it is more a theoretical political concern.

**Q297 Mr David Jones:** Briefly, in terms of the Byzantine nature of LCOs, I think it depends on the LCO, and you cited the environment one which I

think justly merits the description of Byzantine because even after it was completed it was almost impenetrable and impossible to read. Yesterday the Commons dealt with a mental health LCO which was, in its own way, a model of clarity, very easy to read and, frankly, is it not a case of draftsmanship in many cases and is it not also a question of whether the Assembly Government is trying to put a quart into a pint pot which it seems to me was the case in the environment LCO?

**Sir Emyr Jones Parry:** Certainly, Mr Jones, it is partly drafting, it is partly the degree of precision and narrowness which sometimes can verge on a snapshot of the legislation intended, and therefore becomes more acceptable all round, and it is partly, of course, the complexity. It is striking that the draft Order as I saw it on environment, the first three or four pages were about what this does not cover rather than what it does cover and that does not reflect the drafting intent in Cardiff but rather within something set up by the Government of Wales Act, that the White Paper underpinning it is very clear about how powers are to be drawn down, the net result is you have to go for some of, and when you are taking “some of” it must be clear not just that you are limited there but that exceptions come into play and restrictions, and by the time you have taken all those into account actually you end up with something which per force, in a complex area like environment, is going to be very difficult. I put in the report quite deliberately climate change is even more so. It is a consequence of the arrangements.

**Q298 Mark Williams:** Is there not also this issue, that there is a reluctance on the part of the Assembly Government to tell Parliament what they propose to do with the powers conferred by the LCO. Now the difference in the case of the mental health LCO was that on the face of the Explanatory Memorandum the Welsh Assembly Government made it absolutely clear what it intended to do with the powers. I would suggest that really a more mature relationship between Cardiff and Whitehall would see the Welsh Assembly Government at least giving a hint to Whitehall as to what immediate Measures might flow from the powers transferred. Would you agree that would be a helpful and positive development?

**Sir Emyr Jones Parry:** I will answer this, if I may, Chairman, in two ways. The first is there is a dilemma for those who seek more powers for the Assembly in that they are not prepared to say what they want more powers to be used for. From the very beginning I said to most people who came to give evidence, “What do you want the powers for? Can you give me an example.” Political parties and others distinguished themselves by their unwillingness to say what they wanted the powers for. I think that is a major problem for any referendum. You can have a referendum and say, “I want these powers”, not a theoretical exercise, the people of Wales are entitled to say, “What do you want to do with them?” and I do not think that question has been fully resolved.

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**Q299 Chairman:** Could I thank you for a very stimulating and rigorous evidence session. The length of it is an indication of how much we value your evidence and your colleagues' evidence. Could I leave you with this thought, for you to reflect upon. As a career diplomat you probably would be familiar with Edward Saeed's work *Orientalism* and when we talk about Byzantine and when we talk about confusion, it is often the case all of us in an inevitable ethnocentric way of dealing with matters tend to dismiss anything that we do not understand as confusing and problematic. I think in the use of words and language all the time you will appreciate how important that is as a diplomat. You used a word today which I have never personally used and that I rarely hear used and I think this is part of the challenge before us. You used the word "Kingdom" and you also used the word "nation", which is obviously more widely used in Wales, but the word that is used more commonly, and the one that unites us all is "country". The writer Alun Richards said: "Of course Wales is a country and that is the end of the matter". Sometimes I think we add to the confusion by using language or words that are not commonly used. I throw that up as a suggestion to

you to reflect upon, not to respond here and now. I would be very grateful if you did go away and reflect on that.

**Sir Emyr Jones Parry:** Chairman, if I may, because I have been very discourteous to Mr Jones, I was just going to answer the second part of his question, and it is—and I flagged it up in this report—the question of the roles of different legislatures. If you have voted for devolution there is a point at which you should allow the devolved administration to go away and legislate. As for correct terms, of course, "Kingdom" I mean United Kingdom, lest there be any doubt. If that causes confusion I apologise. Wales, as Scotland and Ireland, I term consistently as "nations" because you know that internationally there is one country called the United Kingdom which is the United Kingdom recognised in the United Nations, a member of the European Union. There should be no confusion about that. The country is the Kingdom for me and I am proud to be Welsh and British. If that clears up your confusion, Chairman, I am happy.

**Chairman:** I am sure that Hywel Williams and I would probably differ. We recognise the Kingdom of Hywel Dda. As a good friend of mine once said, if you are not confused, you are not up to date.

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*Witness:* **Mr Gerald Holtham**, Chair, Independent Commission on Funding and Finance for Wales, gave evidence.

**Q300 Chairman:** Welcome to this extended session of the Welsh Affairs Committee and I apologise for keeping you waiting. For the record could you introduce yourself please?

**Mr Holtham:** I am Gerald Holtham, I am currently chair of the Independent Commission on Funding and Finance for Wales set up by the Welsh Assembly Government.

**Q301 Chairman:** Thank you very much. There have been several reviews of the Barnett Formula, does the existence of all of these reviews reflect a lack of communication between the devolved administrations or an example of what Rhodri Morgan mentioned in his evidence to us as "living laboratories within the UK"? Is that a fairer description of the situation?

**Mr Holtham:** Yes. I think the different reviews have had a slightly different focus. The House of Lords review under Lord Richard was looking at the Barnett Formula with respect to the whole of the United Kingdom. Our brief was to look at its impact on Wales specifically, although of course we were careful not to recommend things we did not think were principled and could be applied more generally.

**Q302 Albert Owen:** You mention the House of Lords report and of course there has been a House of Commons Justice Committee looking into it which was broader than your specific remit, what distinctive contribution do you think your Commission's report has made to the debate and how does it compare with other reports?

**Mr Holtham:** We went into a bit more detail. Other reports have looked at the philosophy underlying Barnett, or the absence of philosophy underlying Barnett, and made the philosophical case there ought to be something which is more justifiable in terms of need or some other criteria without then tackling the practical issues of how much and how you do it. We saw our role following on from the Calman Commission in Scotland, which expressed a general view that the block grant should be needs based but did not begin to tackle how and why. We very much saw our remit as permitting us and compelling us to go in to a bit more detail, to look at the way that allocation of public resources was made in other areas, and to draw conclusions from that about what a fair allocation might look like and indeed how it might be managed going forward. So we tried to do a little more staff work, if you like.

**Q303 Albert Owen:** You have mentioned the Scotland one as well, so we have had one in Wales, one in Scotland and both Houses of Parliament doing separate reviews. Has there been any attempt to bring the work of the four reports together and have ministers and the different Governments come together to try and formulate a single view?

**Mr Holtham:** I am sure each of the reports has fed into thinking but I am not aware of a formal effort to pull them together. In writing our report we were aware of the Calman Commission of course and we did refer to it, and we referred to the House of Lords report, and we tried to take that further and used some of the graphical representations in that report.

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In a working paper we published after the report itself, we have actually derived a needs-based formula from the expenditure decisions around the UK and, as we remarked in that working paper, it does reflect very much the conclusions of the House of Lords report but we actually put numbers on it.

**Q304 Albert Owen:** You say you made reference to it, did you have dialogue with the authors of it?

**Mr Holtham:** Yes, indeed. We have had extensive conversations with Alan Trench, who was the rapporteur, as well as a meeting with the Committee itself, and I earlier met the Chairman Lord Richard; and indeed we did the same with Calman. We went to Scotland and I have met Sir Kenneth Calman and Jim Gallagher, the secretary to that Commission, on a number of occasions.

**Q305 Albert Owen:** Do you think it would be beneficial for the ministers, to whom each of the separate committees report, and the departments, to meet together and have a similar dialogue to the one you have had with the authors?

**Mr Holtham:** I very much hope that the outcome of all this will be a considered and integrated series of reflections at government level, absolutely.

**Albert Owen:** Thank you.

**Q306 Nia Griffith:** I would like to look in some detail at the actual mechanism and you have described very well what actually happens in the Barnett Formula. Could we look at the past, present and future, in terms of the situation of convergence which has been occurring, could you explain to us why you think there were not any safeguards put in that? It seems to me that more funds have been allocated but they seem not to have been allocated with the 20% factor in. Do you understand why that might have been the case, that they were given as block amounts?

**Mr Holtham:** I think initially no one had a view as to how long the Barnett Formula was going to last and at the time it was created it applied to the expenditure decisions of the various Secretaries of State. As time went on, those devolved functions increased and on each and every occasion that happened there would have been an increase in the Barnett Formula to take account of the extra responsibility which was going to the devolved system. I do not know in detail if there was any very firm or uniform set of principles behind that, it was a horse trade each time, as notoriously is currently happening over the devolution of law and order in Northern Ireland, which is an extraordinary horse trade, and it seemed to be ad hoc on each occasion. So you have a new responsibility and your block grant was upped for that. So that, plus other advantageous factors like population changes, meant that the squeeze implicit in the Barnett Formula was not evident, and indeed often was not occurring, and it is only since the democratisation of devolution, if you like, since 1999 that the squeeze in Wales has become very apparent.

**Q307 Nia Griffith:** So in recommending some needs-based formula, it would need to be agreed here in Westminster but also in the devolved administrations. Do you think we should be dealing with all the devolved administrations together or each one separately, and how do you envisage that process working?

**Mr Holtham:** For Wales we made a two-stage recommendation. The first was that the Barnett Formula should be replaced by a needs-based formula, which we denied was impossible or terribly complicated or politically unachievable; any of those things. But we did also say that if this is a prolonged process, as it may well be to arrive at a new approach, you can complete or augment the existing system by defining what the end point is; what is the floor to which the Barnett Formula should be pushing you. At the moment, it is just the English average but the regions of England do not have the same expenditure per head, they are not converging, there is no process to make them converge and there is no rationale for making them converge, so why should a devolved administration converge on an average rather than on, for example, the level it would be at if it were an English region. What we did in our report was to calculate how much Wales would get if it were treated as an English region and say, "At the very least, and it is rather a minimalist approach, that should be the floor rather than any English average." We could put that forward as a principle, that any devolved administration if you continue with Barnett should go to the point where it gets no more than it would as an English region and there should not be any further reduction in its relative expenditure per head. The beauty of that from a practical, political point of view is that it only applies to Wales; the Irish are some way away and the Scots are miles away.

**Q308 Nia Griffith:** Are you saying that effectively there is a usable model there in the model that is used for the regions of England and that could be worked on and looked at and used to try and get a better settlement for Wales?

**Mr Holtham:** Yes, that was our conclusion. For the report we, or rather our secretariat, laboriously went through taking all of the formulae from the spending ministries in England and applying them in all of their complexity to Welsh data. Subsequently we said, "It is the case that these extraordinarily complicated formulae are usually driven by a few of the variables that are in those equations", you have a hundred things in there but it is a political process and any time somebody wants to argue about it, you hang another element in there to satisfy the political machinations, and the truth is that there are five or six things which are doing nearly all the work. We were able to demonstrate this. We found we could explain the variation in relative expenditure across England, and indeed across Great Britain, with a formula which only had six or seven variables in it, which we boiled down from the hundreds which are in the actual expenditure formulae that are used. For example, we have the number of children under 16 and we have a measure of poverty, and I was

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challenged in public once, "But you do not have child poverty", and I said, "No, but we have children and we have got poverty and, on the whole, you will find child poverty is extremely highly correlated with those two; you do not need a separate child poverty variable." We did find that and therefore I do think it is practical to use a condensed formula of that sort at least to define the floor. If you do not define the whole allocation, if you continue with Barnett you can at least define the floor using a formula of that sort.

**Q309 Mr David Jones:** Mr Holtham, when compiling your report, to what extent did you consult with the Treasury and other Whitehall departments?

**Mr Holtham:** We did indeed, we had a number of meetings with the Treasury and, for the second part of our report, we met the Debt Management Office and Revenue and Customs. We also met with, as I have already mentioned, Jim Gallagher in the Ministry of Justice, who is the Devolution Director-General. We have indeed met them.

**Q310 Mr David Jones:** Did you find the Treasury helpful?

**Mr Holtham:** I found them correct. They answered all factual questions and provided all of the background information we requested. It was extremely difficult to draw them out on hypothetical questions. If we were to say, "Would this work if we were to do this?" or "What would you think of that?" they would tend to say, "That is not the situation and our political masters have not asked us to do that so we cannot possibly comment." So there was a sense in which they slightly worked to rule but I would not want to over-stress that, they were generally very correct and provided all the factual information we asked for.

**Q311 Mr David Jones:** Did you have contact with the Wales Office?

**Mr Holtham:** Yes, we did. At various times I met both the current Secretary of State and his predecessor, Mr Paul Murphy. I would say they were receptive; they were interested in what we were going to find out.

**Q312 Hywel Williams:** Just going back to the answers you gave to Nia Griffith a moment ago, what is your view of the announcement by the Secretary of State that the Treasury has given a commitment that Wales will receive a fairer funding agreement than the Barnett Formula? What do you think that actually means?

**Mr Holtham:** I do not know. I have no inside information on that. I am in the same position as any other member of the public; I have read it with interest. One thing which does occur to me though is that the Treasury or the Government really ought not to get into a position where it seems to be saying, "Wales is poor, Wales is moaning, so we will look after it." That is the opposite of the claim they made for Barnett, that because it is a rule you avoid horse trading, it is simple, cut and dried and principled. I

accept that argument and for that reason they ought to replace it with another principle or another rule; just agreeing to an ad hoc fix if Wales moans enough I think is not the way to go. The Irish can moan too. They should refute our argument or accept it, saying, "There is no way of getting around that, we accept that principle", and then you do not get into a continuous horse trade.

**Q313 Hywel Williams:** It does encourage people like myself in particular from my Party to up the moaning.

**Mr Holtham:** That is no doubt the case.

**Q314 Albert Owen:** On the fair funding issue and something you said to Nia Griffith earlier with regard to the English regions, some of my parliamentary colleagues from the regions have been moaning also; moaning that in comparison with London they are losing out. Did you examine those thoroughly and is there not a danger that if we have a full review they will want a larger slice of the cake as well because other factors have changed within their regions?

**Mr Holtham:** Indeed. I should say that we have tried very hard to avoid introducing our own political judgments into this. Much less than Emyr Jones Parry's Commission, we are not representative at all; we are just three people with technical experience but no political standing whatever. So we have not attempted to introduce our own distributional views into this in any way. What we did in the case of the English regions was to look at the existing formulae which exist at the moment. We are not saying that they are ideal, that they are the best or they could not be improved, we are not taking a view, we are simply saying, "If you use these formulae, this is the consequence", and moreover if we can boil those formulae down into something more tractable, more easy to handle, which explains 97% of the variation and then if we use that for the regions of England and the devolved authorities, we get the following results. So we are fairly fire-proof in terms of being accused of special pleading. What that would show is that Scotland, for example, should get a lot less than the North East, the North West or indeed the West Midlands and of course it gets a heck of a lot more.

**Q315 Albert Owen:** The logic of that is that some of the regions of England will want a larger slice of the cake, but the cake will be the same size for the English regions and the nations of the United Kingdom, so are you saying that Scotland's distribution might go to some of the poorer regions of England which might benefit from this at the expense of Scotland, Wales or Northern Ireland?

**Mr Holtham:** In effect that is right. These are all relative formulae, they are not saying what the size of the pot should be, they are talking about distribution. Because we use the existing formulae there is nothing in our work which says the English regions should get more, what we are in effect doing is putting them and the devolved authorities on a comparable basis. What that shows is that Wales

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should get slightly more, Ireland should get slightly less and Scotland should get an eye-watering 15% less, which I think is a political problem and why it might be difficult to make something happen.

**Q316 Albert Owen:** But you do accept there is an English element to this?

**Mr Holtham:** Yes, absolutely.

**Q317 Mr David Jones:** The Secretary of State's announcement was made in direct response to the potential for convergence that was identified in your report. You referred to that as an ad hoc fix—I think that was the expression you used. It does not seem to me that it actually fixed anything. As far as I could see what the Secretary of State was saying was, in those circumstances he would speak to the Treasury and the Treasury might take some unspecified action. Have you any better understanding of what is proposed in that?

**Mr Holtham:** No, I think I am going to repeat what I said to Mr Williams. I do not have any insight into what that means any more than you do. I do think it would be preferable if a new principle were enunciated rather than an assurance of an ad hoc fix.

**Q318 Mr David Jones:** That is unspecified.

**Mr Holtham:** To repeat the term, yes.

**Q319 Hywel Williams:** It appears to me that the options were that convergence was stopped, reversed or abandoned, and it is unclear as to which one he is referring to.

**Mr Holtham:** Of course it is the case, and the Treasury are to some extent retreating behind this, that the convergence does depend on growth in public expenditure. As public expenditure grows, the relative expenditure per head falls—not the absolute, the relative—in the devolved authorities. If expenditure does not grow, then of course that does not happen, and if expenditure in nominal terms were to shrink then it becomes a divergence formula. As the growth in public expenditure, even in nominal terms, is expected to be very low over the next few years, the Treasury is of course saying there is nothing to worry about because convergence will not be an issue. As far as that goes, I think that is true, but at some point one expects the growth in public expenditure to resume and then convergence itself will resume. We have made the point to them orally that this is a very good time to put the new principle to work because it will not cost them anything for a few years, but this so far has not been an argument which has been accepted.

**Q320 Hywel Williams:** That is very interesting indeed. In written evidence to this Committee, the Assembly has expressed concern that the Treasury acts as judge and jury in the case of disagreement over the Barnett Formula and how it operates in fact. Does the suggestion of an independent advisory body, which is one of the suggestions they have made, show a lack of confidence in the Treasury or is it practical?

**Mr Holtham:** I think we took the view that it would be better to reform the process at the front end, as it were, rather than to introduce elaborate reconciliation or adjudication mechanisms at the back after a Treasury allocation has been made. At the end of the day, these are decisions for the UK Government, they will be made politically, and one just has to accept that. I think what we felt was that political decisions ought to be clearly identified as such, not hidden in the fine print as it were, because that does lead to ill feeling. If the way the technical aspects were processed initially were done by an independent group, the Treasury could then override that. The outstanding case was the Olympics, where a whole lot of things which would normally be done under the auspices of one ministry were transferred out of it so there was no Barnett consequential; the whole of the development in East London associated with the Olympics had no Barnett consequential. That is a political decision which I am sure is perfectly defensible but it came as a surprise to the devolved authorities, and they noticed there had been things moved around under different headings which struck them as anomalous. So that did create a certain amount of ill feeling and it was presented initially as a technical matter. It did seem to us that had there been an independent body, they would simply have taken expenditure where it normally occurred and derived a consequential. If the Government had then decided that was not appropriate, they wished to override, they would of course have been free to do so. However, we did think there was an advantage in having some of the initial work on drawing up the block grant each expenditure period, as it were, done by a body which was neither attached to the devolved authority of course but nor to the Treasury either.

**Q321 Hywel Williams:** This Committee has looked at the Olympics decision as well and we have made our views quite clear about it. Some of the concerns about having an independent body would be around the political clout they might have if they were advisory. It is an imponderable anyway, but do you have an opinion on that?

**Mr Holtham:** The experience in other countries where such things exist is that their decisions are very, very seldom contested. The political cost of overriding it seems to be regarded as quite high. The obvious case is Australia where I do not think there has ever been a situation where the Commonwealth Government has said, "Okay, that is what they are saying but we do not care, we are going to do something different." That is a very heavy body and it was not something we were proposing. They have a staff of scores of people and we were not proposing anything on that scale. We would hope that a similar sort of prestige would attach to what is clearly disinterested, unprejudiced work and it would be politically fairly costly for the Government to clearly override, but it would have the freedom to do so if it felt needed to, and I do not think that can be avoided.

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**Q322 Hywel Williams:** How do you enhance the transparency of the way the Assembly is funded? You would say a clear formula and then a separate body to adjudicate?

**Mr Holtham:** Yes. We would recommend a separate body to calculate the consequential and derive a first cut as to what the block grant is, and that would be the case whether or not you were continuing with the present very simple Barnett Formula, but it might be even more the case when you are using a needs-based formula where the technical work would be a little more complicated.

**Q323 Mark Williams:** You touched on this just now but turning to the process by which a new formula could be adopted, ultimately the UK Government has that final decision and it has had a fairly belligerent response to date. Should the Welsh Assembly Government wish to proceed with your recommendations, what avenues are available to them and what mechanisms are there in place for them to proceed?

**Mr Holtham:** I gather they are holding discussions in the quadrilateral meetings with the other devolved authorities, and this of course is one area where there is common cause. Obviously, our particular needs-based formula which we developed would not win universal applause in Scotland, and I do not know they would be absolutely delighted in Northern Ireland either, but they all agree they do not want to be end-run as it were by the Treasury; they do not want to be in a situation where they are confronted with something at the eleventh hour and there is very little realistic opportunity to change it. The independent body is one of the elements in our report, perhaps one of the few elements in our report, where there is complete agreement across the devolved authorities. So I think the representations to the Government will be coming not just from Wales in this case.

**Q324 Mark Williams:** You pre-empt my second question. Has there ever been at any point a discussion on how the Government would decide on the funding for each devolved nation separately? Has that been considered? Is that a likely outcome in the future?

**Mr Holtham:** I do not know. We took it as a design criteria, if you like, that the allocation of the block grants for each devolved authority should be according to a uniform set of principles. It is the United Kingdom and it does not seem appropriate

that there is one rule for Jack and another rule for Jill, as it were. Of course if circumstances differ in the different places, then uniform principles result in different allocations, but we did take it as a design criteria that anything we recommended for Wales should be applicable to the other areas as well.

**Q325 Mark Williams:** You are satisfied that the co-operation, the discussions at least, are taking place, have taken place and can continue?

**Mr Holtham:** Yes. I am not privy to all of the discussions which have taken place. I hope to be meeting the Chief Secretary to the Treasury later this week. I met his predecessor and may find more about how their thinking is progressing. Otherwise, my information has come second-hand from Welsh ministers.

**Q326 Mr David Jones:** Your report suggests that there should be a reformed relationship between the Government and the devolved administrations. How do you think that should be achieved? Should it be formalised or maybe incorporated in protocols, or is it just a question of attitude?

**Mr Holtham:** I do think there is a case for a little bit of formalisation. At the moment the Barnett Formula is not covered by legislation; it is not as far as I know embodied in any legislation, it is just something which is done. The Treasury publishes its own funding policy and at the moment that is agreed by the Secretary of State with the Government. There is no requirement for the Welsh Assembly Government, for example, to express its agreement or disagreement. While as a practical matter there may be discussions, one of the parties to the discussions is not then a signatory to anything which comes out of it. It did occur to us that was slightly peculiar and that maybe there was a case for some Concordat which was agreed each three-year expenditure term, where as a result of the discussion both parties said, "Fine, this is an outcome we find acceptable", and that made it clearer. We were looking at an agreed outcome rather than something which was simply imposed.

**Q327 Chairman:** Thank you very much for your evidence today. I believe firmly that your evidence is going to be critical in the way in which we write our Report and will certainly inform the way in which we address questions to the ministers who will come before us later this month or next month. Thank you very much.

**Mr Holtham:** Thank you very much, Chairman.

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**Tuesday 2 February 2010**

Members present

Dr Hywel Francis, in the Chair

Nia Griffith  
Mrs Siân C James  
Mr David Jones

Alun Michael  
Hywel Williams  
Mark Williams

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*Witness:* **Mr Alan Trench**, Honorary Senior Research Fellow, Constitution Unit, University College London, gave evidence.

**Chairman:** Good morning, Mr Trench.

**Mr David Jones:** Chairman, before we start, may I declare an interest: I am a member of the Law Society.

**Alun Michael:** Guilty.

**Q328 Chairman:** Welcome to the Welsh Affairs Select Committee. For the record, could you introduce yourself, please.

**Mr Trench:** Good morning. I am Alan Trench. I am an Honorary Senior Research Fellow at the Constitution Unit, University College London. I am also associated with the School of Social and Political Science at the University of Edinburgh.

**Q329 Chairman:** Thank you for that. Could I begin by thanking you for the written memorandum you have prepared for us, it was very helpful in preparing for this session. You have recently described the Welsh settlement as dysfunctional. Can you explain what you mean by this?

**Mr Trench:** Yes, and I ought to say that I consider it dysfunctional as a result of two sets of work that I have done, or two sets of approaches. The first is trying to think about how government should work in a democratic society; and that means talking about the relative place in particular of executive and directly elected or legislative elements within that. The other is to look at it in a comparative context and compare how devolution for Wales works compared with decentralised and federal arrangements elsewhere around the world. I think, coming out of those two sets of ways of thinking about things, I find four things that are particularly problematic with Welsh devolution. The first is the particular system of Legislative Competence Orders and how that operates. My concern about that is that in particular it creates a very permeable boundary between constitutional and non-constitutional matters, and the two become intimately and intricately entwined in the course of trying to work out what the Welsh constitution is and what powers the National Assembly should have. I think that undermines accountability and clarity for electors at large, and means that it is not clear which part of government is responsible for what. The fact that it is essentially unregulated is, I think, a particular source of difficulty with that.

**Q330 Chairman:** That is your first point?

**Mr Trench:** That is my first criticism.

**Q331 Chairman:** Could you just give us bullet points, because I am sure we will be coming back to many of the points you raise.

**Mr Trench:** The second issue is that the solutions that are found to the political problems that that throws up are themselves often very messy and complicated, and sometimes even unworkable. The third problem that I would identify is the way that powers are conferred upon the devolved institutions within Wales, because the Legislative Competence Order is only one of three routes by which powers can be conferred; the second are legislative powers set out in Westminster legislation, so-called framework powers; the third are executive powers conferred directly on Welsh ministers. Particularly as regards the second and third, the decisions about what happens there are made largely within the Welsh Assembly Government, and the elected element plays only a minimal role in that. The fourth point is the legislative outcome of that, and the very complicated framing and drafting of Schedule 5 to the 2006 Act, which itself I think creates a significant barrier to general public understanding; and of course that is something that you identified yourselves recently in your Report reviewing the LCO process.

**Q332 Chairman:** Thank you for those initial observations. The complexity that you have just described, does that, I assume, add to the problems of public understanding of devolution currently?

**Mr Trench:** Hugely.

**Q333 Chairman:** How does that compare with other countries? Have you studied other countries—for example, the asymmetrical devolution in Spain?

**Mr Trench:** I have studied Spain to some extent. I am more familiar with common law federal systems, I have to say, than I am with Spain. The Spanish system is somewhat confused and ad hoc, but the particular situation as regards any individual autonomous community and the central state is fairly clear. Partly because there is a written constitution with a formal process of amendment, it is also very clear when a matter falls into the constitutional arena; that is not so in Wales. It means that a debate about a day-to-day policy matter that the Assembly wants to take action about—that it seeks to have powers conferred on it by a Legislative Competence Order—becomes both a policy and a constitutional debate; that is not so. One can follow Spain; one can look at constitutional debates

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particularly regarding Catalonia at the moment, and that is very obviously a constitutional debate that is in a separate arena from day-to-day policy issues, even if there is some interplay between them.

**Q334 Alun Michael:** Could I put it to you that actually you are wrong about the advantages and disadvantages of having a permeable boundary in legislation; that is actually the strength of the system in Wales; the fact that you can have movement that does not require primary legislation or constitutional change in order to make adjustments that are necessary. Can I put it to you also that nobody really understands the respective responsibilities of settled situations, like between local government; it could be between London government and the boroughs, for instance, or other arrangements of that sort. It sounds to me as if you are arguing for tidiness for the convenience of academics rather than for something that is of use practically on the ground?

**Mr Trench:** I would argue it is actually the opposite. Academics do very well out of the present confusion—it gives us a great deal to write about! The people who are the real losers here are the general public who want to understand how they are governed, what principles and rules govern them and, most particularly, who is responsible if things go wrong.

**Q335 Alun Michael:** With respect, you ignored the second part of my question.

**Mr Trench:** You asked me two questions and I am trying to answer them. The issue about permeable boundaries is that that is a very good argument on the level of principle. It depends on how the system is in fact practised. The problem with the practice of a system is that that confusion has ramified, I would say, throughout all aspects of how Welsh devolution works.

**Q336 Alun Michael:** On what evidence?

**Mr Trench:** If politicians, both here and in Cardiff Bay, had been able to exercise a greater degree of self-control then conceivably that might not have arisen; but, frankly, it would be unrealistic to expect politicians to be able to do that.

**Q337 Alun Michael:** Perhaps you would like to supplement outside the meeting with some evidence about that. There is a massive amount of assertion which is hardly recognisable.

**Mr Trench:** If you want to consult my writings about this you will find huge amounts of details set out in the footnotes in various writings about the Government of Wales Act, going back to something I wrote about the White Paper in 2005, saying these were exactly the problems that could be foreseen if this system were put in place; and I am very sorry to find out that I have been right.

**Q338 Alun Michael:** Is it rather more about the nature of debate about both legislation and constitutional issues and the nature of media coverage of those in Wales?

**Mr Trench:** I would not have said so. The problem starts with the fact that we are talking about something that is constantly changing and can, at best, be known by people with extensive training and professional skill. It is not readily accessible and it is a highly confusing situation; and it is a confusing situation at any moment in time. If I might answer your second point: you said, do people not understand settled constitutional orders? Very often it is true they do not. Equally, it is very often again because of how those systems operate in practice, because there is an incentive, if we take your London example, for the Mayor of London and for the GLA to seek to muscle in on functions that are formally, properly speaking, those of the boroughs, and to claim credit for actions of the boroughs; to seek to influence the actions of the boroughs in order to be able to do so. So you put money on the table in order to persuade another level of government in order to do something that you want them to do.

**Q339 Alun Michael:** Is that bad?

**Mr Trench:** It is not necessarily bad in many respects; but what it is bad for is accountability.

**Q340 Alun Michael:** Is it good for results?

**Mr Trench:** It may produce good outcomes but it will produce confusion.

**Chairman:** That is the longest series of supplementaries allowed for a very long time!

**Q341 Mrs James:** In your blog *Devolution Matters* you say there are differences in how Scotland and Wales are treated in Whitehall. If so, is this due to the nature of the settlements or for other cultural or political reasons?

**Mr Trench:** I would say it is due to both. On the one hand we have a different set of constitutional arrangements—the Welsh arrangements being particularly intricate, particularly going back to the 1998 Act. The very intricacy of those itself means that it is hard for civil servants in Whitehall to understand exactly what the position is. They then often want to do what is sometimes called a “read across” to the Scottish precedent. The one thing that can be guaranteed not to work is to apply the principles that govern Scotland to Wales. I would very seldom want to draw a broad and general conclusion but I would draw that one. Wales is not Scotland; Scotland is not Wales; if you confuse the two you will get things wrong. I think there are still occasional instances where civil servants deal with—remember they have to think about devolution; they think about it in relation to Scotland; they check the Scottish stuff; they do not bother to check issues in relation to Wales; and they find that as a result things have gone terribly wrong, but they have assumed that they would be the same, because they have assumed the settlements are the same. On the other hand, the other side of this is that Scotland has, and has always had, a much higher profile in Whitehall. This is something that goes back to the size and strength of the Scottish Office in the period before

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devolution, the relative authority and strength of Secretaries of States for Scotland, and their ability to get very good deals; which in turn goes back partly to the constitutional position of Scotland within the UK, and partly to the extent to which the SNP is seen as a political threat. That has always highlighted issues relating to Scotland in a way that has not happened in relation to Wales.

**Q342 Mrs James:** Do you believe there is a lack of clear procedure for handling intergovernmental relations; and are they robust enough to survive different governments in power possibly in Wales and Whitehall?

**Mr Trench:** That is a very big question, and it manifests itself in a lot of ways. One has to work out, first of all, quite what one means by “intergovernmental relations”; whether you are talking about peak level relationships between First Ministers at the summit, or you are talking about day-to-day interactions between civil servants who ring one another up in a fairly sort of ad hoc way to discuss things. By and large, intergovernmental relations in the UK are uninstitutionalised and unsystematic. They have become a bit more systematic since 2008 with the revival of the Joint Ministerial Committee and the creation of the Joint Ministerial Committee (Domestic). Particularly between the period from about 2002 to 2007 they have become extremely ad hoc, unstructured and unsystematic, very messy and particularly patchy in outcome as a result.

**Q343 Hywel Williams:** I just want to ask about the Memorandum of Understanding which has not changed since 1999, and is explicitly a statement of political intents, not circulating legally binding obligations. Do you think this actually works, or would you prefer to have a document with a quasi-legal basis?

**Mr Trench:** I think that the most valuable thing about the Memorandum of Understanding is the process of drafting it—which is of course more than a decade in the past now—because that made people across government, both politicians and civil servants, think about how relationships were going to work and set out what they thought that might look like. The problem with a Memorandum of Understanding is that, by and large, it is very, very unspecific, and it deals primarily with issues of process rather than with issues of substance or with guiding principles that apply to how devolution should work. I am told that that is somewhat improved in the draft that is presently on the table. A revised draft was apparently proposed nearly a year ago now, but has yet to be formally approved and was referred to in somewhat sceptical terms by the Scottish First Minister when he gave evidence a couple of weeks ago to the Scottish Affairs Committee. He said changes had been proposed, we think they are an improvement but we have not agreed them and they do not go as far as the Scottish Government would like. The most substantive things that are set out in the Memorandum of

Understanding are what are called the four Cs that are supposed to underlie relationships between governments: confidentiality, consultation, communication—and I am forgetting what my fourth C is.

**Q344 Chairman:** Confusion!

**Mr Trench:** Communication, consultation, cooperation and confidentiality are the four Cs. I would regard those as being the outcome of good relations, rather than something that needs documenting in order to record that. That said, I am not sure that a more detailed quasi-legal document would necessarily serve the function of the Memorandum of Understanding. For one thing, it would be impossible to have something that is legally binding. It would simply be constitutionally impossible to do that. Having looked at intergovernmental agreements as used in federal and decentralised systems across the world, very often—at least many of them are drafted in very legal-looking terms—they are not legally binding. The only thing that tells you they are not legally binding is the clause that says, “This document is not legally binding”. This agreement, however, has been disregarded on quite a number of occasions. For example, there is an annual commitment in the Memorandum of Understanding that the plenary Joint Ministerial Committee, the Prime Minister, First Ministers and Secretaries of State, would meet annually. It did not. It did not meet annually for a protracted period from 2002 to 2008. There is no remedy for that. There are occasional complaints—some of them have been aired in evidence before yourselves; some of them have been aired in evidence before other committees—about breaches of confidentiality by both governments, but particularly by the UK Government. Again, there is no consequence; there is no sanction. It would be impossible, I think, for the Memorandum of Understanding to set out sanctions, but if you are going to have an agreement that is binding in honour only it must be binding in honour; and, frankly, that seems not always to be the case.

**Q345 Hywel Williams:** You said that there is a draft revision in train. Would you be in favour of revising it annually or every parliament or at some convenient point?

**Mr Trench:** I think it would be a very wise thing. Indeed I advised, as you may know, the House of Lords Constitution Committee some years ago when it produced a report on *Devolution: Inter Institutional Relations in the United Kingdom*. One of the recommendations of that committee was for a sunset clause on the departmental Concordats of, I think, five years; and that I think would be very valuable because it would focus the minds of politicians and civil servants on how those relationships were meant to work, and would mean that they would have to revisit and understand these things in a current context rather than simply having what was put on the table many years before.

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**Q346 Hywel Williams:** Can I ask you about the Joint Ministerial Committee, which you referred to earlier on, with its responsibility for promoting dialogue. Do you think that would help improve the UK Government's relations with devolved governments' administrations?

**Mr Trench:** I know there has been quite a lot of tension around meetings of the Joint Ministerial Committee (JMC) since it was revived. I am not sure that all the issues that could have been aired before it have been and there are tensions at both ends. The particular value that I have always seen to the Joint Ministerial Committee is that it signals the engagement of the UK Prime Minister, the highest political levels of UK Government, in understanding what devolution is about and in managing the territorial structure of the UK. That then sends a very powerful signal across Whitehall that this is something that matters to the Prime Minister; that if something goes wrong someone as important as the Prime Minister will be paying attention to it. I think part of the problems that have been identified in my memorandum, in my academic writings and in some of the other evidence you have had is not that there are not many occasions of good practice, but that practice is inconsistent. There are also some occasions of, frankly, shocking practice. I cherish a Report, I have to say, of this Committee on the Bill that created the Children's Commissioner for England, who of course has responsibilities in relation to children in the Criminal Justice Service in Wales as well; and that seemed to me a very good example of truly shocking practice across Whitehall. I think that the engagement of the JMC at the highest level is a very powerful way of indicating to Whitehall that it needs to pay attention to devolution matters that will cascade throughout Whitehall and hit everybody who has got a routine devolution issue sitting on their desk; that they do not put the devolution side of that as the last and least of the things that they worry about just before they tie up the final loose ends.

**Q347 Mr David Jones:** To what extent has the Prime Minister actually taken an interest when things have gone wrong, which clearly they have?

**Mr Trench:** The present Prime Minister unsurprisingly appears to be rather more sensitive to devolution concerns because he is Scottish by background and he has been very concerned about Scottish issues throughout his career. I am not so sure that Welsh issues have figured very highly on his agenda, however. Everything I see, have seen, suggests that was, if anything, more emphatically the case for Tony Blair when he was Prime Minister.

**Q348 Mr David Jones:** Do you mean he took very little interest at all?

**Mr Trench:** Yes. He was very substantially unengaged from his point of view, it appears to me particularly. The line, of course, of Ron Davies was that devolution was a process, not an event; but for Whitehall devolution was an event, not a process. Having got things in place by about 2001–02 Whitehall very substantially disengaged and

thought it could forget about it. To the extent that the present Prime Minister has paid attention to issues, it is very emphatically Scotland. So we have seen a lot of activity and we have seen the establishment of the Calman Commission, which reported both to the Scottish Parliament and to the UK Government; and we have subsequently seen White Papers responding to Calman and dealing with some of the consequential issues of the financial issues arising from that. By and large, I have to say—and you will be in a much better position than I am—that what I see suggests that the Prime Minister's attention to Wales is rhetorical more than substantive.

**Q349 Mr David Jones:** I am having difficulty remembering where the rhetoric was!

**Mr Trench:** He will occasionally make speeches and statements that will say nice things about devolution, about Wales; he will make the usual sorts of comments that people make when they give a speech somewhere; if he happens to be giving a speech in Wales then it will be nice comments about Wales; but that is about as far as it goes, I am afraid.

**Q350 Mrs James:** In your opinion?

**Mr Trench:** In my opinion.

**Q351 Alun Michael:** Reflecting on your last comment, it seemed to me that you were describing Whitehall as a single place, whereas one of the problems is that Whitehall is a series of places in which it is difficult to know what is happening in each one of them. There is a tension, is there not, between something you mentioned a few minutes ago, the importance of confidentiality and confidence and, on the other hand, in earlier answers you placed a great deal of emphasis on transparency. What more could be done to make more transparent the relationships, the negotiations, between either government generally or government departments and the Welsh Assembly Government?

**Mr Trench:** I obviously absolutely agree that Whitehall is a multiplicity of places; it is a particularly confusingly laid out village, to use a common metaphor, and it is a deeply balkanised place. One thing I discovered at quite an early stage is while there are meaningful things such as departmental cultures—and it is important to understand the difference between one department and another—particularly in the case of departments that have experienced a sequence of mergers and changes and identity over a short period of time, you will find different cultures and attitudes in different parts of that department; and so some parts will be very good and some parts will be very bad. It will be the whole of a particular side of a department, but it may go down to much smaller units, it may even go down to particular individual civil servants. One of the very few iron rules that I have identified about knowing how Whitehall was going to respond to devolution is that if someone has had a devolution issue that has gone wrong on them in the past they will almost certainly get it right the next time.

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**Q352 Alun Michael:** There is the benefit of experiential learning!

**Mr Trench:** Absolutely. There is a value to some of the things that have gone wrong. However, the big problem that I would identify in devolution is a great big gap between a very big principle that certain things are devolved to Wales, Scotland and Northern Ireland and certain things are not; and, as I have said, a very, very detailed legal and technical understanding of how that is operationalised; and there is not much in the middle. There is not much in the way of general principle to say that if you are going to do X, the expectation is that Y and Z should follow; and that if you are going not to do Y and Z, as applied in your particular instance, there needs to be a jolly good explanation why; and here are the important acts to whom you must explain yourself.

**Q353 Alun Michael:** Is that about processes, or is it more about relationships? One of the interesting things is the evidence we had that, for instance, the need to have a single approach to agriculture in relation to European negotiations means there has been a lot more sensitive interrelationship between Defra and the devolved—

**Mr Trench:** Indeed, and agriculture is an interesting example in many ways of good practice as a result of that. Of course, the fact that agriculture is so largely determined at EU level means that there is that external actor.

**Q354 Alun Michael:** You mean there is a common enemy? I mean a common relationship!

**Mr Trench:** There is a common relationship and there is a need for the UK to be able to speak clearly with a single voice. It is in the UK Government's interest to have ensured before it goes into a Council of Ministers' meeting that its lines are cleared domestically. We have had three areas where there have been systematic working level meetings of officials that have carried on during this period of unsystematic and disorganised intergovernmental relations that I spoke about from 2002 to about 2008. One of them has been finance, where there have been quadrilateral meetings of finance ministers most although not every six months; the second has been the JMC (Europe); and the third has been agriculture ministers. At two of these we have an external actor; we have the fact that the UK has to deal with the EU and has to ensure that there is a single UK line that is agreed. There are complaints from the devolved that their concerns have been overlooked and disregarded in the formation of the UK line; but nonetheless the fact is that in those areas the UK has gone out of its way to make much more effort to include the devolved administrations in what it is doing than in any other, it is that external sanction that I think is particularly important. The question then is: would it be desirable for there to be a similar sort of mechanism operating for purely domestic non-EU related matters, and it is fairly obvious my view is yes. The question then is: how do you establish or create such an actor within the UK framework. I can expand on that if you would like.

**Q355 Alun Michael:** It perhaps takes us on to the next question I want to ask about. In theory, the Department of Constitutional Affairs transmogrified into the Justice Department; but in practice evidence we have heard suggests that there is not a single point of responsibility for devolution, and if there is it is not necessarily the Department for Justice. Do you think there is a gap there? Is there a need for a clear lead within Whitehall?

**Mr Trench:** I would emphatically say, yes. The Ministry of Justice's capacity was beefed-up to try and take a more synoptic overall view of devolution in about 2007. This was directly in response to a political event. It was directly in response to the election of the SNP Government in Scotland and the political challenge that seemed to represent. There has been a huge amount of initiative that has focussed on Scotland; and, as far as I can make out, that has been the main focus of the Ministry of Justice's concerns since then as well. There are, as I mentioned in my memorandum, in fact three elements of the UK Government that are specifically concerned with devolution for Wales: there is, of course, the Wales Office; there is the Ministry of Justice; but there is also this rather peculiar relationship between the Ministry of Justice and the Cabinet Office, because the responsibility for providing secretariat services for the JMC has fallen primarily on the Cabinet Office. Even that beefing-up of capacity between the Ministry of Justice and the Cabinet Office has involved fewer than a dozen officials—one of them very senior; but it is still a very, very small team that has been responsible for trying to do that coordination. That simply does not have the resources or the weight to try and deal with the sorts of issues that a more general coordination would call for.

**Q356 Nia Griffith:** Do you think there is a bit of a danger that people pigeonhole devolution: "Oh, it's for them to deal with", if you have just, say, one department? If you look at the example of Defra—Defra is an outstanding example in many ways. If we look at the Marine Bill, it was extremely complex because obviously the four different component countries obviously had different devolution settlements and different issues about the jurisdiction over the sea, and obviously that was dealt with from the very, very beginning. Then you get other departments that are completely unaware: a classic example being last week we had an announcement from the MoD which involved DCLG; and if it had come from DCLG they would have been devo-aware; but because it came from the MoD they were not. I think the danger is that if you have it all in one place everybody else says, "Oh, well, that's it; it's done; devolution's done". Do you think there has got to be much, much broader training and understanding in every single department?

**Mr Trench:** Yes, I would certainly agree emphatically with that. I am slightly surprised you mentioned the Ministry of Defence as a problematic department. The Ministry of Defence was one of two departments that kept a specific devolution desk

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running within Whitehall (there is an argument about a third) after all departments across Whitehall wound down their constitution units or devolution teams in around 2001–02. The Ministry of Defence kept its and thought that it was doing its coordination of the devolved administrations very effectively, certainly up to a couple of years ago. The Foreign Office was the second; and there is an argument about the Home Office. There is a person who has the responsibility in the Home Office; the question is quite what they do and how it combines with other functions. I am slightly surprised that problems have arisen with the Ministry of Defence, because the Ministry of Defence used to be rather good at this sort of thing.

**Q357 Nia Griffith:** Essentially it was a housing issue, which obviously would be an Assembly issue in Wales, and it might have been something that could have been prepared in advance rather than left to be dealt with afterwards?

**Mr Trench:** Part of the problem, I would say, is actually the opposite of what you are saying. There needs to be a central centre of expertise. The problem is that that is seen as existing and being the Wales Office. People remember that there is a problem; they know that they have got to ring the Wales Office. Various Devolution Guidance Notes and other bits of information they put on government websites and so on say very emphatically if you have got an issue it is the Wales Office you pick up the phone to. The other side of that though is the policy of mainstreaming responsibility for devolution. I think that is where I would identify the problems arising. After about 2001–02 the idea was that devolution had been delivered; it had been successfully mainstreamed across Whitehall; it was, at least formally, one of the core competences in which civil servants were expected to be knowledgeable, and very often they would have done sufficient to tick the box on whatever training records needed to be kept in order to do that; but it was a less pressing and less urgent one than even, for example, human rights or EU matters, which would similarly be seen as core competences.

**Q358 Mr David Jones:** You will lament the absence of a strong centre for devolution. You have touched on the point that the Cabinet Office in fact provides secretarial back-up for the Joint Ministerial Committee. Would you say that the Cabinet Office, given its proximity to the Prime Minister, would actually be the appropriate place for that strong centre, or should it be the Ministry of Justice?

**Mr Trench:** There are a number of options. The Cabinet Office would be one place. There is a question about quite how effective a policy-issuing Cabinet Office is, because an awful lot of the Cabinet Office's work is process management and coordination, rather than necessarily them developing a policy steer, although it also plays a very important role in that. There may be a parallel in the way that the European secretariat works

within the Cabinet Office, as an example. To an extent, that is the function that the former constitution secretariat within Cabinet Office had, until that was dissolved in about 2002. Another option, which is the one recommended by the Lords committee I advised, was the idea of a free-standing department, a Department of Nations and Regions; which would be a small department at the centre of government that would bring together devolution, coordination and the role of thinking about the territorial nature of the UK as a whole. That would be another option. I suspect that subsuming it within the Ministry of Justice is not the way to secure a strong centre, if that were your goal; because the Ministry of Justice is concerned with so many things. It has got serious policy operational responsibilities when it comes to the Prison Service, offender management and the Court Service. It has got some significant policy coordination functions in relation to the legal system. It is very likely to find its concerns crowded out. If it is also supposed to think about devolution, devolution would be in danger of being yet again the last box to be ticked on a long list and not getting the attention, in my view, it would need.

**Q359 Mr David Jones:** Getting back to the Cabinet Office, you have mentioned the importance of an engaged Prime Minister in all this process. Is that not the strength of the Cabinet Office as the centre, that it is physically close?

**Mr Trench:** That is one of the strong arguments for it, yes.

**Q360 Hywel Williams:** I am just thinking of small departments getting marginalised; and subsuming a small matter in a large department which then gets lost in the agenda. I suppose there is a tension there all the time. You have already referred to the patchiness and standing of devolution within Whitehall. Would you say it is the same for the Civil Service in Wales?

**Mr Trench:** This is emphatically a case of asymmetry. It is a question of which end of the telescope you are looking out of. When you are looking from the centre outward Wales is a relatively small and, from an administrative point of view now, semi-detached part of the UK. If you are an official in the Department of Health you do not really quite understand what Wales means to you. If you are a really observant official in the Department of Health you will know that there are significant interchanges of patients across the border, of course, which your Committee looked at in your work on cross-border public services. An awful lot of officials will not notice that, who are in the Department of Health. If you are a health official in Cardiff you are going to be thinking, "What they're doing across the border there is going to have a very direct and practical effect on me: if you alter hospital provision in the Bristol area that is going to have an effect on our acute services in south eastern Wales". If the UK alters rules for the reimbursement of certain prescription items, for example, that again is going

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to have a very direct effect. So it is very clearly the case that officials in Cardiff are inevitably aware of the devolution implication of what they do, because everything they do is a devolution matter; and they are aware of what goes on in England because it bears directly upon them. Officials in London are not so aware of the effects of what they are doing on Wales, Scotland or Northern Ireland.

**Q361 Hywel Williams:** You already suggested some ways of changing this, but we have had suggestions, for example, from Sir Jon Shortridge the other day suggesting that we might have a “devolution expert”, as it were, specifically in each department; and also the idea of having secondments has been suggested—both ways actually. Do you have any observations on those ideas?

**Mr Trench:** In principle devolution experts exist. It is some time since I looked at this in any detail, but when I did in the early 2000s, about 2003–04, what I found was that every department had a departmental contact and, in principle, that person was the devolution expert; and in reality they received circulars and were supposed to pass them on to the relevant individuals; sometimes they did and sometimes they did not. The extent to which they were an engaged departmental devolution expert was very, very limited, with the exceptions I mentioned already of the Foreign Office, MoD and the Home Office. It is a good idea but it has not worked in our recent experiences; and I think that is because it needs a very strong political signal that this is important and that officials are expected to have thought hard about devolution matters before they take any significant action on a policy file, legislative initiative or whatever it is. Secondment would certainly be a valuable thing. One of the consequences of devolution—and I am unclear about the extent to which there was ever very much interchange between the old Welsh Office and Whitehall departments—there used to be a fairly substantial interchange between the Scottish Office and Whitehall departments, particularly the Cabinet Office. It was an important part, in the old days, of the Scottish Office for someone who aspired to a high position within the Civil Service to have had some significant London experience. That I gather has significantly declined since devolution. I have not actually seen recent figures but I believe they are kept by the Civil Service Capability Group, I believe it is called, in Cabinet Office. The reason for that, I think, is quite simple: it is that your career hierarchy if you are in a devolved administration is going to lie primarily within that devolved administration. You are going to be looking for your next job within your own government rather than moving somewhere else. There is a bit of interchange between, for example, DWP as it is and DWP functions as they are in Scotland or in Wales, and other parts of the Civil Service, but that is going to be generally at a pretty low level and not at the senior level you are probably talking about. It is, as it were, a Whitehall experience; you are just working for a different arm of government.

**Q362 Mrs James:** Turning now to the review of the guidance notes on devolution. What importance do you think they have and how do you rate their quality?

**Mr Trench:** The Devolution Guidance Notes are in some ways the most useful documents I find to understand how devolution is at least meant to work. They are the closest thing that comes to the mid level guidance about principles and their normal application in practice that exists. I suspect they are far less often consulted in reality that they should be, so the guidance is fine but no-one actually notices it is there. It is not always terribly clear and their status is rather peculiar, I find; because of course they are simply internal guidance notes that are published but are issued by one government for the benefit of its own officials. They are discussed between governments but what they say is purely a matter for the UK Government. Trying to clarify those, I think, and at least some of the material that is presently set out in Devolution Guidance Notes in a successor intergovernmental agreement, a sort of manual for managing intergovernmental relations, would be the sort of thing I would like to see happen. If I may give you another Scottish example: the clearest guidance to what the Sewel Convention actually means—the principle by which Westminster legislates for devolved matters with the consent of the devolved legislature—is set out in a Devolution Guidance Note; it is set out I think in Devolution Guidance Note 10 on post-devolution primary legislation for Scotland. There is a significant difference between the version of the Sewel Convention as set out there and that which is set out in the Memorandum of Understanding which was stated in Parliament during debates on the Scotland Act. It seems to me that it would be more than desirable—it would be really exceptionally useful—for that to be set out in a document that was expressly specifically agreed by governments.

**Chairman:** We have a large number of witnesses. All your evidence is extremely valuable and appreciated but could you begin to start to give shorter answers, please.

**Q363 Alun Michael:** Just on the point you were mentioning about the reluctance of officials to spend time in Whitehall, there is not a great difference, is there, between that and sometimes the reluctance of Whitehall officials to spend time, for instance, in Europe; and yet the value of officials that have undertaken that sort of experience is often recognised and palpable.

**Mr Trench:** It has clearly got value for civil servants on a particular career path within the UK Government. There may also be a degree of attraction for the idea of living in Brussels for a few months that may be greater, I have to say, than the attraction for an official from Cardiff living in London for a few months. That may be a factor.

**Q364 Alun Michael:** I was thinking rather more of the value to the institution than of the enhanced capabilities of people from having that sort of experience. It suggests that something needs to be done in order to make it more attractive, does it not?

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**Mr Trench:** It suggests that; and it needs to be clear—if you are going to make secondment attractive to individuals—what the gain to their personal career profile is going to be if they go and they spend six months, three years, or whatever it is in Whitehall.

**Q365 Alun Michael:** The other side of that is the liaison between officials in the Welsh Assembly Government and their counterparts in central government, whether it is on specifics or whether it is on generals. Would you agree with the proposition that has been put to us that Assembly Government officials need to do more to liaise with their Whitehall counterparts?

**Mr Trench:** I would agree much more strongly with the converse. It is Whitehall officials who need to do much more.

**Q366 Alun Michael:** Yes, but at the moment I am asking you about the Assembly's behaviour rather than about Whitehall's behaviour—we have done that.

**Mr Trench:** The interview that I have done with Assembly Government officials suggests that they are generally pretty good at coordinating with Whitehall officials; that the problem is not a problem that lies in Cardiff; it is a problem that lies much more at this end.

**Q367 Alun Michael:** Did you get a sense at all that there is sometimes an emphasis on the separateness of policy, rather than a question of how to do it best?

**Mr Trench:** Yes, but that is an inevitable consequence of a distinct government. That is what devolution is meant to secure.

**Q368 Alun Michael:** I put to you that actually most people think devolution is about doing things best rather than doing it necessarily differently?

**Mr Trench:** People are necessarily going to take a different view about what is best. What is best in Greater London is not necessarily what is going to be best in rural North Wales.

**Q369 Alun Michael:** Indeed, which is why the judgment about what is best for Wales is best taken in Wales?

**Mr Trench:** Indeed.

**Q370 Mr David Jones:** How would you say that the Civil Service in Wales has changed, has evolved, since devolution?

**Mr Trench:** It is again a little while since I have looked at the figures, but when I did last look it was more than twice the size that it had been in 1999. That is not a great wonder given the dramatic change in its role and its organisation and, from what I have seen also, its self-confidence since 1999. It has moved from being essentially a transmission belt for initiatives and policies largely decided in London to something that is implementing, developing different policies, having had policy development capacity as a result, implementing those policies as well as simply delivering a wide range of public services, which is what it has always been doing.

**Q371 Mr David Jones:** Given that it has doubled in size, is there now sufficient capacity to deal with the policy challenges that it faces?

**Mr Trench:** I would like to think so but I am not qualified to say whether there is or is not.

**Q372 Mr David Jones:** Can we turn to the role of the Wales Office. You have said that it plays an important role notably in relation to legislative powers for the Assembly. Do you think that the Wales Office plays a positive role in the devolution settlement, or do you think that it may possibly hamper efforts of the Assembly and of the Assembly Government and Whitehall to deal directly with each other?

**Mr Trench:** I do not think that it is in itself a cause of difficulty, in a way that the Scotland Office has become a source of difficulty in relations between the UK Government and the Scottish Government since 2007, and particularly since 2008. As I have mentioned in my memorandum, there is a significant problem now in relation to the Scotland Office of the Office being seen as having a political role, and an adversarial political role, as a result of the difference in political administrations at each end of the A1.

**Q373 Mr David Jones:** Could I just pause there. It was surely inevitable from the outset of devolution that you would not indefinitely have governments of the same stripe in London and in the devolved administrations?

**Mr Trench:** Absolutely.

**Q374 Mr David Jones:** Is this therefore something that is inherently a risk within the system?

**Mr Trench:** In my view it is. Putting such heavy emphasis on what are necessarily going to be politicised roles creates an inevitable risk of that. It has been a longstanding matter of concern to me, given the inevitability of different parties coming to office, that mechanisms were not put in place to deal with that effectively at an early stage in devolution when they would have had plenty of time to have bedded in by the time they came to be tested around 2007.

**Q375 Mr David Jones:** Could we turn to the role of the Wales Office with regard to legislation. You may or may not be aware that there were significant problems with the Planning Bill some time ago where the Wales-only clauses were not actually tabled until well into the Committee stage; the consequence was that they were not debated at any great length at that stage and in fact were not debated at all at Report stage and Third reading. I think it is acknowledged that that was a fault. Who should take the lead role for ensuring that Welsh legislation is properly presented in a timely manner? Is this the Wales Office, or is this the Welsh Assembly Government?

**Mr Trench:** If one is talking about legislation at Westminster, it surely has to be a matter for a part of the UK Government; it cannot be for the Welsh Assembly Government to seek to table legislation to a legislature that it is not engaged with, that it is not part of.

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**Q376 Mr David Jones:** Do you believe that the Wales Office has sufficient capacity to undertake that function, given the large amount of legislation that is passing through this place every year?

**Mr Trench:** It has been a longstanding puzzle to me why, since 2001, the Wales Office has been so much smaller than the Scotland Office when it has had so much more to do; because it has still had an engagement with the legislative programme for Wales in a way that the Scotland Office never had after 1999 for Scotland. I am unclear to the extent to which the Wales Office would have that capacity; but of course the existence of the LCO system means that the burdens on it have increased and not diminished since the 2006 Act came into force.

**Q377 Mr David Jones:** It is your view therefore, do I take it, that really the capacity of the Wales Office should be built up?

**Mr Trench:** If that is the system that you have got in place, then you need to have the resources to make it work.

**Q378 Mark Williams:** My question is about resources to make devolution work. You touched on the Calman Commission earlier on and now we turn to Barnett. In your view, is Wales being disadvantaged by the current funding arrangements via the Barnett Formula?

**Mr Trench:** I am not qualified to answer that question directly. It is fairly plain from the work I have been involved in, including advising the Lords committee that has been looking at the Barnett Formula, that Wales has significantly higher levels of need than most of the other devolved administrations, and many other parts of the United Kingdom. There is an ongoing debate about the extent to which that is reflected in the current allocations of funding through the Barnett Formula. You will be well aware of the work done by the Holtham Commission that has identified the current level of spending in Wales as being at about 112% of the per capita average in England for comparable functions, but the level of need justifying 114% or 115%; so that suggests a degree of under-funding but it is important to note quite probably one within the margin of error. That is a very, very difficult question to answer.

**Q379 Mark Williams:** We took evidence from Mr Holtham last week and one of his conclusions in the Holtham Report was that any new needs-based funding model should be jointly (and I emphasise that) agreed between ministers from both the UK Government and all the devolved administrations concerned. How do you envisage this agenda being taken forward? On the one hand the need for dialogue between the devolved administrations and then ultimately of course with the UK Government?

**Mr Trench:** Many of the problems that arise—and these are not just problems for Wales but for Scotland and Northern Ireland as well—arise because of the very considerable power that the Treasury has within the system. Effectively the system we have at the moment on the administrative

level is whatever the Treasury says goes. The statement of funding policy that operationalises the working of the Barnett Formula is purely a statement of Treasury policy. The policy can change; it is a unilateral statement that is issued by the Treasury. We had a very strong complaint by John Swinney, the Scottish Finance Secretary, when we were taking evidence in Edinburgh with the Barnett Formula Committee that he was not responsible for approving the statement of funding policy; that that was a function of the Secretary of State on behalf of Scotland and not someone from the Scottish Government directly. All the decision-making processes are purely internally within the Treasury; and we have plenty of instances of fairly arbitrary decision-making as a result. One simple example that you are well aware of here is regeneration funding and the 2012 Olympics, but there are quite a few others. Finding a way to create some different sort of approach to that, which would ultimately need to be approved by politicians but would ensure that there was much greater expert advice given as part of the process, would I think be a valuable contribution to try to shape that.

**Q380 Nia Griffith:** You will obviously be aware that the Chief Secretary to the Treasury spoke to the Wales Finance Minister quite recently and talked about an open-mindedness about some sort of reform, and sort of change; and you obviously will have heard Peter Hain saying similar. What would you see as possible practical outcomes that could be implemented? What sort of timescale might we be looking at? What sort of changes might be able to be implemented easily, and what would take much longer?

**Mr Trench:** That is an extremely large question to ask! My usual talk for that goes for about 30 minutes, I am afraid, and I do not think I have got time to give that.

**Q381 Nia Griffith:** Just a summary?

**Mr Trench:** This is a cataclysmically bad time to be trying to review devolution finance. The constraints that public spending is going to face in the coming years and the demands that there are going to be for public services mean that it is really a very, very difficult point in the cycle at which to do so. The common point at which you try and do this in most other federal decentralised systems is when times are good, because then you have money in order to cushion the transition and ensure that those who will ultimately lose out do not lose out in the short-term.

**Q382 Nia Griffith:** Are you suggesting that we postpone it or are you suggesting that it is all the more urgent that we get it right for Wales?

**Mr Trench:** I am suggesting that whatever happens is going to be painful and difficult. The second question that the UK Government is going to have to decide is how it understands this new system is operating, assuming it does bring in a new system. Does it understand it was operating bilaterally between the UK level and each specific devolved part of the UK; or does it wish to have a general

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settlement that applies more or less equally and more or less fairly across the whole of the UK? That again is going to be very difficult particularly given the political situation with the SNP in Scotland, on the one hand, and those financial constraints, on the other. That is why I say it is such a cataclysmically difficult time at which to try and do this. I am somewhat puzzled by the position that the UK Government is taking. You mentioned the statement of the Chief Security to the Treasury a couple of weeks ago and Peter Hain's statement made in November—which I have to say left me completely puzzled. We may get a degree of further clarification in the course of today; because, as you may know, the debate on the report of the Lords committee on the Barnett Formula is being held this evening. The Government's official response to that report was effectively a very flat rejection of all the substantial recommendations that were made by the Committee for a general attempt at a needs review done on what is known as a top-down basis using a relatively small number of indicators, which is very much the

approach followed by the Holtham Commission in their working paper on needs assessment. The UK Government simply noted all the recommendations with great interest and an implication that it is not going to do anything about any of them.

**Q383 Chairman:** Could I halt you on that point. We will be receiving witnesses next week that will be addressing these issues, including of course the Secretary of State for Wales, Peter Hain. Could I thank you for your evidence today; it has been very full and very comprehensive. I apologise for cutting you off but if you feel—as I am sure you will—that you would like to accept our invitation to write a further memorandum, if there are points that you have not been able to cover today, we would be delighted to receive them.

**Mr Trench:** If there any particular issues that members of the Committee would like me to cover that I have not been able to do so, it would be very helpful if I could have a note from the Clerk to advise me of that and I will gladly deal with that.

**Chairman:** Thank you very much.

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*Witnesses:* **Professor Tim Jones**, Swansea Law School, University of Wales, Swansea, **Professor Richard Wyn Jones**, Director, **Ms Christina Palko**, Wales Governance Centre, **Ms Tessa Shellens**, and **Mr Huw Williams**, The Law Society, gave evidence.

**Q384 Chairman:** While our witnesses come forward I should mention on the record, I suppose, that I am an Emeritus Professor at Swansea University. Welcome to the Welsh Affairs Committee. For the record, could you, from my right, introduce yourselves, please?

**Ms Palko:** My name is Christina Palko, a member of the Welsh Governance Centre, working with Professor Jones and David Lambert.

**Professor Richard Wyn Jones:** Bore Da. My name is Richard Wyn Jones; I am Director of the Wales Governance Centre at Cardiff University. I should say that I am, in a sense, here instead of a colleague David Lambert, who is the co-author of the memorandum, who is recovering, and recovering well, I should say, after a recent operation.

**Professor Tim Jones:** Tim Jones, I am a Professor of Public Law in Swansea University.

**Mr Williams:** My name is Huw Williams; I am a member of the Law Society's Wales Committee and also its Planning and Environment Law Committee, and also a practising solicitor with a firm of solicitors in Cardiff, by the name of Geldards, and I principally practise in the area of public law.

**Ms Shellens:** I am Tessa Shellens, I am a consultant in health and public sector law in Morgan Cole in Cardiff and a member of the Law Society's Wales Committee.

**Q385 Chairman:** Thank you very much and thank you for introducing yourselves. Could I, on behalf of the Committee, convey our good wishes to Professor Lambert for a speedy recovery, and also, thank you for stepping in at such short notice, Professor Jones. Could I begin by asking this very simple question—

and please do not feel that you have to all respond to every single question. We did have the misfortune of having four chief constables before us once and they all wanted to answer every question, even though they were agreeing with each other. How has the devolution settlement affected the administration of justice and the body of law in Wales? Perhaps you could put it into the context of our most recent experiences and our recent inquiry into the Legal Services Commission.

**Ms Shellens:** I think, by and large, we have welcomed it as a body, as lawyers in Wales as a profession, in particular as an example of where it has been a positive benefit in that it enabled us to argue a very good case for the Administrative Court to be set up in Wales. That has been a huge success for practitioners; it has been very warmly welcomed and supported. So alongside the very poor example of the Legal Services Commission this other example is an example of a very positive benefit for Wales to enable businesses to access justice much more quickly and more locally for their clients.

**Q386 Chairman:** Any other observations, Professor Jones?

**Professor Richard Wyn Jones:** Can I make one observation here? As part of the Governance Centre we run Wales Legislation Online, which is, I guess, the most accessible source of knowledge about the legislation which applies in Wales. I have to say that this is funded partly with the support of the Assembly Commission, to a lesser extent by the Assembly Government and by Cardiff University itself. I took over the directorship of the Centre a year ago, and I have been very aware that this is a

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hand-to-mouth operation. It is a very proper principle that the law is accessible and the All Wales Convention is very eloquent on that point. I would make the point this has been a hand-to-mouth operation, continues to be a hand-to-mouth operation, and I think that having a readily accessible source of information about the law as it applies in Wales is vital for democracy, and I was very pleased to see that in the Convention report, and I very much hope that this will be taken up by the Welsh Assembly Government.

**Q387 Chairman:** Professor Tim Jones, would you like to add to that?

**Professor Tim Jones:** It is quite clear, of course, that devolution has had a considerable impact on law and the administration of justice, and we have seen an increasing divergence in areas of law between England and Wales, and there are now significant areas of law which are different between the two areas. Of course, it is not difference in law just for the sake of having different law, it is the result of decisions about policy and having different policies which are reflected in law. There are implications for the legal profession in terms of access to and knowledge of this divergent law; it is relevant to clients, particularly in the public sector, of course, and there are further questions as to how the administration of justice will develop in the future, particularly if the next stage of devolution arrives.

**Q388 Mrs James:** I want to turn to intergovernmental relations. Do any of you have concerns that intergovernmental relations are of a non-binding, non-statutory nature, or are you content that they should be based on the relationship between two governments?

**Professor Tim Jones:** We heard some of what Alan Trench was saying before. I think it is difficult to conceive how these relationships could be governed by statute. I think there is a way in which the system has developed over the last few years which tends towards strengthening the role of the Executive, and increasing the role of the Secretary of State, because when we are talking about these relationships then we are talking about relationships between two governments, between two executives, which can have the consequence of marginalising the role of the legislature. If we think about the LCO process, for example, then it has developed very much in terms of the relationship between two executives. The role of the Secretary of State in that is a non-statutory role, in many ways, but it has become critical. We are looking at the way that practices have developed rather than the law as reflected in the Government of Wales Act.

**Professor Richard Wyn Jones:** Could I respond to that? I have two worries on this particular score. First of all, in terms of relying on relationships, the fact that it is a very unequal relationship. My background is in international relations, before I started taking an interest in Welsh politics, and the *Realpolitik* of this is that Wales is relatively small, relatively marginal; there is a rather complex

constitutional dispensation for that relatively small, relatively marginal country. I think it is absolutely to be expected that at the centre this is going to slip off the radar screen on a regular basis if it is all based on relationship. I do not want to provoke Mr Michael over there, but I think tidiness would actually benefit Whitehall at least as much as it would benefit Wales because, I think, in that condition of inequality a very complex settlement is actually inimical to getting Whitehall to engage seriously, properly or consistently. The second point I wanted to make very briefly was to echo what Professor Jones was saying. It is, on the whole, an executive/executive relationship, with the exception of this Committee, actually, and one of the things which worries me most about the direction in which Welsh devolution is headed (and I hope this is a point which I do not really need to underline in this present company) is that it is leading to a situation of executive dominance. In the Welsh context we have a powerful Welsh Assembly Government, a National Assembly that has relatively weak legislative powers, very tightly constrained legislative powers. The evidence that we have put forward in the memorandum today suggests that there is a lot of scrutiny of powers being transferred to the National Assembly; the powers being transferred to the executive in Wales are subject to very little scrutiny. This is an unintended consequence of the system but it is leading to a very powerful executive in Wales which is not particularly tightly controlled by the legislature. As somebody who worries about these kinds of things, this is not healthy.

**Q389 Chairman:** Could I just come back to Professor Tim Jones and could I refer to your paper that you prepared jointly with Ms Jane Williams. Do you have it before you? (Copy handed to witness)

**Professor Tim Jones:** Yes.

**Chairman:** Could I just refer to one part? We have been bedevilled with this word "confusion" and I must say that both media and academics sometimes add to that confusion. Could I just read out a passage (and I am not taking it out of context) where there is clear confusion: "Parallel to these developments is the apparent strengthening of the UK Government's control over the Welsh Assembly Government in relation to Welsh policy. In one instance, this tendency produced a potential illegality. When considering the draft LCO on housing, the Welsh Affairs Committee objected to the LCO conferring power to abolish, as opposed to simply suspend, the right to buy." There are two errors there: somehow or other the UK Government is conflated with the Welsh Affairs Committee, and they are two very separate bodies. We are very proud of our role that is distinct from and sometimes in contradiction to the Government, but also we never, ever, at any stage, stated that we were actually opposed to the right to buy; what we were trying to do was clarify the position on policy. Would you like to make any observation on my quoting your

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statement and respond to the fact that you have added to the confusion and merely repeated what the media has been saying or was saying at the time?

**Alun Michael:** A media-driven academic quirk.

**Chairman:** Perhaps you could reflect on what I have said and write to us.

**Q390 Mrs James:** Do you want to give a practical example of that, when you talked about the confusion?

**Professor Richard Wyn Jones:** What aspect of the confusion, did I refer to? Sorry.

**Q391 Mrs James:** You talked about where there was the confusion between the Executive and some anomalies arising from legislation.

**Professor Richard Wyn Jones:** I am not sure that we mentioned confusion. Christina did the work on this particular issue.

**Ms Palko:** Just before I go on to that I want to say that I analyse the existing and prospective powers of the legislative powers of the National Assembly. In doing this I consider the nature of the powers which are proposed to be given to the Assembly by Legislative Competence Orders and by framework powers by UK Acts. One of the concerns raised in our evidence paper was that the Assembly has no current machinery by which it can influence the contents over the powers granted to the Welsh Assembly Government by Acts of Parliament. So we have a Parliament that decides to what extent, if any, the Assembly will control the Welsh Assembly Government's powers under a particular Act. The same is true in relation to powers given to the Assembly to make laws. So we have LCOs initiated by the Welsh Assembly Government or by an individual Assembly member, and considered by the National Assembly of Wales and considered by the Welsh Affairs Select Committee. But we have these framework powers in an Act of Parliament which are not initiated in the Assembly and there is little control over the nature of the powers given to the Assembly through these framework powers. Since the commencement of the Government of Wales Act 2006 we have noticed that the powers come more from the Acts of Parliament rather than from the Legislative Competence Orders. We think that the aim should be that more powers should come from the Legislative Competence Orders, and the reason for that is because the Assembly will be able to control the content. We do know that the Assembly does not expressly monitor Acts of Parliament; we have to be fair about it, they have got a big, heavy workload; they make LCOs and other Measures, and the only committee which is actually looking at some of the Acts really is the Subordinate Legislation Committee or, from Thursday, if the motion will be approved to change the name, the Constitutional Affairs Committee. So they have looked at some Acts but what is not very clear is: what is the practical input of these recommendations? Where do these recommendations go? What we think is that it is unacceptable that the Assembly has so little control

in relation to the legislative powers of the Assembly or the powers of the Executive. In the paper presented there is an annex which shows that three LCOs have been fully completed in the parliamentary session 2008–09, and we have nine Acts of Parliament completed in that parliamentary session, of which two give legislative and executive powers, and we have seven giving executive powers only. As regards these executive powers, they are very wide and cover a considerable number of subject areas. In the current parliamentary session, 2009–10, so far we have identified six Acts potentially giving powers to Wales, of which two would give legislative and executive powers and four giving executive powers.

**Chairman:** Could you pause at that point? You have made your points very well and what you have said, in terms of the emerging Constitutional Affairs Committee, is an indication that the Assembly rather the Welsh Assembly Government is very well aware of the challenges before it, really. We will revisit that, I think. I am about to give evidence myself to that Committee in February.

**Q392 Mrs James:** The Holtham Commission has recommended an independent advisory body to administer the operation of the Barnett Formula. What impact would this have on the constitutional arrangements?

**Professor Richard Wyn Jones:** Sorry to give an academic answer but I guess it would depend on the form that the Committee takes and where it would fit into the system, really, before I can talk about any constitutional implications. It all depends on what form that takes and where it fits into the system. That is a very difficult question to answer, I am sorry.

**Q393 Alun Michael:** I have listened to what has been said here and it strikes me that there is considerable muddle about the different nature of different pieces of legislation. Primary legislation does not appear in the year out of nowhere; there is a trail back. So that if you simply compare what is happening within a parliamentary year in one type of legislation and another you get a completely false picture. Secondly, is it not the case that the best example arises out of something that was in the hands in the Welsh Assembly Government and, indeed, the Welsh Assembly itself? So that, for instance, propositions could have been put by Legislative Competence Orders that were not. A prime example is the sprinklers outcome, which sat around in the administrative system in the Welsh Assembly Government for more than a year, waiting for primary legislation, which was totally unnecessary and was criticised by this Committee. So is there not a power for initiation on the part of the Welsh Assembly Government and the Assembly were they to use it?

**Professor Richard Wyn Jones:** Yes. However, perhaps I have not explained the point that I was trying to make clearly enough. What I am trying to draw attention to here is, in a sense, the figures are indicative of a general trend, and what I am

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interested in is the overall, aggregate effect of what is happening. What I am suggesting to the Committee Members is what we are seeing is that powers are being passed to the Executive in Wales—

**Q394 Alun Michael:** This is a different point.

**Professor Richard Wyn Jones:** I am referring to the point, or what I took to be your point where you were disputing the statistics.

**Q395 Alun Michael:** No, I was suggesting that the statistics are based on a muddle, in terms of the understanding of legislative processes. It is a little bit like the table in the Jones Parry report which is a complete misrepresentation of the comparative timescales of primary legislation and the LCO process—the point being that if you get the facts right then you can make a genuine comparison. You may reach the same conclusion but at least should we not have from academics and from journalists in Wales an accurate representation of the processes that have been dealt with?

**Professor Richard Wyn Jones:** I can apologise on behalf of my friends and colleagues in academia that we have offended you. I will not speak for journalists.

**Q396 Alun Michael:** Very wise.

**Professor Richard Wyn Jones:** I think there is a serious point here about executive dominance in a system which is actually—

**Q397 Alun Michael:** I was not arguing about that; I was asking you about the processes and the transfer of the powers. I accept your point about dominance, and I was going to ask a question about that, which is: does that not suggest that one of the big issues ought to be the strengthening of the Welsh Assembly in general terms in its methodologies and powers of scrutiny?

**Mr Williams:** Can I perhaps assist there because it is a topic on which Tessa and I gave some evidence recently to the Subordinate Legislation Committee, as it then was, of the National Assembly, and indeed to their previous inquiry as well. It has struck us that the Assembly itself should really be more interested in the Westminster legislative process because there are, it strikes me certainly, various points when they could engage with the process because there are a number of Bills now, of course, which first see the light of day as draft Bills before they enter the legislative programme. We have pointed out that there seems to be more of an opportunity there that is not being exploited at the moment to actually engage with the drafting process. When I was in front of the Subordinate Legislation Committee I drew attention to the draft Heritage Protection Bill, for example, which has a very large element of conferring executive power on the Welsh Assembly Government; it is basically for “Secretary of State” read “Welsh Ministers” in Wales, and there was no territorial section in the draft legislation. It struck me: why is that the case? One can see the argument for the Assembly Government saying: “Yes, we want

this reform of Heritage Protection” but, at the same time, should we be looking at ensuring that the next time there is a reform it is done in Cardiff Bay and not in Westminster?”. Equally, before coming here this morning, I looked at the—admittedly fairly briefly—Report of the Culture, Media and Sport Committee on that draft Bill. There is no reference there that I could find to any consideration of the territorial aspects of the draft at this (i.e. Westminster) end of the process, even in the sense of why is it just, as I say, for “Welsh Ministers” read “Secretary of State”, or vice-versa.

**Q398 Alun Michael:** I am sorry if my questions were not clear but I was trying to tease out a different point to the one that has originally been made, and I found that very useful. Is the suggestion that, in fact, there ought to be some sort of form of scrutiny by the Assembly and, perhaps, by the Welsh Affairs Select Committee linked to it, in the way that there is in LCOs, when consideration is being given to primary legislation that affects Wales? Is that what you are suggesting?

**Professor Richard Wyn Jones:** That would be a possible way of operating. One of the things which does come out, I hope, very clearly in the evidence is that the Subordinate Legislation Committee—it is very unclear or opaque how it has actually dealt with suggestions or recommendations on the things that it manages to look at and it does not have the capacity to look at everything.

**Q399 Alun Michael:** Which committee are you referring to?

**Professor Richard Wyn Jones:** The Subordinate Legislation Committee. This is the only body in the National Assembly which actually tries to follow these things.

**Q400 Alun Michael:** Not the Committee in the Lords?

**Professor Richard Wyn Jones:** No, I do apologise. I should have made that clear.

**Q401 Mark Williams:** Would you see an enhanced role for that Committee? I think we are well used to, when framework powers emerge, Welsh Members of Parliament summoned off to a committee room and the Welsh Minister will be there and the Wales Minister will be there to give us some general explanation as to the framework powers that often have been requested by Assembly Ministers in legislation. What other methods would you envisage improving that communication—accepting what you say about how powers are going off to the Executive, and the powers of scrutiny that are seemingly lacking at the Assembly level? Is it just a role for that Subordinate Committee in the Assembly?

**Professor Richard Wyn Jones:** There is a slightly facetious point, but I would not start from here, I guess. I think it is a system which has this inherent problem. I think it is inherently unlikely that even with the best will in the world and all the resources

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that one could summon up, it is very difficult, in the end, to envisage how a National Assembly committee could have a meaningful impact on legislation passed in this place, particularly if it is contentious legislation. I am going back to my *Realpolitik* point.

**Q402 Mark Williams:** You have identified the problem, and some of us would share your facetiousness in these matters. There is a problem there which I think you have identified. There has been an acknowledgement; Mr Michael has acknowledged that there is an issue there about powers going to the Executive, but in terms of good government, accountable government, the role of Assembly Members in scrutinising framework powers which hitherto have been left to this place. Perhaps the other witnesses could give us some suggestions for how we could improve this.

**Mr Williams:** It strikes me that there is possibly an argument about the overall capacity of the National Assembly in terms of the numbers of Members. There is the question though about how they divide up their time and whether they make time to actually look at what is emerging from the Westminster legislative process and then avail themselves of the mechanisms of consultation and communication to make their views known. I know that there have been experiments with joint sittings of AMs and MPs which seem to have foundered on timetabling difficulties, but it strikes me that there must be mechanisms of that sort that could be usefully employed. Of course, it does not help the instances where territorial provisions or Welsh provisions have come forward quite late in the day as well.

**Chairman:** Mr David Jones, you have been very patient. You wanted a supplementary.

**Q403 Mr David Jones:** Yes, Chairman, thank you very much. I would like to go back to the issue of the relations between central government and the devolved administrations being non-binding but comprising of concordats, memoranda, and protocols and what-have-you of a non-binding nature. Where does this leave the citizen—usually the Welsh citizen but perhaps the English citizen—who may possibly want to sue, to assert his rights? Is there a break in the nexus which could actually prejudice the system? I am thinking, in particular, most practically, of the problems that we are all aware of in cross-border healthcare, where the arrangements between the Welsh Assembly Government and the Department of Health are of a non-binding nature. Is it not the case that the Welsh citizen might be prejudiced because of the non-binding nature of these arrangements?

**Ms Shellens:** Our concern is that the citizen is disadvantaged primarily because it is so complicated. And the citizen in Wales may well be disadvantaged, in even trying to assess and ascertain what the law is and what the relevant guidance is. In cross-border health issues, the citizen always has a right to take action, either against an LHB in Wales or a PCT in England—they (the LHB or PCT) may

want to be counter-suing each other but citizens are not deprived of their right to take action. What they are deprived of (and this is coming across, we think, quite a lot) is they are not able to even ascertain what their right is because they become embroiled in such a complex arrangement. So they are not even certain as to whom they should call to account.

**Q404 Mr David Jones:** Sir Emyr Jones Parry does not like the word “byzantine”, but it seems to me that you are talking about a byzantine process.

**Ms Shellens:** It is a challenging Act.

**Q405 Mr David Jones:** It is really a muddle that, frankly, is not working to the benefit of the citizen, though, is it?

**Ms Shellens:** Certainly the Law Society agrees with that.

**Q406 Hywel Williams:** Can I ask a question of the Law Society, first, please? Do you see a lack of engagement by the Ministry of Justice with the legal profession in Wales as far as policy is concerned? If so, what difficulties have arisen because of this?

**Mr Williams:** I must say I heard Mr Trench’s comment in his evidence about the way that the performance had dropped off from 2002 onwards, and I think that very much echoes our experience. In the run-up to the first Government of Wales Act and then, subsequently, the old Lord Chancellor’s Department, was, I think we felt, very engaged in the whole process and in preparing for devolved institutions. Of course, we have subsequently, obviously, had the constitutional debate about the separation of powers, but the Lord Chancellor’s Department was a very different creature from the current Ministry of Justice, and of course we have benefited from the considerable engagement of the judiciary in ensuring that the judicial system in Wales, as it were, reconfigured itself to match what was happening. I think it is very interesting the progress that has been made in relation to the way that the court system and the administration of civil justice, in particular administrative justice, has continued to develop. Tessa has already referred to the very welcome advent of the Administrative Court in Wales in its new form since last April, and I think the process in which the profession has been able to make the constitutional case for that court through Lord Justice May’s Committee, and so forth, was a very successful piece of interaction with the judiciary. That does contrast with, obviously, what has happened with the Legal Services Commission, which has obviously now been well-documented. There was also some preliminary difficulty with the legislation on tribunals where the new Tribunals Service, similarly, in its first attempt at setting out its England and Wales organisation was devolution-blind. Fortunately, there, I think (he is not here so I will not spare his blushes) Mr Justice Hickinbottom, who had been a judge in Wales, became one of the senior tribunal judges. I think with his understanding of the set-up in Wales, the configuration of the Tribunals Service was turned

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into something a lot more acceptable. I think if we had to put our finger on the problem with engagement with the Ministry of Justice, it is that we see it now as a kind of many-headed hydra; it is a department with so many responsibilities, so many pre-occupations, like the legal advice and assistance budget, like the Prisons Service, that it has lost the focus on the administration of justice and constitutional development aspects that we saw in the early years.

**Q407 Hywel Williams:** What I am getting at is that it is somewhat haphazard and contingent on individuals actually doing something other than what they be would be really doing—taking up causes and pressing particular points.

**Mr Williams:** Do you mean from the MoJ side?

**Q408 Hywel Williams:** Yes.

**Mr Williams:** Yes, it is obviously part of the work of the Law Society's Wales Committee to be alert to these things and to make sure that heed is paid to the interests of the administration of justice in Wales.

**Q409 Hywel Williams:** That reflects what Mr Trench was saying earlier on about the nature of the relationship between London and Cardiff; that the attention is taken away from Cardiff to what happens in London.

**Mr Williams:** Yes, this, of course, is a fact of population and geography. Wales has a population less than the size of the West Midlands, yet it has this large piece of constitutional (I will not use the word "complexity") machinery attached to it.

**Professor Tim Jones:** There is a particular issue here in terms of being part of the England and Wales jurisdiction, the England and Wales legal system, which means that one has to be vigilant all the time as to the movement, perhaps, of activities, because if one thinks of something like the Legal Services Commission, then they have an England and Wales focus. One has to keep an eye on all these England and Wales bodies within the legal system. Mr Williams referred also to the example of tribunals as well. It is a constant process there.

**Q410 Mark Williams:** Turning specifically to work of the Legal Services Commission, I think Ms Shellens touched on this earlier, but could you elaborate a bit more on how the role of the Legal Services Commission differs in Wales from that in England?

**Ms Shellens:** It is interesting. I have done a lot of work for the Law Society in the last year in training up lawyers on devolution issues and I was actually training lawyers on devolution and the opportunity for lawyers when the news was texted through about the Legal Services Commission decision. It suddenly undermined my lecture for the day about the opportunities presented by devolution, and they all said: "that surely cannot happen now?". So there was complete astonishment that this decision had been made, and that lawyers were not aware that it was going to be made. Why it was so particularly

important is that, in particular, in the Law Society we have done a lot of work in identifying areas where there is a poor service of legal advice for example in major rural areas, so people have to travel a long way, for example, to get legal advice, and where they cannot get the services that they need. In addition, as you can see from the written evidence that we are giving, there will eventually emerge areas of public law challenge, as your colleague, David Jones, pointed out, and we were concerned that the Legal Services Commission needs to be aware of these Welsh issues. We were worried that in making this decision without consultation those specific issues have not been taken into account, as the expectation would have been they would have been automatically taken into account, given the devolution settlement.

**Q411 Mark Williams:** You pre-empt my second question, which was the extent to which the Welsh situation is not taken into account by arm's length bodies. Welcome as it was that the Ministry of Justice held an event on 24 August to raise awareness of devolution, there is a long way to go. You would agree with your colleague, therefore, when he used the phrase "devolution-blind", it is still very worrying?

**Ms Shellens:** It is interesting because on the train we were looking at a very helpful document by the Institute for Government on "Shaping up Whitehall for the future", and that very helpful piece of work identifies the problems in Whitehall for cross-cutting across organisations. In a sense, it is a great pity that in both that piece of work and in the *Better Government initiative* paper, they have not gone on to take the next step and say: how does it work within devolution and how do devolved countries come into that consultation process as well? So it is quite clear that the kind of difficulties that have been commented on in central government are exaggerated, maybe, in the relationship between Wales and Whitehall because of this difficulty of joined-up working, I suppose.

**Q412 Alun Michael:** Can we turn to your views on how the processes develop with regard to the Legislative Competence Orders? Obviously, we see it from the point of view of this Committee, and I think we have now dealt with 15. Only one of those has fallen by the wayside because of comments in the House of Lords on drafting rather than as a result of our comments on the policy. The sixteenth is near the end of the process, so we are doing rather well. How is the process, as a whole, bedding in, in your view?

**Mr Williams:** Can I offer a couple of comments? First of all, I think that, from the outside looking in, there is no clarity as to what happens with some aspects of the pre-legislative scrutiny of these things. The environment LCO is a classic example. The point has already been made that when it came to its formal stages in Cardiff Bay and, also, in this House, it went through relatively speedily but, of course, there was two years when it sat somewhere in the governmental machine between Cardiff and

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Whitehall, and one saw press comments on it in the environmental press. They just said it is sitting there and there is dialogue going on. I am sure there is a very interesting piece of academic—

**Q413 Alun Michael:** You read the comments in our Report on that?

**Mr Williams:** Indeed, yes, and there is a very interesting piece of academic work on government to be done there, I am sure, if only the papers could be accessed, in terms of what went on between Cardiff and Whitehall on it.

**Q414 Alun Michael:** Would you agree with the suggestion that has been put to us that the transfer of draft Legislative Competence Orders ought to be from the Assembly to Parliament rather than between the Welsh Assembly Government and the Wales Office?

**Mr Williams:** I think it is an attractive proposition, but I think that inevitably—and this goes for the private legislation context—the executive impact of Legislative Competence Orders when they are proposed is an essential aspect of it. The point about transmitting LCOs directly from Cardiff Bay to Westminster, I think, does raise another issue which is the question of parity of esteem between legislatures, and I think that Sir Jon Shortridge's comment about the role of the Secretary of State, in that regard, withering away, I have some sympathy with. But I think that is a slightly different point to what you are asking.

**Q415 Alun Michael:** If I may, I think it goes back to the point that was made earlier about transparency and responsibility. I think it would not do away with the need for Whitehall departments to comment or the Wales Office to have a role in that process, but what it would do, though, would be to make a clear starting point when it arrives here and allow greater oversight by this Committee in terms of scrutiny of the processes and discussion within Whitehall.

**Mr Williams:** I think it would open up the whole process if the debates that would undoubtedly have gone on that resulted in these, however many pages it is, of exceptions in the environmental LCO had been opened up to the light of day, because I am not aware that any of the processes anywhere benefited from officials in the Whitehall departments which contributed to this process explaining why they were so concerned about these exceptions. This does lead, of course, to the question about the whole evolving shape of Schedule 5 of the Government of Wales Act, which I think already is in need of an oversight exercise in itself to see whether some of the drafting can be tightened up and whether Matters within fields can be amalgamated.

**Q416 Alun Michael:** So there would be a form of consolidation rather than tearing it all up.

**Mr Williams:** A sort of consolidation, but probably more a sort of going through it with a sharp drafting pencil to try and come up with something that is crisper and more comprehensible to the citizen.

**Q417 Chairman:** Could I ask you to pause at that point? It has been suggested to us in defence of the way in which the two executives dealt with the environmental LCO that we were dealing—they were dealing—(a Freudian slip there) with highly complex issues, very complex policies, and it does take time to deal with that. I am just saying that as an observation. By contrast, could I tempt you to make some observations about the way in which we, as the Welsh Affairs Committee, dealt with the Welsh Language LCO, because it was constantly predicted in the press that there would be mayhem here, when in fact, with all due respect to everyone else that was involved—and everyone played their part—the matter was resolved here, not elsewhere.

**Mr Williams:** Can I come back briefly on the environmental LCO, because it happens to be an area close to my own areas of practice. If you were going to tackle an area of complexity the environment is probably at the top of the list; any environmental legislation is phenomenally complicated, and in that sense the environmental LCO simply reflects other bodies of law. The biggest concern is that if all these exceptions had to be applied in relation to Schedule 5, if we then move on to Part IV and Schedule 7 can these exceptions drop away and are these concerns are going to evaporate. Moving on to the Welsh Language LCO, which I have not studied quite as closely as the environmental one, I think you are quite right; I think blood on the wall was predicted and it did not appear, and I think that it appears to have gone through relatively smoothly in the event. If one was to offer a comment, and again one is conscious about “Don't believe what one reads in the press” as opposed to the actual inquiry Report, I will take my life in my hands and make the point that there was possibly an issue in terms of the question of asking the Assembly Government what did they intend to use the powers for, rather than why did they need them in the first place. In terms of things like the Royal Charter bodies and the £200,000 of public funding points, whether having those set as limits and whether that is then synonymous with the Assembly immediately going off and legislating up to those limits, I think, is a point perhaps to an outside observer.

**Chairman:** I really must apologise to Sian James because many of these points she would have been wishing to raise. I must allow Mrs James to ask the next two questions.

**Q418 Mrs James:** The All Wales Convention urged greater transparency in the LCO process. In your opinion, how could that current system be further improved?

**Mr Williams:** Again, we have had a number of LCOs of varying degrees of complexity and precision. I think that in terms of the transparency point, it is, as I said a few moments ago, trying to open up to the light of day this process that evidently goes on between government in Cardiff and in Whitehall at the pre-legislative stage in terms of the shape of the drafting and, in particular, what is carved out and

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what are the concerns. I think it is that aspect of it that is of concern, and I think that although clearly it is unfortunate in that it potentially lengthens your inquiries, it might do no harm on a suitable occasion to try and have a good, hard look at what went on at that stage before an LCO saw the light of day and actually get officials from the relevant Whitehall departments that have had input into the drafting of the LCO to come and talk to you about what they saw as being their role. I think that would certainly lend a degree of transparency into how these things get formulated.

**Q419 Mrs James:** Just building on that, a greater emphasis on the pre-legislative scrutiny.

**Mr Williams:** I think, as I said—and bear in mind it is a fairly novel process—when it has hit the formal part of the parliamentary procedure it has moved fairly reasonably crisply, given the potential complexities. As I say, you have these periods of time when nothing seems to be happening to it on the outside, and clearly something is going on within the machine. As consumers of the legislative product, or the Measures that might ultimately eventuate, I think we would like to have a better understanding of what goes on there, and perhaps this Committee is a means of doing it.

**Professor Richard Wyn Jones:** Can I respond to a couple of the questions very, very briefly? First of all, Mr Michael made a really intriguing suggestion that the LCO process, in a sense, be a legislature procedure, which I have to say, instinctively, I warned to immediately because I think that is how I would like to think democracy works and I would very much like to see backbench Members of this place, in a sense, act as champions of the sister parliament in Cardiff. “Sister Parliament” was a phrase which Sylvia Heale used at the opening of the new Senedd programme and I thought that was an interesting and potentially productive way of thinking about it. However, I do worry about the practicalities of that, to be honest, as it would, I suspect, inevitably be executives who do all the work in the end, but symbolically I could certainly see the value. In terms of the role of this Committee—you asked specifically about its role in the LCO process—maybe I am just restating the problem, in a sense, but I think this Committee has a very difficult role, because it is a fine line between pre-legislative scrutiny and double scrutiny, if I can use that distinction. Double scrutiny is obviously what my colleague here was referring to in the sense of looking at what the Assembly intends to do with powers, which is problematic in lots of kinds of ways in terms of democratic mandate, but pre-legislative scrutiny is your job and I am not quite sure where that line is. I think it is a very tricky one, and if we do move to a different party in government at this end of the M4 then I think that is going to become a really live issue, and I think this is a very, very delicate one, because that line is not so obvious.

**Alun Michael:** I am very interested in that response, because, actually, the legislators here acting as champions for the Assembly is something that has

happened. Actually, there is developing, certainly, I can see within my own party (other colleagues can speak for theirs) a much better understanding of the potential for mutually supportive roles in the two places. Actually, the Welsh Language Order, which the Chairman asked about, is a case in point. I want to put to Huw Williams, because I know, Huw, way back from the days of drafting of the Cardiff Bay Barrage Bill, how meticulous you are in what you say, to suggest that you go back and look at what happened with the Welsh language LCO, both the evidence and the Report and the commentary that we made subsequently. Actually, what happened is that this Committee asked “what is being proposed? What is being attempted to be achieved? Does the drafting actually deliver on the intentions?” We proposed back to the Assembly (that is both to the Welsh Assembly Government and to the Assembly itself) things that actually met the concerns of the Welsh Assembly Committee in what they expressed in their report, and actually was more ambitious in terms of the extent of devolution of powers. That seems to me a good point. The reason I made it is that I find quite an intriguing discussion going on in this evidence session, Chairman, which might be worth pursuing in some other way.

**Chairman:** This is a rhetorical question, and Mr Williams can respond in writing, I think.

**Alun Michael:** The final point is that scrutiny committees in this place, the Standing Committees, take evidence before they go on to do the normal ping-pong between both sides. That is a considerable development in the nature of legislation here, which might be worth reflecting on.

**Chairman:** You have brought your conclusions to a comment. I do not think they require a response immediately now.

**Mr David Jones:** I would like to explore the discussion we have just been having a bit further, but before doing so I would like to turn to the issue of Private Members’ LCO applications. It strikes me that the LCO process does not actually lend itself terribly well to a backbencher’s proposal. Can we go back to the sprinkler application, which was really, in essence, a very simple application? The Assembly Member in question had a proposal that there should be sprinklers installed in every new-build house—very straightforward. We went through years before the LCO was actually passed, and it seems to me that in that particular case it would probably be far preferable if the application for competence actually had a draft of the proposal annexed to it, so that the Assembly was, in that particular case, empowered to enact an Assembly Measure in the form attached to the draft. It seems to me that that would actually achieve what the backbench member wanted and would probably work a lot more quickly because Whitehall would be able to assess far more quickly the impact of the proposal. Really, I wonder whether backbencher LCOs should be treated in that way, in a wholly different manner from government proposals.

**Q420 Chairman:** Professor Tim Jones, would you like to respond to that, because it has been a dialogue between us and Mr Williams for a long time.

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**Professor Tim Jones:** It is an interesting suggestion, and while you were putting it forward I was trying to think of what the potential objection to it might be. I think the objection might be that if it is to (however helpful it might be) cross this line of principle between conferring legislative competence and actually knowing what that competence is going to be used for.

**Q421 Mr David Jones:** Is that not posturing, in reality?

**Professor Tim Jones:** I am not sure that it is. Of course, you would have to ask the people who might make that objection. I am thinking what it might be.

**Q422 Mr David Jones:** It strikes me that you want to arrive at a practical conclusion swiftly. That is the way to do it. Most backbench LCO applications would be similar to Private Members' Bills in Parliament; very short pieces of legislation aimed at a particular mischief. It seems to me that if we put aside what I would refer to as the posturing and actually have a look at the meat of what we are trying to achieve, that is a practical method of arriving at a satisfactory conclusion.

**Professor Tim Jones:** The objection that might be taken to that idea is that an LCO confers an enduring legislative competence. It is quite possible that a differently constituted Assembly could decide that it is too much of a burden on the building industry to have sprinklers and were no longer going to insist upon it.

**Q423 Mr David Jones:** They would have the power to revoke it if necessary.

**Professor Tim Jones:** They would, in any case.

**Q424 Mr David Jones:** Precisely. If that was taken specifically on the face of it. It is just a suggestion. It appears to me that a lot of these backbench proposals are probably going to result in a very lengthy period before actually they are converted into an Assembly Measure, and this might be a practical way of dealing with it. I just put it forward as a suggestion. Could I go back to your memorandum, please, Professor Tim Jones? You put forward a principle that the Assembly had the right to promote extension of its powers in a clear and transparent way without first seeking permission from the United Kingdom Government. Whatever we think of that as a principle, do we not fall foul of Professor Wyn Jones' *Realpolitik*, which is essentially that if the rules, if you like, were changed and an LCO proposal were put forward which was not acceptable to the United Kingdom Government, they would not be approved by Parliament, because of course the Government would be in the majority. So do you not think that whatever your principle it is going to founder on *Realpolitik*?

**Professor Tim Jones:** That may be the case because that is the way that the process has developed. If we go back the best part of three years, the Welsh Assembly Government did publicly announce the first couple of proposals, and subsequent to that

there has developed this process called clearance (for want of a better phrase) before the LCO sees the light of day. It may be that that is the *Realpolitik* of the situation, but I think it may present difficulties or greater difficulties when at some future point the government in Cardiff and the government in London are of different political persuasions.

**Q425 Mr David Jones:** That is clearly the case, but we know as a matter of fact there have probably been similar problems going on behind the scenes in the current process where the government in Cardiff and the government in Whitehall are of the same political hue. We know that is certainly the case, do we not?

**Professor Tim Jones:** Yes, but I think it is a question to ask of the Welsh Assembly Government whether it is happy with the current process; whether it is happy with not being able to make public proposals.

**Q426 Hywel Williams:** Can I ask you a specific question? The Government of Wales Act does not specify that the Secretary of State must say yes or no to the laying of a Legislative Competence Order before both Houses of Parliament. Do you think that this is a weakness?

**Professor Tim Jones:** That it does not?

**Q427 Hywel Williams:** Yes.

**Professor Tim Jones:** It may suggest that the process was intended to work in a slightly different way than it actually has. I am not sure that it is necessary for that to be put in the statute; it is a matter of practice that has developed, and since it is a practice it can change and it may be necessary at some future point for there to be a departure from it.

**Q428 Hywel Williams:** If, as might be the case, the Government in Cardiff and the Secretary of State took a certain decision, can you envisage a judicial review being applied for on that particular decision?

**Professor Tim Jones:** Theoretically it is possible, yes.

**Mr Williams:** Could I perhaps comment briefly on that? The Secretary of State, if he were to refuse to lay, has to give reasons. So, therefore, once you are into the field of a duty to give reasons, you, by its nature, have to discuss the potential for judicial reviews. My feeling for it would be that if such a claim were mounted (a) it would be part of a wider controversy that had a political element to it. Secondly, I suspect, on the basis of the lines taken by the courts in other instances (the GCHQ case comes to mind), is that they would probably agree that in principle they had power to review to the Secretary of State because, at the end of the day, he is a Minister and not laying is a Ministerial act, but I suspect that they would then reach the threshold at which the courts would say: "We are now into the matter of politics" and would probably tread very carefully unless the Secretary of State had done something totally egregious.

**Q429 Nia Griffith:** Can we move on then and talk about the capacity in Wales in terms of the Civil Service? If people say: "How are we going to cope

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then if we have not had the training? Are we getting the people—can we attract in the staff? Have we really got the full capacity that we need?” what would you suggest, if you think there are any shortcomings, that we do about it?

**Mr Williams:** At the risk of starting again, if you look at the evidence given to the All Wales Convention the assurance is given there that Wales has the capacity to do more in the sense that they could take on the capacity of Part IV in Schedule 7 of the Act. Neither Tessa or I are civil service insiders. All I would say is that speaking in the areas of legal practice I know quite well, which is the development of planning law in Wales, it strikes me that the civil servants in the planning division of the Assembly Government have had their hands full for the last several years pursuing a very distinct Welsh planning agenda to do with new development plans and climate change, and that they would be hard-pressed to take anything else on at the moment.

**Q430 Nia Griffith:** There is quality and quantity, is there not? There may very well be the necessary quality but the issue is the time, and the capacity. You are actually saying there would be an issue on the amount of time.

**Mr Williams:** If you said: could they take on responsibility for development control legislation in Wales without increasing the number of civil servants able to think that aspect of policy, then I might question whether that is the case. Tessa may have an example in her area of specialism as well.

**Ms Shellens:** As part of the paper that we submitted to you we are particularly concerned about the legislative deficit between England and Wales where the policy is exactly the same and where there may be delay in secondary legislation coming through for no obvious and apparent reason. We do not know whether that is due to lack of staffing, or what it is, but in established fields where Huw and I are involved, in planning and health, respectively, there should not really be a significant legislative deficit where there is no disagreement in terms of policy, because you should be expecting, say, in mental health law, that if there are regulations coming out in England and Wales they are either going to be exactly the same or very similar indeed. They should be coming out on a par with each other.

**Q431 Nia Griffith:** So, from the public perspective, it is something which actually does not play well.

**Ms Shellens:** It does not.

**Q432 Nia Griffith:** They are going to have to wait quite a long time before something comes through.

**Ms Shellens:** It has been said to me by lawyers from England who are working across the two jurisdictions, that they have found it pretty difficult.

**Q433 Mr David Jones:** In terms of capacity, one recent matter that caused me significant concern was the transfer to the Welsh Assembly Government of competence for the building regulations, which is a huge responsibility, coupled with a very ambitious

timetable on the part of the Welsh Assembly Government. Do you feel that in that particular case there is the capacity within the Welsh Assembly Government to produce new building regulations for Wales?

**Mr Williams:** I do not know enough about how they are proposing to staff up to deal with it. I can fully understand the case as to why they have asked for the power, because if you look at the way the climate change agenda has developed in Wales then it is clearly an essential part of the powers that they need. What it does stimulate in my mind, I suppose—and it really goes back to, possibly, what we, as the Law Society, thought the LCO process might develop into as it unfolded—is that at the moment it is been quite focused on the case for having powers and the uses intended to be made of those powers immediately. I wonder whether there is a case for looking more closely at the overall capacity to handle these powers because it strikes me that one way of drawing down legislative powers is not to say that we have got an immediate legislative proposal but we have now got the capacity to deal with this particular area of policy in all its facets, and that might include, in future, bringing forward legislative proposals, which we like to do in Cardiff, by Measures that currently have a legislative competence. That is a slightly roundabout answer.

**Q434 Mr David Jones:** It just appeared to me that from a practical point of view, the Assembly Government may well have bitten off more than it could chew in respect of building regs.

**Mr Williams:** As I say, I do not know exactly how they are proposing to staff it up and I do not know what arrangements they would have put in place to draw on expertise in Whitehall in relation to this area, but it does in principle raise this question about its inherent capacity: to what extent should you, or should you in practical terms, take material that has been produced in Whitehall and say: “That is good enough for Wales purposes so we will use that—we can focus the resource on something else where we really want Wales to be different, and we will do that properly.”

**Q435 Alun Michael:** You have said in your memorandum that you have been arguing (this is the Law Society) consistently for a Wales statute book. Could you explain to us what you mean by a Wales statute book, who should take the lead in drafting it and how would it help both lawyers and non-lawyers?

**Ms Shellens:** Our point, I suppose, is that yes we can ascertain the LCOs; where we are having more difficulty is in ascertaining the various Acts with various powers in them, and it is almost impossible to scrutinise whether powers are going to be taken up by the Assembly or not and whether they are going to be left redundant, and is England moving one way and are we not moving anywhere at all? So we have come to the view that the only way that you can have a proper body of law is by a form of statute

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book which gives direct access not simply to LCOs and Assembly Measures but, more importantly, the statutes where powers are given to Wales.

**Q436 Alun Michael:** Would that go on to—because you touched on the question of where powers are taken up—implementation? I have some experience of consolidation because I had to deal with company law reform legislation for a period, and it is actually a moving target, very often, is it not? Is the suggestion, therefore, not so much having a book (perhaps that is slightly misleading) as having an electronic and constantly updated body of information about where the law stands which, in some ways, would be quite a new form of repository, would it not?

**Ms Shellens:** We think it would but we just think there is such an important need for it, and we cannot see other than it would have to be publicly funded because it is part of the access of citizens to the law that has been now established in Wales.

**Professor Richard Wyn Jones:** A very quick point, and I am sorry if I sound as if I am advertising, but Welsh Legislation Online does part of this job already, but there is a bigger job needed and we need proper resource to do that, because it is hand-to-mouth at the moment.

**Q437 Alun Michael:** So it is moving from what is there to something much more comprehensive.

**Professor Richard Wyn Jones:** The bare bones are there; it just needs to be staffed up—was the phrase used?

**Ms Shellens:** Where it would be a part of an obligation to be kept up to date.

**Q438 Alun Michael:** Could I ask about the accommodation of the Welsh language within the Welsh statutory process? Two things, I suppose: how would you see it accommodated? The other one is: how do we avoid it causing delay? For instance, one of the things that I am aware of is the subsidiary legislation under the Clean Neighbourhoods Act, which actually was a piece of legislation designed on the experience in Wales rather than England, and yet Wales had the secondary legislation a year later than England. Are there ways of having proper accommodation of the Welsh language within the legislative system, but not allow it to become a cause of delay, if you like?

**Professor Richard Wyn Jones:** In terms of things like Wales Legislation Online, we are currently engaged in a project to ensure that that is fully bi-lingual but I think that question, in a sense, Mr Michael, is directed at the people who are drafting and all that kind of thing. I am not qualified to respond to that.

**Mr Williams:** Tessa and I gave evidence about ten days ago to the Subordinate Legislation Committee in Cardiff Bay, on various aspects of Welsh subordinate legislation, and this was one of the aspects that we covered. We went into the co-drafting, and all of that.

**Q439 Alun Michael:** You suggest that should be our bedtime reading?

**Mr Williams:** I was about to say, if you do feel insomnia then I can recommend it.

**Chairman:** On that very serious note, could I thank you all for your evidence today and for your forbearance as well, because it has been a very long, two sessions. If you feel that you wish to add anything further, please feel free to write to us. I am sure that out of the evidence that you have given you may well wish to reflect on other matters which you have not had the opportunity to develop today.

## Thursday 4 February 2010

Members present

Dr Hywel Francis, in the Chair

Mrs Sian C James  
Mr David Jones  
Alun Michael

Hywel Williams  
Mark Williams

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*Witnesses:* **Mr Carwyn Jones, AM**, First Minister, and **Dame Gillian Morgan DBE**, Permanent Secretary, Welsh Assembly Government, gave evidence.

**Q440 Chairman:** Good morning. Welcome to the Welsh Affairs Committee. First of all, First Minister, could we congratulate you on your recent appointment, and could I begin by asking a very simple straightforward question? Since becoming the First Minister, what discussions have you had with the Prime Minister and what is the nature of those discussions?

**Mr Jones:** I have spoken to the Prime Minister twice, once on the phone, once in person. We had a discussion that ranged over a number of issues in terms of close working, of course, between the UK Government and the Welsh Assembly Government, and communications obviously between my officials and the Prime Minister's officials are under way.

**Q441 Chairman:** What advice did you have from the former First Minister on building good working relationships with UK Government?

**Mr Jones:** Over the years the previous First Minister has made it clear that the key to a good relationship between both the administrations in Cardiff and London and, indeed, on a parliamentary level between Cardiff and London is that as much information as possible is shared as early as possible so that there is no scope for misunderstanding and everybody is aware of what is being proposed.

**Q442 Chairman:** In this inquiry and in previous evidence sessions in other inquiries it has become evident that the relationship between the Welsh Assembly Government and individual Whitehall departments is at best, as one person, said "patchy". How have you addressed that in your early days?

**Mr Jones:** We seek to work firstly, of course, with the Wales Office. The Wales Office is crucial in terms of its ability to talk to other Whitehall departments, in terms of its ability to deal with Legislative Competence Orders, particularly as they arrive here from the Assembly. What we always try to do, of course, is identify problems as they arise and try and resolve those problems. I think it is fair to say that some Whitehall departments are better than others. For example, the Home Office have a scheme whereby they will conduct the Welsh impact assessment on their policies and, indeed, the Department for Transport has a devolution champion, a devolution co-ordinator, but I think it is correct to say that the response from various departments in Whitehall is variable in terms of their understanding and application of the Welsh devolution settlement.

**Q443 Chairman:** When your predecessor gave evidence to us he characterised the challenge really as a cultural challenge, in that he described or characterised relationships as being either warm or cold. How would your approach be different from your predecessor's?

**Mr Jones:** My intention, of course, is to work as closely as possible with the Wales Office and, of course, to work as closely as possible with parliamentarians and, indeed, ministers here in London. What is important is that we ensure firstly that we receive information on policy development in sufficient time, policy development that will affect Wales, and it is important from our point of view that we are able to work closely alongside the Wales Office but also with other individual departments in order to speed up the process by developing Legislative Competence Orders.

**Q444 Chairman:** Just following up on that, it seems that some of the problems that existed in recent years have been as a consequence of the inactivity of the Joint Ministerial Committee. What importance do you attach to the revival of that Joint Ministerial Committee to bring some kind of order and structure to the relationships?

**Mr Jones:** I think the JMC is exceptionally important. At the moment it is in a state of almost continual postponement because of the situation in Northern Ireland, but there is no doubt in my mind that, where there is a forum where devolution issues can be raised, then those issues can be dealt with more effectively.

**Q445 Hywel Williams:** You agreed a moment ago that relationships between Whitehall departments were "patchy". Can you surmise as to why that might be the case? Is it to do with the policy agenda? Is it to do with personalities? For example, in your old brief, agriculture, we have heard that relationships with Defra were very good indeed. What is the cause of the patchiness?

**Mr Jones:** I do not think there is sufficient understanding of the nature of the Welsh devolution settlement across all departments. I think there is a great understanding of Scotland, and I note the previous First Minister's words when he appeared here when he said that Scotland was regarded as not a foreign country but another country, and I think there is an element of truth in that. It is very difficult to know where a situation arises if there has been oversight with regard to us not being kept informed,

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but I think part of the problem is that more thought needs to be given to the effect on the powers that we have when policies or Bills are proposed that appear on the face of them to deal with non-devolved matters. The Welfare Reform Bill is a prime example of that where, on the face of it, we know that welfare is not devolved and yet there were elements of the Bill which impacted on service delivery in Wales. There needs to be a greater awareness that, where a Bill appears to be a non-devolved Bill, there may well be aspects of devolution that need to be dealt with at an early stage.

**Q446 Hywel Williams:** We did hear in earlier evidence that, since the advent of an SNP government in Scotland there has been a further greater awareness of Scottish matters. Is this something to do with assertiveness from the government in Cardiff or differential assertiveness between Cardiff and Scotland, and perhaps Northern Ireland as well?

**Mr Jones:** No. I think there has always been a greater understanding of the Scottish devolution settlement. My experience as a young minister, and I became a minister in 2000, dealing not with ministers but certainly officials in what was then MAFF, was that Scotland was regarded as something separate and Wales was regarded, as it was suggested to me, as an experiment in devolution and, whilst the situation has improved since then, there is still scope for improvement. It is not to do with assertiveness but more to do with history in terms of the fact that the Scottish Office goes back to the 19th century, the Wales Office back to 1964, and an understanding that still persists to an extent that Scotland is different. Of course, its separate legislative framework has always been there and there has always been a tendency to think of Scotland as being separate because of that separate legislative framework, whereas in Wales we have a devolution settlement and a legislative framework that is still quite new.

**Q447 Mark Williams:** One of the implications perhaps of the lack of formal structure or mechanism for discussion has been the lack of transparency, so do you favour bringing much more transparency to negotiations between the UK Government and the Assembly, and, over and above what will be hoped for the Joint Ministerial Committee, how could that be achieved?

**Mr Jones:** We are aiming at Devolution Guidance Note 16, which sets out the nature of the relationship and the principles that lie behind the negotiation and the process that follows the negotiation, so that guidance is a live guidance, a guidance that continues. Nevertheless it remains important that there be a free flow of information between ourselves as an administration and with the UK Government so that any potential difficulties can be identified early on and dealt with early on. So the guidance is there but what is important, of course, is that the guidance is followed at all times.

**Q448 Mark Williams:** Are you satisfied that it has been?

**Mr Jones:** Variable. I come back to the point I made before; there are some examples where good work has been carried out in terms of liaison between the Welsh Assembly Government and UK Government, but there have been occasions when that has not been as effective as we would hope.

**Q449 Mark Williams:** We had some pretty robust remarks from Sir Jon Shortridge that there have been occasions when ministers in London have kept Welsh ministers “in the dark” about major announcements on the grounds that your colleagues could not be trusted with sensitive information. Do you agree with those comments? If so, again, how could we remedy that?

**Mr Jones:** That is not my experience, I have to say. There have been to my mind many examples where information has not been shared because of oversight; that has certainly happened. My experience as a minister has also been that the ministers have been far more aware of the nature of the devolution settlement in Wales and what that entails than officials sometimes are, and I have had experience where I have discussed many matters with ministerial colleagues and they have understood the situation, whereas it is not always the case with officials.

**Q450 Alun Michael:** Looking at the role of the Wales Office, inevitably the Wales Office is going to be a small body with the bulk of policy development and official activity in the Assembly rather than the Wales Office, that is inevitable. How important do you see the Wales Office as being in the arrangements now and for the future?

**Mr Jones:** The Wales Office is absolutely essential, given the current settlement. It is very difficult to see how Legislative Competence Orders could be progressed without the Wales Office being there to take the Legislative Competence Orders through Parliament, it is difficult to see what other mechanism might exist that would have the same kind of drive to take Legislative Competence Orders through, so the situation we have at the moment where we have Legislative Competence Orders does very much require the existence of both the Wales Office and the position of Secretary of State for Wales in order to ensure that LCOs have a smooth and timely passage through Parliament.

**Q451 Alun Michael:** Is that the primary purpose of the Wales Office now?

**Mr Jones:** The Wales Office cannot be expected, I do not think, to have policy expertise across all fields. It is a small department, and that is our role, we have that policy expertise and the policy expertise exists in Whitehall departments, but the Wales Office has an exceptionally important role in terms of facilitating contact between ourselves and Whitehall departments, we have our own direct contact but we also have the Wales Office and can facilitate that as well, but I think primarily the role of the Wales Office is to act as a liaison between ourselves and, indeed,

with UK Government and, to a lesser extent, with Parliament, but the role of taking Legislative Competence Orders through, dealing with government departments in Whitehall, dealing with timetabling of Legislative Competence Orders, is absolutely crucial, and without the Wales Office I do not see how that role can be fulfilled.

**Q452 Alun Michael:** How about those wider relationships with government departments which you have referred to on a number of occasions? You have referred, for instance, to the fact that good contact with ministers very often meant that you got a greater political sensitivity, if you like, in the response. To what extent do you depend on the Wales Office to facilitate links with Whitehall and to what extent are there occasions when it is better if it is a direct contact?

**Mr Jones:** Both are effective. It is essential that we have direct contact, of course, with Whitehall departments, but quite often the Wales Office adds that extra support to a point that we might make to a Whitehall department, so that is another role that the Wales Office fulfils very effectively.

**Q453 Alun Michael:** Are there any occasions when the Wales Office almost gets in the way of contact with other government departments?

**Mr Jones:** No, I have never found that. The Wales Office has always been helpful and certainly, as I have said already, to my mind crucial in ensuring that Legislative Competence Orders are taken through in a timely manner.

**Q454 Alun Michael:** Can we look at the ways in which new legislation comes through? There is a variety of different ways. It can be through Statutory Instruments, primary legislation or framework powers in primary legislation that gives powers to the Assembly; there are those avenues as well as others that end up with the Assembly having powers and responsibilities. Who takes the lead in initiating changes of that sort?

**Mr Jones:** We will look at what the Queen's Speech says every year and identify whether there are any Bills there where it would be appropriate for us to have Measure-making powers. Clearly, that is a swifter process than the Legislative Competence Order process so where, as it were, there is a bus going in the right direction we will try and jump on that bus.

**Q455 Alun Michael:** That is if the bus is already travelling.

**Mr Jones:** If it is already ready to go, I suppose, but there will be occasions as well where, as it were, there is no bus going in the direction we want so we have to build our own, and that is the Legislative Competence Order process. So we will always look and see whether there is a Bill that will give us the appropriate Measure-making power we need, but, of course, there will be many occasions, as the Committee will be aware, where there is a need for us to take a Legislative Competence Order through the Assembly and Parliament in order to provide us with

the powers that a Parliamentary Bill would not provide us with because one does not exist at that time.

**Q456 Alun Michael:** I take your point about the way the broad sweep of things works but I am looking at a rather narrower situation where there is a choice of which avenue to take. For instance, the Marine and Coastal Access Bill is a piece of legislation that was in formation for quite a long period of time. The aspiration was there back at the time of the 2005 General Election but it took some time for it to get to the point where it was in the Queen's Speech and then in draft and then coming through the process. With that, for example, was it a case of waiting to see how it developed and then looking at how it would apply to Wales, or were you going to the presumably Defra ministers in this case saying, "Look, we have these aspirations as far as the situation in Wales" and affecting the drafting of the Bill itself?

**Mr Jones:** Yes, with the Marine Bill I was involved as a Minister at an early stage because there were particular issues to do with fisheries and fisheries limits. We had an anomaly in the legislation that affected Wales that needed to be dealt with via the Marine Bill, that was the easiest way of doing it, so with regard to the Marine Bill there was ministerial involvement and official involvement at an early stage.

**Q457 Alun Michael:** So that was ministers from the Assembly, yourself in this case, being proactive and having discussion with people?

**Mr Jones:** Yes. When the Marine Bill was first proposed it became clear to me that it would be an appropriate vehicle for dealing with the issue of fisheries and the territorial waters in Wales, where there was a difficulty in terms of identifying which set of legislation applied where. It was a particular issue that had been raised with me by a member of Parliament, and at the time I remember thinking the Marine Bill would be an appropriate way of dealing with that.

**Q458 Alun Michael:** That would suggest that there is a need for the Assembly at official and ministerial level to be quite conscious about the processes that are happening at this end in order to look for where there are opportunities to be creative on behalf of Wales in looking for opportunities in legislation.

**Mr Jones:** We will always do that. Where there is the potential for Measure-making powers in a parliamentary Bill, we will always be as proactive as we can and seek to get involved as quickly as possible. There will be occasions, of course, when there are Bills that appear not to have an effect on devolved government but do, and it is important that those issues are flagged up first so we are able to get involved at an appropriate stage.

**Q459 Alun Michael:** On this question of choice of which avenue, it would appear that when it came to the sprinklers Legislative Competence Order officials in the Assembly thought: "Let's wait until the legislation to change building regulations comes

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along”, and somehow that would be a preferable means, and that led to quite a lot of delay in those powers being brought forward. Is that something that is becoming more sophisticated, do you think, in using each of the avenues as appropriate?

**Mr Jones:** We will always seek to use the most efficient avenue. When it comes to the sprinklers Legislative Competence Order, the dilemma there was, if my understanding is correct, that the sprinklers Legislative Competence Order would devolve a power to us that would have been devolved anyway with building regulations. The hope was that building regulations would have been devolved more quickly than they were, and as a result we were really caught in a dilemma at the time. Now, of course, the matter has been resolved, but I think it took longer than we had hoped for the building regulations structure to be devolved.

**Q460 Hywel Williams:** As we have already referred to the Marine Bill, can I draw your attention to the Planning Bill where there were also problems? In fact, the Welsh clauses, I think, were scarcely discussed at all. Can you explain what has happened there, or what is your opinion of what happened there? Also, is there any danger that in that circumstance and in others the Welsh Assembly Government was leaving action and legislation to the Wales Office, or perhaps the other way around?

**Mr Jones:** No, we would never sit back and watch the passage of any Bill that affected Wales and the devolution settlement without offering a view. That was true of the Planning Bill. I think one of the issues of the Planning Bill was that it appeared, certainly in the first instance, to remove powers that were already devolved, because of the nature of the consents that would be given to the new Planning Commission and they were consents that rested with us, so there was a need to deal with that issue, and we were involved at a very early stage with the Planning Bill even though, of course, it dealt primarily with areas that were not devolved. Again, there was an impact on devolved government because of the issue of the consents that attached to major planning applications, but we were aware of that from the beginning and we were involved from the beginning in negotiations.

**Q461 Hywel Williams:** What is your opinion of the scrutiny in this place with regard to the Planning Bill?

**Mr Jones:** I do not think it is for me to comment on the quality of scrutiny here. Clearly, where there is a Parliamentary Bill, it is a matter for both Houses to scrutinise as they see fit.

**Q462 Mr David Jones:** I would like to raise two matters. First, you acknowledge the importance of the Wales Office. Do you feel that it is adequately resourced? You have already said it is a small department and we have had evidence already that it may be under some strain. Do you feel it is adequately resourced to do the job demanded of it?

**Mr Jones:** I have not noticed any signs of under-resourcing in the Wales Office. We have had more than adequate support given to us in the administration when it comes to not just dealing with government but taking Legislative Competence Orders through the process.

**Q463 Mr David Jones:** The second point relates to the Westminster legislative programme. You have said you have a look at the Queen’s Speech when it comes up but it does seem to me by that stage the legislative programme is already fairly well developed. Does the Welsh Assembly Government not get, if you like, a sneak preview of what is likely to be in the Queen’s Speech?

**Mr Jones:** No, the Queen’s Speech is a matter for the UK Government. Where policies have been worked on so there is a White Paper clearly we would have an input at that stage, or if there is a Green Paper, so we have an idea of what is proposed in terms of policy, but the Government announces the legislative programme of course via Her Majesty, and what we will do is see what the Government programme is and then obviously see if there is any application in terms of legislation, in the same way as our legislative programme is announced in July and that announcement of course is made to the Assembly itself.

**Q464 Mr David Jones:** So you must be under a bit of pressure on the date of Queen’s Speech to see whether there are any opportunities in the legislative programme for Wales?

**Mr Jones:** Yes. We see what is in the Queen’s Speech, we examine in the Queen’s Speech what Bills are proposed, we will then follow up the nature of those Bills to see what detail will be included and then see what the effect will be on the Welsh devolution settlement. There was a time when we would have been, as it were, via the Wales Office bidding for space in the Government’s legislative programme. That is less relevant now, of course, with the advent of the Legislative Competence Order process.

**Q465 Mr David Jones:** The Planning Bill has been mentioned already, and you very diplomatically refused to comment on it, but I was a member of that Bill Committee and I think Mr Michael was too, and Committee members were very concerned that the Wales only clauses did not appear until well into the Committee procedure. They were not debated at Second Reading, they were not debated very extensively in Committee because of timetable and were not debated at all either at Report or at Third Reading. I had a concern that they were not given adequate attention. Was their late appearance the fault of the Wales Office or the Welsh Assembly Government? Or possibly some other department that may have been involved in it?

**Mr Jones:** A great deal of work goes into Bills and quite often it takes some time before clauses that affect Wales can be phrased properly after negotiation and agreement between ourselves and our colleagues here. There are two points to make about Welsh clauses. They are sometimes described

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as framework powers but a better description is Measure-making powers. They are not detailed and the reason is they are simply devolving power and the exercise of that power is subject to full scrutiny via a similar process in the Assembly. The Committee will have had experience, no doubt, of scrutinising Bills where there is a power made available to ministers to make regulations. That is a different process, to my mind. The scrutiny of the powers given to ministers to make regulations is a final process; once these regulations are provided to ministers there is no further scrutiny. There is the process of praying against it, of course, which is rarely used, as we know. With regard to Measure-making powers, the power is being devolved to another legislature that has the same level of scrutiny as both Houses here do.

**Q466 Mr David Jones:** What I am interested in, though, is whose fault was it?

**Mr Jones:** It is not a question of fault; it takes time. There will inevitably be a process of negotiation between both administrations. That may take some months, and the fruit of those negotiations will be clauses in a Bill and quite often those clauses will be inserted late because the negotiations have taken some time.

**Q467 Mr David Jones:** The current Westminster legislative programme includes two Bills which have got framework powers for the Assembly. There are a further three Bills with specific provisions for Wales and confer Executive powers on the Welsh ministers. Since you have become First Minister, what discussions have you had with the Government on the progress of those Bills through Parliament?

**Mr Jones:** The responsibility for the legislative programme rests with, firstly, the Counsel General in terms of drawing up the legislative programme and then with the Minister for Business and Budget in terms of legislation that has already begun and in the system, so it would be primarily a matter for them to liaise with the Wales Office and the UK Government departments to ensure that the view of the Welsh Assembly Government is made clear.

**Q468 Mr David Jones:** Obviously we are due to have a General Election in about ninety days' time. What concerns do you have as to the impact that will have upon your ambitions in terms of legislation for Wales?

**Mr Jones:** It is inevitable that we will want to keep a close eye on the wash-up process; we will want to ensure that the Legislative Competence Orders that are now in the system will be dealt with before then, and that these discussions are taking place not just here, of course, but between ourselves and, indeed, with the Wales Office to ensure that we can get as much as possible dealt with in the wash-up process.

**Q469 Mr David Jones:** How satisfied are you as to the capacity of the Civil Service in Wales to cope with the volume of legislation that is now going through and is affecting Wales?

**Mr Jones:** I think the best test is to examine how much legislation has been found wanting in the courts, and no Measure has been found wanting in the courts.

**Q470 Mr David Jones:** That is a good lawyer's answer!

**Mr Jones:** My previous occupation obviously still has not left my head, but I think it is a point to make. Bad law will lead to frequent judicial review, and that has not happened. Successful judicial reviews have happened infrequently with regard to the Statutory Instruments we have produced, but with regard to our Measures there has been no challenge at all. I think that is a sign of the robustness of the legislation.

**Q471 Mr David Jones:** It is fairly early days though, is it not, at the moment? Are you satisfied that you have sufficient man and woman power to deal with it?

**Mr Jones:** Yes. As you know, judicial review cases have to be dealt with expeditiously. We would not expect legislation to be judicially reviewed after six months or a year. We have in place now a body of law via Welsh Measures and they are regarded as robust and effective. The fact they certainly have not been challenged is a sign, firstly, of their robustness and, secondly, of the abilities of our drafting team to draft law that is both coherent and sound.

**Q472 Mr David Jones:** So you do not feel in any sense under-resourced?

**Mr Jones:** No. There is a limit to how much legislation we can produce but I think that is the same for any legislature. You may notice that what we have tended to do is produce roughly nine pieces of legislation every year, a mixture of Legislative Competence Orders and Measures, and that is sufficient. In Scotland until recently the priority was to take through six or seven Bills a year. What is important is the quality of legislation that is taken through rather than generally quantity for the sake of it. I believe we have produced sufficient quantity and quality of legislation, and the building up of the expertise that we have, particularly the drafting expertise which has been built up almost from scratch, has been effective and the laws and Measures that have been produced have been in my view robust and sound.

**Alun Michael:** Can I refer back to Mr Jones' comments about the Planning Bill? As he said, the amendments which dealt with Welsh issues came late in the process and there was little debate in Committee. My memory is that that was largely because there was support for the clauses when they came forward amongst Welsh MPs and there had been quite a lot of discussion; indeed, on I think at least two occasions the Minister had briefed Welsh MPs here about the way in which the development of those clauses was taking place. I suppose that is less satisfactory than everything being in order when the Bill comes through but—

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**Mr David Jones:** Could I intervene at that point—

**Alun Michael:** Can I just complete my point?

**Mr David Jones:** I think your point is wrong. Your memory is faulty.

**Chairman:** Let Mr Jones answer Mr Michael's question.

**Q473 Alun Michael:** To complete the question might be rather nice. Does that suggest that informal contact with members of Parliament can be a valuable resource for the Assembly in making sure that the aspirations are followed through in terms of the processes here and Wales?

**Mr Jones:** That is correct. Clearly it is important for this Committee to be as informed as possible when it deliberates on Legislative Competence Orders that come before it.

**Mr David Jones:** I think Mr Michael's memory may be possibly wrong. I think the briefing we had from the Welsh Minister was actually after Second Reading.

**Alun Michael:** It was, indeed. My whole point was that, although the clauses came into the Bill late, there was a process of discussion and briefing from the Assembly which meant that Welsh members of Parliament were quite well informed about what was coming forward to the Committee in parallel to the negotiations that were taking place, as the First Minister has indicated, at a fairly late stage in order to make sure that everything caught up, if you like.

**Chairman:** Mr Michael, ask the next question now, please.

**Alun Michael:** Thank you. I just thought it was important to get the record correct.

**Mr David Jones:** So did I.

**Q474 Alun Michael:** On the Legislative Competence Orders obviously there is a fairly straightforward situation, if there is a power that is being sought by the Assembly it is a request "Can we have that power?" and it is fairly straightforward, but has the process of Legislative Competence Orders led to greater working opportunities and understanding between the Welsh Assembly Government and Whitehall?

**Mr Jones:** No, I do not think I would go that far. It has led to closer working between the Welsh Assembly Government and Whitehall but there have been occasions when there have been some intense negotiations in terms of what can and what cannot be devolved. The system is certainly much improved from when it first started but that is inevitable because it was a very new process when it started back in 2007, and there will be occasions where some Legislative Competence Orders take longer than others because they are more complex than others, and the environment Legislative Competence Order is an example of that, but I have to go back to what I said before, the approach taken by various Whitehall departments and, indeed, within different parts of Whitehall departments can vary quite significantly in terms of their understanding of the Welsh devolution settlement.

**Q475 Alun Michael:** How about the amount of priority given to engaging with a Legislative Competence Order proposal? Do you think enough priority is given by departments? Or is that again a variable element?

**Mr Jones:** It varies. There will be some Legislative Competence Orders that are relatively uncontroversial. The red meat levy board Legislative Competence Order was one example which was fairly straightforward and involved effectively contact with one department. In the Environment Legislative Competence Order there were a number of departments that were involved, there were a large number of issues that had to be resolved and that is why the Legislative Competence Order took some time, but it is variable in terms of the approach taken by the various departments.

**Q476 Alun Michael:** Sir Jon Shortridge when he gave evidence to us suggested that Legislative Competence Orders perhaps ought to go straight from the Assembly to Parliament, Assembly to Assembly, as it were, rather than from administration to administration. Do you agree with that idea?

**Mr Jones:** The concern I have with that is the timetabling of Legislative Competence Orders. Clearly, in order for a Legislative Competence Order to be timetabled it needs the support of government, and from our point of view, if it was to be a legislature-to-legislature transfer, there would have to be a great deal of thought given to ensuring that Legislative Competence Orders were taken forward in a timely fashion. Obviously with the support of the UK Government that can be done but without the support of the UK Government it is difficult to see how the process could be taken forward.

**Q477 Alun Michael:** That is true but I think the suggestion provokes quite a lot of thought. One of the benefits might be that the arrival of a Legislative Competence Order here would not do away with the need for discussion with Whitehall departments in order to prepare the ground then for the process of scrutiny, but it would mean that it was out in the open. It would enable this Committee, if you like, to be pressing for progress to be made, which might be of advantage to the Assembly.

**Mr Jones:** I can see the advantage in that but I suppose my concern would be, if that were to happen in the future, that there would have to be processes in place for ensuring that Legislative Competence Orders were taken forward in a timely fashion; they could not be shunted to one side because of a lack of government support for a particular Legislative Competence Order. The advantage we have in the present system is that, if it is taken forward by government, then, of course, it would be timetabled in a timely fashion.

**Chairman:** Mr Jones, do you wish to ask a supplementary?

**Q478 Mr David Jones:** Yes. You have already noted that the Legislative Competence Order process requires to a large extent goodwill both in London

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and in Cardiff. That, of course, is easy to achieve—although possibly not—when you have two governments of the same political hue. How do you anticipate the system will cope with the potential of a change of government in London, possibly towards the end of the next three months?

**Mr Jones:** It is a difficult question to answer because if there were to be a change of government—and you will not be surprised to hear me say I do not accept this is necessarily the case—it would depend on the element of goodwill that government displayed to us in the Welsh Assembly Government. Clearly if we had a system where Legislative Competence Orders were routinely blocked that would cause the system to break down. It does require that level of goodwill and we have had that until now.

**Q479 Mr David Jones:** Of course goodwill operates in two directions.

**Mr Jones:** Yes, but where we, as a legislature, produce Legislative Competence Orders, that is a request for power that has been made by a democratically elected legislature. We have found so far that that has been respected by the UK Government and Legislative Competence Orders have been taken forward. There have been discussions on their content, how broad they should be, that is inevitable to make sure they are as clear as they possibly can be, but we have never had a Legislative Competence Order simply blocked and I hope that situation continues.

**Q480 Mr David Jones:** Presumably you would be prepared to trim your course on appropriate occasions. In other words, to negotiate?

**Mr Jones:** There is always scope to negotiate, of course, but if trimming involved emasculating the Legislative Competence Order or consigning it to the dustbin, then clearly that would not work. There will be occasions, however, as there have been, where in order to clarify the powers that have been devolved there needs to be negotiation and matters will be picked up by this Committee and, indeed, by Assembly Committees in order to make sure that the Legislative Competence Order has the clarity it requires.

**Q481 Hywel Williams:** Earlier on I tried to tempt you to comment on the scrutiny in this place and I think you very wisely declined. Can I ask you about the scrutiny in the Assembly itself, and scrutiny by the Subordinate Legislation Committee? Is there any mechanism where their concerns can be transmitted to members of Parliament, members of the House of Lords, or is it down to individual ministers to take notice of what that Committee says? Is there any way that the system can be changed or improved or strengthened?

**Mr Jones:** The Subordinate Legislation Committee, or the Constitution Committee as it has now been renamed, has historically had a role in terms of examining subordinate legislation, SIs particularly, that are produced by ministers in the Assembly, so they do not scrutinise Measures. Measured scrutiny lies with the legislative committees that exist for that

very purpose. So in terms of subordinate legislation, Measures are subordinate legislation but if we exclude Measures at this point, in terms of the other subordinate legislation that ministers produce then that Committee has a role, but there would not be a role for members of Parliament in terms of scrutinising regulations made by Assembly ministers. That, of course, is a role for Welsh ministers, rather—for Assembly members.

**Q482 Hywel Williams:** And you find that system is working well and does not need to be strengthened or changed in any way?

**Mr Jones:** No, I do not think it does. The Constitution Committee will always look to examine ways in which scrutiny might be made more effective, for example by looking at an early stage at parliamentary Bills, but the scrutiny process we have in place parallels very much the scrutiny that exists here and it is a process that in my opinion works very well, again drawing on the fact that the legislation that has been produced thus far, ie Measures, has been clear and robust, and that is a sign to me of not just the ability to draft properly but also the ability to scrutinise properly, to make sure that the legislation is robust.

**Q483 Hywel Williams:** Turning to another matter, that of the Barnett formula, do you think Wales is being disadvantaged by the present funding arrangements for the Barnett formula?

**Mr Jones:** The Holtham Commission has pointed out the difficulties that exist in the Barnett formula, there is no question about that. I certainly very much welcome the statements made by the Chief Secretary of the Treasury to recognise the fact that there may be a need to introduce a floor beyond which the Welsh block does not drop. The Barnett squeeze has certainly been a reality over the last ten years, but my view is that there is a need to examine the financial arrangements of the constituent parts of the UK with all parts of the UK, I do not think you can necessarily divorce the funding of Wales from the funding of Scotland or the funding of Northern Ireland. There would need to be a settlement across the whole of the UK that is seen as fair across the whole of the UK.

**Q484 Mark Williams:** Following on from that, in the evidence the Welsh Assembly Government gave this Committee it was quite clear that the undertaking by the Secretary of State for Wales did not go far enough. You have commented you welcome the announcement as far as it goes. What more would you like to see? You mention you want a UK-wide approach to this. What discussions has the Assembly Government had or is the Assembly Government likely to have with the other devolved administrations on pushing this agenda forward?

**Mr Jones:** Certainly there was a quadrilateral planned between Jane Hutt as Minister for Budget and Assembly Business. Unfortunately her Northern Irish and Scottish colleagues were not able to attend but she discussed the issue with Liam Byrne. It is a significant step forward that the

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Treasury acknowledged that there is a need to examine the process at least; that is quite significant as far as the Treasury is concerned. I do not think you can necessarily divorce the findings of the Holtham Commission, of course we have had the first set of findings at the moment, from Calman and from the funding of the UK as a whole. There will be, certainly to my mind, some point when all the administrations in the UK will sit down and work through a new settlement. The fact that Calman is something that will have a significant effect on the findings of Scotland does mean that that cannot be divorced from the finances of Wales and the need to examine carefully what is best for the people of Wales.

**Q485 Mark Williams:** Specifically on the announcement that the Secretary of State made on November 26, do you foresee any specific changes to the money received by Wales as a result of this announcement? I guess the statement is based on your evidence which was that convergence is not currently expected in the coming years.

**Mr Jones:** That may well be correct but it does mean that the next step, to my mind, is to introduce a floor below which the Welsh block would not fall in order to ensure that convergence comes to a halt. It may well be that practically that will not happen for the next few years but nevertheless the mechanism needs to be in place. Clearly the Holtham Commission has identified the various shortcomings of the present financial arrangements; as I said, you cannot divorce it from the arrangements for the rest of the UK, there are inevitable knock-on effects. We have benefited in Wales very much from the Barnett formula over the past thirty years but clearly the findings of the Holtham Commission indicate that the time has come to examine carefully whether the arrangements should continue in their present form.

**Q486 Alun Michael:** On the Barnett formula, the search for fairness in a variety of different formulae can lead to unintended consequences. Over the years I have dealt with the local government formula, the Health Service formula, the police grants formula, and in each case one of the problems has been unpredictability; you can have variations from one year to another as a result of some of the indicators changing. Would you agree that it is important in whatever fairer system comes into place that it also has a degree of predictability for a period of time so that people can plan ahead and so that you can plan ahead in terms of the application of resources?

**Mr Jones:** That is absolutely right; that would be very helpful indeed. The Holtham Commission was set up to look carefully at the financial arrangements for Wales. It was an important step, and remains one because it is still in being, because we needed to examine the evidence to see whether or not the Barnett formula was still fit for purpose, as it were, because naturally when a proven formula is being replaced there will inevitably be concerns that the replacement for that formula might lead to unintended consequences, but clearly the Holtham Commission has made its recommendations, we are

examining those very carefully, and I am grateful for the work the Secretary of State has put in to make sure that the arrangements for the funding of Wales are on the radar for the Treasury in the same way as the Calman recommendations are.

**Q487 Alun Michael:** Are you looking for some sort of mechanism that would ensure there is a degree of warning? It is always easier to cope with a change that increases your income rather than one that reduces it, a bit of spare money never comes amiss, but some sort of damping mechanism to ensure you have predictability a couple of years ahead?

**Mr Jones:** It is difficult to comment on what the actual mechanism might look like at this stage. The Holtham Commission has identified the need for a needs-based formula, what one could describe as "Barnett Plus" because it is introducing new factors into the formula that they think are appropriate. For a formula to be successful there has to be certainty and trust, and Barnett gave us that for a number of years but circumstances have changed since the late 1970s, and clearly Holtham has indicated there is a need from the Welsh perspective to examine the arrangements. Calman has identified the arrangement he felt was appropriate for Scotland illustrating the point that these arrangements have to be dealt with on a UK level and Wales cannot be dealt with in isolation from Scotland or Northern Ireland or, indeed, the English regions.

**Alun Michael:** I would urge you to look at that question of predictability over the period ahead.

**Q488 Mr David Jones:** In its evidence to the Committee the Welsh Assembly Government has expressed concern that the Treasury acts as judge and jury in the case of disagreement over how the Barnett formula operates. I guess that will be a concern uttered by Whitehall departments too, so you are probably not alone. How confident are you in the Treasury being the ultimate arbiter of funding for the devolved administrations?

**Mr Jones:** There are two factors that are important. Firstly, the Treasury will determine the amount of money made available generally. Secondly, there needs to be in place a formula that is seen as a fair and transparent formula for distributing that money. If the formula is in place then the Treasury is obliged to distribute money according to that formula, so the importance of having a lasting formula that is seen as fair across the whole of the UK is obviously essential.

**Q489 Mr David Jones:** But it is essentially the Treasury who decides whether or not that formula has been adhered to; there is no right of appeal, no independent tribunal. You are stuck with the Treasury's decision.

**Mr Jones:** That is the case at the moment, yes, but it is something that could be expected given the fact that it is the Treasury. I know there are proposals for an independent tribunal; I think the first step is to get a formula in place. If the formula is robust enough then there would be no need, in my view, to have an independent tribunal.

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**Q490 Mr David Jones:** Was the Secretary of State's announcement as to his concordat with the Treasury so far as you are concerned anything more than comfort? Is it anything you can rely upon? In fact, do you even understand what he has agreed with the Treasury?

**Mr Jones:** Yes, because what has happened is that the Treasury now recognise that there is an issue with the present function of the Barnett formula via the Barnett squeeze. The Treasury recognising that that is an issue and potentially a problem is a significant step forward. The recognition of the issue will leave that open now to deal with the issue in future.

**Q491 Mr David Jones:** But it does not go beyond that, does it? All that is agreed is that the Treasury may take some unspecified action. It really is no clearer than that.

**Mr Jones:** The fact that it is now on Treasury's radar is important but also the Treasury will, I have no doubt, be examining the situation in Wales at the same time as examining the situation in Scotland through Calman. What was important for us is that the Calman recommendations were not taken forward in isolation but there was also, at the beginning certainly, a recognition of the issues that affect Wales, and of course then what we hope to see in the future is a commitment to dealing with the issue and providing ways forward based on the recommendations of Holtham, and as far as Scotland is concerned the recommendations possibly of Calman.

**Q492 Hywel Williams:** Can I ask you a broad question as to your ambitions as First Minister concerning negotiations with Whitehall? You have referred a number of times to the historic context as far as Scotland is concerned compared to Wales and then again now in the discussion about Barnett. The point is not just to understand history but to change it, as it were. Can I ask you what your ambition is as the First Minister? Are you going to be transforming the relationship or is it a matter of steady as she goes?

**Mr Jones:** That is a very broad question. It is essential that we continue to make sure that the level of awareness of the Welsh devolution settlement is raised across the whole of Whitehall. It is fair to say that in some departments there is a great level of awareness. I mentioned the Department for Transport and the fact they have a devolution co-ordinator and champion. The relationships between the various departments that deal with agriculture has always been close because there has always been a need, because in the main agricultural policy as far as Wales is concerned is determined either in Cardiff or Europe, there is very little input in terms of UK Government and we had a practice of a meeting for ministers across the UK every month to determine the line that the UK government would take at the forthcoming European Council, and that worked very successfully, and as a result there is a great deal of understanding on the devolution settlement within what then became Defra. It is also fair to point out that there is a good understanding of devolution in some departments that primarily deal

with non-devolved areas, and the Home Office is an example in that regard. So it is not a question of does the Department deal regularly with devolved administrations or not and does that affect their understanding of the Welsh devolution settlement, it does not work that way. Much depends on the interpretation quite often of individual officials in terms of what is devolved and what is not.

**Q493 Chairman:** Could I end by asking you a question about the Welsh Civil Service? That is emerging as one of the key themes of this inquiry, and without anticipating what we might say in the Report, because we still are taking evidence, could I have your thoughts on the observations made to us by your Assembly colleague, Andrew Davies, where he talked about the Welsh Civil Service having a preoccupation on policy, including legislation, and did not spend enough time on strategic thinking? I will illustrate that point by saying that Sir Jon Shortridge remarked rather surprisingly that he thought that the Wales Office would wither away. It occurs to me, given what you say about the strategic role of the Wales Office today and in the recent past, that is a very strange observation really, and it lacked strategic thinking on his part.

**Mr Jones:** The role of the Wales Office would change significantly if the Assembly had primary powers because, of course, there would then be no need to take forward the Legislative Competence Order process, and much of the work that the Wales Office does now would not need to be done. There would still be, of course, a need to represent Wales' interest when it came to the financial settlement and in terms potentially of non devolved areas. I cannot comment any further on what Sir Jon said but, as I say, where we are now the Wales Office is absolutely essential to the Legislative Competence Order process and, indeed, in terms of delivering legislative powers to the Assembly and representing, for example, the interests of the Assembly Government with the Treasury; that much is very clear. In terms of the Welsh Civil Service, I know that the Permanent Secretary will be giving evidence to you in a moment but what I would like to see the Welsh Civil Service do is focus very strongly on targets. I have taken responsibility for public service delivery myself as First Minister in order to drive that forward. I would not want to see the Welsh Civil Service become insular in its thinking. It is absolutely essential that we have secondments, not just to Whitehall departments and *vice versa* but to local government and public bodies and, indeed, to private organisations as well. I think that strengthens the Civil Service quite considerably. The one thing I have noticed over the past ten years is that there are a number of very talented young civil servants now who are working for the Welsh Assembly Government and they are people who would not have gone to the old Wales Office because it did not do very much as far as they were concerned; there was not the opportunity for policy development or the opportunity for them to develop their talents, and to me it is very encouraging that we have some

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very talented people who are in the Welsh Assembly Government and some opportunities for them to use their talents.

**Q494 Chairman:** Could I end by asking a question about the Legal Services Commission? As you are aware this inquiry grew out of certain decisions taken by the Legal Services Commission a year ago about the status of its Cardiff office, and in a short inquiry we held in the spring of last year it was revealed to us that there was something of a—I cannot think of an appropriate English word for it—“cawlach” in the way that everyone performed. What role did the Welsh Service have in all of that? At that time you had a central place in dealing with this, I am sure.

**Mr Jones:** This was not something that we were informed of until the effect of the announcement was made. It was clear that thought had been given to the decision that the Legal Services Commission would make but thought had not been given to the impact on devolution and the impact on Wales. After all, the Legal Services Commission is an England and Wales

body and to service Wales from outside Wales was, to my mind, strongly unacceptable. But there were practical effects as well as presentational effects, if I can put it that way. For example, the Legal Services Commission may well have been asked to take a decision as to whether legal aid should be granted for an individual to pursue a case that would involve the interpretation of a Welsh Measure. Now, that would involve somebody sitting in an office possibly in Bristol being asked to take a decision on granting legal aid to somebody to challenge a Welsh law, and that clearly would have created some difficulties and it was important that there was an office in Wales to deal with those situations, as well as a recognition that the Legal Services Commission is, indeed, a body that serves both England and Wales. I am searching for a translation of the word that you used for the benefit of the stenographer and possibly the closest I can come to one is “mess”!

**Mr David Jones:** Dog’s breakfast!

**Chairman:** I am grateful to you for your assistance and thank you for your evidence. I hope we will have a productive relationship, if we are all here past the election, into the future.

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*Witnesses:* **Dame Gillian Morgan DBE**, Permanent Secretary, **Ms Kate Cassidy**, Head of Constitutional Affairs and Policy Support Division, and **Mr Andrew Felton**, Head of Constitutional Affairs and External Liaison Team, Welsh Assembly Government, gave evidence.

**Q495 Chairman:** Good morning, Dame Gillian. Could I ask you to introduce yourself once again and your colleagues please?

**Dame Gillian Morgan:** I am Gill Morgan, Permanent Secretary. On my right is Kate Cassidy, who works in our Constitutional Unit, and on my left is Andrew Felton, who does a lot of the interface between us and Whitehall departments in a strategic way rather than on an item-by-item basis.

**Q496 Chairman:** Thank you very much. Could I begin where I ended with the First Minister a moment ago by referring to Mr Andrew Davies’ comments about the Welsh Civil Service apparently having, in his words, a preoccupation on policy, including legislation, and not spending enough time on strategic thinking. What are your thoughts on that?

**Dame Gillian Morgan:** Much of policy has to be based within a strategic framework so I would argue you cannot really develop effective policy unless you understand the strategy you are trying to achieve, so the two are not divisible into saying here is a big strategy, here is a policy; they have to be integrated. In terms of looking forward, strategic planning and understanding the five-year dimension, because that is one of the opportunities the Civil Service can bring, we have actually brought in a lot more over the last 18 months economic modelling, forecasting and testing out scenarios as part of the way that we work as a senior team at director general and at director level. Every couple of months we have a whole day where we take a theme and just worry it through in terms of what it will mean in ten years for

Wales, to check that what we think about this year is actually robust in getting us to where we want to be in the longer term.

**Q497 Chairman:** I am tempted to go on and ask about Sir Jon Shortridge but I think that colleagues wish to ask questions about his observations in relation to the Wales Office and clearly we will explore that in a moment. Could I go back to asking you about the need for you to respond to the criticism that inadequacies in Civil Service resources in the Welsh Assembly Government have caused what is described as a “legislative deficit” with inadequate consultation and research and slow timetables for implementation. Is that a fair observation?

**Dame Gillian Morgan:** I think it is slightly unfair. One of the interesting issues for me coming into the Welsh Assembly Government, not having been a civil servant before, is that one of our big challenges—and this is not said as a plea for extra staff or extra resources—is that when you look at the resources we have to do the work and you compare what is available in Whitehall, there is an incredible difference. For example, for the whole of the policies that we do around health effectively we have 23 senior civil servants who do the policy work, they manage the implementation, they follow through the performance. The Department of Health has 260 people carrying out relatively similar work. So we have not a capability issue but a capacity issue in the sheer numbers and the sheer seniority of people that we can feed into some of the programmes. One of the things that we are working on at the moment as a

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major change programme is thinking about how we can use people more interchangeably. For example, how we can make available teams with a set of skills around legislation to another department when the LCO moves over there. We are changing our structure from being very Whitehall-modelled with lots of separate silos into something which is much more inter-connected, where the specialist skills can be used on behalf of many departments rather than one department, because if we try to do it in a Whitehall model we will never survive because we will always have far fewer numbers of people at a senior level to do the work. Therefore, we are having to create a very different model of delivering the Civil Service from the traditional Whitehall model. Interestingly enough, we have come to a model which is very similar to the model that is being used in Scotland, although we have come at it from different purposes, and we are very different from what you would see in a traditional Whitehall department.

**Q498 Chairman:** That is very interesting. How helpful did you find our cross-border inquiry in that context? As you will know, this Committee had a self-denying ordinance in not going into devolved matters but in more recent times we have cautiously entered the terrain via the cross-border inquiries. Did you engage very much in what we were doing and what did you learn from what we were doing?

**Dame Gillian Morgan:** I find the cross-border work very interesting and very helpful. I think the difficulty of that work for civil servants is what it often teases out is the political differences and judgments taken either side of the border because services are based on different philosophies. What I was very clear on though about some of the examples in terms of cross-border work was that as officials we had not sorted out some of the minutiae, and the minutiae that we could have sorted out was creating more and more problems. Obviously I had a particular interest on the health side. I felt that officials could have done more work on the 80% which was technical rather than worrying about the 20% which was political in terms of different style and philosophy. We need to think and have thought differently about how we engage much more consistently with Whitehall departments on those issues and what is the nature of support that officials need to put into the political process.

**Q499 Mr David Jones:** But it is not just the minutiae, is it, it is also strategy, and in fact personally I was quite shocked when we had evidence from the Deputy First Minister to hear that the Wales Freight Strategy had been developed apparently without any great liaison with the Department of Transport. Is that sort of deficit being remedied now?

**Dame Gillian Morgan:** Very much so. One of my observations coming into the Civil Service and coming into Wales was that lots of work in Whitehall in terms of strategy is done by very senior people who are at under-secretary level and I think Sir Emyr Jones Parry referred to that. We have had very few people at that level of seniority, so we have often

found it very difficult to engage with Whitehall departments because we put in somebody very junior (who is our senior person working on a piece of work) and there is a big gap. In the restructuring I have taken out some of the middle grades to allow us to have people of sufficient seniority to work alongside on a continual basis. An example of a piece of work that we have now started is a board between DWP and ourselves jointly chaired by a director general (that is an under-secretary) at DWP and by our director general who looks after children and skills. That is doing the strategic connection as well as the operational work on a monthly basis. Part of the reason we are able to do that is we now have people of sufficient seniority who can go to the meetings where other senior civil servants attend. Sir Gus O'Donnell runs a group called the Top 200 which is basically people of that level and they are the strategic heart of Whitehall. Up until last April there were only two people able to attend from Wales and we did not have the relationships. Now the director generals here are able to attend and are beginning to develop the type of relationships which you need to maintain long-term strategic work rather than the first time you meet people being around a problem. That is not a very effective way of doing work. We are trying to make sure that we are much more effective in binding ourselves together. We are also trying to be—and I think this is quite important—much more assertive because there is some stuff that has gone on in Wales which is actually a model and is very good work that we need to be showing and demonstrating to Whitehall colleagues because it actually gives the answer to some of the things that people in Whitehall are struggling with.

**Q500 Hywel Williams:** You referred to working with the DWP. Can I ask you about a case in point therefore. Can you tell the Committee what sort of link was there when discussions were being carried out on the Personal Care at Home Bill and the Green Paper and the proposals about DLA and attendance allowance which as an outsider seemed to me to be—and it is not a phrase I like—devolution-blind as far as the proposals for England were concerned?

**Dame Gillian Morgan:** I think for departments where some of the work is devolved and some of the work is not devolved it is very easy, by pure omission, to be blind. I think DWP have had a recognition over the last year about how important it is to think about devolution and they have actually changed their structure. They have recognised very much this issue about “for Wales see Scotland” as a genuine issue where people think because the settlement is like that with Scotland it is symmetrical with Wales, and of course it is an asymmetrical settlement. DWP have worked hard with their in-country managers to make sure that they begin to build up a much stronger relationship. It is important to remember that the majority of our contact with DWP is not about Bills; it is about how do we jointly deliver services to citizens in Wales. When we look at that operational level we have very close working with DWP and have been able to put in some very

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innovative work around Merthyr and places like that where although we report in two different ways on the ground the service is integrated. That is not a flavour that has come out yet in terms of the review, this integration around delivering services to the citizen, which I think in many places is excellent between us, DWP and the Home Office.

**Q501 Hywel Williams:** The point I came in at was the strategic thinking. It seems to me that Wales did not seem to have been considered.

**Dame Gillian Morgan:** No, and that is one of the reasons that we now have this joint strategic board sitting with the two directors general who meet now on a monthly basis, not only to talk about the day-to-day integration of services but to talk about the strategic vision that we both have and how we can do things collectively, and of course in Wales we have some opportunities with European funding to be able to push further on things than perhaps you could do in Whitehall. Those are now being discussed in a much more open way than they would have been a year ago.

**Q502 Mr David Jones:** You were quoted in the *Journal of the Institute of Welsh Affairs*—and you know what I am going to say—as saying that you were struck in your first year as Permanent Secretary by “a lack of genuine commitment to devolution and a culture of arrogance in some Whitehall departments. In many respects Wales is off the radar in London.” You have touched on that in your answer so far but can you say who is most guilty of this culture of arrogance?

**Dame Gillian Morgan:** The use of the word “department” was an error because I think it is individual civil servants. You meet it in every department. You will meet people who just think we are from the boondocks if we come up from Wales and in the same department there will be some people who are absolutely excellent and who come and try and learn. What we have tried to do over the last year is be much more assertive about what we do well, inviting people down, sending material on things when we think we have leading edge stuff, of which there is a lot, and trying to generate a reputation in Whitehall because we do things well not because we just whinge when people forget about us.

**Q503 Mr David Jones:** I was going to ask you how you feel Whitehall could get better at considering Wales. One of the suggestions that Sir Jon Shortridge had, as you probably know, is that there should be devolution specialists embedded in each Whitehall department. Would you agree with that?

**Dame Gillian Morgan:** I think you need a combination of approaches. I was reflecting on Sir Jon’s report because I think over the last year there has been a significant sea-change at senior level. For example, Permanent Secretaries have visited Wales, found out about our settlement, and had discussions about things we are doing in common. There is a stock-take going on at the moment of what departments are doing. Many departments have

appointed and refreshed their devolution champions. Many departments have had much more engagement, so for example the Foreign and Commonwealth Office lent us somebody with expertise to do a piece of work and we lent them Andrew to go back to the Foreign and Commonwealth Office to help them renew and refresh the programme that they are doing. I think the leadership that Sir Gus has provided in terms of thinking about devolution and keeping devolution on the agenda in all the Permanent Secretaries’ meetings has been exemplary over the last 18 months.

**Q504 Mr David Jones:** Does that also extend to ministerial level? Are you finding that ministers are alert to devolution?

**Dame Gillian Morgan:** Ministers are differently alert depending on whether their portfolio has issues that overlap with devolution. For example, in the MoD there are some things where there is overlap but in general there is very little overlap, so when something has a devolution issue it is not unusual for officials, not through any sin of evil or whatever, just not to remember about the devolved administrations until late in the process. What is now happening is that people are being much more open in the Civil Service about those things and sharing the lessons and the learning between departments. Sir Ian Andrews wrote a very useful memorandum that he sent to all the departments after something which had caused a little bit of internal friction saying “If we do these things it will make a difference.” I feel there is a lot more recognition now than I felt when I started 18 months ago.

**Q505 Mr David Jones:** Have you read Sir Jon’s evidence to this Committee?

**Dame Gillian Morgan:** Yes.

**Q506 Mr David Jones:** Would it be fair to say things have moved on quite a bit since his day?

**Dame Gillian Morgan:** I believe so. I believe I give a lot of priority to get to the weekly meeting of Permanent Secretaries. It can be a great chore coming up from Wales to do it but it is really important because by knowing people you are able to unlock problems in a very simple way. I am making sure the senior team have the same sort of relationships with their peers and, as I say, we are being very proactive when we have something good at telling people, which is a bit counter-cultural for Wales. We have not tended to blow our own trumpet as much as we might have been able to, so we are being a bit more assertive.

**Q507 Alun Michael:** I think you have partly answered my question in the sense you implied that you have been able to put Wales on the radar more in Whitehall over the last year or so.

**Dame Gillian Morgan:** Not just Wales. I work very closely with the Permanent Secretaries in Scotland and in Northern Ireland and we work together, we

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do joint work outside, and we work out how collectively we keep the devolved issues on the agenda.

**Q508 Alun Michael:** In saying that I wonder if you could point to specific outcomes that have resulted from this change of relationship?

**Dame Gillian Morgan:** Yes, I can point to a particular LCO where it had reached an impasse which was involving a large amount of political input. The impasse was really about whether or not we would choose to pass a Measure that was in conflict with European law, which quite clearly we never would because we could not.

**Q509 Alun Michael:** Was this in relation to environment?

**Dame Gillian Morgan:** No, and I picked the phone up to the Permanent Secretary and the issue was resolved in half an hour. That is because I know him and I have had a conversation with him and we have talked about devolution and we have talked on other issues where it has gone wrong, we have had those direct conversations.

**Q510 Alun Michael:** So there was groundwork of understanding to start off with?

**Dame Gillian Morgan:** Indeed, and I could quote another example where another department resolved what could have been a significant financial Bill for us because the Permanent Secretary himself went to resolve those issues for us. It had implications for England but Wales picked it up and we were at the front end of arguing. That sort of personal help is what the Permanent Secretaries Group does and I feel very supported by my individual colleagues there.

**Q511 Mark Williams:** The Assembly Government has called for “a focus within government for its policy on devolution”. What in your experience has been the role of the Cabinet Office in co-ordinating Whitehall’s response to devolution issues?

**Dame Gillian Morgan:** Over the last 18 months I think the thing that has really improved the situation has been Sir Gus’s direct involvement and the involvement of the Cabinet Office. I think the fact that he keeps it on the agenda, and has issued personal guidance, the fact that we have seconded people into the Cabinet Office to help work on that, has been very important. I think we end up with three overall types of relationships. There is a big constitutional issue which is where does devolution go, which is the type of debate we should have with the Ministry of Justice. There is the nitty-gritty debate we have on a day-to-day basis with the Wales Office and individual departments and then there is a strategic co-ordination role sitting in the middle which is no different really from devolution in putting together what happens between Defra and DECC in terms of the different perspectives around energy policy or animals. I think it sits there appropriately and that is why I feel convinced that it is very important that the Permanent Secretaries of the devolved administrations continue to attend the

Permanent Secretaries’ meeting because that is where you can actually move things along quite significantly.

**Q512 Mark Williams:** Notwithstanding the three demarcation lines that you drew there, and you seem very cheerful about the role of the Cabinet Office, would you welcome some form of enhanced role for that body?

**Dame Gillian Morgan:** The Cabinet Office has quite a direct role with me personally because I report to and I am appraised by, with input from the First Minister, the Permanent Secretary, so I feel I have direct contact and a relationship with the Cabinet Secretary around how I do and I would look to him in terms of providing support if I needed it, and he would be very ready to provide it. Through those conversations I think it has improved significantly the debate and we have seconded, as I say, people from Wales who have been able to help write some of the personal letters that Sir Gus has sent out. I think if everybody followed the personal letters there would be no administrative difficulty whatsoever because they are very clear and very well written.

**Q513 Hywel Williams:** I just wanted to ask you about the current rigorous examination of Whitehall departments of their approach to devolution. I think you have answered a lot of it already in fact. What is the Welsh Assembly Government’s involvement in that current rigorous examination?

**Dame Gillian Morgan:** We were involved through secondees in helping shape what the stock-take looks like. We were involved through the debates of the Permanent Secretaries’ meeting in reflecting back our views of how well people think they are doing. We are involved at our end by doing a comparative view of how we do when we ask ourselves those questions, because we make lots of mistakes in terms of devolution as well. This is a two-sided set of relationships and sometimes we fail to engage or to recognise that there is a challenge there. We feel we are very actively involved in shaping some of those issues.

**Q514 Hywel Williams:** Thank you. You have referred a number of times already to secondments. In fact, you referred to Mr Felton and the FCO. Is there room for a more systematic approach to secondment between London and Cardiff and also Cardiff and Edinburgh?

**Dame Gillian Morgan:** Yes, we are doing exactly this. Most of our secondments are to the Wales Office and I think that is very helpful because it means people understand both aspects and civil servants are very good at respecting the different lines, so we handle the fact that there is different knowledge without any problem there as part of our professional expertise. We are talking about more secondments to departments like the Treasury, both ways. A long-standing debate in Wales has been about whether we should move to something which is either a Welsh Civil Service or a Welsh public service. I am trying to reframe that debate because we need to be able to have secondments to Whitehall, to Scotland, to

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really get the best of the UK Civil Service, which is within the best half a dozen civil services in the world, and in parallel we are trying to develop a set of relationships and secondments to public services because we need to have closer contact with public services. We have a debate with the CBI about more exchanges. That is part of the talent programme that we are running through our People and Places Director General. We are trying to make sure that we identify where best we play our civil servants in and where best we play the cohort of people whose future may be interchanged with other public service organisations. The set of skills you need for that is quite different from the set of skills you need to be a Whitehall civil servant and to be able therefore to do the policy, the legislation and strategy.

**Q515 Hywel Williams:** We have heard evidence that Cardiff civil servants are reluctant to take up secondments and I do not know whether that works in the other direction as well. What can be done to encourage them?

**Dame Gillian Morgan:** We find that there is not as much resistance if you think carefully about the talent management. The conversation we are having at the moment is not just about devolution but it is about how we improve our professional standards altogether as civil servants. We are taking a much more active role in saying X is a really talented person, they have a future to become a Permanent Secretary. As part of their development they must/should spend some time in Whitehall or they should/must spend some time in Brussels, because we have a lot of secondments to Brussels as well, as part of making sure Wales has the capacity and capability grown in our own staff by us being a bit more bossy in terms of career development.

**Q516 Hywel Williams:** I am intrigued to hear you mention Brussels. I was going to ask you about that but I did not want to appear too insular on these matters. Could you expand a little on secondments to Brussels, how those work and how popular they are?

**Dame Gillian Morgan:** We have two opportunities in Brussels. We have our own office and we have the opportunity obviously to go into the EU machinery. We run for our own staff a couple of times a year not a taster but a market-place, and at the last one I went to which had our Brussels people coming we had about 60 Welsh Assembly Government civil servants in the room who were being coached in how to apply. It is about that sort of attendance each time so there is significant interest from people in doing these sorts of secondments. Of course it has to fit at the right time in your career, in your family life, and it is often not a reluctance to go; it is "how do I find the right timing to go in terms of living this broader life?" We are having much more active engagement. Personally I feel very generous because I have sacrificed my personal supporter who is acting in as director for Peter Hain!

**Q517 Hywel Williams:** Can I ask you a question about making sure that the devolution settlement is well understood throughout the service. Would a common Civil Service Code for the UK, setting out common principles of devolution, be a way of ensuring that?

**Dame Gillian Morgan:** We have been talking and we have been offering and have run—and maybe Andrew you want to answer—some training for people and we have been talking to the National School of Government about how every course for every civil servant should talk about devolution as part of the intrinsic basic thing because it is now for the UK and for the Civil Service as intrinsic as freedom of information or the Civil Service Code and devolution should be there in the same sort of way. Andrew, do you want to comment on your experience?

**Mr Felton:** I think what we have tried to do over the last couple of years is work with the Cabinet Office and with the Ministry of Justice and the Wales Office, and of course the other territorial offices, to make sure there is more and more training offered not just on devolution, which they have done a pretty good job on over the last couple of years, but for us particularly it is about getting the Welsh settlement, it is a recurring theme of this inquiry, and to get the particular features of the Welsh settlement embedded as far as we can in the Whitehall mind-set so at least everybody has a general alertness and understanding. Even if I do not know all the answers on devolution at least I have a general understanding about what I need to know and I can go and ask the devolution champion for example. So, yes, we have certainly done some good work with the Wales Office. We have tried to build on the back of that general devolution awareness-raising by offering tailor-made seminars in particular departments. We have done one recently with DCMS and the same with DECC; we have other ones lined up with the Home Office and DWP. As Gill and others who have given evidence to the inquiry have said, it is about getting Whitehall officials to come down to Cardiff and the Merthyr office and the Aberystwyth office to sample and see devolution in action. Recently we had devolution strategy officials from the Ministry of Justice come down partly for a day of strategic thinking and how we can move forward but also to come and see First Minister's questions. It so happened it was our current First Minister's first First Minister's questions so it was a pretty good day really. Similarly, next week we have the devolution strategy people from BIS coming down and they will hear the Assembly Plenary debate as well as having some strategic review meetings about the relationship going forward, so we have done quite a lot in the last six months.

**Dame Gillian Morgan:** We like to remind everybody that we have government buildings that came in on time and on cost.

**Q518 Chairman:** It occurs to me following our earlier inquiries with regard to higher education that some arm's length bodies such as HEFCE did not seem to understand the full nature of devolution and

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the central role of the Wales Office and there is a need for such bodies to be up to speed in terms of understanding the relationships between the Wales Office and Whitehall. Do you actually do any training of these arm's length bodies? They should know it themselves but it occurs to me that they should be part of some training programme as well.

**Ms Cassidy:** We did do briefing for those bodies, particularly in the context of the Government of Wales Act being passed, so as well as doing blanket training for all the staff in the Welsh Assembly Government about what the implications of those changes were going to be and the basics that everybody should have in their mind about the distinction between the Welsh Assembly Government and the National Assembly for Wales, for example, we made sure that every division that was sponsoring one of those public bodies gave that briefing to the management teams of those bodies. It may be that it is always timely to keep refreshing that. We have kept going the internal training on a demand-led basis. We can certainly look at keeping up and checking that any changes of staff in those other bodies are also brought up-to-date.

**Dame Gillian Morgan:** The other thing that is also very important to us—and I think it surprises people—is that under 20% of civil servants in Wales work for the Welsh Assembly Government and over 80% work for Whitehall departments. I run a regular meeting which is called the Heads of Government Offices, and we involve arm's length bodies as well in that meeting. That has an HR sub-group because one of the things I think is really important is if we have civil servants in Wales and there are changes in staffing levels we work hard in the Welsh Assembly Government to replace and move people. About 10% of our appointees are now coming in from other government departments often with changes, and in the recent HMRC work we have been able to help revolve over 100 of the people by linking together on the HR network. We are looking to do that in a much more dynamic way so that for civil servants in Wales, even though theoretically they have nothing to do with the Welsh Assembly Government, we provide some strategic leadership because we have an interest in the whole community, and they are jobs and we want jobs in Wales.

**Q519 Mr David Jones:** You are clearly very enthusiastic about the opportunities available to your staff through secondment. To what extent, if at all, do you think it would be affected by a change of Government in London?

**Dame Gillian Morgan:** I hope it would not be because I would hope people would have confidence that one of the key skills of civil servants'—and not just skills, it is part of our mantra—is about impartiality, it is about not sharing information that would be quite inappropriate. I do not think on an official level and in terms of exchanges it should make any difference who the party of government is because civil servants have to respect and are impartial in what they do.

**Q520 Mr David Jones:** I understand that but it must, equally, be very difficult for civil servants who are put in the position of having to serve a political master of a completely different hue, who probably will have completely different political ambitions from their previous master.

**Dame Gillian Morgan:** It is no different from the Welsh Assembly Government, if you are seconded between departments, if there were a change in Government in Whitehall. A civil servant coming to a secondment in Whitehall would serve the ministers in that department. That is what they would be there for.

**Q521 Mr David Jones:** I understand that but pre-devolution what you had was a big bang on the day of the general election when you would have a complete change of Government. It must be much more difficult when you have different administrations co-existing in different parts of the country.

**Dame Gillian Morgan:** I think for officials it is easier than it is perhaps for politicians because the standards of the Civil Service Code are so clear and explicit about impartiality. Our role is to serve and deliver for the elected Government. If we second somebody to a department they are part of that department in terms of their work. We have no performance management of that individual. They would be performance managed within that department and therefore would serve the Government of the day irrespective of hue or difference with Wales.

**Q522 Mr David Jones:** Could we turn to the Wales Office. Do you consider that it is adequately resourced to represent Wales in Whitehall under the current settlement?

**Dame Gillian Morgan:** I have been pleasantly surprised about the support that we get from the Wales Office. We have not found anything where we have needed help or support where there has been a lack of capacity in the Wales Office.

**Q523 Mr David Jones:** Does it have any spare capacity or is it fully stretched?

**Dame Gillian Morgan:** I think it has some opportunities in terms of thinking about some of the routine functions and how those are provided, but part of this challenge is trying to deliver in two places. You have an office in Cardiff as well as an office in London, but we have never found, even when there have been things that needed to be dealt with rapidly, a problem where they have said we cannot deal with it because we are overworked or we do not have the capacity. The relationships work well and effectively at the moment.

**Q524 Mark Williams:** You touched earlier on on a lot of what I am going to ask about. You have been talking a lot about the building of relationships at all levels, and the seemingly successful building of relationships. Underpinning that the Welsh Assembly Government has called for a more robust set of arrangements for inter-governmental

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relations, in other words building clear structures rather than those day-to-day engagement matters. What else do you envisage in terms of the framework of those relationships? How could Parliament and the Assembly keep abreast of developments as they occur?

**Dame Gillian Morgan:** Whilst I am emphasising in a lot of what I have said how you build relationships, good strong governance and good clear arrangements are at the heart of solving problems. If you go back to the Nolan principles, the things you write down for governance are not for times of peace but for times of trouble. If you have got written arrangements, my view is that the process of developing the resolution mechanisms is more important than the resolution mechanism itself, because you have to talk about the difficult issues and about tensions, and by putting these on the table it actually helps you manage on a day-to-day basis, so I am very keen on things which talk about governance. I am also very keen on, and I think it is an emerging theme that we will have to think about at some time, and I think in our evidence we talk about it, parity of esteem. You could phrase the question if there are four fully devolved services why should the UK service always lead the work at times of trouble. You could talk about sharing it. The British-Irish Council, where you have the four countries plus Eire, the Isle of Man, Jersey and Guernsey, has been very effective at sharing work out as equals. There is some learning in the parity around the room that could be built in and could strengthen the sort of JMC-type of settlement. That works very effectively on a range of policy areas which are of shared and mutual interest.

**Q525 Mark Williams:** What mechanisms would they have in place for that share out of those lead roles as they emerge?

**Dame Gillian Morgan:** We are working for the British-Irish Council on having a shared secretariat to do the work and then each country takes a lead on something where it believes it has something to offer. For example, Wales has provided a lead on language because of the challenge. It is very interesting that even though you do not think there is a language issue similar to Welsh in the Isle of Man or in Jersey or in Guernsey, there are indeed exactly the same sorts of issues. There is a lot of mutual understanding that comes out of that shared work which happens by officials on behalf of ministers. It is the type of equality where you are sharing out things because you are all equal, you all have the same sort of view, I would like to see that become a characteristic of the JMC rather than the assumption that on fully devolved matters the UK should automatically lead. There is of course a business reason why the UK should lead, which is that they have many more people than the other countries to do the work and we might very well want them to, but it should be based within the concept that our view and our opinion on current devolved matters is equally as important and valuable as the view of any of the other countries.

**Q526 Chairman:** Could I end by asking you a couple of very brief questions in light of your evidence today. In following up the point that Mr David Jones was asking about in the event of a possible change of administration, it occurs to me what is relevant here is the words of the late John Smith in leading the campaigns in Scotland for democratic devolution where he characterised it beautifully by saying that it was the “settled will” of the Scottish people. I guess given your response to Mr Jones you would in your own inimitable way as Permanent Secretary remind the incoming administration, if it is another party, that this is the settled will of the Welsh people?

**Dame Gillian Morgan:** Absolutely, that is my role. I have no role whatsoever with Whitehall but I am part of the Civil Service and the issue for me is how I use the privilege of being part of the UK Home Civil Service to advance the interests of Wales and the will of the people. If I second people out I would expect them to follow Caesar in the department that they work in.

**Q527 Chairman:** Could I finally then ask about your own role as a Permanent Secretary. You have described very fully quite a strategic role that you have but you have also described that strategic role in relation to other Permanent Secretaries and you seem to have developed that quite strongly on your watch, so to speak. Could you tell us how important you value those relationships and how detailed are those relationships?

**Dame Gillian Morgan:** Yes, I think it is important to recognise that the role of a Permanent Secretary in a devolved administration, whilst the job descriptions are very similar—my primary role is to be chief policy adviser, as you would be if you were in a Whitehall department—the reality is with the whole scope of policy within a devolved administration you cannot be an expert in all those policy areas, so I think very much that the role of the Permanent Secretary in Wales, and I think it is one of the phenomenal opportunities we have, becomes thinking about how do you join up between policy areas, which is in fact the bit that is found very difficult in Whitehall, and is exactly the thing that in Wales we can really make a difference, by joining up between the policy themes. I see my role very much as being in that joining-up box, joining up between each of the individual themes, making sure that that is coherent and we do not miss things, joining up in terms of running a professional 21st century organisation that is business-like and offers value for money, but also joining up in terms of the official underpinning of political relationships within Wales and within Whitehall. In terms of the routine, my role is probably closer to Sir Gus’s role than it would be to Sir Bill Jeffrey’s in the MoD, where you would be a policy expert and provide that expertise, and the running of the organisation would actually be a second order issue; for me it is a first order issue. I develop relationships with all the Permanent Secretaries irrespective of whether it is devolved or not. As I say, we have regular meetings which I think are absolutely fundamental and I personally believe it would be a really retrograde step if a change in

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Whitehall Government led to a breakdown of the home Civil Service so that as Scotland and Wales Permanent Secretaries we were not part of that type of meeting. I think we are adding value as well as learning a phenomenal amount that I can actually use on a day-to-day basis, because if somebody has got a good idea I would like to steal it rather than try and invent the wheel! I think it is really important that those sorts of connections continue. Obviously you have stronger relationships with some people

than other people, but I regard it as a real honour and privilege to be part of that group and to understand some of the challenges which we will face in future years as devolution grows in its scope.

**Chairman:** That is a very good positive point on which to end this session. Thank you very much for a most productive nearly hour. It will certainly assist us in our inquiry and inform questioning in the future sessions we have in the coming weeks. Thank you very much.

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**Tuesday 9 February 2010**

Members present

Dr Hywel Francis, in the Chair

Nia Griffith  
Mrs Siân C James  
Mr David Jones

Alun Michael  
Hywel Williams  
Mark Williams

*Witnesses:* **Mr Paul Davies**, Wales Director, and **Mr Phil Lambert**, Executive Director Business Support, Legal Services Commission, gave evidence.

**Q528 Chairman:** Good morning and welcome back to the Welsh Affairs Committee. For the record could you introduce yourselves, please?

**Mr Lambert:** I am Phil Lambert. I am the Executive Director for Business Support at the Legal Services Commission.

**Mr Davies:** My name is Paul Davies and I am the Wales Director at the Legal Services Commission.

**Q529 Chairman:** You will be aware that in some respects this inquiry into Wales and Whitehall emanated from our earlier very brief inquiry into the Legal Services Commission. Could you tell us very briefly what decisions you have made on the future of the Cardiff office since our inquiry in 2009?

**Mr Lambert:** Yes, I think it is fair to say that we are in something of a holding pattern since the earlier meetings, for a number of reasons. That is in terms of proactive actions that we are taking. What we are certainly not in a holding pattern for is engagement, consultation and liaison with stakeholders. If I could suggest how we can respond best for you today, Paul Davies has run a lot of that engagement in his role as Wales Director, and I think that has been a significant step forward that we have taken since that earlier Committee. Paul can give you the detail on that. In terms of the actual operational side that falls to me. For a number of reasons around the Magee inquiry, around budgetary issues but also where we are on the project phase, if you recall we have started a project that has several years' duration to run and therefore until we have got right through it, there are a lot of things that we cannot decide upon. To a degree we are in a holding pattern, as I have said. What we have communicated to our staff in the Welsh office is that we have an awful lot to work through, but we are consulting with them and keeping them informed at every step of the way, and I think Paul can probably pick up on the other consultations that we have had.

**Mr Davies:** In terms of the external consultations that we have put in place we have certainly taken on board the feedback from this Committee from last year and we have significantly increased our external stakeholder engagement, especially with the Welsh Assembly Government and the Wales Office, to make sure we keep them fully informed of our thinking and we get their feedback and actively listen to what they have said. As part of our written evidence you will have seen the number of meetings we have put in place. I would be happy to go through that if the Committee would like me to do so. This is

really about where we are at the moment with a hiatus in terms of where we are with Cardiff. No decisions have been made and therefore it is pretty much business as usual as we speak for the Cardiff office.

**Q530 Chairman:** We anticipate that our Report will be published in March and no doubt you will be taking account of that. Without anticipating what that Report might say, you will see from some of the evidence given to us by civil servants and politicians that one of the emerging themes is strategic thinking. Will you actually be thinking about that yourself and, for example, personally I am attracted to the idea that the Legal Services Commission could administer a part of England from Wales.

**Mr Lambert:** Yes, I think the big learning that we had following our experiences of nigh on 12 months ago was that we had not approached matters in an appropriate way, and Lord Bach apologised fully for that. I think we have learned some pretty big lessons from that and I hope you will see that we have taken them not only to heart but have actually acted on them through the consultations that we have now made, as I said, largely through Paul's offices. It is not just that we have made consultations; we are genuinely listening and taking matters into account. The big issue that we have of course—and that is why I used the phrase earlier “something of a holding pattern”—is we do need to wait and see the outcome of the Magee inquiry because obviously that will dictate a number of factors. I think I am giving a very positive response that we have listened and we know that when that does come into the public domain we will feed that into the consultations and move on from there.

**Q531 Alun Michael:** It is nice to have you back. I hope that it is going to be more constructive than the last occasion when Lord Bach, frankly, had to rescue you as you carried on digging deeper into a hole. Can you explain the exact impact? What is going to be the number of jobs created and lost in Cardiff and do you have plans to meet the implementation date of 2012?

**Mr Lambert:** Yes, the technology is in several phases. The first phase is to move to electronic operating. That is going extremely well at the moment and our staff and the providers are very positive about that, but that will have limited, if any, impact on the Cardiff office in terms of job positions.

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**Q532 Alun Michael:** So the numbers will not change?

**Mr Lambert:** Not as a result of the first phase, no. The second phase is still on course but it is further down the line, so it is difficult to give quite such an accurate update on where we are on that. Broadly, yes, the plans are the same.

**Q533 Alun Michael:** The same as what, sorry?

**Mr Lambert:** Our earlier plans in terms of the numbers that automation will take out of our business.

**Q534 Alun Michael:** So can you explain what the impact on Cardiff will be?

**Mr Lambert:** Yes I can. In broad terms we expect that the number of clerical positions as a result of automation will reduce by approximately 15. It is very difficult to say it is definitely 12, 13, 14, 15, or whatever it is, because obviously as you work through an IT implementation—

**Q535 Alun Michael:** 15 out of?

**Mr Lambert:** Out of about 30. But I am stressing the point that is as a result of automating the processes. There are a number of things that we do need to take into account. For example, we need to strengthen some of our controls and that is being built into automation. If that means that instead of the automation allowing us to reduce our headcount by 15, it is only 12, then so be it; that is what it will have to be. That is why I do not want you to feel that I am hedging on the number. There are reasons why we cannot be totally precise.

**Q536 Alun Michael:** In your earlier comments you made it clear that you were listening to the Wales Director. Will that continue and can Mr Davies say how the issues that were raised by the Committee on the last occasion will be dealt with in terms of this future process?

**Mr Davies:** We certainly have an excellent relationship between ourselves in Cardiff and the central people within London. Phil and I are regularly in conversation about how his elements of the business will impact in Cardiff, and he and I talk and we do listen to each other, so there is definitely internally a very good working relationship within the LSC. Equally, when there are things that are starting to become firm and we believe there are ways of moving forward, I have built up a very good relationship with the Wales Office and continue an existing good relationship with the Welsh Assembly Government. I have met with both on numerous occasions during the last 12 months. At the start it was about explaining how we were going to put right those areas that the Committee had brought to our attention. We have now moved on from that into a full normal process of consultation. So, for example, meeting with the Wales Office only a week ago, it was, unfortunately, just a case of saying, “We have not moved forward but this is what we have done; are we on the right tracks; what guidance can you give us?” but that iterative process is very much on-going. As Phil says, once new thoughts come out from the central area of business support in terms of this IT,

they will be fed into me, and I will make sure they are properly engaged in the consultation areas that I have set up with all the key stakeholders.

**Q537 Alun Michael:** That is nice but can we expect some communication with Welsh Members of Parliament in the near future? Will you be taking account of the knowledge of the legislative build-up that we have seen in recent times and which has been commented on in evidence to this Committee by organisations such as the Law Society last week in terms of the way that the Commission does its business and the need for a focus, which goes back to the Chairman’s original comment about it making more sense to run parts of England from an England/Wales location in Cardiff?

**Mr Davies:** Certainly we are very focused on what we need to do now. As a result of last year we know exactly what we need to be doing. As I said, we are fully engaged with our colleagues in both the Wales Office and in the Welsh Assembly Government and that will continue going forward. The focus is absolutely there. As and when new decisions are made we will certainly be talking to Welsh MPs.

**Q538 Alun Michael:** Would you be thinking of talking to Welsh MPs before decisions are made?

**Mr Davies:** Sorry, wrong phrase. As we start to formulate the ways forward that we need to think about, we will certainly engage with Welsh MPs. We held an event just after last year celebrating our 60th year specifically for Welsh MPs where we did acknowledge the mistakes that we had made and the ways forward we were looking at to deal with that, and we will certainly continue to engage very much to make sure that there is an early two-way process.

**Q539 Alun Michael:** I and others will look forward to that with interest. Obviously given the confusion and the delays that have taken place there must be uncertainty for staff. Can you tell us how you are keeping staff adequately informed about their future employment?

**Mr Lambert:** There are a number of issues we have at the moment. The processing staff fall within my Directorate of LSC. This week I am going round all of our centres and will also be calling in Cardiff. I have deliberately timed it so that I can talk to the staff in Cardiff (a) about other issues that we have but (b) to feed back to them the outcome of today as well. They are all very interested clearly, so we will give them a full briefing on where we are on all fronts.

**Q540 Mrs James:** How do you respond to the view that the Legal Services Commission does not have a real understanding of the issues relevant to Wales?

**Mr Davies:** I think it is fair to say when we were at the last Committee meeting that is very true. We acknowledged our weaknesses and sought to put them right. Today, however, I think we do have an understanding. We have engaged fully with our colleagues at the MoJ and within the Wales Office and we do seek guidance whenever there are any issues in relation to matters that impact Wales. For example, for all new projects commenced in the Legal Services

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Commission, as part of the initial assessment, there is a part which checks whether it impacts on laws, on language, on Wales in any shape, manner or form and, if it does, that is referred to me and my team so we can take a view as to whether this is something that is relevant and that needs to be thought through properly and, if it is, I will then consult using the mechanisms that I have put in place. We have learned a lot. That would not be a fair criticism of the LSC today but I do acknowledge that it was at the time of the last Committee hearing.

**Q541 Mrs James:** You have touched on something very important there, the divergence between laws in Wales and the new law-making powers in Wales. Can you give us an update as to the current state of how you handle new policy post-devolution and what is planned for the Cardiff office?

**Mr Davies:** Yes, one of the things that we have always committed to doing is increasing our policy team in Cardiff to make sure that we take that into consideration. Unfortunately, we have not been able to move that forward due to the Magee review and we are waiting to hear the outcome of that. Clearly what we would not want to do is to appoint somebody to find that some changes are recommended by the Magee review that we would then have to unscramble, so we are waiting with bated breath any time now the outcome of that to assess where that takes us in Wales. In the meantime we have a policy officer there. We make sure that we link into the Welsh Assembly Government at officer level and we have monthly meetings with them and our policy team to make sure that anything that is relevant flows two ways in and out of the Welsh Assembly Government so we keep in track. We need to do more and we need to understand what the outcome of the Magee review will allow us to do.

**Q542 Nia Griffith:** Obviously you will remember the discussions that we had about the lack of communication with the Wales Office. Since then there has been the government response to our Report and we understand that you will be making much more effort to keep in touch on a more regular basis. Can you tell us something about how that has worked out in practice, whether that has been by letter or meeting? Can you tell us about the last meeting you had with the Wales Office and any decisions that were made at that meeting?

**Mr Davies:** Of course. They are always arranged to be face-to-face meetings. All of them have been in the Wales Office building here in London. The first meeting immediately after the last Committee hearing was with Carolyn Regan and Phil Lambert who went across to speak to Alan Cogbill. The last two meetings have been with the Wales Office and me. The first one was with Alan Cogbill and the last one was with Tim Hemmings, the Policy Director. The last one for which I can give you an update was last week. It was part of our six monthly review which happened to fall comfortably in terms of today's meeting. We updated the evidence in writing that we had provided to the Committee and we were reviewing that in a very positive way because we have

taken on board the previous comments from this Committee about the need to increase that. There are something like 13 different engagements at either minister or official level within the Welsh Assembly Government, three with the Wales Office itself, several with the Welsh Language Board, lots of different consultations, so that was reviewed and a very positive steer was given to us by the Wales Office at our last meeting as to how that has moved forward. We believe that we are on the front foot in understanding our responsibilities under the consultative process, but we still want to do more, we want to learn more, so the Wales Office have agreed to come along to the LSC and provide us with a session to our senior people in our organisation to talk through the devolution settlement to make sure this is not just sat with one or two individuals but it is spread across the entire organisation so we understand that further. Those were two key areas that came up from the last meeting because, as Mr Lambert said earlier, we have not got any decisions on people or process because of the hiatus with budgets, *et cetera*. We certainly updated them on that but there were no meeting decisions that came out of that as a result.

**Q543 Mark Williams:** Following on from both those two previous questions, Mr Lambert, you received correspondence from the former First Minister, Rhodri Morgan, last June and he was talking about an enhanced role for the Wales Committee. He quoted the view of the Welsh Assembly Government: "the Wales Committee needs to be given a more formal status in relation to the LSC's activities and operation in Wales. . . We believe that the Committee needs to have a clear role in advising the LSC on diverging Welsh policy." Have you made any steps to follow Mr Morgan's recommendations?

**Mr Lambert:** That falls very much into Paul's area but I wanted to make one point first. Tom Jones, our Commissioner, is the chair of that Committee and I asked Tom if he would be able to be with us today but, unfortunately, there was a change of date, otherwise he would have been here. I asked him specifically if I could say that today. He is very supportive of all the actions we have been taking. In some of the meetings that we have referred to in previous answers Tom has actually been with us on some of those.

**Q544 Mark Williams:** When Mr Morgan talked about a more formal status what do you think he had in mind and is that going to happen?

**Mr Davies:** Certainly in terms of the consultation with the Wales Committee itself there are a number of areas where we will talk to them on a very regular basis. The minutes are available on our website and we can certainly make them available to this Committee if you would like from the last year. One of the key things that we consult with them regularly about is the setting up of a network, what we are calling a community legal advice network, where providers come together in a joined-up end-to-end process for the citizen. That is something that we review regularly with them. We also talk to the Welsh Assembly Government where they are putting forward different proposals, *et cetera*, and that Wales

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Committee is an area where we share thoughts and issues surrounding that in particular. Because of the type of people we have on there—we have some very key stakeholders in terms of the Welsh Local Government Association, providers themselves, and a raft of other very influential people—we are able to take on board very much the thoughts of that Committee to take that forward, so they are a big influence in terms of what we consider is the way forward and understanding how to take policy forward in Wales.

**Q545 Mark Williams:** Is that an on-going dialogue and not simply a response to events?

**Mr Davies:** Yes it is. There is a formal quarterly meeting of the Wales Committee that is set up but between meetings, certainly with the likes of the Welsh Assembly Government, the Local Government Association, there are many other meetings that go where we follow those threads up. These are just a bringing together of idea meetings; they are not one-offs that we just do on a quarterly basis.

**Q546 Hywel Williams:** Can I ask Mr Lambert a formal, direct question: do you accept that a Wales Director is a requirement to ensure that the devolution settlement in Wales works rather than just having a director who happens to be Welsh, as it were?

**Mr Lambert:** My very short answer is yes, but I think we have proved that over the last 12 months, and the role that Paul now plays is tangible rather than simply nominal and in name only and is very integral to what we are doing there, I absolutely agree.

**Q547 Hywel Williams:** This is an investigation into Wales and Whitehall and the general lessons and we have already heard from you some of the steps that you have taken recently to keep people informed and to keep in consultation. Do you have any views as to the general issues that have arisen from the events over the last few months? Are there any lessons about the understanding in Whitehall of the devolution settlements, from where you sit?

**Mr Davies:** I can only speak from our point of view, I cannot speak of course across Westminster as a whole, and from our organisational point of view there was certainly a lack of understanding about what was needed. We have now sought to close the gap and indeed we have had some very proactive input from other areas like the MoJ and the Wales Office, *et cetera*. I think it is a two-way process and the lesson that we learned is that we ignore that at our peril.

**Mr Lambert:** I think the lessons were two-fold. They were not just LSC but also in MoJ as well. There was an element of confusion around what a non-departmental public body could do. We were autonomous; we made our decisions; we told people, and away we went. I think that was the big learning that quite rightly we were rapped over the knuckles for last time. We have improved our relationship with the sponsorship department in the MoJ and as we go

forward, however things are structured, we have learned that lesson so hard that we will ensure that is integrated whatever the structure is for LSC going forward.

**Q548 Hywel Williams:** Do you have any suggestions for procedures or protocols that might be relevant to other people in similar situations to yourselves?

**Mr Lambert:** Ironically as a result of this—and the Chairman said this is where it all started from—I was even asked to go and speak on it, and I think I said something along the lines that I have just said to you that there was a naivety, it almost came over as arrogance, but it was more ignorance, that we felt this was our role in it and this is what we did and yet the impact of what we did was far-reaching, and we had not fully taken into account all those stakeholders. It was helping others in similar roles to our own to understand the experience that we went through and how we would have done it differently. I think we are now doing it differently; we are consulting, and we have had some very positive and some very enjoyable meetings with various people.

**Q549 Chairman:** Mr Lambert, could I end by asking for your observations on the recent Public Accounts Committee criticism of the Legal Services Commission. Specifically it says there is “a lack of clarity in the respective roles of the Ministry of Justice and the Legal Services Commission leading to uncertainty and duplication”. It then goes on “the Commission has failed to get a grip of its financial management” and “the Commission lacks a clear strategic direction”.

**Mr Lambert:** Yes, I can answer that. I think prior to that there was a review undertaken called the Stratton review which was specifically looking at policy. I think that is what this refers to. The feedback is broadly along the lines that there was a policy team within LSC and there was also a policy team within MoJ and that is where the duplication comes from. The findings from the Stratton review have been incorporated into Magee and we simply await that outcome. Clearly that is the area of duplication and hence lack of clarity. As far as financial controls are concerned, I think that is a separate matter. The National Audit Office (NAO) have given us a number of pointers. I am very hopeful that we can move further ahead with our automation because what we are incorporating into that are a number of very key financial checks and that will help us improve our financial controls. However, that will not be enough and we need to use our staff very positively and we are putting a number of manual checks in place as well to strengthen the situation, so there is quite a strong action plan in place to address everything that was raised by the NAO.

**Chairman:** Thank you very much for your evidence this morning. If you feel there are points that we have not covered we would be very pleased to receive an additional memorandum from you. I hope that when our Report is published it will be helpful to you in your work.

*Witnesses:* **Sir Gus O'Donnell KCB**, Cabinet Secretary and Head of the Home Civil Service, and **Mr Robin Fellgett**, Deputy Head, Economic and Domestic Affairs Secretariat, Cabinet Office, gave evidence.

**Q550 Chairman:** Good morning and welcome. Can you introduce yourself and your colleague?

**Sir Gus O'Donnell:** Certainly. I am Gus O'Donnell, the Cabinet Secretary and Head of the Home Civil Service, and my colleague is Robin Fellgett who is a Director at the Cabinet Office and Deputy Head of the Economic and Domestic Secretariat. He also supports the Prime Minister on devolution matters and helps on the Secretariat for the JMC.

**Q551 Chairman:** This inquiry into Wales and Whitehall has identified the fact that the performance of Whitehall has been, according to some witnesses, uneven, and the word "patchy" has been mentioned by some. Who is actually responsible for monitoring how well departments are performing? Are there any sanctions if departments are not performing up to standard?

**Sir Gus O'Donnell:** Could I just say, Chairman, that I am very delighted to be here with this Committee because I think it is a very important Committee. It plays a very important role and a slightly unusual role in terms of the LCOs, so I would be keen to talk about that at some point. In terms of the Civil Service I would take responsibility for the way in which civil servants handle devolution matters in Whitehall. The various different settlements is something with which I have grown up and I have seen our attempts to keep up with what is an evolving situation. In terms of how we do it, I would say at our best it is very good. It is very important that we have interchange. If you look at the Wales Office, having about a third of their staff on secondment from the Welsh Assembly Government is a good thing. I benefit from having Michael Kay working for the Cabinet Office on secondment from the Welsh Assembly Government. The area I am disappointed in is that we have not been able to do as much the other way as I would like. I am certainly trying to encourage civil servants in Whitehall to get out and spend some time working in the Welsh Assembly Government because I think it is a really good development experience for them to learn about, particularly the joining up and the different relationships between the Welsh Assembly Government and the rest of the public sector in Wales.

**Q552 Chairman:** You have not answered my second question about what sanctions there are if departments are not performing. For example, we have noted that only about half of government departments have a Welsh language plan and, oddly enough, the Ministry of Justice does not appear to have one.

**Sir Gus O'Donnell:** In terms of sanctions it is something which we would assess in terms of how well a department is doing. I started an exercise with all of my Permanent Secretary colleagues to ask them to provide a self-assessment on how they are doing in terms of their management of devolved issues. That work is underway. We are currently trying to analyse those answers and obviously I will

want to talk to my Permanent Secretaries whose own self-assessment leaves something to be desired. Your point about Welsh language plans is a good one. The fact there is only half is not good enough. I know when it came to Welsh language issues this Committee played a particularly important role in sorting out some tricky issues. That is an area where you did very well and where we need to do better, to be frank, in terms of handling those issues. One thing I wanted to ask you, Chairman, is in terms of sorting out that assessment, I will obviously be writing that up at some point. There are two options really. I could send something to you about my assessment of that but it might be slightly late. The other thing we could do is to take into account our self-assessment plus your own work which you are doing at the moment, bring those two together and incorporate them within a response to your own findings, which might give us a richer response, so that would be what I would favour.

**Q553 Chairman:** Thank you very much for that. I answer that question with a question of my own. In marks out of the ten what would you give the Ministry of Justice for its performance over the Legal Services Commission?

**Sir Gus O'Donnell:** I think there are certainly some real problems with the Legal Services Commission. I tend not to want to give marks out of ten because I do not know enough directly about it. I know there are some real problems and the Permanent Secretary and I have discussed them and he is taking some clear action to sort out those problems. I myself visited the Legal Services Commission not so long ago. There are real problems there.

**Q554 Mrs James:** Just to tease out a little more about that. When she gave evidence to the Committee Dame Gillian Morgan said that she had seen an improvement in the quality of the work, *et cetera*, and direct involvement, and she attributed a lot of that to you personally and she said that the response to devolution issues had improved. I am interested to know whether that is an improvement or were you so poor at it previously that there had to be an improvement?

**Sir Gus O'Donnell:** Had we started from a low base? I must admit coming here I was wondering whether given the events of the weekend you would take an Englishman and try and trip him up!

**Mrs James:** That is sharp!

**Chairman:** Could you strike those comments from the record!

**Mrs James:** That is really below the belt!

**Q555 Chairman:** And could you replace them with the comment from the Chair that James Hook is from my Aberavon constituency.

**Sir Gus O'Donnell:** I apologise profusely for the events of the weekend.

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**Q556 Mrs James:** And he plays for the Ospreys in my constituency!

**Sir Gus O'Donnell:** I was grateful for the comments of Gill. I have always tried to involve Gill very much in our work. In fact, Gill hosted an event down in Cardiff for all Permanent Secretaries where we got them down there because I am very much of the view that we need to learn from each other from the different ways the Welsh Assembly Government approaches things and we approach things. Examples I would give would be rural payments; the fact you got to the smoking ban more quickly; I am quite interested in what you are doing on plastic bag taxes, so there are some areas there; and obviously issues like health where there are different approaches and we have seen various studies of that. Was it that we were very bad? No, I do not think so. Like I say I think it is patchy. At its best it is very good. There is a group of people that were around when the first settlement was sorted out and who have seen the Government of Wales Act and they are involved in issues where they have to think about Wales all the time. That is a group which probably gets it. What I worry about is those people where it is not part of their everyday work and then suddenly an issue comes up where it is really important to take the devolved arrangements into account and they do not naturally get it right first time. These are sins of forgetfulness really and that is the part where I think we need to up our game. That is why I am thinking about induction training, more interchange; all of that would help I am sure.

**Q557 Mrs James:** Could you tell us what findings are emerging from the examinations of current departmental "systems and behaviours in relation to devolution"?

**Sir Gus O'Donnell:** We had an end of January deadline for that. A couple are slightly late so we have not analysed them yet. That is the part I was very keen to put together and the question for me really is whether to write you a note on that ahead of your coming to some conclusions (because we are not there yet and we probably would not get there for a few weeks) or whether to incorporate your findings with that and give you one response which puts both together. I will be guided by the Committee on that.

**Q558 Mrs James:** Are you confident in the research you are doing that you have specific and measurable objectives, because obviously if you are doing that sort of evaluation it needs to be measurable?

**Sir Gus O'Donnell:** Yes, and, to be honest, this is a self-assessment and that is a strength and a weakness in that what you would ideally want is third party views on how well you think this is being done. I think what you will get is one part of the evidence, which is why I am keen to put it with some other areas. For example, when we do capability reviews we come up with objective measures, we score departments, we publish in red, orange and green ratings where people are on leadership, strategy and

delivery, and that work involves us going to the department but also going to stakeholders and getting a 360 degree view. What we have done in this exercise is asked departments purely for their self-assessment.

**Q559 Mrs James:** What happens if you feel they have failed?

**Sir Gus O'Donnell:** If we feel they have failed we need to put in place remedial measures to help them improve. That is the whole purpose of this. Can we identify from that failure what are the issues: is it quality of staff, is it training, is it induction, and then have an action plan to try and improve matters, because we know that this is going to be important and we know it is going to possibly become more complex because there are votes this afternoon, I think, on areas that might have an impact.

**Q560 Alun Michael:** The Chairman referred to the issues of the Legal Services Commission which you acknowledge. I think in some ways more worrying was the fact that the Ministry of Justice did not seem to understand that criminal justice is not a devolved matter when it came to some legislation a little more than a year ago, so clearly this is a very important area. Given there are a lot of pressures on the Civil Service, there are financial pressures and human resources pressures, how can you be sure that the devolution awareness-raising programme will be carried forward with some energy rather than perhaps being pushed to one side?

**Sir Gus O'Donnell:** It is a perfectly valid point. The government's Smarter Government agenda requires us to take out over £100 million in cost of the Senior Civil Service over the next three years so we will be going through an agenda where we are trying to do more with less, I guess. For me, it is about quality, so when we talk about training and induction we need to try to get to people at the right stages. The areas I have tried to get at are, as you will know personally, taking the Permanent Secretaries down to Cardiff to actually get the people at the top involved. We have had sessions of the top 200 staff. We have now also got something called Base Camp where all SCSS (Senior Civil Servants) when they become members of the Senior Civil Service go off on a two-day course. Most recently Sir John Elvidge<sup>1</sup> was the key Permanent Secretary delivering that and I went to speak to each tranche. One of the things we emphasise is the need to understand the nature of the devolution settlements and how they evolve, possibly. I think the Government of Wales Act 2006 creates quite a complex environment for civil servants to operate, and it is quite unusual in the sense that it is something where we need to be sure we are getting this right.

**Q561 Alun Michael:** It also led to some developments of course rather than being a single event in time as this Committee has discovered. Just as an aside, it seems to me that one of the big problems is the lack of continuity where very often

<sup>1</sup> Permanent Secretary to the Scottish Executive.

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there is a gap at the Senior Civil Service level where they have been thinned down, so the person who comes into the role may not be there with any overlap and indeed there may be a gap with the predecessor. Is there not a danger that things like the nuances of devolution in health or education get lost in those sorts of discontinuities?

**Sir Gus O'Donnell:** It is absolutely a danger. That is where having more secondees in from the Welsh Assembly Government, making sure that in the Cabinet Office and in the Wales Office we have the staff who can pick those things up is important. I agree the first best is getting the departments themselves to get it right in the first place. That will never be perfect so we need to have mechanisms. We would see ourselves and the Wales Office as playing a role in trying to pick up areas where it has not worked quite right. For example, there is a good area where the MoD were talking about the services provided to Armed Forces in the different areas where it probably did not start off in the right place but we got there in the end.

**Q562 Alun Michael:** We seem to have got an impression rather than very hard evidence that some civil servants in Wales are reluctant to undertake secondments in Whitehall and, equally, civil servants in Whitehall are often reluctant to undertake secondments in Wales. What can you do to make sure that such secondments are career enhancing and they are something people are missing out on if they do not do rather than something that means they are missing out on a particular raft of promotions and therefore feel that the secondment poses a risk to their career progression?

**Sir Gus O'Donnell:** I think this is a job for the leaders of both organisations. We need to get across the benefits of the secondments both ways. When I talk to civil servants from Whitehall departments, if you take issues like climate change, obesity and ageing, these are issues that will not be solved by one department alone. They need the departments working very closely together, which is why I have raised the issue about pooled budgets, for example. If you work in a devolved authority Government you actually see those joining-ups within a smaller area and I would say they are better at it because it is tighter.

**Q563 Alun Michael:** I would accept entirely that at your level and the level of people like Gillian Morgan, and perhaps other Permanent Secretaries, that is understood, but if people are to see that their next stage in promotion would benefit from a secondment, then it needs to be something that permeates the whole organisation, does it not? It is not enough for it to be something that you appreciate and promote. It has to be promoted by the whole of the Civil Service structure.

**Sir Gus O'Donnell:** Absolutely right but if the leaders are not giving this consistent message it will not happen. It is necessary but certainly not sufficient so we need to get the message through. I think one of

the problems we have got is the basic economics of living in London and house prices. It is very expensive and I think that is a negative factor. Of course when you try and adjust this by housing allowances the media start to get worried about it. I think it is something that we will need to work on and find ways to improve.

**Q564 Alun Michael:** I think, Chairman, this is something that we would look at in this exchange that you are offering in terms of an analysis to see what in practice is going to be done to embed that throughout the structure.

**Sir Gus O'Donnell:** I accept that.

**Q565 Hywel Williams:** We have been told in terms of the overall devolution settlement that the Cabinet Office has responsibility for co-ordination, the MoJ has responsibility for overall strategy and the Wales Office manages the devolution settlement essentially, and that there is some overlap and some lack of complete clarity, sometimes at least. Can you explain the practical differences between these functions, perhaps giving us an example?

**Sir Gus O'Donnell:** Sure. Let me talk about the Cabinet Office's role which I know best. We are often in a situation where we are trying to broker a deal on a specific issue. We do a lot of brokering between departments but then there will be an issue about the devolved authorities as well. It may be a devolved issue or not. We may be having a discussion about Barnett and Barnettisation or not. We would get involved in the co-ordination aspects and we provide the secretariat to the Constitution Committee, chaired by Jack Straw, and that would get into some of these issues, for example issues to do with what the vote will be this afternoon, where the political end will come to. I would say that there are other aspects that turned out to be important. The Cabinet Office set up the National Economic Council and that was really quite important in the sense of when we set that up Peter Hain, for example, is a member. It was really important because there were very different things happening in Wales to what was happening in, say, England on some of the programmes that the Government was putting forward and their approach to dealing with the recession, and having Peter Hain there, I would say as a practical example, worked very well. That was set up by the Cabinet Office. It was an issue where we were trying to bring in devolved authorities in an area where they may not have been involved previously. That worked quite well. We learned from each other the different approaches to those particular programmes for helping business during a recession.

**Q566 Hywel Williams:** That sounds like a developing process rather than something that is set in stone. Would you agree with that?

**Sir Gus O'Donnell:** I would absolutely agree with that. As the nature of the devolution settlements changes we will need to bear this in mind. Obviously

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it is a matter for the Prime Minister as to what the particular machinery of government is at any one time, but it is our job to make sure that, whatever it is, we make it work as well as possible. As you say, where there are overlaps we try and make sure that we co-ordinate as well as possible.

**Q567 Hywel Williams:** Speaking as a constituency MP, the Wales Office seems to impinge mostly on my constituents' lives. The Wales Office is the most important institution, but we have been given the impression that as a small department it also carries the least clout in this tripartite relationship.

**Sir Gus O'Donnell:** I would not say that. From my point of view, if I wanted to understand how an issue will be viewed by the Welsh Assembly Government, I would go to the Wales Office. Like I say, about a third of their staff are secondees from the Welsh Assembly Government. I was talking to Peter Hain this morning, who I know you are seeing later, about how he feels about the Wales Office and he was very complimentary. We have upped the number of senior civil servants within the Wales Office and I think that it is a very high-quality operation.

**Q568 Hywel Williams:** Can I ask you about the resources issue. As far as the effectiveness of the Civil Service is concerned, particularly in terms of the Welsh Assembly Government, how do you satisfy yourself that they have sufficient resources?

**Sir Gus O'Donnell:** That the Welsh Assembly Government has sufficient resources? I think that would be a question where you would expect them to come to us and I would expect Gill to come to me if she felt there was an issue there. I would see that as very much in their territory, not my territory.

**Q569 Hywel Williams:** Do you go down to Cardiff? Do you visit the Welsh Assembly Government?

**Sir Gus O'Donnell:** Most certainly.

**Q570 Hywel Williams:** What sort of issues do they bring up with you when you are down there?

**Sir Gus O'Donnell:** I went there with all the Permanent Secretaries. I am quite careful when I go there as to who I see. When we were there we saw Rhodri Morgan when he was in charge and Plaid as well. Normally when I go to Wales I would visit those offices where there are UK civil servants, so for example DVLA, but last time I was in Swansea seeing them I also looked into the Welsh Assembly Government offices and I will have quite detailed discussions with Gill Morgan at appraisal time about how she is doing against her objectives. The First Minister will give me his personal feedback on her performance and we will discuss that at a mid-year review and an end-year review just as I would discuss those things with any other Permanent Secretary.

**Q571 Alun Michael:** I just wanted to raise the issue of the Civil Service Code. It has been referred to in this Committee. We also looked at it in the Justice

Select Committee not so long ago. Perhaps I can pose it as a positive question rather than an open question. Seeing that we have more than one Civil Service Code, but each of them says exactly the same things, would it not be better if we had a single Civil Service Code which took account of the variations in accountability but also built in the need for civil servants, wherever they are, to understand and respect the nature of the devolution settlements?

**Sir Gus O'Donnell:** I thought you might ask this question so I did come prepared. This is the single old version of the Civil Service Code. I have to say it is not my idea of plain English in that the first sentence—and I will not read it out to you—is 66 words long and it has a footnote and if you add that in it goes over the 100 mark. That is because it is attempting to manage all the different devolved areas and refers to the Scotland Act and Wales Act and all the rest of it. So we have this version and the Welsh version. They are virtually the same but this one is, as it were, optimised for someone in Wales to think about the accountabilities and all the rest of it. They are virtually identical but they do differ in important respects and talking about accountability to ministers is the most important thing. Personally I think it is fine. They are very similar and this one has 16 words for the first sentence. People read this one, we know that, and this one. I am not sure people if you ask people about this how many of them would have got beyond that first sentence!

**Q572 Alun Michael:** I am sure it is not a straight alternative between an unreformed and unreadable Code and a refreshed one. The point behind it is should not the nature of the devolution settlement as a fact of life for civil servants both in Whitehall and in the devolved administrations be something that is built into the Code for civil servants wherever they work, whether in a department, a devolved administration or indeed the agencies of either central or devolved Governments?

**Sir Gus O'Donnell:** Yes, you are right, and then the question really is how much of that goes in the Code and how much of it goes in other documents. I am anxious not to change the Code every five minutes but, you are right, it is an important matter. When we next come to change it I think we should look at this and come to a decision about that. For me the important point is that people read this and actually act on it, and so if three versions gets us to a higher level of awareness and acting on it, then I would probably want to go with that, but it is a perfectly good point that we should make sure within this we get across the point you have made about understanding the settlements.

**Q573 Mr David Jones:** I would like to turn to the issue of relations between the administrations of London and Cardiff. Last month we took evidence from Rhodri Morgan in Cardiff and he said that far more important than the formal structures of the JMC and the Memorandum of Understanding and

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so on was warm or cold relationships between the two administrations. Do you agree with him or do you agree more with Gillian Morgan who told us last week that she felt the formal structures were actually crucial?

**Sir Gus O'Donnell:** It has got to be both. If the formal structures get in the way then, no matter what the strength of the relationships, it is going to be difficult. If you have a set of formal structures which allow you to operate effectively together then, again, I would say that is necessary but by no means sufficient for things to work. If you have good structures and people do not try and make them work and the relationships are poor, then I think you will come up with poorer outcomes. To my mind, I would say if the relationships are strong you will get by; if the structures are poor you will still try and do the best within poor structures; but if you have poor relationships, whatever the structures, it is not going to work.

**Q574 Mr David Jones:** It is a reasonable possibility that there will be a change of Government here in London in the course of the next three months or so which may possibly put personal relationships under strain. Obviously from your perspective this is not unprecedented because you have different administrations in Edinburgh and London at the moment. To what extent are you engaging now with the administration in Cardiff and the official Opposition here in Westminster as to the need, for example, for the Civil Service to preserve neutrality, and to what extent do you think that you will be able to manage those different relationships at either end of the M4?

**Sir Gus O'Donnell:** I think our job as the Civil Service is to be ready for whatever possible outcome emerges from the election. As you know, since the start of 2009 the Prime Minister's letter to David Cameron made clear that Permanent Secretaries can engage with their shadows and that process has been going on. I made a point of saying that I am not going to comment on that process because I do not think it would be right for me to talk about relations with the Opposition. I think that most people understand that the nature of these conversations has to be quite private so I have never elaborated on them.

**Q575 Mr David Jones:** How then do you think the Civil Service will be able to function with administrations of different hues in London and Cardiff?

**Sir Gus O'Donnell:** We have the experience of what happened in Scotland where a somewhat unexpected result in terms of minority Government emerged and we have learned from that as a Civil Service. I think we have observed what has worked and what has not. I think we need to be ready to handle the processes and I think the processes were set up with this in mind. The JMC and the like are there and they are supposed to be robust to whatever political outcomes emerge. I think we will see whether those structures can withstand different political outcomes

as through the course of time, who knows when, such political outcomes come through if we do have changes.

**Q576 Mr David Jones:** You have said you are very keen on secondment and in fact that was something that Gillian Morgan said last week. How easy do you think it is going to be to encourage secondment at a time when you may well have administrations in London and Cardiff which have different political agendas and ambitions?

**Sir Gus O'Donnell:** For us as civil servants the importance of our job is to deliver for the Government of the day, so it should not be determined by whether it is the same administration or different administrations. Some people would say it creates a more interesting and more difficult challenge if there are different political parties, and it is managing that process where the Civil Service has to come together, given that there are possibly different political objectives in Whitehall and in Cardiff, to make that process work.

**Q577 Mr David Jones:** So you think secondment will still happen and you would still encourage it?

**Sir Gus O'Donnell:** I would definitely still encourage it, yes. I really would be very unhappy with a process where you would be saying you should only second if there is a certain political structure. Given that we know through time there may well be different structures, it is important for us to keep that learning up.

**Q578 Mark Williams:** The Lords Constitution Committee and others have argued the case for a single 'department of devolution' or 'department of the nations and regions' on the grounds that it would perhaps give Wales more weight in terms of influence in Whitehall than the current Wales Office. Would that be a neat way of tidying the rather fragmented present arrangements or would that be a means for Wales to lose out to Scotland and Northern Ireland?

**Sir Gus O'Donnell:** I have to say what I said before. Machinery of government changes are for the Prime Minister, so it is for him or her to decide what the appropriate relationships would be. It is for us in the Civil Service to make sure that whatever decisions are made by the Prime Minister we make them work. I think the Wales Office does a very good job at the minute and I think that works very effectively. I can imagine other ways of managing. As you say, the House of Lords have come up with some other suggestions. They are possible and I think we could make them work. All I am saying is I think at the moment the Wales Office does a good job, both of representing Wales in Cabinet, the Secretary of State there, and of representing the UK within the Welsh Assembly Government. It certainly works at the minute. We would do our best as a Civil Service to make those arrangements as effective as possible.

**Mark Williams:** We will see. Thank you.

**Q579 Chairman:** Finally, in answer to an earlier question from Mrs James you mentioned about the review you are undertaking. We would be very

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pleased to have your interim findings on that; could you give us a short synopsis of what your thoughts are about that review?

**Sir Gus O'Donnell:** Like I said, we have not got all of the results in yet so I have not got an analysis of them yet, but I will be happy to share that with the Committee. There are two options: do you want us to share that with you early?

**Q580 Chairman:** Early, yes.

**Sir Gus O'Donnell:** You want it early; fine.

**Chairman:** We would be very keen to produce a Report as soon as possible now in March, so whenever you are able to provide that information it would be extremely helpful. Thank you both for attending; only one of you spoke but it has been most illuminating. Thank you very much.<sup>2</sup>

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*Witnesses:* **Rt Hon Peter Hain MP**, Secretary of State for Wales, **Ms Fiona Adams-Jones**, Director, and **Mr Glyn Jones**, Head of Legislation and Deputy Director, Wales Office, gave evidence.

**Q581 Chairman:** Good morning, Secretary of State, for the record could you introduce yourself and your colleagues please?

**Mr Hain:** Thank you very much. Peter Hain, Secretary of State for Wales; my Director of the Wales Office Fiona Adams-Jones; and Glyn Jones, the Head of Legislation and Deputy Director.

**Q582 Chairman:** Could I begin by asking you about the plenary session of the Joint Ministerial Committee and the fact that it did not meet between 2002 and 2008. What effect do you think this had on inter-governmental relations?

**Mr Hain:** Inter-governmental relations during this period—and I remember it well because I was Secretary of State for the great bulk of it—were good. There were no particular imperatives for it to meet but since then we have collectively agreed, both at the UK Government level and across the JMC membership, that it ought to meet more frequently, which is what we have sought to do and it has been quite helpful.

**Q583 Chairman:** Do you think that it would have been better had it been meeting in that period?

**Mr Hain:** In the sense that it is a piece of government machinery that is in existence for a purpose, obviously, but on the other hand there was no clamour from either Cardiff or Edinburgh, for example, for it to meet in order to solve a problem that could not otherwise be solved, and that is an important issue as well.

**Q584 Chairman:** Now that it is meeting it has this new responsibility of promoting dialogue; do you think that will improve the UK Government's relations with the devolved administrations?

**Mr Hain:** I think so and, indeed, we are very anxious for it to meet. We were anxious for a meeting to take place before Christmas and, indeed, it was put back until January, but it did not prove possible for it to meet because of the situation of stalemate that then existed in Northern Ireland; that was the main reason. I can give you an example: a tangible success that may be of interest to your Committee, Chairman, was the Marine and Coastal Access Bill which was discussed at a plenary session of the Committee in June 2008 and helped to bring all the

parties together to secure a framework power for marine planning in what was a very good example of joined-up working.

**Q585 Chairman:** We have been interested in the relationships and the responsibilities of the Wales Office, the Ministry of Justice and the Cabinet Office and how they inter-relate. Could you explain to us how the sharing of responsibilities over devolution occurs between those three bodies?

**Mr Hain:** As you are aware, the Ministry of Justice has responsibility for devolution strategy and is able to consider the overall position of Wales within the constitutional framework of the United Kingdom, and the Secretary of State for Justice is the chairman of both the Domestic Affairs and Constitutional Committees (CN). He provides an overview of Government's handling of devolution and of course the MoJ also has a minister with specific responsibility for devolution policy, so that deals with the overall strategic issues. The Cabinet Office then has responsibility for co-ordination of policy and it basically serves the committees concerned, particularly the Legislative Committee and the Domestic Affairs Committee and indeed the Constitutional Committee as well. It therefore sits at the centre of Government, co-ordinating policy and getting clearance for cross-departmental policy agreements when, for example, I might write in to the Chairman or other Secretaries of State might write in seeking clearance for a particular policy. That will be co-ordinated through the Cabinet Office so I think they work quite well together, the MoJ focusing on the strategy of devolution and the Cabinet Office focusing on the co-ordination, almost day-to-day and certainly week-to-week, of policy development.

**Q586 Chairman:** I think you have convinced me, but I am not sure. It seems plausible from the inside but the fact that there is not one office with that overall responsibility for devolution certainly is confusing for people on the outside.

**Mr Hain:** I can understand that people at first glance would say "Why is this the case?" but the Cabinet Office clears policy between every government department and the Prime Minister's office at Number 10 on every issue that concerns Government, that is of a cross-government nature,

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and even when it is not of a cross-government nature other Secretaries of States' clearance will be needed to take a particular policy forward. The Ministry of Justice is in a sense the custodian of the overall devolution settlement for the United Kingdom as it affects Wales, Scotland and Northern Ireland. The fact that it has a strategic overview is actually quite helpful.

**Q587 Chairman:** The problem of course arises—and I do not apologise for going back to this—on the Legal Services Commission, and I know other colleagues may well want to ask questions about this—with the fact that the Ministry of Justice is responsible for the Legal Services Commission and also responsible for devolution, and the peculiar contradictory situation where it did not seem to grasp the devolution settlement that well, hence the problems that arose last year, is an indication that things are not quite as they ought to be.

**Mr Hain:** The Legal Services Commission has had a very fast learning curve following what was a very poor example, to be perfectly frank, of the co-ordination of Whitehall with Wales. It illustrates the example of a body such as it coming under the MoJ which has simply not adequately considered its responsibilities. As you will know, it developed proposals for reducing staff numbers because of changes in processing work without even consulting the Wales Office let alone engaging with the Welsh Assembly Government in any meaningful way or other stakeholders. You suggested that Devolution Guidance Note 4 should be strengthened and we have indeed done that and are seeking Cabinet Committee clearance at the present time. It is a good example of a failure—I would hold up my hands to that, and we need to learn from it. The Commission has learnt from it, the MoJ has certainly learnt from it and all these glitches that occur from time to time are points of improving the situation.

**Q588 Alun Michael:** Just on that point we have seen an admission that there was a need for a learning curve for the Commission itself, but actually we have seen examples from within the Department of Justice—for instance, officials dealing with legislation appeared not to be aware that criminal justice is not a devolved matter and when, for instance, the protection of NHS staff was an item under consideration a scramble for recovery was necessary over that. Does that not indicate that whereas the Ministry of Justice, as you put it, acts as the overall guardian of devolution across Government, it is not doing the job as well as it should within the Department for Justice itself?

**Mr Hain:** At ministerial level I am very clear that the Secretary of State and the Minister are well seized of the imperatives of devolution and the necessities that follow for the workings of the settlement; I would not say that is true of every official in the departments. Maybe, Chairman, I could just give an overview that indicates the sort of spectrum of achievement. Some departments have set very high standards—I would say the Department for Environment, Food and Rural Affairs, for example,

would probably be at the top of my tree. Others, such as the Department of Energy and Climate Change, having made a slow start—perhaps because it was a new department—have improved enormously and I would say it is a very good performer and certainly the Secretary of State always is assiduous about consulting his equivalent Minister in the Welsh Assembly Government, Jane Davidson.

**Q589 Alun Michael:** And at the other end of the scale?

**Mr Hain:** As far as I know, yes. The problems do not necessarily always arise at this end of the M4 I might add; we can always go into that. The Department for Children, Schools and Families is a good performer; I would say that the MoJ, the Home Office and the Department for Transport need to get towards the high standards that have been set by other departments. There is a range of performance but overall I think the settlement is working pretty well, people have learnt very fast from some of the failures in the past and the Legislative Competence Order system is delivering enormously for Wales. We have had five LCOs speed through the system with proper scrutiny—including by your Committee—and three further ones will receive Royal Assent tomorrow. That is eight. We have had eight framework powers; this is an enormous process of devolution over a relatively short scale of time, within a couple of years, with an entirely new animal that Whitehall had not encountered before devolving powers to Wales.

**Q590 Alun Michael:** I accept that, but back at the Ministry of Justice would you agree that they need to take on, as a matter of pride, settling an understanding of what is devolved and what is not right throughout the department?

**Mr Hain:** If that is an issue, and obviously I will look with interest at what your Report has to say, Chairman, then clearly that needs to be addressed at every level.

**Q591 Alun Michael:** What do you say to the argument which has been put to us that the Cabinet Office would actually be a better place for the centre of devolution, especially with the revival of the Joint Ministerial Committee which you have already commented on, because it is closer to the Prime Minister and therefore closer to the centre of Government?

**Mr Hain:** What I would say first of all is that the Cabinet Office is a relatively small unit in departmental terms and has extensive policy co-ordination responsibilities. There is an element of delivery in overseeing the devolution settlement for which MoJ is responsible and the Secretary of State ultimately. I do not have very strong views on this; what is important to me is not necessarily where responsibility is sited, although obviously you need to have a cross-government role, there would not be any point in siting the devolution settlement in the Department of Health for example. As between the MoJ and the Cabinet Office I would not go to the

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wall on an argument but I do think there is a great deal of logic in the Secretary of State for Justice having this overall constitutional guardian role in a sense.

**Q592 Alun Michael:** Would you accept, as the Chairman put to you, that clarity is a great thing for those outside the arcane corridors of these departments?

**Mr Hain:** Outcome is what is important; clarity is always a big advantage but we would all agree that it is outcome, do we have a process of Legislative Competence Orders devolving powers at an enormous rate to Wales and extensively, many times faster and more extensively than the previous system, as I think we all agree is happening? Is it working well? Can it be improved? I am less interested in where responsibility is ultimately sited although I take your point about clarity and I do not think any of these issues are set in concrete.

**Q593 Alun Michael:** Do you think there are differences in the way that Scotland and Wales are treated in Whitehall and, if so, is that due to the nature of the settlement or is it for other reasons—cultural reasons, histories within departments or whatever?

**Mr Hain:** I have always found from my very first days as a Welsh Office minister, prior to devolution, in May 1997—and of course for a period I served you as Secretary of State—that Scotland always had a higher profile from news desks in London of all the media outlets to Whitehall as a whole and in the political ladder Scotland has always had a higher level than Wales. That has always been a source of frustration to me, but I do not think there is any view in Whitehall that that should be the case, there is no sense of Wales getting in any way a second class deal compared with Scotland. On the contrary, Wales now gets much more attention from Whitehall as a result of the LCO process in particular than probably it did, and it is seen as a priority, as we have seen in the appointment of lead officials in all departments responsible for devolution and for taking through the LCOs as they come up the M4. That is now a recognition that is very high on the agenda.

**Q594 Mrs James:** Turning to how the Wales Office relates to its dual role of being Wales' voice in Westminster and Westminster's voice in Wales, do you think that is working and how do you think it has changed since the 1999 Act?

**Mr Hain:** Obviously the old Welsh Office used to run the whole of Wales so since 1999, clearly, its role has considerable diminished. How has it developed over that period? It plays an absolutely crucial role—and I would say this since I am the Secretary of State—I genuinely every day see its crucial role as a facilitator, as a broker of agreements when issues need to be resolved. We can just take, for example, facilitating an agreement between the Welsh Assembly Government and Whitehall departments on the scope and content of framework powers; in agreeing the Order

framework power in the Constitutional Reform and Governments Bill it was the Wales Office that brokered the agreement between the Welsh Assembly Government and government departments including the Treasury. In every respect, from framework powers to LCOs but beyond that, there is just a daily process of interaction on policy. We may come to this but the truth is that we spend more time probably on policy co-ordination than we do even on taking through the Legislative Competence Orders. By the way, it goes beyond the legislative arena: I might mention the recent agreement we secured on the Barnett Formula which was as a result of an initiative from myself as Secretary of State, backed by the Wales Office, and liaising of course with the First Minister in the Welsh Assembly Government. We are all making sure that we are getting the absolutely vital output in terms of programmes under the Future Jobs Fund to deliver youth jobs in Wales because, as we all know, youth employment is becoming a real problem and we have been very instrumental in making sure Wales gets its full share of that UK fund. Then the Strategic Investment Fund which delivered, very recently, a £10 million super-computer project to Wales, it was the Wales Office which was brokering that and making sure that Wales got its fair share of what was a UK fund.

**Q595 Mrs James:** You have talked about that process in terms of Westminster and what you do as Secretary of State here in Westminster in relation to legislation, but what about the role of you being Westminster's voice in Wales and the meetings that you have on a regular basis with the First Minister *et cetera*; how well do you think that is going?

**Mr Hain:** I have been privileged to enjoy very good relationships with the First Minister for a long time, for nearly six years with Rhodri Morgan and now with Carwyn Jones who is proving to be an excellent successor. We meet on average every couple of weeks, sometimes weekly, we are on the phone a lot, and so there is that process of interaction in making sure the Cabinet's position is understood by the Welsh Assembly Government and also explaining Government policy in Wales and interacting with a wide range of bodies. For instance, although housing is devolved I recently met the director of Shelter Cymru, John Pusey, because he was concerned to see the housing LCO taken forward—and I know you recently reported on that, for which we are grateful. Equally I meet the CBI, the Wales TUC, the Archbishop of Wales, a variety of people who have an interest in influencing what goes on in the Cabinet and making sure their views are put right into the heart of the Cabinet. If I mention just briefly one other example, the National Economic Council on which I sit as the Secretary of State, which is the central co-ordinating body, particularly in terms of dealing with the global financial crisis as we have been doing for nearly two years now. I attend on behalf of the UK Government the economic summits which have been called by the Welsh Assembly Government and I am therefore able to explain, as

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I will do on Thursday in Carmarthen, what we are doing as a UK Government and we will be making sure that that gets wider attention. So there is a process of speaking across a range of issues—Treasury issues, Department for Work and Pensions issues, energy issues, notably policing and justice—which are not devolved and for which the Secretary of State for Wales has a key role in terms of interacting with the citizens of Wales.

**Q596 Hywel Williams:** Can I just go back to the situation up here in Whitehall. Do you agree with Dame Gillian Morgan's comments when she first came into post, and I will read this to get it perfectly clear. She said: "What I have been struck by in my first year as Permanent Secretary is a lack of genuine commitment to devolution and a culture of arrogance in some Whitehall departments. In many respects Wales is off the radar in London." That is quite a trenchant view from someone who is just taking a look at her first year and it is about some departments. What is your comment on that?

**Mr Hain:** To be honest I was a bit puzzled by it and I understand that she has subsequently put her views in a rather different form. My experience has been very positive in overall terms; I have mentioned where there has been a certain amount of progress that still needs to be made. She may have been referring to individual officials rather than a cross-Whitehall kind of view, and certainly when I look at my experience and I look at some of the evidence given to your Committee—Andrew Davies, for instance, was very complimentary about his detailed experience over ten years as a government minister of interaction with Whitehall, and particularly he saw the crucial role for the Wales Office. I put a lot of store by that because he has been a minister in key departments interacting with Whitehall departments. As I say, I remain a little puzzled by it but I still have a high regard for her.

**Q597 Hywel Williams:** Can I ask you a specific structural question. Is there a lack of understanding where there are non-devolved issues which have implications for Wales? Is that a difficulty where perhaps departments here would not see a particular Welsh dimension because the issue itself is not devolved but the people in Wales might see it rather differently from the other end of the telescope as it were?

**Mr Hain:** Sometimes that is the case and it is particularly the case when you get a cross-government initiative. I am thinking, for example, of the *Building Britain's Future* document which we published as a Government in the late summer of last year. That was a monumental exercise in cross-government co-operation, cross-departmental co-operation, let alone making sure that there was interaction with Wales, and it is my job to pick up on these things. My officials on the whole do this very well, but sometimes those cross-government initiatives are not necessarily taking full account of Wales' interest in the way that we would all like. On the other hand we have seen, as I say, in 50

different areas the equivalent of 50 different Matters in Schedule 5 actually devolved already as a result of precisely this good co-operation and awareness of devolution and Wales' interests amongst the range of government departments in Whitehall.

**Q598 Hywel Williams:** Can I ask you about another case therefore? Something that puzzled me when the Care at Home Green Paper was published was that there was some lack of clarity I suppose about the future of Disability Living Allowance and Attendance Allowance, which in England might have been used for a specific purpose. As a Welsh MP I was not clear as to how that might apply in Wales and initially at least, investigating it directly, that lack of clarity persisted. That was a case where there was an England-only situation and one might almost say that the matter was being devolved to England as it were, affecting devolution to Wales. Is there a lack of clarity or a problem there?

**Mr Hain:** That is a particularly interesting example. The Government's commitment, which I am very enthusiastic about, and our next big crusade after Nye Bevan's National Health Service is to establish a National Care Service to deal with the problems of an ageing society, of which we all are aware. You have here a quite difficult circle to square because responsibility for care in the community is a devolved matter and largely delivered by local authorities and also the Health Service—all devolved—but on the other hand part of the care support system is reserved notably through the Attendance Allowance, Carer's Allowance and the Disability Living Allowance. There was a little uncertainty—perhaps the Green Paper was too green. We did make it clear that matters were devolved and indeed there has been interaction between the Secretary of State for Health and the Welsh Health Minister and her deputy, Gwenda Thomas, very recently as a result of my suggestion. I did have discussions with the First Minister at the time, but because it was a Green Paper we could perhaps have been clear that all of those, especially on low incomes or modest incomes, would be protected in respect of the benefits that they receive from Attendance Allowance and that element of Disability Living Allowance which is relevant. We could have been a bit clearer than that and then I do not think there would have been the concern that there was, especially amongst pensioner groups in Wales. They now need to know that their position is going to be absolutely protected but we are all agreed—Welsh Assembly Government ministers and ourselves—that this issue has to be addressed, otherwise it is going to either cost the taxpayer an absolutely unsustainable fortune in the future or people are going to be in real poverty and despair in future years as more and more people become older and relatively fewer people are in work to pay for that elderly care.

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**Q599 Hywel Williams:** I suppose the general point that worries me is that the situation in Wales might be profoundly influenced by what happens in England just because of the size and importance of departments up here compared to Wales and possibly to the Wales Office, that devolution sometimes might be devalued because of that fundamental disparity in size and power.

**Mr Hain:** I do not think so actually. The Wales Office is a midget in Whitehall terms but it is a pretty feisty, powerful midget in batting for Wales—if that is not a mixed metaphor. I do not know whether midgets can bat for Wales, but you know what I mean.

**Q600 Hywel Williams:** We can do midgets!

**Mr Hain:** It is. In the case of the Wales Minister and myself, we are always fighting Wales' corner and that is true for all of our officials. I think I am right in saying that about a third of our officials are secondees from the Welsh Assembly Government, which is a practice I applaud, including Fiona Adams-Jones our Director. They are not going to suddenly short-change Wales. I do not think it is the size of the department; it is the necessary learning process. You may recall from your days as a special adviser in the Wales Office at the beginning, Chairman, there was a learning curve then in dealing with the 1998 settlement, just as there has been a learning curve in dealing with this new settlement which is altogether more powerful in Wales' interest.

**Q601 Hywel Williams:** What is your impression of the awareness and knowledge of the devolution settlement amongst the Civil Service up here in Whitehall; are you disappointed at all in the level of awareness of some people?

**Mr Hain:** As I have indicated there is a range of Whitehall departments and the extent to which they meet the highest standards of devolution consciousness, if I can put it that way. Some are very, very good at it, almost right the way through the system, others need to improve. In the end the system is working well, I really believe that, otherwise you would not have seen this enormous legislative output, you would have had complaints all the time from Welsh Assembly Government ministers, including those of your party, but they do not complain, they are actually very pleased on the whole with the relationship. Perhaps I could answer this in another way: I have witnessed and been in the middle of big arguments and lack of understanding—there is a lot of “departmental-itis” within Whitehall. It is pretty common that a lot of departments will feel that other departments do not understand their point of view, most departments feel the Treasury never understands their point of view and most departments might feel that Dame Gillian's comments in respect of Whitehall could be applied to the Treasury. I probably should not have said that, but the point I am making is that there are a lot of tensions between departments in Whitehall let alone on an inter-governmental basis when obviously there is a different set of criteria. There is nothing unusual about this: there are arguments within families, there are arguments within political

parties even, I dare say, yours from time to time. There is nothing unusual about this; the point is we have a process for resolving these and I think it works very well.

**Q602 Hywel Williams:** Can I finally say that you have already indicated that you think there have been improvements during your time as Secretary of State.

**Mr Hain:** Yes, and if I may say so—this is not just as it were flattery to deceive—your Committee has helped with that process in terms of getting the LCOs right and getting the learning process a little steeper; there has been a big improvement. To be frank we started off in a bad place, on LCOs especially, where they were rushed out, came up from Cardiff Bay not always drafted in the way that they needed to be—and that is no criticism because there was a new process at that end as well. We got on with the show for obvious political reasons and then we had to kind of pick up the pieces, and you know all about that. That is now in a much, much better place, immeasurably different from 2007.

**Q603 Chairman:** We thank you for those comments about our work. Sir Gus O'Donnell who was a witness a moment ago indicated that he wished to praise our work as well; we did not encourage him, but we will be writing to him to ask him for his observations, which I am sure will be similar to yours. Before we leave this point about the variable performance, you were quick to praise some departments and you did not criticise other departments. Could I ask you very directly, why is it that a department that is so close to yours, the Ministry of Justice, still fails to have a Welsh language scheme, and have you written to them to remind them that they ought to hurry up?

**Mr Hain:** These matters are usually better dealt with in other ways than just formal letters, although sometimes it is necessary to write. Clearly with the new Legislative Competence Order—which will get Royal Assent tomorrow in the Privy Council I trust—and the new terrain there the MoJ will want to be fully aware of its responsibility. Maybe I just could give two good examples: the Child Poverty Bill, which was born out of the work of the Child Poverty Unit, a cross-departmental strategy group of the Department for Children, Schools and Families, DWP, Treasury and Welsh Assembly Government, was a very good example of cross-government co-operation, and the Flood and Water Management Bill, very much a cross-border Bill and an excellent example of co-operation between Wales and Whitehall which should be a model for others.

**Q604 Nia Griffith:** Certainly in your memorandum from the Wales Office you explain to us about the meetings that you have had with the various departments. It is often a chicken and egg situation: it is almost that you can listen to something but you do not actually take it in until you actually have to put it into action, so as you say the collaboration between Defra and the Assembly Government has been excellent in the Marine Bill and the Flood and

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Water Management Bill, but perhaps in some of the departments it would be only when they actually are confronted with it that they will actually begin to learn the lessons. If we are now asking what is happening in Whitehall in regards to a more rigorous examination through all departments as to what people understand about devolution and what their current approach is to devolution, how would you see the Wales Office fitting into that, in other words how do we monitor and evaluate what is actually happening in the other departments in respect of, as you might call it, “devo” awareness?

**Mr Hain:** We have been very proactive in terms of getting updated Devolution Guidance Notes, in terms of supporting the position where there is now a lead official in all Whitehall departments covering devolution, and in making sure that those awareness-raising seminars and so on which have been held increasingly frequently, so we have been very much engaged with that. I would also pick up on the point that Rhodri Morgan made in his evidence to you, that in the end you can design the most beautifully geometric relationships and processes and guidance notes, structures and committees and goodness knows what, but actually what it depends on is human relationships and the warmth of those relationships. There needs to be more work done on that from the Welsh Assembly Government’s end of things as well as a lot more work done on that in Whitehall and we are very seized of that task.

**Q605 Nia Griffith:** In terms of practical interaction with the departments once you have delivered your seminar or meeting are you constantly in touch with the other departments about how they are furthering their understanding of devolution?

**Mr Hain:** What really focuses people’s minds and attention is when they have an issue to deal with. As I said, we are pushing ahead and the Cabinet Secretary has been extremely supportive of this, which is why I think he was keen to come and give evidence to you today, it is very unusual for him to do this, and certainly the Prime Minister is, and we do have a general consciousness across Whitehall that has improved. In the end you can write a letter, you can have a guidance note, you can get people to a seminar, but it is when it comes to an actual issue in front of people that a test arises. That is something which is improving all the time as more and more policies and more bits of legislation come across people’s desks.

**Q606 Mr David Jones:** We have discussed the question of the Care at Home Green Paper which appears, as Mr Hywel Williams indicated, to not entirely recognise the Welsh context. Who is responsible for ensuring that policy development in Whitehall recognises the Welsh interest, is it the Wales Office or is it something that is the responsibility of the Welsh Assembly Government?

**Mr Hain:** It is a bit of everybody in this. I gave a particular priority to try to focus on this when it became clear to me that the UK Government’s policy was being misrepresented, in some cases for

politically opportunistic reasons, in terms of what we were seeking to do with bringing the huge resource of Attendance Allowance into the wider picture. It is a non-means-tested allowance and the issue is can you make sure that the great bulk of people in Wales get the care that they deserve in the future as well as now, but maybe millionaires, the few of them that there are in Wales, do not need to get Attendance Allowance. It is that kind of issue that we need to work through. I am concerned about senior citizens in constituencies such as mine that are on very low incomes or at least modest incomes, that they have a future of dignity, especially when they need care. The Department of Health is in the lead on this and the Secretary of State for Health is the lead person, which is why it is so good that he had an excellent meeting with the Minister of Health on this very subject that I set up—or helped to set up—but obviously I am taking a very close interest in all of this because of Wales’ unique demographic factors: an older population that has a greater history of industrial disease and deprivation, especially in a constituency like mine which is a traditional mining constituency. The interests of those people are paramount in my mind.

**Q607 Mr David Jones:** Moving beyond that specific instance, generally speaking do you regard it as the function of the Wales Office to ensure that Welsh interests are generally borne in mind in terms of policy throughout Whitehall?

**Mr Hain:** Absolutely, throughout Whitehall and indeed in the implementation of Whitehall delivery and policy within Wales—whether it is policing, whether it is support via the Department for Business, Innovation and Skills, whether it is the Department of Energy and Climate Change, whether it is the Department for Work and Pensions. All those departments and how they actually impact in Wales is obviously an important issue for me.

**Q608 Mr David Jones:** What about the converse, to what extent does the Wales Office take an interest in policy development in the Welsh Assembly Government to ensure that that will slot in with policy development at a UK level?

**Mr Hain:** My primary duty is to support the Welsh Assembly Government in making sure that objectives which it sets and the Assembly wants to achieve are supported in Whitehall. That is my main responsibility in respect of the Welsh Assembly Government; it is not my job as Secretary of State to second guess the Welsh Assembly Government.

**Q609 Mr David Jones:** I understand that but, for example, we took evidence some time ago from the Welsh Transport Minister who is also the Deputy First Minister, as you know, and he told us that in terms of the development of the Welsh road freight transport policy there had been very little liaison with the Department for Transport, which many people found rather surprising given that most freight journeys either start or end in England. To that extent does anyone have overarching

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responsibility for ensuring that policy development in Wales actually takes account of the national context?

**Mr Hain:** In transport which, as you say, is one of the best examples of a cross-border issue—and there would be big issues for Defra as well obviously—that kind of joined-up thinking and joined-up policy development is imperative. I indicated earlier on that the Department for Transport has some ground to make up to perform at the level of the best Whitehall departments, but on the whole relations are pretty good.

**Q610 Mr David Jones:** Would you say that the different roles of the Wales Office and the Welsh Assembly Government are fully understood throughout Whitehall?

**Mr Hain:** Are they perfectly understood? No. Are they well understood? Yes. On some of the detail there needs always to be what I remember from my more radical, left wing days as a conscious-raising exercise but on the whole I do not think there is a them and us attitude, everybody wants to do their best to resolve a policy issue in the best interests.

**Q611 Mr David Jones:** Would you encourage, therefore, continued secondment between Whitehall and Cardiff and *vice versa*?

**Mr Hain:** Yes. I have been particularly keen on this and it fell by the wayside a little earlier on in the period I have been Secretary of State, but Gill Morgan has been very keen to achieve this and we have had some very, very good appointees, if I may say so, including our new Director, bringing a Welsh Assembly Government and fresh Wales perspective to what is a Whitehall department, the Wales Office's role. I would like to see Whitehall departments also second more people down to Cardiff. I have talked to the Cabinet Secretary about this and he very much shares my view, but it is not always easy to get people to relocate—they do not know how nice a place Cardiff is to live in and some of the problems we sometimes have had recruiting people from Cardiff is that actually Cardiff has got an immensely better quality of life than London, and that is an issue. On the other hand, we have had some really good quality people who have recently come into the Wales Office.

**Q612 Mr David Jones:** Perhaps they will be more enthusiastic when the new Llandudno office opens.

**Mr Hain:** Quite possibly—you mean locating from London to Llandudno. Is this because of the beauties of the seafront there?

**Q613 Mr David Jones:** Absolutely.

**Mr Hain:** Or the local Member of Parliament, I do not know!

**Alun Michael:** As Jim Callaghan did.

**Q614 Chairman:** It might be a good location for the prison in North Wales perhaps.

**Mr Hain:** I have not had a bid from the seashore of Llandudno for a prison whereas I have had one from Anglesey.

**Q615 Mark Williams:** In a spirit of balance I will put in a bid for Aberystwyth as well. You have talked very positively about emerging relationships between Cardiff and Whitehall. Sir Jon Shortridge made some interesting comments when he talked about ministers in London keeping Welsh counterparts in the dark about major announcements because they do not trust them with sensitive information. You have talked about positive relationships—has that always been the case or what do you think he was alluding to in his comments?

**Mr Hain:** I think he overstated the case he was making and his view was not shared to the extent that I heard it and saw it by Andrew Davies and I do not think it was shared by Carwyn Jones, the First Minister, or his predecessor Rhodri Morgan. To be frank, sometimes Whitehall departments do not tell other Whitehall departments when they are going to make an announcement; the Welsh Assembly Government does not always inform us when we might have an interest to report to Whitehall. These issues are not actually very important in the great tide of affairs of devolution as a process. There are shortcomings on all sides from time to time but the great tide of devolution is flowing strongly and, in my view, very well.

**Q616 Mark Williams:** You mentioned various bits of legislation where you felt the relationship worked extremely well. We have had in this Committee some discussions on the late inclusion of Wales-only clauses in the Planning Bill. Sir Emyr Jones Parry when he came before us was clearly of the opinion that the responsibility lay with the Welsh Assembly Government; other evidence we have received has said that it was the responsibility of the Wales Office. What do you think are the origins of those late inclusions and where does the fault if you like lie?

**Mr Hain:** I am not sure that there is a finger to point, to blame anybody on this. The Planning Bill which became the Planning Act 2008 was a very large and complex Bill and I believe I am right in saying, Chairman, that it was introduced as some Bills have to be (and I recall very well being frustrated as Leader of the Commons from 2003 to 2005) when they are not really ready, but they have to get into the system to get through the Second Reading and get into the legislative process otherwise they are not going to be completed within the time deadline set. Governments introduce late amendments into their own Bills to improve the drafting because other issues may not have been settled within Whitehall. This is pretty well what happened in this instance in the sense of the Welsh Assembly Government, so a framework power was not included when the Bill was introduced or at Second Reading but was subsequently included with a lot of other Government amendments. I am not sure that there is a great deal to be made of that. Another example was the Marine and Coastal Access Bill which has been an enormous success story and again a very complex Bill, but there was close liaison and I think everybody feels, as Jane Davidson told the Assembly Sustainability Committee in February 2009, we had

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a good, co-operative almost daily working relationship with Defra. That is an example of best practice; the Planning Bill was an example of less good practice but lots of government amendments were introduced late which had nothing to do with Wales.

**Q617 Chairman:** On this question of Assembly Government officials needing to do more liaison with Whitehall, do you detect that there has been a significant step change since the arrival of Dame Gillian Morgan?

**Mr Hain:** I would not want to comment and I am not sure that I am able to give a definitive answer to that. She has been very good news for the Welsh Assembly Government; Sir Jon Shortridge was an extremely experienced official and I always worked extremely well with him, so I do not know that there was a dramatic change. At the beginning this was an entirely new settlement, a point I made before, and both sets of officials at Welsh Assembly Government level and in Whitehall had to get up to speed and there was slowness and shortcomings at both ends at the beginning, but increasingly it is the right thing to do. At the beginning there was a sense in the Welsh Assembly Government, both at ministerial level in the coalition Government—and of course the coalition Government coincided with this new era you will recall—and at official level that they wanted to play their cards a little more closely to their chests than perhaps had always been the case, and therefore in the case of some of the LCOs they were fully drafted before we had a chance to have a process of interaction to deal with issues of scope and technicalities. We are now working in a much more joined-up fashion and the results are there for you to see.

**Q618 Chairman:** You must be a keen observer of the way in which Permanent Secretaries interact. I assume that you would be very supportive of the idea that the Permanent Secretary in the Welsh Assembly Government should have strong structural relationships with other Permanent Secretaries?

**Mr Hain:** She attends the Wednesday morning meeting of all Permanent Secretaries as her predecessor did, and I do not think anybody would accuse Gill Morgan of being shy about coming forward to put Wales' case, so she is very effectively known as a champion for Wales amongst her peers at Permanent Secretary level.

**Q619 Alun Michael:** You said earlier that you thought the LCO process had helped create greater working opportunities and understanding between the Welsh Assembly Government and Whitehall. Do you think the Whitehall departments now give sufficient priority to LCOs and are you able to influence and speed up what has sometimes been the slow consideration of Welsh Assembly Government requests?

**Mr Hain:** Again, you have seen an improvement all round on this. As I said earlier, in just two and a half years five LCOs have already been delivered.

**Q620 Alun Michael:** I am accepting that general point, I am asking specifically about getting Whitehall departments to speed up where there is a request from the Welsh Assembly Government?

**Mr Hain:** There probably are cases when a faster pace could be required. Sometimes the deadlines are quite short to meet the Assembly Government and the Assembly's timetables and that puts quite a lot of pressure on, but we usually manage to overcome these issues.

**Q621 Alun Michael:** And you do see that as an important role for the Wales Office?

**Mr Hain:** Absolutely. The advantage of the Wales Office and its Secretary of State and Minister leaders—I do not just say this in a self-justifying sense—is that we can just walk across the road to our opposite numbers. I can see colleagues in the Lobby when we are voting, if I need to do so informally, or a lot of business is done before Cabinet meetings.

**Q622 Alun Michael:** Can I ask you, mischievously perhaps, if LCOs did not exist would there still be a need for a Wales Office or would just an embassy of the Assembly in London then be adequate?

**Mr Hain:** There would still be a need for a Wales Office, whether it is sited within the MoJ or sited elsewhere. There will always be a Wales Office, even if there were to be an activation of the Part 4 powers in the 2006 Act after a successful referendum. I was checking on this prior to this session and only 15% of our officials in the Wales Office are part of the legislation branch headed by Glyn Jones and I would say that around half of those are focusing on LCOs as opposed to focusing on other potential issues of interest in legislation across the board. We are dealing with a massive range of policy issues, of funding for Wales—we are currently taking forward the Holtham Commission recommendations, energy, defence, the St Athan project, criminal justice matters. These will all continue.

**Q623 Alun Michael:** On the LCO process Sir Jon Shortridge suggested to us that LCOs should go straight from the Assembly to Parliament. Obviously that would still leave the role of the Wales Office and the discussion with Whitehall departments to be undertaken, but it would be a slight reordering of events. Do you agree with Sir Jon's suggestion?

**Mr Hain:** No, I do not, and was quite surprised to say the least to hear that from such an experienced senior civil servant. The process of LCOs has to start with an inter-governmental relationship, that is what the Act specifies and that is the way it works. It is for Parliament—and in this case pre-eminently this Committee—to hold accountable that process and to scrutinise, but I cannot see circumstances in which the Assembly would itself maybe bypass the Welsh Assembly Government and deal directly with Parliament here. I cannot see how that could reasonably happen. If the outcome had to be, as it would be, legislation, Governments are the only animals that can deliver legislation.

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**Q624 Alun Michael:** Backbenchers can sometimes propose legislation which Governments can then delay, as we found with the sprinklers LCO—the delay was not central Government; it was the Assembly that delayed it.

**Mr Hain:** Yes, there was no delay by the UK Government in that respect at all.

**Q625 Alun Michael:** No, I was not suggesting that.

**Mr Hain:** Again, for legislation to come forward the Welsh Assembly Government had to give the nod to that particular LCO before it came to us and then to you. I cannot see a backbencher contacting a backbencher here, liaising and making that work. That would be a very novel process of legislative interaction.

**Q626 Mrs James:** Turning now to the Barnett Formula, in your view is Wales being disadvantaged by the present funding arrangements?

**Mr Hain:** The agreement I achieved with the Treasury, which was not straightforward or easy to achieve, I might add, but had a successful outcome, recognised—and I can quote it but I am sure you are aware of it—that there was an issue here. The Barnett Formula had delivered a good deal for Wales and the Welsh budget has more than doubled from £7 billion when I first became a Welsh minister in 1997 to near £16 billion, and that is under the Barnett Formula. That is an extraordinary increase but there is certainly no doubt, as the Holtham Commission showed, that this is now an issue which needs to be addressed because if convergence, which is an inherent property to the English average for Welsh spending, continues to occur and if the pressures continue to be there, then Wales will start to fall behind comparable regions of England—the north-east of England the Holtham Commission rightly in my view identified. Just for the record, I was very struck that over the last ten years spending per head in Wales has fallen from 25% higher than spending per head on comparable programmes in England, or 125 in the index notation, where England is set at 100, to 113 in 2009–10. Between 1999–2000 and 2009–10, a ten-year period, that gap has roughly halved and if it kept going in that direction and we did not put some kind of floor in place, that would be very damaging to Wales and we would start falling behind the north-east of England, for example, which would not be acceptable to me as

Secretary of State. That is why the agreement I have negotiated with the Chancellor is a very important building block and has been recognised by the First Minister, by the former Finance Minister Andrew Davies and by Gerry Holtham himself as a major achievement. We are now in the process of interaction with the Treasury at official level and, when the times comes, at ministerial level to make sure we work out how that assessment can be made during the Comprehensive Spending Review which will happen later this year and Wales' position can be protected.

**Q627 Nia Griffith:** Could you perhaps expand a little bit about that floor and exactly how you see that? Are you saying the 113 would not go down any further or what exactly do you mean by that, and what do you see as the basis for future negotiation which has been hinted at by Liam Byrne, Chief Secretary to the Treasury, quite recently on his visit to Wales?

**Mr Hain:** I thought the Chief Secretary gave a very positive statement in his visit to Wales which echoed exactly my own sense of it when he said on 14 January 2010, following the finance ministers' quadrilateral, "I do think that Barnett needs a good hard look and I think now is the time to do it", and he spoke very fulsomely about the Holtham Commission. We are now seeking to find a formula and a method of assessment with the Treasury that protects Wales' position so that it does not fall behind. If we look ahead, if there were to be the kind of steep public spending increases that we have had over the last ten years as I have described, where that gap has halved, then I think we would be in a very alarming position without a refinement of the Barnett Formula. The formula will stay for the foreseeable future but I think we have now got the basis for establishing a mechanism which would ensure that in periods of greater and increased public spending Wales' position is protected. Nobody is expecting big increases in public spending however in the coming year so it is not as immediate a situation as would otherwise have been the case.

**Q628 Chairman:** Secretary of State, thank you very much for your evidence today. We hope that when we produce our Report next month both you and your colleagues will find it very helpful.

**Mr Hain:** I look forward to it, as I always do.

**Chairman:** Thank you very much.

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# Written evidence

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## Written evidence from the Adjudication Panel for Wales

### SUMMARY

- The legislative framework within which the Adjudication Panel for Wales operates was established by the Local Government Act 2000 (“the 2000 Act”).
- While there was a great deal of commonality between the local government ethical frameworks for England and Wales introduced by the 2000 Act, there were a number of important differences reflecting the differing circumstances in Wales.
- In the case of police authorities in Wales, the legislative framework appears muddled and to make little practical sense. It is the Adjudication Panel for Wales’ understanding that this is largely a consequence of responsibility for policing in Wales being reserved to the UK Government.
- There has been further divergence in the operation of the ethical frameworks in each country arising from changes in England introduced by the Local Government and Public Involvement in Health Act 2007. Devolution has enabled the Assembly Government to adopt different approaches to match the circumstances and needs of Wales.
- The fundamental reform of tribunal services in England has not, to date, been mirrored in Wales. While this may be a natural consequence of devolution—the Assembly Government would no doubt point to other priorities—there are potential benefits from reform that are not being realised in Wales.

### INTRODUCTION

1. The Adjudication Panel for Wales (“the Adjudication Panel”) is grateful for the opportunity to contribute to the Welsh Affairs Committee’s inquiry. The Committee’s general call for evidence published on 23 October 2009 sought submissions on a number of aspects of devolution, including the relationship between Whitehall departments, the Wales Office, the Welsh Assembly Government and the National Assembly for Wales. The Adjudication Panel has no direct knowledge or experience of these matters and, consequently, is unable to submit evidence upon them. However, the Adjudication Panel is pleased to respond to the specific request from the Committee (dated 15 December) to hear “from the ombudsmen services in Wales, and how devolution has led to divergence in policy and legislation.”

2. A background note on the role of the Adjudication Panel is below. However, the Committee will wish to note that while the Panel is an independent statutory body, it does not provide a service akin to that of an ombudsman.

### ROLE OF THE ADJUDICATION PANEL FOR WALES

3. The Adjudication Panel was established as part of the new ethical framework for local government in England and Wales put in place by the Local Government Act 2000.

4. The Panel has two statutory functions:

- (i) to form “case” tribunals to consider reports from the Public Services Ombudsman for Wales following the investigation of allegations that a member of a local authority<sup>1</sup> in Wales has failed to comply with his/her authority’s code of conduct; and
- (ii) to consider appeals by members against the determination of their authority’s standards committee that they have breached the code of conduct.

5. Where a case tribunal finds there has been a breach of the code of conduct, it has powers to suspend a member for up to one year, or to disqualify them from holding office for up to five years. An appeal tribunal’s powers of sanction mirror those of the standards committee and range from a censure to a suspension of up to six months.

### THE LEGISLATIVE FRAMEWORK

#### *The Local Government Act 2000*

6. As stated above, the ethical framework for local government in England and Wales was established by Part III of the 2000 Act. While, when first established, there was much in common between the respective frameworks for the two countries, there were also some important differences. These and further divergences of approach introduced subsequently are described.

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<sup>1</sup> In this context, a local authority means a county/county borough council, community council, fire and rescue authority, national park authority and a police authority.

7. In essence, the framework comprises:

- a set of general principles of conduct (derived from the “Seven Principles of Public Life”)<sup>2</sup> and a statutory model code of conduct;
- Local standards committees to advise members and authorities on standards of conduct;
- The investigation of alleged misconduct by the Public Services Ombudsman for Wales (and its predecessor body), the Standards Board for England or an authority’s monitoring officer; and
- The adjudication of such investigations by local standards committees or, generally in more serious cases, the relevant Adjudication Panel for Wales or England.

#### *Differing Approaches Between Wales and England*

8. The (then) National Assembly for Wales moved quickly to implement the legislative framework fully following commencement of the provisions of the 2000 Act. Importantly, this included subordinate legislation to enable the Public Services Ombudsman for Wales to delegate the investigation of allegations of misconduct to local monitoring officers and for their adjudication by local standards committees. This meant that the Ombudsman and the Adjudication Panel could concentrate on more serious allegations. By comparison, all allegations in England had to be investigated by the Standards Board and, where appropriate, referred to the Adjudication Panel for England for decision. It is common knowledge that this created a backlog of cases which led to criticism of the operation of the framework in England at the time. In some respects, therefore, it could be said that devolution meant that the Assembly Government was not hindered by the approach in England which meant that criticism of the new ethical framework on the scale seen in England was largely avoided.

9. In framing the new legislation for Wales, the National Assembly for Wales decided that it did not wish to establish a new body akin to the Standards Board for England to undertake investigations in Wales. Instead, it was decided to expand the role of the then Commission for Local Administration in Wales (ie the Local Government Ombudsman). The functions of the Commission now form part of the functions of the Public Services Ombudsman for Wales. The Adjudication Panel understands that this approach was thought to offer a more cost-effective and proportionate solution for Wales, whilst drawing on the Ombudsman’s expertise in investigating complaints about local authorities.

10. One area where devolution (or perhaps lack of it) has had an impact is that relating to the ethical framework for police authorities in England and Wales. The 2000 Act presents a somewhat confusing and inconsistent approach:

- Police authority members in Wales are subject to the same code of conduct as members of police and other local authorities in England. For those members who are appointed by their local authority, this means that they need to understand two different codes. While the codes are similar, there are some important differences which have the potential to cause confusion for members when acting in their different roles.
- The power to issue guidance on conduct matters to police authorities in Wales rests with the Standards Board for England, but the investigation of alleged misconduct is a function of the Public Services Ombudsman for Wales.
- The constitution of police authority standards committees in Wales is subject to regulations made by the UK Government which are similar to those for their counterparts in England. However, while police authorities (and other local authorities) in England have local sifting arrangements for allegations of misconduct (see below), these do not apply to police authorities in Wales.
- Reports on allegations of misconduct by members of police authorities in Wales are heard by tribunals drawn from the Adjudication Panel. The regulations governing the tribunal procedures are made by the Welsh Assembly Government. Appeals by members of police authorities in Wales against the decisions of standards committees are also considered by the Adjudication Panel. However, the procedures and sanctions are subject to regulations made by the UK Government and differ from those applicable to appeals by members of other local authorities in Wales.

11. While the Adjudication Panel has no direct knowledge of the policy reasons for this approach, it understands that it is largely attributable to policing matters not being devolved to Wales. The Adjudication Panel makes no comment on the desirability or otherwise of that, but it believes that the current approach is muddled, inefficient, makes little practical sense and is unsustainable in the long term. Any changes would need primary legislation, which would require collaboration between the Assembly Government and the UK Government.

<sup>2</sup> *Standards of Conduct in Local Government in England, Scotland and Wales*, Third Report of the Committee on Standards in Public Life (July 1997)

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*Local Government and Public Involvement in Health Act 2007 (“the 2007 Act”)*

12. The 2007 Act introduced a new local approach to the handling of allegations of misconduct in England. Allegations no longer go initially to the Standards Board for England, but instead must be made to the local standards committee. The local standards committee is responsible for assessing allegations and determining whether an investigation or some other action should be undertaken. The Standards Board for England role has changed as a consequence. It is now a strategic regulator responsible for, among other things, providing independent oversight of the local standards framework.

13. These changes have not been introduced in Wales and there has been no indication from the Assembly Government that it is considering a similar approach. The Adjudication Panel has no evidence to support one approach over the other at this time, but merely notes that this difference is a natural consequence of the devolution settlement.

**REFORM OF TRIBUNAL SERVICES**

14. Tribunal services in England are undergoing fundamental reform following the enactment of the Tribunals, Courts and Enforcement Act 2007. Over time, this will bring tribunals together within a unified two-tier tribunal structure: a First-tier Tribunal and an Upper Tribunal. Both tribunals are split into Chambers comprising similar jurisdictions. As part of the reforms, the Adjudication Panel for England ceases to have a separate existence and becomes part of the General Regulatory Chamber of the First-tier Tribunal in January 2010.

15. The Tribunals Service, an executive agency of the Ministry of Justice, provides administrative support for the tribunals’ judiciary. As a single body, it will bring greater commonality of standards and efficiency to the tribunal system, resulting in a more responsive and focussed service for users. The unified tribunal system will also facilitate “cross-ticketing” of tribunal judges and members within the same chamber, enabling more effective and fuller use of their skills, knowledge and experience.

16. The reforms do not apply to tribunals operating solely in Wales, though the Upper Tribunal will hear appeals from some such tribunals. The UK Government’s 2004 White Paper<sup>3</sup> which preceded the reforms recognised the complexity of the devolution settlement for Wales (and for Scotland and Northern Ireland) in relation to tribunal services. The White Paper indicated that the UK Government would review with the (then) National Assembly for Wales the future arrangements for all tribunals in light of the reforms in England. However, the pace of change in Wales is at best slow in comparison and the Assembly Government’s position remains unclear. In 2009, the Welsh Committee of the Administrative Justice and Tribunals Council commenced a review of tribunals operating in Wales. It is understood that this will inform Assembly Government thinking on these matters.

*January 2010*

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**Written evidence from Cymorth Cymru**

Cymorth Cymru is the representative body for providers of housing-related support, homelessness and supported living services in Wales, and as such has two overarching objectives:

- To improve the links between policy and practice by ensuring that those working in frontline service delivery understand the wider policy context, and those working in policy development understand and are influenced by the experiences and knowledge of those working on the ground.
- To ensure that the housing-related support sector maximises its contribution to the lives of service users and the communities in which they live, by helping to build and develop the sector’s capacity and professionalism.

**INTRODUCTION**

Cymorth’s response to this inquiry is particularly concerned with one aspect of devolution and how this has impacted on public policy in the past two years. As such our response will focus specifically on one part of the inquiry’s remit:

- The extent of communication between Whitehall, the Welsh Assembly Government, the National Assembly for Wales and Welsh MPs.

**RESPONSE**

Our response is influenced by a particular consultation released last year by Whitehall and the problems that arose from this. The consultation in question was the Green Paper entitled “*No One Written Off*” focussing on the welfare reform agenda.

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<sup>3</sup> *Transforming Public Services: Complaints, Redress and Tribunals* (DCA 2004)

Our primary concern in terms of this inquiry was not the consultation itself as such, but the manner in which it did not account for the varying circumstances across the UK, and in particular in Wales:

- Firstly, the consultation did not fully acknowledge the devolved settlement in Wales, and where there would be crossover between DWP's welfare reform remit, and those areas of power that are partially devolved (in our case Supporting People and Homelessness.) This miscommunication means many of the commitments within the paper were not realistic in Wales and could potentially undermine Welsh devolved policy; and
- Secondly, the consultation did not appreciate how Welsh circumstances differ from English circumstances, and many of the compulsions within the green paper would not have been achievable in Wales.

Though our response is more focussed on the underlying principle of contextualisation of centrally held powers, some examples of where there was a mismatch between Wales and Whitehall may help to provide some understanding of the issues.

The Green Paper outlined proposals to curtail the benefits of unemployed people experiencing drug problems who are not engaging with treatment. Among a number of serious concerns that Cymorth members had with this approach was the simple fact that in Wales substance misuse treatment is not widely available enough for this policy to be practicable. In fact there can be up to a two year waiting list in some areas of Wales just for assessment, and blanket UK wide proposals undermine these contextual issues.

Much of the focus of the Green Paper was on moving lone parents on to JSA, and compelling them towards work when their children reach a certain age. Again, the assumption here was that childcare is widely available and affordable—in Wales this is often not the case, though the blanket policy within the Green Paper could have still applied and left many lone parents significantly struggling financially.

The Green Paper alluded to the availability of skills training for all individuals. Many recipients of housing-related support or homelessness services do not find mainstream skills training suitable and have frequently become disengaged. Third sector organisations can provide non-mainstream training to these individuals given that they already have positive relationships with these individuals, this is a valuable part of the support they provide. The availability of these programmes is not universal in Wales, and often a shortfall in funding is the problem—the Green Paper did not take these Welsh circumstances into account.

Question 21 in the Green Paper discussed how individuals can attain individual budgets to better support themselves. In Wales we have chosen not to adopt the Individual Budgets model, and as such this question plainly conflicted with the Welsh policy agenda.

As part of the Green Paper, DWP sent a delegation to Wales for a consultation event. They were simply unable to respond to any of the questions relating to the different circumstances in Wales, which was both embarrassing and offensive.

#### CONCLUSION

These examples above demonstrate where we see difficulties in the relationship between Wales and Whitehall. There remain areas of policy where power remains with Whitehall, yet there is significant crossover with policies which are devolved.

The Welfare Reform Green Paper brought many of these issues to light—specifically that Whitehall proposals do not adequately account for Wales' circumstances, and that Whitehall proposals can conflict with existing Wales policies—and this clearly demonstrates that there can be a lack of communication between officers at the Welsh Assembly Government and officers at Whitehall.

This relationship needs to be improved, and any centrally held policy areas must take full account of the different circumstances within the devolved areas. As the National Assembly of Wales moves to adopt greater powers in specific policy areas under the terms of the Government of Wales Act—for example, through the housing Legislative Competence Order currently being considered in both Cardiff and Westminster—these issues will become of even greater importance. As well as officials working more closely together, officials at Whitehall should consult more with Welsh organisations in order to gain a particular Welsh context (and the same principle should apply in Scotland).

*December 2009*

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#### **Written evidence from the Farmers' Union of Wales (FUW)**

Thank you for inviting the view of the Farmers' Union of Wales (FUW) regarding co-operation and consultation between Wales and Whitehall, which is given below.

As you no doubt appreciate, certain matters relating to devolution and the relationship between Wales and Whitehall lie outside the remit of the FUW, and the Union has not therefore attempted to address these in its evidence.

We would also emphasise that, with regard to many matters, the Union can only express its impressions regarding co-operation and consultation between Wales and Whitehall, since those directly involved in such relationships are unlikely to explicitly criticise their English or Welsh counterparts in a manner that would constitute evidence. Nevertheless, the FUU does have longstanding concerns regarding apparent failures by English administrations to properly recognise devolution, and it is notable that similar concerns have previously been raised by the Welsh Affairs Committee and are alluded to in the Justice Select Committee's recent report.

#### SUMMARY

- While the FUU recognises that significant progress has been made in terms of individuals and bodies recognising devolution, there remain major concerns that this is not always the case, including regarding matters of major importance to Wales and the UK as a whole.
- Such failings include failures on the part of Whitehall to involve Welsh administrations and stakeholders in discussions that have an impact on the UK as a whole.
- It is believed that such failings occur both in terms of communications between wholly devolved administrations, and communications within bodies that are not devolved but have Welsh departments or branches.
- There can sometimes be a failure by MPs to properly recognise areas of devolved responsibility.
- It would appear that it is Whitehall, as opposed to Wales, that is most guilty of failing to properly communicate and consult with Welsh parties and departments.
- The FUU welcomes the review of Whitehall guidance on devolution, and believes that the revised guidance should compel Whitehall to consult with all relevant parties regarding issues which will have direct or indirect consequences for Wales.
- The FUU fully supports the majority of recommendations of the Justice Select Committee regarding those issues that fall within the Union's remit, in particular that devolution awareness be a core part of the training for all senior civil servants, and that a secondment programme be introduced to encourage awareness and best practice.
- The FUU would not wish to see the introduction of a common Civil Service code that undermines current engagement between Welsh departments and stakeholders.
- The FUU fully supports steps advocated by the Justice Select Committee in relation to the Barnett Formula, with a view to implementing an equitable formula that recognises the needs of Wales, while providing long term stability that allows departments to plan budgets at least three years ahead.

#### *Awareness of the devolution settlement within the Civil Service and of the protocols which are in place in relation to legislation and policy affecting Wales*

1. Given that responsibility for agriculture is almost entirely devolved to Wales, and that the Welsh Assembly Government is legally bound to enforce European Regulations, the majority of interactions between the FUU and government bodies occur at a Welsh or European level, and concern matters with regard to which relationships between Wales and Whitehall are less relevant.

2. However, there are certain issues where co-operation between English and Welsh bodies, or within UK bodies, are of critical importance. Examples of these include: animal health and welfare, where cross border co-operation is crucial to the control of animal diseases; matters dealt with by the Food Standards Agency, where powers are not devolved; and issues dealt with by the Environment Agency, where, again, powers are not devolved.

3. In terms of animal health and welfare, responsibility for policy is devolved to the Office of the Chief Veterinary Officer for Wales (OCVO), while Animal Health is the centrally funded UK body responsible for implementing those policies.

4. While the FUU has an extremely high opinion of the OCVO and Animal Health, longstanding concerns exist regarding Whitehall's failure to properly involve and engage with those parties, including the OCVO, who are responsible for animal health and welfare issues within Wales.

5. In particular, with regard to DEFRA's cost sharing agenda, which aims to transfer significant running costs to the farming industry, it is understood that information that is crucial in terms of Wales's budgeting for future animal health measures has not been forthcoming, despite having been requested some years ago.

6. It is also concerning that the Welsh Assembly Government was not notified of or consulted about the appointment of Rosemary Radcliff to chair the DEFRA/industry group set up to develop cost sharing policy, despite the impact that this will have for Wales.

7. It had also been proposed that a Chief Veterinary Officer (CVO) for the UK would be employed by an England-only quango, but would nevertheless have had the remit to negotiate on behalf of the UK as a whole, despite devolution. It is understood that it was only following concerns being expressed by the devolved administrations that DEFRA agreed to alternative arrangements that would involve the separation of CVO England and CVO UK roles.

8. Thus, there exist major ongoing concerns regarding Whitehall's failures to properly communicate and engage with Wales regarding matters that will have a major impact on Welsh animal health and welfare.

9. Similar worries exist regarding issues dealt with by both the Environment Agency and the Food Standards Agency which, while being less acute, nevertheless have an impact on Wales.

10. In terms of the protocols which are in place regarding legislation and policy affecting Wales, it is believed that these are more than familiar to the Welsh Civil Service. However, this may not necessarily be the case in the English Civil Service.

11. For example, during DEFRA's drafting of the Commons Act 2006, the significant differences between the importance of common land in England and Wales led to a situation whereby less focus was placed on the agricultural importance of commons than would have been the case had the Act been drawn up in Wales.

12. Thus, while the FUW succeeded in securing crucial changes to the Commons Act that more properly reflected the fact that 11% of Wales's forage area is common land, better recognition of Wales's devolved status would have led to more appropriate Measures within the Act, and more flexibility in terms of the powers conferred to Wales by the Act.

#### *The role of the Wales Office and the Ministry of Justice*

13. The FUW is unaware of any significant problems that exist or have occurred as a result of failures by the Wales Office and the Ministry of Justice to co-operate and consult. However, as has already been stated, such problems may exist in areas that lie outside the remit of the FUW.

14. However, it is notable that we have yet to experience a situation whereby parties with significantly different political views are in power (or coalition) in Westminster and Wales; thus, any problems that exist now may be exacerbated in the absence of clear agreements relating to the functioning of devolution under such circumstances.

15. The FUW welcomes the Wales Office's securing of a commitment from the Chancellor that the UK Government will take action if Wales becomes disproportionately disadvantaged by the Barnett Formula. However, the potential impact of convergence is of significant concern to the Union, particularly in light of the recent report of the Independent Commission on Funding & Finance for Wales.

16. Thus, while it may not strictly fall within the remit of the Committee's inquiry, the FUW would take this opportunity to highlight the potential impact of convergence in terms of co-operation and consultation between Wales and Whitehall, and the central role that the Wales Office plays with regard to such relations.

#### *The extent of communication between Whitehall, the Welsh Assembly Government, the National Assembly for Wales and Welsh MPs*

17. In terms of communications between Whitehall and the Welsh Assembly Government, the Union would refer the Committee to the concerns already expressed above.

18. With regard to the relationship between the National Assembly for Wales and Welsh MPs, there is a perception that political tensions exist between AMs and MPs, and within political parties, as a result of MPs' failure to properly recognise devolution.

19. For example, in July 2008 the Right Honourable Alun Michael MP tabled an Early Day Motion, which was signed by nine MPs, eight of whom were Welsh. The Motion effectively called on the Welsh Assembly Government Cabinet and National Assembly for Wales to reverse its decision to investigate a cull of badgers in order to control bovine Tuberculosis, (bTB) while also implying that the decision was not evidence based.

20. Given that the Labour Party and Plaid Cymru decided to form a Government in Wales, that the Welsh Assembly Government is responsible for animal health issues within Wales, and that the National Assembly for Wales voted overwhelmingly to support the Welsh bTB Eradication Programme, the FUW believes that the EDM represented a failure by MPs to recognise devolution, including Welsh MPs and a former First Secretary for Wales and leader of the Labour Party in the National Assembly for Wales.

21. Moreover, the implication that the Welsh Cabinet and the National Assembly for Wales were not following an evidence based approach was not only wrong, but also divisive, in that it was aimed at discrediting the Welsh Assembly Government and the National Assembly for Wales in relation to a devolved issue over which MPs have no authority.

*The review of Whitehall guidance on devolution, announced by the Ministry of Justice in response to the Committee's Report on the Legal Services Commission*

22. The FUW welcomes the review of Whitehall guidance on devolution, and believes that the revised guidance should seek to address the Committee's concerns, many of which are shared by the FUW.

23. Moreover, it is believed that the revised guidance should compel Whitehall to consult with all interested bodies and devolved governmental departments regarding issues which will have direct or indirect consequences for Wales.

*Taking forward the findings of the Justice Select Committee in its recent substantial Report, "Devolution: A Decade On"*

24. The FUW fully supports the majority of recommendations of the Justice Select Committee regarding those issues that fall within the Unions remit.

25. In particular, the Union supports devolution awareness being a core part of the training for all senior civil servants, and the implementation of a secondment programme between Whitehall and Cardiff which would not only raise awareness of devolution, but also promote best practice.

26. With regard to the recommendation regarding a common Civil Service Code throughout the UK, the FUW would not wish to see the adoption of a Code that undermines current engagement between Welsh departments and stakeholders, through the introduction of bureaucracy and protocols. This view is based upon the current relationships between Welsh stakeholders and Welsh civil servants/departments, which we believe to be significantly better than parallel relationships in England. We would therefore advocate a Code that allows devolved departments to operate flexibly and maintain and improve relationships, while simultaneously ensuring that devolution is properly recognised by all departments.

27. With regard to the process of enhancing the legislative competence of the National Assembly for Wales, with the consent of Whitehall and Westminster, FUW members have previously expressed the view that more powers should be devolved to Wales, and that processes of doing so should be straightforward. However, members have also emphasised the need for a steady transition towards such a position, and that robust checks and balances should exist to ensure all Measures that might be introduced in Wales are properly scrutinised.

28. As already stated, the FUW has growing concerns regarding the appropriateness of the Barnett Formula, given the current devolution settlements, the Government of Wales Acts 1998 and 2006, and the risk that convergence represents for Wales. We therefore fully support the steps advocated by the Justice Select Committee, namely; the publication of a factual paper about the Formula, a UK wide review of the Formula, and the proposal of an equitable formula that recognises the needs of Wales, while providing long term stability that allows departments to plan budgets at least three years ahead.

*December 2009*

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**Written evidence from Professor Tim Jones and Ms Jane Williams, School of Law, Swansea University  
(Submitting as individuals)**

**INTRODUCTION**

This submission is concerned with the legislative process for Wales; in particular the exercise in practice of the power under the Government of Wales Act 2006 to enhance the Assembly's legislative competence by means of Legislative Competence Orders (LCOs). It engages with some, but not all of, the matters listed in the Welsh Affairs Committee's call for evidence. It does not address awareness within the Civil Service of the devolution settlement and associated protocols, nor the extent of communication between Whitehall, the Welsh Assembly Government, the National Assembly for Wales and Welsh MPs.

We note the content of the recent Report of the Welsh Affairs Committee on its review of the LCO process, particularly the generally positive view of the process as a bridge between Parliament and the National Assembly for Wales and of the role of the Welsh Affairs Committee itself within this process.

The first part of this submission makes a number of points that may appear a little more negative than the view expounded in the Welsh Affairs Committee's Report. Nonetheless, we believe these issues should be raised, so that serious consideration may be given to them by persons interested in the development of devolved law-making for Wales. We note the Committee's view that in Wales there are 'widespread misapprehensions and misunderstandings' about the LCO process, but respectfully submit that the points

raised below, even if not accepted by the Committee, might be regarded as a reflection of a different view, rather than simply as an erroneous one. As the Committee itself has remarked, the process is unprecedented and evolutionary. While the Committee has been energetic and innovative in the construction of working methods to support the LCO process, there is room for more than one view as to the way in which that process should operate and develop.

#### JUSTICE COMMITTEE REPORT AND GOVERNMENT RESPONSE

Paragraphs 22–24 of the Conclusions and Recommendations of the Justice Select Committee’s Report *Devolution: A Decade On* refer to the LCO process.<sup>4</sup> The Justice Committee notes the view of “some commentators” that it is complex, and “some initial fears” about the process for scrutiny of LCOs. They consider there is a legitimate role for Westminster in scrutinising draft LCOs:

“to check whether they are in order, what their scope is, whether the drafting is clear and precise and whether the legislative competence can or should be devolved under the terms of the Act”.

At the same time, however, they express concern about the lack of transparency of the role of the Secretary of State and recommend a protocol outlining the principles that would inform a decision by the Secretary of State whether or not to lay a draft Order. The Government’s response is somewhat cursory, simply stating that the Government of Wales Act 2006 makes sufficiently clear the role of the Secretary of State.

We would urge that further attention be paid to the issue of transparency. The Welsh Affairs Committee itself reiterated this concern in its Report on its review of the LCO process. The Government’s response seems inadequate to address the issues of democratic accountability that have arisen in the practice of the LCO process. In the light of this, it is tempting simply to support the Committee’s decision to intensify its scrutiny of the Wales Office with regard to the progress of proposed LCOs. However, we submit that there are issues not only about the role of Secretary of State but also, with respect, about the role of the Welsh Affairs Committee which ought also to be considered. We submit that these are matters going to the credibility of the process. If satisfactory solutions cannot be found, it is questionable whether the LCO process should be continued rather than, instead, moving swiftly to the promotion of the clearer basis of legislative competence offered by Part IV of the 2006 Act.

#### LEGISLATIVE COMPETENCE ORDERS: GENERAL ISSUES

It is pertinent to recall that the White Paper *Better Governance for Wales* followed on from the Richard Commission Report, but did not promise to execute its recommendations in full. In particular, it departed from Richard’s recommendations for the establishment of legislative devolution for Wales. The Government of Wales Act 2006 (“the 2006 Act”) reflected the political compromise put forward in the White Paper, in which a new National Assembly for Wales could be granted enhanced legislative competence in two stages. The first, currently in operation, is designed to allow incremental increase in legislative competence by means of LCOs made under Part 3 of the 2006 Act. An LCO bestows power on the Assembly to pass laws, known as Assembly Measures, on matters specified in the LCO. LCOs provide an enduring legislative competence in the matter identified. They are limited not to simply providing legislative competence so that a particular Measure can be enacted. They enable the Assembly to legislate in relation to the matter identified indefinitely. That is, although no doubt originating in response to a political objective to secure a particular legislative/policy aim (to be realised in a subsequent Measure), the legislative competence can henceforth be used to develop or reverse that outcome, or to make further and different provision within the competence conferred by the LCO.

Subject to certain general restrictions, similar to those applying to Acts of the Scottish Parliament, an Assembly Measure can make any provision that could be made by an Act of Parliament. In this way, it was envisaged that the Assembly could gradually acquire “primary” legislative powers on more and more matters that would be specified within the policy fields listed in the Act. The second stage, which the 2006 Act makes contingent on popular consent signified in a referendum in Wales, would replace this incremental scheme with a much broader delineation of legislative competence across a wider range of policy fields.

It will be recalled that the origin of the LCO lies in an embellishment upon Box 13.2 in the Report of the Richard Commission, dubbed “13.2 plus” and set out at paragraphs 3.14 to 3.21 of the White Paper *Better Governance for Wales*. Paragraphs 3.19 to 3.21 dealt with the probable Westminster scrutiny processes for what became LCOs, suggesting draft affirmative procedure and a likelihood of pre-legislative scrutiny before the draft affirmative debates on the floor of both Houses. Paragraph 3.21 stated that this pre-legislative scrutiny “could be informed by understanding the use the Assembly might propose to make of these powers in the immediate future”. However, it went on, “as the power would be a general and continuing one for that particular policy area, this would serve only as an example of what could be done; the issues for the committee and for each House would be the appropriateness in general of delegating legislative authority to the Assembly on the particular policy area specified in the draft Order in Council”.

<sup>4</sup> Justice Committee, Fifth Report of Session 2008–09, *Devolution: A Decade On*, HC 529-I, II

Section 95 of the 2006 Act gave statutory effect to these aspirations. Section 95 sets out what an LCO can do, and the process. An LCO can:

- amend Part 1 of Schedule 5 to add, vary or remove a Matter;
- amend Part 1 of Schedule 5 to add, vary or remove a field (although a new field can only be added if WAG already has functions in that field—in practice this must mean either functions inherited from the previous Assembly or functions otherwise conferred by an Act of the UK Parliament); and
- amend Part 2 or 3 of Schedule 5 (general restrictions on the Assembly’s legislative competence and exceptions to the general restrictions).

The process set out in s. 95 is a sequential one, as follows:

1. Draft LCO laid before and approved by resolution of the Assembly.
2. Next, First Minister sends the draft LCO, with notice of the Assembly’s resolution, to Secretary of State (SoS).
3. Then, within 60 days of receiving notice under 2. above, SoS either:
  - (a) lays the draft LCO before Parliament; or
  - (b) refuses to lay the draft LCO before Parliament and gives notice of refusal, with reasons, to the First Minister. In that case, the First Minister must lay a copy of the SoS’ notice before the Assembly and the Assembly must ensure it is published.
4. Where the draft LCO is laid before Parliament, then Parliament must either approve or reject it. It is not amendable at this stage.

#### WHAT HAS HAPPENED IN PRACTICE?

As anticipated in the White Paper, the UK Parliament set about establishing what it considered to be appropriate scrutiny arrangements for draft LCOs. In its second report of Session 2007–08, the House of Lords Constitution Committee responded positively to a request by the then Leader of the House of Lords to undertake the task of conducting pre-legislative scrutiny of proposed LCOs. The Constitution Committee set out at paragraph 12 of its report the criteria it would apply in conducting this pre-legislative scrutiny. These are unexceptional, dealing with the legal and constitutional issues that need to be checked and on which the UK Parliament should be expected to focus its attention.

The same report of the Constitution Committee reflected other aspects of the process, including the role of the Secretary of State for Wales and the Welsh Affairs Committee. This was illustrated in a flow diagram appended to the Constitution Committee’s report. This makes clear that, in contrast to the chronology of section 95 as to the formal stages, pre-legislative scrutiny is conducted jointly by the Assembly and by the Welsh Affairs Committee. It further reveals that no draft Order is to be allowed to enter either the Assembly’s pre-legislative scrutiny process or the UK pre-legislative scrutiny process without both WAG clearance and UK government policy clearance. Thus the role of the Welsh Affairs Committee is presented as a *de facto* joint pre-legislative scrutineer, along with the relevant Assembly committee. And, importantly, the role of the Secretary of State for Wales is that of gatekeeper at the entry point to the pre-legislative scrutiny process.

This last point is elaborated for UK Ministers and their officials in Devolution Guidance Note 16 (*Ministry of Justice*) which gives guidance on dealing with LCOs under section 95 of the 2006 Act. It says that proposed LCOs will be subject to pre-legislative scrutiny in both legislatures. It acknowledges that the proposal for increased legislative competence originates with the Assembly Government, an Assembly Committee or Assembly Member. However, it goes on to say that the terms of each such proposed Order should be agreed between the Welsh Assembly Government and the UK Government before the proposed Order is published. To that end, it requires that, in considering a request for increased legislative competence, a UK Government department should involve their own devolution contact, ministers, the Wales Office, devolution secretariats in the Ministry of Justice and Cabinet Office. The upshot of all this seems to be that no proposed LCO is going to see the light of day in England or Wales without prior UK Government approval. We submit that this is not what section 95 anticipates, is counter-devolutionary in effect and that this aspect of the process ought to be revisited.

There is an important principle underlying the chronology in Section 95 which, we submit, ought also to be respected in the non-statutory arrangements for pre-legislative scrutiny. That principle is that the Assembly has the right to promote extension of its powers in a clear and transparent way, without first seeking permission from the UK Government. The apparent virtue of the pre-legislative process that has been adopted in fact masks the vice (in terms of the principle of devolution) of effective control by the UK Government over what the Welsh Assembly Government may publicly propose by way of extension to its legislative competence. This state of affairs can be seen as inconsistent with the publicly expressed purpose of the 2006 Act. It allows the Secretary of State an inappropriate degree of control over what may be publicly promoted by the Welsh Assembly Government and appears to give the Welsh Affairs Committee the role of

scrutineer of Welsh Assembly Government policy. This carries the danger that the political debate about proposed changes for Wales within the field headings in Schedule 5 to the 2006 Act is perceived to be still centred in Whitehall and Westminster, with outcomes controlled from there and—perhaps most significantly—both the Welsh Assembly Government and the National Assembly effectively controlled from there whenever they consider using the LCO process.

If this assessment is correct, it has important consequences for the general understanding of how Welsh devolution operates in practice. We would respectfully suggest that the Welsh Affairs Committee has an important clarificatory role to play. The Committee itself has identified as an example of the system working well the “red meat” LCO (the National Assembly for Wales (Legislative Competence) (Agriculture and Rural Development) Order 2008). In relation to the draft LCO the Welsh Affairs Committee conceived its task as follows (extracted from para 11 of its Report):

- (a) to examine the scope and appropriateness of the proposed Order under the terms of the Government of Wales Act 2006;
- (b) whether the proposed Order is in the spirit and within the scope of the devolution settlement;
- (c) the extent to which there is a demand for legislation which might follow the adoption of the proposed Order; and
- (d) whether the use of the Legislative Competence Order in Council procedure is more appropriate in this instance than, for example, the use of framework powers in a Westminster Bill.

Whilst an understandable account, there appears to be overlap with the role of other actors in the LCO process and consequent potential for confusion. Thus the first seems to duplicate either the long-established role of the Joint Committee on Statutory Instruments (JCSI) or the role of the House of Lords Constitution Committee (referred to above). The second is suggestive of a settled and static concept of competence, pulling against the concept of incremental development, for which Part 3 of the 2006 Act was designed.<sup>5</sup> The third seems to duplicate the decision-making of the democratic institutions of Wales to seek the enhancement to legislative competence. The fourth seems to duplicate the role conventionally reserved for the promoters of legislation, to decide how best to pursue their legislative goals (and, of course, to live with the consequences of their own judgment).

Parallel to these developments is the apparent strengthening of the UK Government’s control over the Welsh Assembly Government in relation to Welsh policy. In one instance, this tendency produced a potential illegality. When considering the draft LCO on housing, the Welsh Affairs Committee objected to the LCO conferring power to abolish, as opposed to simply suspend, the right to buy. The response to this objection was a “compromise”, whereby no exercise of the power which involved abolition would be made unless agreed between the Secretary of State and the Welsh Ministers. The JCSI rightly reported this on grounds of dubious *vires*. Delegation to the executive of decisions as to legislative competence is not consistent with the scheme in Section 95 of the 2006 Act, and the consequent draft LCO appeared not to be *intra vires*. This was because the draft LCO appeared to make the decision whether the National Assembly had legislative power to abolish the “right to buy” social housing dependent on the consent, at some future point, of the Welsh ministers and the Secretary of State.

In its Report on this draft LCO, the JCSI applied the principle that “delegated legislation should not depend on the exercise of ministerial or departmental discretion unless provision to that effect is expressly contained in the enabling statute”. We venture to suggest that this principle has in a different way been inadequately reflected in relation to the LCO process in general, in that the Secretary of State has acquired a *de facto* screening and gate-keeping role for which there is no statutory authority and no adequate mechanism of accountability. The Westminster mechanisms appear to be responding to this by promoting ever greater and more expansive scrutiny of the LCO process. This has the unfortunate consequence of contributing to the appearance of an Assembly, far from growing in competence and maturity, but ever more closely controlled by the institutions of government at UK level. If this trajectory is indeed the inevitable consequence of the scheme established by Part 3 of the 2006 Act, we suggest that it must lend weight to the argument for a swift move towards promotion of the implementation of the alternative scheme for legislative competence under Part 4.

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<sup>5</sup> Likewise, the Committee’s recent suggestion that LCOs should be tightly drafted so as to confer power only to do what is currently proposed and not to go wider seems contrary to the “framework powers” approach envisaged by the White Paper.

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## Written evidence from The Law Society Wales

### 1. INTRODUCTION

This response has been prepared by the Law Society, the representative body for over 100,000 solicitors in England and Wales. The Law Society negotiates on behalf of the solicitors' profession and lobbies regulators, governments and others.

In Wales the Law Society has a committee dedicated to legal issues both stemming from devolution of law-making and consequent upon a developing legal community. The committee is both proactive and reactive and comprises specialist lawyers (not all of whom are solicitors) drawn from across Wales who volunteer their time. The Wales Committee is supported by a dedicated staff based in Cardiff.

The interest of the Law Society in the development of the law and law-making in Wales is broad. Our interest is reflected in our active engagement in the legal and business community in Wales, our previous submissions to the Welsh Affairs Committee, to committees of the National Assembly including the Subordinate Legislation Committee and, more widely, through encouraging the debate surrounding devolution in relation to the administration of justice.

### 2. OVERVIEW

The Law Society Wales Committee monitors the progress of devolution in Wales and its impact on the profession as well as monitoring the programme of legislation for Wales. Our aims include seeking improvements in the way the law is made and in its accessibility, from preliminary and consultation stages to publication and implementation.<sup>6</sup>

The Law Society welcomes the Welsh Affairs Committee's inquiry, Wales and Whitehall, to consider how devolution is supported through Whitehall. The difficulties inherent in a lack of knowledge and understanding within Whitehall cannot be over-stated. We do not have sufficient direct experience or knowledge of how Whitehall departments work, either internally or in interfacing with the Welsh Assembly Government (WAG) and the National Assembly to respond to all the issues in the call for evidence. In this submission, we seek to describe the consequences of the overlap between Wales and Whitehall: in some areas devolution is developing progressively but in others the development appears piecemeal. The result is the creation of a complex and inappropriate legal environment for citizens and business in Wales to thrive.

### 3. LAW-MAKING

The development of the various ways in which law is now made for Wales has been scrutinised in Westminster and Cardiff Bay as well as given careful consideration by the All Wales Convention.<sup>7</sup> It is unnecessary to rehearse the arguments and conclusions of these various inquiries as the Committee will be aware of them particularly as the same concerns are emerging from each quarter. Below we highlight individual issues arising from the interaction of Whitehall with Wales which are of particular concern.

#### 3.1 *UK Legislation*

It is becoming increasingly apparent that even where Whitehall is legislating for England only there must be careful consideration of the impact on Wales. By way of illustration of the emerging problems, where Statutory Instruments are being drafted and amended, the Welsh Assembly Government must be alerted to review the consequences for Wales law at the same time. This would mean that a considered conclusion is reached whether this results in the original instrument remaining in force in Wales, in the requirement for a new instrument making provisions for Wales or for WAG taking forward its own legislation.

There appears to be an absence of co-ordination in commencing provisions or applying changes to the law in Wales that have already been made in England. These can lead to unnecessary differences between England and Wales in areas where there is no distinctive Welsh policy emerging. There are some examples of this in the field of planning and health law.

Where powers are given to Welsh Ministers, consideration needs to be given to the timetable in Wales for implementing those powers to secure a degree of consistency in implementing legal changes where there are no significant differences in the policy behind them.

#### 3.2 *Legislative Competence Orders*

The recent developments in Legislative Competence Orders (LCOs) and the circumstances where robust negotiation between Departments has resulted in complicated legislative powers added to Schedule 5 including "exceptions to exceptions" and "carve-outs". This emerging complexity within Schedule 5 demonstrates the need to keep in perspective the role of the Order which is to clearly describe a power to legislate in a field of law in the future and is not a first draft of a specific law to be applied in Wales. In

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<sup>6</sup> Law Society Wales Manifesto May 2007

<sup>7</sup> All Wales Convention Report November 2009

particular, the Constitution Committee of the House of Lords sounds the alarm against further development of the use of floating exceptions with the statement “The Constitution Committee considers LCO 8, taken in the round, to be perilously close to the borderline of what is constitutionally acceptable”.<sup>8</sup>

Those developing the proposed LCOs, be it in terms of policy, legal advice, or drafting, should bear in mind that they are defining the new constitution for Wales.

The Law Society recently gave evidence to the National Assembly’s Subordinate-Legislation Committee in response to their inquiry into the development of Schedule 5 of the Government of Wales Act. There we concluded with the following:

“If the process of law-making and the results thereof are over-complicated particularly as a consequence of political intervention, the constitution of Wales will become incomprehensible even to a tiny cadre of technical experts: At that stage the ‘rule of law’ will itself become precarious.

If then there is uncertainty as to the law, either as to the powers under which legislation is made or else as to ministerial powers to act, citizens will be unable to receive a fair hearing.

Both of these are fundamental planks of the rule of law, and of our legal system:

There must be certainty and it is only through clear and progressive law-making that this can be delivered.”<sup>9</sup>

In our oral evidence we highlighted our concern that Schedule 5 appears to be evolving in a haphazard manner as various policy initiatives are pursued, with little evidence of a plan to build up a coherent body of powers within the various Fields. The state of Schedule 5 in relation to the Education field, for example, already cries out for reappraisal to see if a clearer and more succinct formulation of powers can be drafted.

#### 4. THE IMPACT OF WHITEHALL IN AREAS OUTSIDE LAW-MAKING

The main areas of our recent experience of the impact Whitehall relate to the administration of justice both with regard to the courts system and the provision of legal aid funded via the Legal Services Commission.

Since the inception of devolution the Judiciary of England and Wales have been generally supportive in particular in ensuring that courts in Wales reflect the new constitutional map.<sup>10</sup>

##### 4.1 *Administrative Court Office in Wales*

The profession has welcomed the establishment of the Administrative Court in Wales with its office in Cardiff which opened in 2009 as part of the devolution of administrative business from London. This followed a report by Lord Justice May, which recognised the constitutional arguments for a Court in Wales and that Welsh circumstances required the Court to be available in locations throughout Wales, rather than having its location fixed in Cardiff.

Practitioners intend to make the best use of this facility. The Law Society understands that the first months of operation have shown a steady flow of cases slightly ahead of the numbers projected in the Court’s business plan and there is general satisfaction among users at the level of service, accessibility and the availability of judges.

The Lord Chancellor and Secretary of State for Justice confirmed support at the UK level for these innovations in his recent Law Society lecture in Cardiff where he quoted the Lord Chief Justice “Judicial review proceedings concerning any devolution issue arising out of the 2006 Act, for any issue concerning the Assembly of Wales, or the Executive of Wales, or any public body, including a local authority in Wales . . . should be started in Cardiff”.<sup>11</sup>

##### 4.2 *The Legal Services Commission*

The Committee will recall its inquiry into the Legal Services Commission Cardiff Office and Lord Bach’s oral evidence where he said “I do not believe that [the Ministry of Justice] did have conversations with the Welsh Office. Can I say that it should have done. I put that on record; it should have done either itself or through the Legal Services Commission. If we did not, we will learn a lesson from that.”<sup>12</sup>

It is regrettable that the Wales Director is no longer a full time post and that Mr Paul Davies who continued as Wales Director is, at the same time, one of three managers across England and Wales with responsibilities for all contract holders. Given the patent need to ensure that those making decisions in London accommodate the reality of devolution across departments this role should be re-instated as a full-time post.

<sup>8</sup> <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/159/159.pdf>

<sup>9</sup> [http://www.assemblywales.org/bus-home/bus-committees/bus-committees-perm-leg/bus-committees-legislation-dissolved/bus-committees-third-sleg-home/bus-committees-third-sleg-current\\_inquiries/bus\\_leg\\_slc\\_s5-2.htm](http://www.assemblywales.org/bus-home/bus-committees/bus-committees-perm-leg/bus-committees-legislation-dissolved/bus-committees-third-sleg-home/bus-committees-third-sleg-current_inquiries/bus_leg_slc_s5-2.htm)

<sup>10</sup> See speeches of Lord Judge, Lord Justice of England and Wales and Lord Justice Pill 12 October 2009 Legal Wales Conference [http://www.judiciary.gov.uk/publications\\_media/speeches/index.htm](http://www.judiciary.gov.uk/publications_media/speeches/index.htm)

<sup>11</sup> <http://www.justice.gov.uk/news/speech031209a.htm>

<sup>12</sup> Welsh Affairs Committee, Seventh Report of Session 2008–09, *Legal Services Commission* Ev2 Q8

## 5. THE PROFESSION

The need to fully understand the impact of both the Government of Wales Acts of 1998 and 2006 and to keep up to date with the progress of devolution of law-making to Wales brings an added dimension to the work of solicitors across England and Wales. The Law Society is supporting the profession particularly in Wales through regular publication of reports on monitoring of new legislation and through training opportunities.

The complexity of the law-making process and lack of transparency and accessibility is compounded by the apparent limited resources of the National Assembly and Welsh Assembly Government to work with the professions engaged in this process.

## 6. A WALES STATUTE BOOK

The Law Society lobbied on the provision of a Wales Statute Book during the passage of the Government of Wales Act 2006 and renewed the call in written evidence to the All Wales Convention as well as to committees of the National Assembly.

We want a Wales Statute Book provided as a public service: access to justice is a matter for the state and the complexity of the devolution settlement requires action on this.

*January 2010*

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### Written evidence from Legal Services Commission

Further to your recent request, I attach a detailed note regarding the extensive stakeholder engagement that we have undertaken at the Legal Services Commission since our attendance at the Welsh Affairs Committee on 24 March 2009.

It was the LSC's plan to automate and streamline operations that led to the initial stakeholder concerns, and the Committee should note those plans have been delayed owing to a number of factors:

- (i) Redefinition of IT proposals.
- (ii) Delays due to additional procedures in the process for securing funding from the Ministry of Justice.
- (iii) Additional work volumes, increased Financial Stewardship requests and further budgetary challenges.
- (iv) External reviews including the Magee Review.

Many of the above are immediate work in progress, and developments may well occur between the date of this submission and the date of the Committee's hearing, on Tuesday 9 February.

Our vision for a more automated process of delivering legal aid remains as previously described with the inclusion of feedback which has readily been taken on board to enhance the proposition. What has slipped is timing, and at this stage I can confirm that we will be reviewing the timescale over the next three months.

### LIAISON WITH KEY POLITICAL STAKEHOLDERS SINCE THE WELSH AFFAIRS COMMITTEE

1. The Legal Services Commission (LSC) has fully taken on board the recommendations from the Welsh Affairs Committee and has engaged with the key political stakeholders in Wales to ensure an open dialogue is provided in sharing our thinking for the future.

2. Immediately after the Government response to the Welsh Affairs Committee was published, the LSC met with the previous First Minister and the Minister for Social Justice and Local Government in Cardiff Bay. Phil Lambert, Business Support Executive Director, Paul Davies, Wales Director and Tom Jones, Commissioner outlined the rationale for the LSC changes, as highlighted in the evidence to the Welsh Affairs Committee, reviewed the findings and discussed how these could be addressed going forward. It was agreed to hold a series of subsequent meetings with officials to explain in more detail how the plans were going to impact the Cardiff office, and how any changes were likely to be implemented. The key issues needing consultation related to the announced potential staff reductions, what electronic systems would be in place and how this would take account of the divergence in Welsh Laws, the protection of the Welsh Language provision and how citizens in Wales could ensure the same or better level of service from the LSC. This agreement to undertake further meetings was confirmed on the 14 May 2009 in a letter from Phil Lambert to the First Minister, and Rhodri Morgan's reply of the 8 June 2009.

3. In addition to this meeting, Carolyn Regan, LSC Chief Executive and Phil Lambert also met with Alan Cogbill at the Wales Office to discuss how we could ensure we moved forward by engaging with the appropriate stakeholders. It was agreed that regular 6-monthly meetings would be scheduled between the LSC and the Wales Office to share thinking and to ensure that appropriate consultation is being undertaken.

4. On 20 May 2009, at a Commission board meeting, it was agreed that during the current financial year 2009–10, the civil case management team in Cardiff would form a virtual team with Bristol rather than centralise this activity in Bristol itself. It was further agreed that the LSC would maintain a business analyst team in the Cardiff office (five staff), rather than remove the roles to Bristol. Also, three new roles (two auditors and a personal assistant role) were to be created in the Cardiff office rather than elsewhere. There was also a re-affirmation of our commitment to increasing our Policy team in Wales, although this is currently on hold pending the outcome of the Magee review to Ministers.

5. Following the Welsh Affairs Select Committee inquiry, the Wales Office has been invited, and has accepted, to join the membership of the Wales Committee. The Wales Committee is an advisory committee for the Community Legal Advice strategy in Wales, including representatives from the Welsh Assembly Government, Welsh Local Government Association, SOLACE, WCVA, CAFCASS Cymru, Welsh Consumer Council, Commission for Equalities and Human Rights, HMCS, National Offender Management Services, the CLS National Forum for Wales and now the Wales Office. This has further strengthened our consultative approach in Wales.

6. The Wales Director attends a Heads of Government Offices in Wales meeting every six months. This is organised by the Welsh Assembly Government, where issues affecting organisations are shared. These have taken place on 11 June and 10 December 2009.

7. On 8 July, the LSC hosted an event to celebrate the 60th anniversary of legal aid for Welsh MPs in Westminster, where we acknowledged the findings of the Welsh Affairs Committee and outlined the various consultation meetings that we had already undertaken and also those we had planned for the future.

8. We have continued to take our responsibilities and commitment to the Welsh Language seriously. On 8 June 2009 we published our renewed three year Welsh Language Scheme, having worked closely with the Welsh Language Board (WLB). The WLB has produced a leaflet “Mea gen ti ddewis” (you have a choice) in which it cites the Legal Services Commission’s Community Legal Advice website as providing good practice for other public bodies in terms of bi-lingual access for the public. We have also committed to retaining our Welsh Language speakers in the Cardiff office, and to attending the Eisteddfod annually (we attended the Bala Eisteddfod in August 2009).

9. On 24 August, Phil Lambert provided input to a MoJ devolution workshop to share our experience and for others to learn from this event.

10. A further meeting was held with Alan Cogbill at the Wales office with Paul Davies where we debated what consultations had taken place and the actions that had resulted from this, as well as what further meetings and consultations were planned for the forthcoming months. Positive feedback on progress was received.

11. On 17 September, the LSC facilitated a meeting between the First Minister, the Minister for Social Justice and Local Government and Lord Bach, with the Wales Director in attendance. The discussions were positive and maintained the consultative momentum that had been created throughout the year.

12. This meeting was followed on 22 September with a meeting between the Wales Director and Caroline Turner, Head of Communities Directorate in the Welsh Assembly Government, where further discussions took place regarding the plans and impacts for the LSC.

13. One of the key challenges for the LSC is to reduce costs in line with the Government guidelines. The new electronic method of delivering our services to providers (known as Delivery Transformation) was reviewed at a meeting on 24 September with the Minister for Social Justice and Local Government, Lynne Schofield from the Financial Inclusion Unit in the Assembly, the LSC Wales Director and a member of the LSC Delivery Transformation team. This identified that much of the cost saving would relate to a reduction in staff, but that this would not be due to the transferring of roles into England, but rather due to the increased efficiencies that the new IT system would deliver through electronic means of delivering our service. This provided a greater context for the removal of processing work from the Cardiff office. The roll out schedule was also discussed, which is due to happen during 2010.

14. A further updating meeting was held with Caroline Turner, Lynne Schofield, Paul Davies, Helen Riley (LSC Director of Civil Case Management) and Mark Barwick (LSC Operations Manager for Cardiff and Bristol). The current position and thinking was shared and reviewed with all parties to ensure a consistent position was agreed. As budgets for 2010–11 have still to be agreed at this point, no firm decision had yet been made regarding the future of the Cardiff processing work.

15. Sir Ian Magee is currently undertaking a review of the governance of legal aid, and to ensure that Wales was properly consulted, he was invited to Cardiff to talk to key stakeholders from the Wales Committee on the 15 December, as well as members of the LSC. This has ensured that our consultative approach adopted during this year has been maintained.

16. We are currently looking to set up a meeting between Carolyn Regan and the new First Minister in January, and also an updating review between the Wales Director and Fiona Adams-Jones at the Wales Office.

17. Throughout this period, the Head of Civil Policy from the LSC has continued to consult with the Welsh Assembly Government and the Welsh Local Government Association on the joint commissioning of legal services in Wales. The Minister for Social Justice and Local Government has commissioned an independent study and officials are working with the LSC to establish common ground to move forward.

18. Our consultative approach with our key political stakeholders has ensured that all parties have been kept informed of our developments, have had an opportunity to contribute and influence the debate, and have been engaged in an open two-way exchange of views. We will continue to maintain this dialogue.

*January 2010*

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### **Written evidence from the Legal Services Commission Trade Unions**

The recognised trade union representatives based in the Cardiff office of the Legal Services Commission (LSC) here provide submissions to the Welsh Affairs Select Committee, following submissions made to the previous Committee: Legal Services Commission Cardiff Office and which reported on 1/5/09.

The Committee which reported on 1/5/09 found that there had been shortcomings around consultation (or lack of it) between what this Committee describes as “Wales and Whitehall”.

Since publication of the Report, the question of closure of the “business delivery” part of the Cardiff office of the LSC appears to have been deferred.

Although the LSC have not provided any indication as to when they plan to re-announce redundancies in the Cardiff office, it seems clear that they are still planning to remove all “business delivery” work from the Cardiff office some time after April this year. Some of this “business delivery” work was moved to business delivery centres outside Wales after publication of the Report of 1/5/09.

We consider Welsh issues should continue to be dealt with in Wales. Valuable skills will be lost if the decision to remove the work is made. These skills will become even more important as the body of Welsh law develops. The LSC decision is, we suggest, a “short-termist” solution of limited real value that will be to Wales’ detriment. We consider it to be an example of how, despite 10 years of devolution, departments and agencies based outside Wales with responsibility for Wales continue not to demonstrate a real understanding of the issues relevant to Wales.

In their evidence on 24 March 2009, the LSC indicated that they—at question 14—were increasing the number of people within the Welsh policy team. In their response to question 32, the LSC provided a specific commitment to recruiting an additional person “specifically dedicated to having a link into the Assembly ...”.

Although we did not consider this would be sufficient to deal with the issue of devolution and the increasing amounts of Welsh only legislation, this appeared to be a welcome development.

This position was advertised internally within the LSC, but was withdrawn just prior to the closing date of 21/8/09. No person has been appointed to this role, and it has not been re-advertised.

A report on the structure and workings of the LSC was subsequently announced, to be conducted by Sir Ian Magee. Although no specific date of publication is known, this is expected very shortly.

The LSC recently employed around 45 temporary staff in offices where the LSC propose to move Cardiff office work to. We are concerned that these staff are being employed to undertake the same types of work done by Cardiff business delivery staff and that they will be used as a mechanism for accelerating the removal of work from the Cardiff office.

The Committee is invited to look further into whether the issues and developments identified and concerning the Cardiff office of the LSC have been effectively identified by and consulted upon by the LSC.

*29 January 2010*

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### **Written evidence from the Public Services Ombudsman for Wales (PSOW)**

#### **1. BACKGROUND**

1.1 My role as Public Services Ombudsman for Wales (PSOW) is to investigate complaints from members of the public that they have suffered an injustice as a consequence of maladministration or a service failure from a public body in Wales. I also investigate allegations that members of local authorities in Wales have broken their Code of Conduct.

1.2 Given the nature of my position, it would not be appropriate for me to comment on the broader aspects of the existing constitutional settlement. However, I do wish to make some brief observations on the current arrangements from the perspective of the Ombudsman, especially insofar as they impact upon those wishing to complain about public services in Wales.

## 2. DEVOLUTION AND THE PSOW'S JURISDICTION

2.1 My powers emanate from the Public Services Ombudsman (Wales) Act 2005. This lists the bodies in my jurisdiction at Schedule 2 of the Act which can be amended by Welsh ministers.

2.2 Currently, there is no process for consultation where framework powers may have an impact on the jurisdiction of the Public Services Ombudsman for Wales. The existing arrangements for the transfer of legislative power to the Assembly incrementally will not generally lead to pressure for changes to Schedule 2 but there is the potential that matters so transferred may lead to requirements for extensions to my jurisdiction which do not take place in a timely fashion or which in the worst case are not identified at the time of transfer, thus potentially denying complainants an opportunity to complain where a body had not transferred to my jurisdiction but had ceased to be in the jurisdiction of the Parliamentary or other Ombudsman.

2.3 Another point I would wish to make relates to the situation where legislation is being developed on an England only basis, which has an impact on the jurisdiction of Ombudsmen in England and a lack of early consideration of whether framework powers should enable equivalent changes to happen in Wales. There have been recent examples of this. First, where people in England are now able to complain to the Local Government Ombudsman about privately purchased care services made by users, their family or others affected by the actions of a regulated adult care provider, but people in Wales have no similar right to complain to me. A second example is that people in England are now able to complain to the Ombudsman about the management of schools but where no provision has been made in the legislation to enable the Welsh Assembly Government to introduce similar arrangements in Wales. Therefore, people in Wales have no further recourse for their complaints beyond the Boards of Governors of schools.

## 3. OTHER LEGISLATIVE ISSUES IMPACTING ON THE WORK OF THE PSOW

3.1 Another concern I have lies in the area of UK wide legislation which impacts on Ombudsman schemes. Experience to date suggests that consultation with "devolved Ombudsmen" takes place much later in the day. The Equalities Bill is an example of this where there are specific issues that affect all Ombudsman and yet early consultation was confined to England.

3.2 There are other anomalies that emerge over time, such as in respect of the Code of Conduct for members of Police Authorities. First, they have to abide by the English Code of Conduct and yet this is enforced by the Public Services Ombudsman for Wales. Secondly, councillors have the complexity and confusion of having to have regard to two separate Codes—the Code that applies to Wales when acting in their capacity as a county councillor; and then the English Code when acting in their capacity as a member of a police authority.

## 4. LEGISLATIVE ISSUES IDENTIFIED DURING PSOW INVESTIGATIONS

4.1 Another point I would wish to make relates to clarity regarding the case for changes to legislation. On occasions, in investigating a complaint, my staff will find evidence of apparent injustice which has not resulted from maladministration or service failure on the part of a listed authority but rather has occurred even though the listed body has complied with the requirements of the relevant legislation.

4.2 Clearly, I have no power to act in such situations, nor would it be appropriate for me to do so. However, I do have the option of informally drawing such issues to the attention of the appropriate individuals to enable them to consider whether legislative change may be appropriate. In a situation where responsibility for service provision rests in Wales but responsibility for legislation remains with the UK Parliament, the ability to usefully engage in such dialogue is more complex. In a circumstance where responsibility is devolved incrementally, it can be more difficult to identify when and where case for change might usefully be made.

4.3 Examples of areas where legislative changes might be required which have been identified through our caseload include continuing health care and residential care, where major differences in outcome between cases with modest differences in service users' needs create considerable dissatisfaction amongst complainants even where, as is often the case, no maladministration has occurred. Other examples include planning legislation where the system at the moment can be seen to provide decisions more favourable to applicants who do not apply in the first instance, but are able to have approval for retrospective applications, than for people who follow the process correctly.

I trust these points are of assistance and would be happy to explore them further with the Committee if this were desired.

*January 2010*

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**Written evidence from Sir Michael Scholar, KCB**

**SUMMARY**

The Committee has asked me to submit written evidence to its inquiry into Wales and Whitehall.

I ceased being Permanent Secretary to the Welsh Office in June 1996. No Civil Service work on devolution had been authorised prior to that time by the then Conservative Government (who were opposed to it as a policy), so the usefulness of my evidence to the Committee will be limited.

**ARGUMENT**

1. The Welsh Office during my time as Permanent Secretary (1993–96) had considerable autonomy. In the extensive areas where central government responsibilities in Wales were exercised by the Welsh Office, the Department could and did plough its own furrow. Civil servants sought to devise and implement policies for Wales—subject to the authority of Welsh Office ministers—which were suitable for the circumstances of Wales and the Welsh people. They might, or might not, be the same as, or similar to, those being carried out by English, Scottish and Northern Ireland Departments.

2. In some areas the Welsh Office depended on help from Whitehall Departments, typically where a depth of expertise was available in Whitehall which we could not readily draw upon in Wales. Agricultural and planning policies come to mind as examples—eg on animal health issues or technical planning regulatory arrangements. But even in these areas we often pursued our own course.

3. It was not unknown for a Whitehall Department to come to a conclusion affecting Wales without full consultation with the Welsh Office. But such occasions were rare, and usually the result of an oversight. Nor can I call to mind an instance of an English Department seeking to claw back powers which had been transferred to the Welsh Office. Disagreements would be more likely to arise if a UK government policy was being determined which suited England, Wales, Scotland and Northern Ireland differently. In such cases it was always open to us to brief our Secretary of State to raise the matter in Cabinet or in a Cabinet Committee.

4. The arrangements surrounding the Treasury's block grant to the Welsh Office gave Welsh Office ministers extensive power to switch funds, so that Welsh expenditure patterns could differ significantly from those of Whitehall Departments.

5. A wide-ranging network of contacts existed between both senior and junior Welsh Office civil servants and their counterparts in England, Scotland and Northern Ireland. There was much information-sharing, as well as informal exchanges of experience. There was also a range of formal official committees—at the most senior level the Cabinet Secretary's weekly Wednesday morning meeting, which I nearly always attended—to co-ordinate policy-making and service-provision issues across the UK.

*January 2010*

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**Written evidence from Sir Jon Shortridge**

- This submission has been prepared on the basis of my knowledge and understanding of the Welsh devolution settlement derived from over nine years as Permanent Secretary in Wales. It does not take account of developments since my retirement
- Awareness of the Welsh devolution settlement in Whitehall remains poor. The establishment of a stronger network of departmental Welsh devolution experts in Whitehall might help to ensure that Welsh business is managed more sensitively and effectively in future. Significantly raising the awareness of the majority of Whitehall civil servants would probably not be realistic.
- As the devolution settlement continues to mature the need for a Wales Office will diminish.
- Ideally official-level communications between Whitehall and Cardiff should be enhanced. The present arrangements appear to me to be patchy, and lacking in strong leadership. The quadrilateral meetings convened by DEFRA provide a good model which could be replicated more widely.
- It is important that the Memorandum of Understanding on Devolution should be kept up to date. This should be prepared under the auspices of the Joint Ministerial Committee.

1. I retired in May 2008 having been Permanent Secretary in Wales for over nine years. Immediately before that I led the team that had responsibility for establishing the Assembly. I therefore have plenty of experience of how the relationships between Whitehall and the devolved institutions in Wales have worked in practice. I also have some pretty clear views on how these could be improved. I am conscious though that things will have moved on since I retired, and I obviously no longer have an insider's knowledge of events. So in this submission I am simply setting out some of my continuing perceptions and impressions which I am conscious may in some respects be out of date.

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 AWARENESS OF THE DEVOLUTION SETTLEMENT WITHIN THE CIVIL SERVICE

2. Awareness of the Welsh devolution settlement amongst the Civil Service in Whitehall can best be described as disappointing. When the National Assembly for Wales was established in 1999 a serious attempt was made to get Whitehall departments to understand the nature of the settlement and the implications for the conduct of business. The requirement to establish concordats between each Department and the Assembly provided the focus for this. But my assessment is that, following this initial burst of activity, the level of knowledge and understanding diminished rather than grew, and the Civil Service as a whole failed to keep pace with the rapid evolution of the Welsh settlement.

3. With hindsight it was probably unrealistic of me—and others—to have expected anything much different. In practice very few Whitehall civil servants have to deal with the Assembly or the Assembly Government on a regular basis. Those that do usually quickly develop a good understanding of the settlement and establish effective working relationships with their counterparts in Wales. The problem arises when a desk officer in Whitehall suddenly finds him (or her) self having to deal with a piece of Welsh business—a Legislative Competence Order, for example, or a tricky non-devolved issue which affects Wales—without having any knowledge of the governance of Wales or the sensitivities involved. In my view part of the problem is that the London-based media simply have no interest in Wales. Ten years on they still regularly report on policy developments in England as if they apply to Wales, and in stark contrast to Scotland they rarely provide any serious coverage of political events in Wales. All this means that it is not surprising that civil servants in Whitehall often do not have sufficient awareness of how a particular piece of Welsh business that comes their way will “play” in Wales, nor what the correct procedures are for dealing with it.

4. So what is the solution? More training would help. I suspect the National School of Government would agree that they could do more, but the issue is not so much one of providing more courses as incentivising civil servants to go on them. A more realistic innovation would, I think, be for every Department to have someone who would as part of his/her responsibilities be their expert on all Welsh (and probably other) devolution matters. To some extent these “experts” exist already, but it is my impression that their incidence is patchy and their role poorly defined. Under the arrangements I envisage, when a desk officer suddenly discovered that he/she had to deal with a Welsh legislative or policy issue he/she would immediately have someone to turn to for advice. It would be essential for these Departmental ‘experts’ to spend some time in Wales on a regular basis to build up their knowledge and to establish contacts. An associated advantage of this approach would be that the Whitehall network of Welsh devolution experts that would be built up in this manner could meet up on a regular basis—with or without civil servants from the Assembly Government—to share knowledge and experience. Amongst other things this would mean that the UK Government’s knowledge and understanding of the Welsh settlement would be enhanced because individual ministers would have access to better informed advice than they do now.

## THE ROLE OF THE WALES OFFICE AND THE MINISTRY OF JUSTICE

5. I have always seen the Wales Office as having a temporary role. In the early years of devolution it was important that there should continue to be strong Welsh representation in Whitehall and an associated cadre of civil servants who could advise on the handling of Welsh issues. But as the Welsh settlement matures the role of the Wales Office, in my view, becomes all the more anomalous. Ministers and civil servants in Wales understandably want to be able to deal directly with their counterparts in the relevant Whitehall policy Department. Having to deal with the Wales Office as well can become a complication too far. In my view devolution in Wales will have come of age when the Prime Minister of the day feels that separate Departments for Wales, Scotland and Northern Ireland are no longer needed. But all the time the Wales Office does remain it could perhaps do more to enhance understanding of Welsh devolution in Whitehall, for example by convening regular meetings of the departmental Welsh devolution ‘experts’ I referred to earlier.

6. The Justice Department has always been at one remove from the Wales Office, and I rarely needed to engage with it on matters relating to the Welsh settlement. Its role appears to me to be little more than to provide management oversight of Wales Office civil servants. Where perhaps it could be more active is in holding meetings of the official group supporting the Joint Ministerial Committee. In my view this group could be used not just to try and nip emerging devolution problems in the bud, but also more positively to identify good practice in particular jurisdictions which could be applied for the benefit of all.

## THE EXTENT OF COMMUNICATION BETWEEN WHITEHALL, THE WELSH ASSEMBLY GOVERNMENT, THE NATIONAL ASSEMBLY FOR WALES AND WELSH MPs

7. I am not really qualified to comment on the nature and extent of the communication that does, and should, take place between elected members in Westminster and Cardiff. As I have indicated already, official-level communications tend mainly to take place only when particular bits of business arise, and even then not as frequently as they should. The problem is not all one way. Ideally officials in Cardiff should do more to build up relationships with their key opposite numbers in Whitehall, but often the sheer range of these and their own work pressures in Wales make this far from easy. There are exceptions. There have always been good quadrilateral relationships on agriculture matters, with DEFRA convening regular meetings at both official and ministerial level. But there have been occasions when even these have broken down under the pressure of events.

8. So how can the present situation be improved? I am not in favour of creating some great bureaucracy to help manage the relationships between Cardiff and Whitehall/Westminster. The key is to introduce arrangements that help to build trust and understanding between the officials on both sides. Building a stronger network of devolution “experts” in Whitehall as I suggested earlier would help, as might using the JMC machinery to build a better awareness at official level of how the settlements are working, and what procedural changes could be made to improve them.

9. One final thought on communication between the Assembly and Parliament. I have always been of the view that once the Assembly has formally resolved to secure a Legislative Competence Order, it should make its submission directly to Parliament—as one legislature to another—rather than to the UK Government.

#### THE REVIEW OF WHITEHALL GUIDANCE ON DEVOLUTION

10. I have very little to say about this. The preparation of the original concordats served a useful purpose because it got officials’ minds focused on how procedures needed to change to take account of devolution. But, in my view, if these have to be kept constantly up to date that is a sign of failure. In any case, the composition of Whitehall Departments is now changing with such rapidity that preparing guidance on a Departmental basis is not really ideal. There is a need, however, to keep the overarching Memorandum of Understanding up to date. To give this work the necessary status, it needs to be undertaken on behalf of the Joint Ministerial Committee.

January 2010

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#### Written evidence from Alan Trench, The Constitution Unit, University College London

Memorandum to the House of Commons Welsh Affairs Committee by Alan Trench, honorary senior research fellow, The Constitution Unit, University College London, and visiting fellow, School of Social and Political Science, University of Edinburgh; formerly specialist adviser to the House of Lords Select Committee on the Barnett Formula, and to the House of Lords Constitution Committee; author, “*Devolution Matters*” blog (<http://devolutionmatters.wordpress.com/>)

1. This memorandum will address three sets of issues raised by the Committee in its call for evidence: awareness of devolution within the Civil Service, the roles of the Wales Office and the Ministry of Justice, and Whitehall guidance on devolution.

2. Members of the Committee may be aware that I have written extensively on aspects of intergovernmental relations following devolution, and on how Whitehall has responded to it. As well as chapters on these topics in such books as A Trench (ed) *Devolution and Power in the United Kingdom* (Manchester University Press, 2007) and R Hazell and R Rawlings (eds) *Devolution, Law Making and the Constitution* (Imprint Academic, 2005), I submitted a lengthy memorandum to what was then the Constitutional Affairs Select Committee in 2007 for its inquiry on *Devolution: A Decade On*. Members may find it useful to look at that for a more detailed discussion of many of these issues, summarising my own research (and that of academic colleagues) up to that date.

3. As a general observation, however, I find that despite significant changes in the formal framework of devolution relating to Wales since then (in particular, the arrangements for conferring enhanced legislative powers on the National Assembly under Part 3 of the Government of Wales Act 2006), strikingly little has changed in other ways. Processes remain reliant on a sequence of *ad hoc* interactions, usually driven by Whitehall policy priorities, rather than those in Wales (though this has changed somewhat with the existence of Legislative Competence Orders). They are largely at relatively low levels and remain largely informal, despite the revival of the Joint Ministerial Committee framework since 2008. The analysis and evidence presented in my earlier work remains largely accurate in its essentials, despite the considerable changes to the constitutional arrangements for devolution since I wrote.

#### AWARENESS OF THE DEVOLUTION SETTLEMENT WITHIN THE CIVIL SERVICE

4. My experience is that awareness of the devolution settlement within the Civil Service remains patchy. Some departments, and some parts of departments, are good, while others are not. (The pattern of variation is such that even in “good” departments one may come across examples of bad practice, though less often vice versa.) This, in my view, helps to account for the highly variable and inconsistent outcomes to devolution issues when they arise, and to the variable treatment these receive within government. This is the case despite considerable efforts made in recent years to improve awareness, and the building (or rebuilding) of networks of officials to support this. While this has resulted in some improvements, there remains considerable variation from department to department and from case to case. It can be found in all areas of Whitehall’s work, whether relating to general policy making or policy implementation, or to legislation, though UK legislation is probably less problematic than other areas.

5. Part of the reason for this—discussed in an earlier context in my chapter in *Devolution, Law Making and the Constitution*—is the absence of any “strong centre” relating to devolution within UK Government. To the extent that there are general principles underpinning the devolution settlements, there is no part of

UK Government responsible for ensuring compliance with these. The problems caused by the absence of such a strong centre are scarcely new (the most recent consideration is in the Institute for Government's recent report *Shaping Up: A Whitehall for the Future*). As regards devolution for Wales, the principles that are most important for Wales are the responsibility of no central agency other than the Wales Office, which lacks the authority and resources necessary to ensure compliance with the agreed principles from "line" departments. It would need a department sharing some of the authority and central role in the machinery of government that the Cabinet Office enjoys to do that, and that is simply beyond what can be expected of a small and low-ranking Whitehall department.

6. One department that is of particular concern to me in its lack of devolution awareness and sensitivity is HM Treasury. The role played by the Treasury is central, as it is solely responsible for taking practically all decisions relating to finance. Despite this central role, it has little awareness of the wider nature of its role and the sensitivities that attach to it. Rather, it approaches its task with a concern first and foremost for its own administrative convince, and on the basis that the devolved administrations are in much the same place as any line department in Whitehall (or the Welsh Office before devolution). Problems over funding a replacement Forth Road Bridge in Scotland suggest that the Treasury is unable to find solutions to problems that involve departing from the established ways it deals with line departments across Whitehall. Moreover, decisions affecting devolution matters are taken for reasons that have nothing to do with wider constitutional or territorial concerns, as the issue of consequential payments from funding regeneration work as part of the London 2012 Olympics illustrates. It appears ill-equipped to develop the sort of system that is needed to ensure that the financial system for devolution matches the constitutional nature of devolution, to deliver on the recommendations of the Calman Commission for Scotland (which were significantly diluted in the White Paper *Scotland's Place in the United Kingdom*, Cm 7738 or to implement the sorts of approaches recommended by such bodies as the Lords Committee on the Barnett Formula (see its Response to the Committee's report, Cm 7772) or the Holtham Commission.

#### THE ROLES OF THE WALES OFFICE AND THE MINISTRY OF JUSTICE

7. As noted above, one long-standing issue relating to Whitehall is the fragmentation of responsibilities for devolution—as regards Wales, between the Wales Office, the Ministry of Justice and the Cabinet Office. The lack of any one office within government with responsibility for devolution overall is, in my view, a serious deficiency in how the UK Government deals with devolution. It is not paralleled in most other federal or decentralised systems, where countries like Canada have a single such office to ensure the development of a general "territorial" policy across the federal government, and co-ordinate the approaches of individual departments. It prevents the UK taking a general and co-ordinated view of devolution, and means that institutional differences are reinforced by different (and sometimes contradictory) policies as well. Matters have improved significantly since the appointment of a Director-General for Devolution Strategy jointly in Cabinet Office and Ministry of Justice in 2008, but that has involved only a small number of officials (fewer than a dozen, split between Ministry of Justice or Cabinet Office) and has focussed heavily on Scottish constitutional issues and providing secretariat support to the Joint Ministerial Committee.

8. Beyond that, the roles of the three main UK Government actors as regards Welsh devolution—Wales Office, Ministry of Justice and Cabinet Office—are not clearly differentiated or articulated. They appear to overlap in various ways. There is no evidence that their roles conflict with each other, but certainly there are instances where the priority of one office is not that of others, particularly where Welsh concerns may be articulated by the Wales Office but are not taken up by the others. With the best will in the world, a free-standing Wales Office is a small and not high-ranking department in Whitehall. It is therefore inevitable that this structure will lead to Welsh devolution remaining at best a secondary consideration in Whitehall.

9. There are, of course, many more detailed matters where the Wales Office plays a very important role, notably in relation to legislative powers for the National Assembly (and executive ones for the Assembly Government). However, it is notable that for many technical matters the Wales Office has to call on expertise from the Assembly Government. The extent to which it is the repository of expertise on Welsh devolution for Whitehall is a more limited one than might at first appear (or than is set out in Devolution Guidance Note 4 on the *Role of the Secretary of State for Wales*). Its value lies chiefly in its ability to marshal resources to effect co-ordination between London and Cardiff, rather than by being able to do so itself.

10. A further hazard exists with the present arrangements, which is visible more clearly than with the Scotland Office than the Wales Office. That is the increased politicisation of the role of the Secretary of State, and with it the Office, to the detriment of its co-ordination role. Since 2007, and particularly since 2008, the Scotland Office has become increasingly politically active and assertive, taking on more emphatically the role of the voice of the UK Government in Scotland. Its work has come to be seen as increasingly party-political, and therefore as involving opposition to the present Scottish Government. That approach has undermined one of the greatest strengths of the Scotland Office in the period between 1999 and 2007, that it was seen (in Scotland if not in Whitehall) as genuinely non-partisan, an "honest broker" between line departments in Whitehall and the devolved administration. It no longer is. It is seen by the Scottish Government as being a political adversary, and so not only Scotland Office ministers but the officials working for them are trusted very much less. Given the extent to which the devolution settlement relies on "goodwill" between administrations, this is an unsettling development.

11. There is no evidence yet of similar mistrust involving the Wales Office, but it might very well develop in future. The key condition for the changing position of the Scotland Office has been political alternation—the entry into office of the Scottish National Party after the 2007 election, while Labour remained in office in London, and sought to use the Scotland Office as a platform to address the political and constitutional challenges posed by the SNP. Political alternation is a fact of life, with which any robust constitutional settlement must be able to cope. It would be seriously destabilising constitutionally, and cause serious damage to the working of devolution and so the delivery of public services, if the work of the Wales Office were to be compromised in a similar way.

12. An alternative approach has been discussed and recommended on numerous occasions, including by Robert Hazell in his 2001 Constitution Unit Briefing *Three Into One* and the 2003 Lords Constitution Committee report on Devolution: *Inter-Institutional Relations in the United Kingdom*. This would be to combine the Scotland and Wales Offices, and relevant parts of the Ministry of Justice and Cabinet Office, in a single “department of devolution” or “department of the nations and regions”. This would allow a broader, more synoptic view of devolution as a whole to be taken at UK level, while maintaining (and even developing) the expertise on the specific settlements that exists within the Wales and Scotland Offices by incorporating them within the new department. As a department with a larger remit it would be more likely to carry the necessary weight within government and around the UK Cabinet table. Moreover, by emphasising the constitutional rather than party-political role of the Offices and their ministers, it would minimise the risk of these being seen as having an adversarial role.

#### WHITEHALL GUIDANCE ON DEVOLUTION

13. My concerns about Whitehall guidance on devolution—meaning principally the Devolution Guidance Notes (DGN) issued by the Ministry of Justice—are two-fold. First, as noted above, the evidence is that compliance with these guidelines is patchy and inconsistent, even now. Moreover, this guidance is mostly procedural in nature, and requires discussion and agreement about specific matters to be reached. It could be more detailed and prescriptive, setting out the general principles that should normally underpin the substantive terms of specific resolutions (which would need to be applied in each particular case, of course). In my view that would help ensure greater consistency in outcomes and reduce some of the problems presented by the present arrangements.

14. Second, the Devolution Guidance Notes are required to bear an undue constitutional weight. The Notes reflect in most cases considerable discussion and consultation between the UK Government and the devolved administrations. Nonetheless, they remain UK Government documents. At the same time, they are often the only place in which key principles of devolution are noted or articulated (see for example the criteria set out for legislative consent or “Sewel” motions in DGN 10, on *Post-devolution primary legislation affecting Scotland*, or the notes on the Scottish Parliament’s legislative powers in DGN 14 on *Scottish Legislative Proposals Giving Devolved Powers and Functions to UK Bodies*). These are not simply internal matters relating to the affairs of one government, but record important principles of how devolution works more generally. They should be recorded in more appropriate places; many of them, for example, logically should form part of a master intergovernmental agreement such as the *Memorandum of Understanding*. (A revised version of the Memorandum has apparently been prepared but not yet approved. Not having seen it, I do not know whether it addresses these issues, but I suspect from what is being said about it that it does not.)

15. Beyond this, I have some further concerns about the content of the Devolution Guidance Notes. For example, I do not understand why DGN 9 on *Post-devolution primary legislation affecting Wales* does not require the approval of the National Assembly when legislative powers are conferred on the Assembly as framework powers (rather than by Legislative Competence Order). LCOs necessarily require the support of the National Assembly. In Scotland, all conferrals of legislative power on the Scottish Parliament (and of executive powers on the Scottish Ministers) similarly do so (see DGN 10). I cannot see any logical reason for the position in Wales to be different when the key issue is the route by which legislative powers are conferred on the Assembly rather than the substantive outcome. Ensuring that the Assembly approved all conferrals of such powers, regardless of means, would contribute significantly to the strengthening of the elected arm of the devolved Government of Wales.

25 January 2010

### Written evidence from The Wales Office

#### INTRODUCTION

- The Government welcomes the opportunity to provide evidence to the Welsh Affairs Select Committee inquiry into Wales and Whitehall.
- The Government has long legislated for devolution to Wales demonstrating our belief that power should not be retained centrally in Westminster and Whitehall but should reside with the people closer to delivery, and we attach great importance to effecting this.

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- Over the last 10 years we have continued to devolve more power, and we have now forged a devolution settlement that is delivering for Wales, all within a strong UK framework. While the Government believes in decentralising power it also believes that the nations that make up the United Kingdom are stronger when they stand together. This has been amply demonstrated in the combined response to the economic downturn.
  - The current settlement is still new but it is starting to bed in and we are starting to see the real results that it was designed to bring. None of this would be possible without an effective working relationship between the devolved administration in Wales and Whitehall. Although our general assessment is that this reciprocal relationship is working well, and this memorandum sets out numerous examples of how it is doing so, we constantly look for improvement.
  - The Government is grateful for the work carried out by the Committee so far in examining the provision of cross-border services in Wales in the areas of Health, Transport and Higher/Further Education. The Committee has stated its opinion that the three inquiries highlighted some areas of concern regarding the level of awareness of devolution within the related Whitehall Departments and we are acting on these. However these inquiries also found positive aspects of the relationship between Wales and Whitehall.
  - It is the Government's view that the devolution settlement is working well. The Wales Office, Cabinet Office and the Ministry of Justice (MoJ) have made great efforts to ensure that devolution is embedded in Whitehall culture, and this work continues. We welcome this inquiry and hope that it will help to inform further progress in this area.
  - The evidence presented in the memorandum covers:
    - The role of the Wales Office in the context of this inquiry;
    - The role of the Ministry of Justice (MoJ) in the context of this inquiry;
    - Examples of the extent of awareness of devolution across Whitehall Departments;
    - Examples of interactions between Whitehall Departments and the Welsh Assembly Government;
    - The Ministry of Justice led review of devolution guidance material; and
    - The findings of the Justice Select Committee in its Report *Devolution; A Decade On*.
  - This presents an overall picture of growing commitment across Whitehall to making devolution work while devoting the resources required to make this happen. As a new and constantly changing mechanism, devolution can require changing ways of thinking and acting. The evidence contained in this memorandum suggests that this is happening but that time can be needed in order for adaptation to take place. As an example, the system of Legislative Competence Orders (LCO) has been changed to make it tighter and more focused, thus producing better legislation, as illustrated by the Welsh Language LCO. However the evidence that follows has also highlighted that the level of engagement can vary from department to department and that more work can be done in some areas to ensure that devolution is considered at the inception of policy-making rather than later on in the process.

## 1. THE ROLE OF THE WALES OFFICE

1.1 Established in 1999, the Wales Office supports the Secretary of State for Wales in ensuring the smooth working of the devolution settlement in Wales, and representing Welsh interests within the UK Government and the UK Government in Wales, as well as being Wales' voice in Westminster and Westminster's voice in Wales.

1.2 This means that the Wales Office is responsible for maintaining the relationship between UK Government and the Welsh Assembly Government, and addressing policy issues that have an implication for Wales. It also has a key responsibility for handling Welsh legislation in Parliament, and accounting to Parliament for Welsh affairs.

### *Managing the devolution settlement—Devolution awareness raising*

1.3 Wales Office officials continue to promote awareness of the devolution settlement amongst Whitehall Departments and maintain an ongoing programme of meetings that encompasses all Whitehall Departments. In the last eight months they have met with ten Departments; the Home Office; the Department of Energy and Climate Change; the Department for Environment, Food and Rural Affairs; the Department for Culture, Media and Sport; the Department for Communities and Local Government; the Department for Children, Schools and Families; the Department of Health; the Department for Transport; the Department of Innovation, Universities and Skills; and the Department of Business, Enterprise and Regulatory Reform (the later two now form the Department of Business Innovation and Skills); to discuss devolution awareness and explore methods for improving. These meetings have been arranged in partnership with colleagues from the Welsh Assembly Government, allowing them to bring their perspective to the table.

1.4 Building on these meetings the Wales Office, again in partnership with the Welsh Assembly Government, has presented seminars to staff in Whitehall departments promoting devolution awareness and providing advice on how to ensure that work respects the devolution settlement. Two events have been held so far, at the Department for Culture Media and Sport and the Department of Energy and Climate Change. These events have proved successful with a good turnout and positive feedback from attendees. It is hoped that further events will be held before Christmas and in the New Year.

1.5 This recent work builds on the extensive effort undertaken by the Wales Office to raise the awareness of the new devolution settlement in the pre and post Government of Wales Act 2006 period. This saw the Wales Office work closely with Cabinet Office, Ministry of Justice and other territorial offices to deliver a programme of seminars across UK Government Departments. These seminars were designed to promote devolution awareness and understanding of the settlements across the UK Government.

1.6 Wales Office legal advisers also regularly contribute to seminars and training events at the National School of Government for government lawyers dealing with devolution issues, and hold presentations to the legal divisions of Whitehall departments. They are also members of an informal lawyers' group comprising legal advisors working on devolution issues within the UK Government. This network meets regularly, co-ordinates training and development on devolution issues for UK Government lawyers and discusses the legal context of devolution and the differences between the different territorial settlements.

1.7 The Wales Office also advises UK Government Departments on devolution issues on a case by case basis; this complements the information available for officials in the Devolution Guidance Notes and other guidance.

1.8 Following the report of the All Wales Convention the Secretary of State arranged a briefing in Westminster for Peers and MPs which allowed Sir Emyr Jones Parry to address them directly concerning his findings.

#### *Handling legislation as it affects Wales*

1.9 The Wales Office ensures that changes to the constitutional settlement, including additional legislative competence for the National Assembly and additional executive competence for the Welsh Ministers, are within the terms of the Government of Wales Acts 1998 and 2006, and operate smoothly and efficiently. To this end Wales Office Ministers work closely with the Welsh Ministers, and especially the First Minister, to ensure that Welsh interests are fully taken into account when preparing Parliament's legislative programme.

1.10 Many Parliamentary Bills include provisions relating to Wales dealing with non-devolved issues or the role of the Welsh ministers. They can include, for instance, new powers for the Welsh ministers, or modifications to their existing powers. The Wales Office ensures that appropriate provisions for Wales are included within UK Bills, and follows their subsequent passage through Parliament closely, as well as being responsible for transfer of functions and other Orders made under the devolution settlement. The Wales Office engages across Whitehall to ensure that any devolution implications of new legislation are considered at the earliest opportunity.

1.11 Wales Office officials continue to work with fifth session Bill teams to ensure that devolution matters, where necessary, are covered in Parliamentary Bills. They maintain close contact with Bill Teams as policy proposals develop and legislation is brought forward. They advise Departments as Bills progress; broker agreement between the UK Government and Welsh Assembly Government on outstanding or contentious issues; and provide advice on engagement and appropriate handling before Bills are introduced. They also manage the process of agreeing LCOs between the UK Government and the Welsh Assembly Government, chairing project teams comprising officials from relevant Whitehall Departments and the Welsh Assembly Government responsible for agreeing the terms of each LCO at official level and ensuring the process moves forward to agreed timescales.

1.12 The Wales Office also monitors Assembly Measures to ensure the integrity of the devolution settlement and enable the Secretary of State to decide whether to exercise his powers of intervention.

#### *Supporting collaboration between the UK and Welsh Assembly Governments and addressing policy issues that have an implication for Wales*

1.13 The Wales Office is active in its role to support collaboration between the Government and the Welsh Assembly Government. It does not just play a reactive role, but it is a proactive negotiator, facilitator, and broker.

1.14 The Secretary of State has regular meetings with the First Minister, and the Parliamentary Under-Secretary meets with the other Welsh ministers. These meetings allow an effective transfer of information on issues affecting Wales and allow either side to broach subjects of concern and common interest.

1.15 As referred to in paragraph 1.11 the Wales Office takes a leading role in facilitating the agreement of proposed Legislative Competence Orders between the UK Government and the Welsh Assembly Government. The Secretary of State has implemented improvements to strengthen and quicken the procedure for reaching agreement. The process is now subject to more rigorous project management and

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project teams are established from the start, comprising officials from the Welsh Assembly Government and Whitehall Departments to steer the process of agreeing the LCO and work through difficult issues before they develop into serious problems.

1.16 Work on the proposed Welsh Language LCO is a good example of collaborative working between the UK and Welsh Assembly Governments. The two Governments worked closely as the proposals for this sensitive and high profile LCO were being developed, and again to respond to recommendation arising from the Welsh Affairs Committee's scrutiny of the proposals.

1.17 In addition, the Welsh Assembly Government can request the inclusion of framework powers in Parliamentary Bills. When this happened Wales Office officials work closely with colleagues in the Welsh Assembly Government and the lead Whitehall department to ensure that the request is within scope of the Bill. Officials also work together on producing an Explanatory Memorandum which will accompany the framework power and support the Wales Office Minister and Welsh ministers during the briefing session on the framework power. Collaboration at all stages is therefore essential.

1.18 The Wales Office has a process to analyse key UK strategic documents and policy proposals to ensure that they take account of devolution issues. Officials will examine any new proposal in detail, asking questions such as what the territorial extent is, what will be the impact in Wales, and what involvement the sponsoring department has had with the Welsh Assembly Government on any policy proposals. Working with officials from sponsoring departments Wales Office officials provide technical advice, push for changes to text and facilitate contact between the Government and Welsh Assembly Government officials where appropriate. Working in this way the Wales Office contributes to a wide range of policy proposals with a view to ensuring that Wales-specific issues are covered, and that the Welsh Assembly Government is engaged as appropriate. For example this has happened with regard to the New Opportunities White Paper, Child Poverty Consultation and UK Border Strategy.

1.19 The following are non-exhaustive examples of Wales Office Ministers and officials supporting collaboration between Whitehall and Wales:

1.20 *Social Care*—Welsh Assembly Government and UK Government officials, including officials from the Wales Office, continue to liaise as social care policies develop in the two countries. A meeting to discuss the Green Papers has taken place between Gwenda Thomas, Deputy Minister for social care, and Wayne David, Parliamentary-Under Secretary for Wales. The next of a regular series of meetings between officials will take place in December.

1.21 *Policing in Wales*—Wales Office Minister Wayne David is a member of the National Policing Board and National Crime Reduction Board and represents Welsh interests at these meetings. Both he and the Secretary of State hold regular meetings with senior police officers and bodies such as ACPO Cymru and Police Authorities Wales to be kept up to date with issues affecting policing in Wales. Wayne David has also attended "round table" meetings along with the Welsh Assembly Government Local Government Minister, Brian Gibbons and Policing Minister David Hanson aimed at ensuring devolution issues are given full consideration by the Home Office in the policing White Paper.

1.22 *A Prison for North Wales*—Wales Office Ministers have always supported the idea of a prison in North Wales. Following the Ministry of Justice's decision to withdraw interest from the proposed Caernarfon prison site Wayne David met with Prisons Minister Maria Eagle on a number of occasions and made representations on the continued need for dedicated prison estate in North Wales. The Secretary of State has written to North Wales MPs encouraging them to support bids in their area, and he has provided evidence to the Welsh Affairs Committee for their forthcoming inquiry into the Welsh prison estate. He has also received delegations and representations from North Wales.

1.23 *St Athan as part of the Defence Training Review*—Wales Office ministers continue to hold meetings with Ministry of Defence and Welsh ministers to discuss the planned Defence Technical College at St Athan. This is a hugely valuable project that will bring thousands of jobs and billions in investment to South Wales. They also meet with representatives of the Metrix consortium. Wales Office officials attend the bi-monthly Inter-Governmental Steering Group meetings on St Athan alongside Ministry of Defence and Welsh Assembly Government colleagues.

1.24 *Cross Border Health Protocol*—Wales Office ministers and officials played an active part in the discussions between the Welsh Assembly Government and Department of Health colleagues to agree a revised protocol which was put in place from 1 April 2009.

1.25 *Severn Tidal Feasibility Study*—Wales Office Ministers have been key to the development of the proposals for potential power generation from the Severn Estuary, working closely with the Department of Energy and Climate Change and the Welsh Assembly Government and other key stakeholders.

1.26 *Post Offices*—Throughout this year, the UK Government has encouraged Welsh Assembly Government officials to participate in regular meetings to work with Whitehall colleagues and with Post Office Ltd to identify and exchange ideas to help diversify business opportunities for post offices in the UK, including Wales, to ensure their future sustainability.

*Working in partnership with the Welsh Assembly Government to tackle the economic downturn*

1.27 This inquiry comes as the Government in Westminster continues to work in partnership with the Welsh Assembly Government to tackle the worst global economic downturn in living memory. Facilitating this work is a key priority for the Wales Office.

1.28 The unprecedented response from the Government has impacted across the UK and the Wales Office has played a key role, ensuring that the issues in Wales have been brought to the Cabinet table.

1.29 The Secretary of State for Wales has attended National Economic Council (NEC) meetings regularly since the economic crisis began, to feed Welsh issues into policy discussions with UK Ministers, including the Prime Minister. He has also provided updates on the main topics concerning NEC to the All Wales Economic Summits held to ensure Welsh ministers are aware of developments in UK policy.

1.30 The Secretary of State and his predecessor have attended every All Wales Economic Summit of which there have been nine so far held all across Wales in places such as Bangor, Aberystwyth, Newport, Merthyr and Swansea. Attending the summits allows the Secretary of State, in conjunction with Welsh Ministers, to hear first hand the issues affecting businesses, workers and households in Wales. Wales Office Ministers have also hosted meetings with local businesses across Wales so that issues raised can be fed back to the NEC and advice on help available can be provided.

1.31 The Parliamentary Under-Secretary of State is a member of the Council of Regional Ministers and regularly contributes to UK-wide discussions citing developments in Wales with regard to economic policy.

1.32 Wales Office officials have worked closely with the Department of Business Innovation and Skills, the Welsh Assembly Government, and the Department for Work and Pensions to ensure that key policies from Building Britain's Future deliver in Wales as they do in the rest of the UK, particularly the Future Jobs Fund and the Strategic Investment Fund which were announced at the budget.

*Funding for Wales*

1.33 For the devolution settlement to work effectively, it requires funding that is fair and reflects needs within the devolved bodies. For many years, the Barnett Formula has ensured that this is the case. The House of Lords Barnett Select Committee has previously considered the Barnett Formula and made recommendations for improvements.

1.34 The Welsh Assembly Government's report on Funding in Wales ("the Holtham Report") has reported along similar lines. The Government report broadly shares the view that the Barnett Formula requires frequent assessment to ensure that devolution is being properly funded and action taken if there is a risk of that not being the case.

1.35 The Secretary of State for Wales has discussed the issue with the First Minister and made the case for action to ensure sufficient funding for Wales in cabinet meetings and in bilateral meetings with Treasury ministers. As a result, the Government has agreed the following statement on funding for Wales:

- the Government agrees that the Barnett formula could lead to convergence to an extent that would be regarded as unacceptable although further convergence is not currently expected in the coming years;
- the Government will make a full assessment of the extent of convergence with consideration of Wales' position relative to other parts of the United Kingdom as part of each spending review; and
- following this assessment the Government would be prepared to take action if appropriate to ensure Wales is not disproportionately disadvantaged.

**2. ROLE OF THE MINISTRY OF JUSTICE**

2.1 The Ministry of Justice is the lead department within the UK Government on constitutional matters. Devolution within the Ministry forms part of the Departmental Strategic Objective of "strengthening democracy, rights and responsibilities". The devolution settlements form part of the constitution of the United Kingdom, and hence the Ministry of Justice has a strategic interest in devolution and the impact of the three devolution settlements across the United Kingdom.

2.2 In addition, the staffing and management functions of the Wales Office fall under the umbrella of the Ministry of Justice. This is to provide the staff of the office with access to the full range of HR and other functions, and to provide wide-ranging opportunities for career development. In terms of its policy functions, however, the Wales Office is entirely autonomous, reporting directly to the Secretary of State for Wales.

2.3 The Ministry of Justice jointly leads on devolution awareness-raising with the Cabinet Office. This includes modules run through the National School for Government, the development of e-learning and awareness events. Internally, the Ministry of Justice holds regular workshops on devolution, and has intranet and internet guidance, and networks for devolution queries.

2.4 The Devolution Guidance Notes which are hosted on the Ministry of Justice website are well used, particularly those relating to legislation. A recent exercise to collate and categorise devolution responsibilities across the whole department centralised this information as well as raising awareness amongst staff. The Ministry of Justice, together with the Cabinet Office has sponsored a similar awareness raising exercise in other Government departments.

2.5 The Welsh Affairs Committee Report into the Legal Services Commission Cardiff Office raised a number of points in relation to understanding the devolution settlement. The Government response accepted that the Ministry of Justice could do more to ensure that its arms length bodies understand the settlement, and incorporate it into their policies and delivery plans. Since the Report, the Ministry of Justice has conducted devolution awareness raising activities for arms length bodies and agencies, including a devolution training event which reflected upon the findings of the Welsh Affairs Committee Report, discussed lessons learned and promoted best practice. The Ministry of Justice held an event on 24 August to raise awareness of devolution considerations amongst some of its arms length bodies, including the Legal Services Commission.

2.6 The Legal Services Commission itself is now working closely with the Wales Office and Welsh Assembly Government in relation to the provision of legal aid services in Wales, and partnership arrangements between the Legal Services Commission and those bodies are subsequently much improved and strengthened.

### 3. AWARENESS OF THE DEVOLUTION SETTLEMENT IN WHITEHALL

3.1 The Government has always actively worked to improve the level of awareness of devolution across Whitehall and the approach taken by departments in their consideration of devolution and their relations with the devolved administrations. The Cabinet Secretary has led two discussions on this matter with all Permanent Secretaries in recent months, and the Permanent Secretaries' Management Group recently commissioned all departments to examine rigorously their current systems and behaviours in relation to devolution. Once these examinations are completed, the Cabinet Office will identify best practice and where there are shortcomings, and present the findings back to Permanent Secretaries early in the New Year.

3.2 Preliminary work for these discussions identified that departments' capacity for handling devolution is generally good, but that there remains scope for some improvements. All departments have teams that deal with devolution, and many have senior Champions for raising the awareness and sensitivity of their department to relations with the devolved administrations. The territorial offices, Ministry of Justice and Cabinet Office all work closely with these devolution leads to support them in raising awareness of devolution within their departments and to provide advice, on a case-by-case basis, in dealing with devolved administrations.

3.3 The Cabinet Office and MOJ also jointly run regular meetings of all the devolution co-ordinators across Whitehall. These meetings alternately also involve representatives of each of the devolved administrations. This network is designed to build relationships and to share information and learning, for example the group helped steer the approach towards increasing devolution capacity via each department conducting a self-assessment.

3.4 The Cabinet Office are working to ensure that all departments make adequate reference to devolution in their induction of new entrants, and that new members of the Senior Civil Service are made fully aware of the implications of devolution and its impact. The Cabinet Secretary prepared a set of guidance for all civil servants in July last year, which is publicly available on the devolution pages of the Cabinet Office's website.

3.5 The following are non-exhaustive examples of the level of devolution awareness within departments and what departments are doing to consolidate devolution awareness internally.

3.6 Following a seminar on devolution awareness held jointly by the Wales Office and the Welsh Assembly Government for the Department for Culture Media and Sport (DCMS), the Scoping Team—which supports the Projects and Priorities Committee and the DCMS Executive Committee in prioritising resources on key activities and projects—has agreed that project initiation documents will include a “devolution proofing” section, so ensuring that all priority projects take on board the implications of any policy on the devolved administrations from the very first stages of development.

3.7 At the Department for Work and Pensions a Devolution Champion has recently been appointed in each policy group. This will provide assurance that devolution is being addressed effectively and it has been agreed that a basic understanding of devolution has to be a core skill for the Work and Pensions Policy Profession.

3.8 To assist staff at the Department of Health the department has produced detailed guidance on handling requests for legislative competence on health matters from the Welsh Assembly Government. This guidance explains the differences between the Scotland, Northern Ireland and Wales devolution settlements and was followed up by staff seminars attended by officials from the Welsh Assembly Government and Department of Health lawyers. The guidance is posted on the Department's intranet.

3.9 Given the wide variety and scope of the aims, and the extent of shared interests with the devolved administrations, at the Department of Environment, Food and Rural Affairs, awareness of the devolution settlements is necessarily embedded in its working practices. Much of the Department's business is

determined at the European Union level, and it consults the devolved administrations on proposed UK positions for European Union negotiations as a matter of course. It also has considerable experience of accommodating requests by devolved administration ministers to attend the Agriculture and Fisheries Council and the Environment Council. The Department ensures its policies are “devolution sensitive” by including representatives of the devolved administrations as part of the relevant governance structures for taking forward projects in key areas. Examples include nature conservation and close co-operation on Commission proposals to reform support for the uplands (“less favoured areas”).

3.10 The Foreign and Commonwealth Office is reviewing its approach to devolution, both to ensure it has the appropriate level of expertise and in particular its approach to engaging the devolved administrations. Foreign policy aspects of international relations are non-devolved matters under all three devolution settlements. The Foreign and Commonwealth Office represents the interests of all of the UK internationally and in doing so, takes into account the views of the devolved administrations. Currently, the Foreign and Commonwealth Office has a part-time temporary secondee from the Welsh Assembly Government who is working on a devolution integration project. The project is assessing the depth of understanding of devolution amongst staff through a combination of face-to-face interviews, meetings and a short online survey to establish what staff know about the devolved administrations. The findings have identified the need for greater understanding of devolution and are being taken forward in an interactive workshop. This will explain the context of devolution in foreign policy and outline the Foreign and Commonwealth Office’s approach for the development of a future strategy for engaging more strategically and systematically with the devolved administrations. To build on this work, the Foreign and Commonwealth Office’s Corporate Communication Group would be interested in establishing a systematic secondment from each devolved administration on a rotational basis, subject to the availability of the DA staff. In addition to this work the Foreign and Commonwealth Office has also taken on a part-time Devolution Policy Manager, on secondment from the Devolution Strategy branch of the Ministry of Justice: providing a central point of contact for devolution matters, joining up the Office with the Territorial Offices and the devolved administrations as necessary, and facilitating the sharing of best practice and policy guidance on devolution matters. Further the Foreign and Commonwealth Office has a range of guidance on devolution and working with the devolved administrations on its intranet (FCONet) which is available to all staff worldwide, and visible to the devolved administrations themselves via the GSi. Guidance includes key contact points both in the Foreign and Commonwealth Office and in the devolved administrations, the Territorial Offices, and links directly to the Memorandum of Understanding, Concordats and Ministry of Justice devolution guidance. The Communications teams of the three devolved administrations are working closely with Digital Diplomacy Group to enhance their presence on the new Foreign and Commonwealth Office website. This will include dynamic content covering events in the devolved administrations.

3.11 The Home Office Devolution Unit and Devolution Champion (Director General level) have established good working relationships with devolved colleagues and regularly visited/hosted meetings to catch up with each others’ remits. This is illustrated in the Home Office’s Partnership Working Scorecard for Home Office Corporate Partners (recent survey carried out in Sept 09) where the Welsh Assembly Government noted “Good working relationships between Welsh Assembly Government officials and devolution contacts and other officials in HO, with fairly regular engagement and face-to-face review meetings in London and Wales a couple of times a year. Evidence of increased commitment at senior level in the Home Office to consult with the Welsh Assembly Government.” There is also ongoing work to increase devolution awareness for the Home Office estate. Training/advice has been offered to officials within the Department and the Home Office is to host at least one lunchtime seminar on Devolution and Wales in the New Year with guest speakers from Welsh Assembly Government and the Wales Office.

3.12 The Department of Energy and Climate Change recognises the importance of a high level of awareness among its staff of the devolved administrations, the need to collaborate effectively with them and an appreciation of the devolution settlement in taking forward their work. The Local, Regional and Devolved Government policy team at the Department of Energy and Climate Change has overall responsibility for co-ordinating engagement with devolved administrations, with other policy teams working directly with them on specific and technical areas where appropriate. The Local, Regional and Devolved Government policy team organised a staff training event in October 2009 on devolved administration engagement which included speakers from the Wales Office and the Welsh Assembly Government and expects to hold similar events in the future.

3.13 There are particularly strong relationships between lawyers in the Welsh Assembly Government and the Department of Children Schools and Families on education matters, as they have worked together on a number of Bills and occasional Statutory Instruments. In the summer they held a team building event when 10 lawyers from the Department of Children Schools and Families travelled down to Cardiff and attended a morning of seminars on the devolution settlement in Wales focusing on the Government of Wales Act 2006 and the population of Schedule 5, and visited the Senedd. A return visit by Welsh Assembly Government lawyers to London is planned for next summer.

3.14 The Department for Transport has a Director General level devolution “champion” who has overall responsibility for high level matters with devolved administrations and who attends the High Level forums. In addition the Department for Transport has a coordination unit for devolution (which has strong top-level support) which is the first port of call for all devolution matters. The co-ordination unit ensures that all issues

are passed out to the relevant policy desk. It is this unit which oversees all general devolution briefing, arranging ministerial visits, facilitates meetings with officials from the Wales Office and Welsh Assembly Government representatives as necessary, coordinates Legislative Competence Orders and is responsible for raising general awareness of working with devolved administrations across the Department. The Department has structured interaction with devolved administrations at ministerial and senior official levels. These include bi-annual High Level Forums with Welsh Assembly Government and Department for Transport senior officials, regular ministerial meetings with the Welsh Deputy First Minister and Secretary of State. In addition, most policy areas have specific, bilateral machinery in place with Welsh Assembly Government counterparts in the case of particular modes (eg rail).

3.15 The Department of Business Innovation and Skills has appointed a Director General with extensive experience of devolved government to oversee relations with the devolved administrations on behalf of the board alongside his other responsibilities in the Department. This ensures that there is a good understanding of devolved issues at board level.

3.16 The Department for Communities and Local Government is currently reviewing its approach to devolution as part of the recent commission from the Permanent Secretaries' Management Group. The Local Governance policy team at CLG has overall responsibility for co-ordinating and facilitating Communities and Local Government's engagement with the devolved administrations and is in regular contact with officials in the Welsh Assembly Government to ensure that requests for legislative competence are being progressed. Other policy teams work directly with officials in the devolved administrations on specific issues where appropriate. CLG also regularly consults the devolved administrations on policy decisions in the area of local and regional democracy which are taken on behalf of the UK within the Council of Europe and EU, and a representative of the devolved administrations is included within the UK delegation to the annual EU High Level Meeting on Governance.

3.17 Relations between the Treasury and the Welsh Assembly Government on funding issues are governed by the principles set out in the Statement of Funding Policy published by the Treasury in October 2007. The Treasury works in partnership with the Welsh Assembly Government including on economic matters, which have been discussed for example at JMC and finance ministers' quadrilateral meetings.

#### 4. EXTENT OF COMMUNICATION BETWEEN WHITEHALL AND THE WELSH ASSEMBLY GOVERNMENT

4.1 Communication takes place between Whitehall and Wales on relevant issues at Ministerial and official level. At ministerial level the Wales Office hold regular bilateral meetings with all Welsh ministers as referred to in paragraph 1.14. In addition other UK ministers meet with Welsh ministers as necessary to discuss issues of mutual interest. On a more formal level ministerial engagement also takes place via the Joint Ministerial Committee on Devolution (JMC).

##### *The Joint Ministerial Committee on Devolution*

4.2 The Memorandum of Understanding set out the Joint Ministerial Committee framework. The JMC machinery provides a formal consultation role with devolved ministers on a wide range of matters where there is an interaction between reserved and devolved policy matters. The Joint Ministerial Committee meets annually in full plenary format, chaired by the Prime Minister or his representative. It last met in September 2009 to take stock of relations and discuss the economy—which included a discussion led by the Prime Minister on the subsequent meeting of the G20 in Pittsburgh.

4.3 There are two sub-committees of the JMC, on Europe and on domestic affairs. The Joint Ministerial Committee (Europe) (JMC(E)) specifically addresses European matters and has operated successfully from the outset of devolution. JMC(E) meets four times a year, prior to each European Council. This has enabled the devolved administrations to be informed and help to inform, the UK line for these key European negotiations. Official level meetings in advance of the ministerial meetings ensure that appropriate exchanges take place and that contacts are in place for regular exchanges throughout the year. The Joint Ministerial Committee (Domestic) (JMC(D)) is chaired by the Secretary of State for Wales, in his capacity of senior Minister for inter-administration relations, and discusses issues of mutual interest to the devolved administrations and the Government. Its inaugural meeting was held in March 2009, discussing welfare reform, and it met again in May 2009 to discuss managed migration. A third meeting is being arranged for early in the new year.

4.4 We are currently reviving both the Memorandum of Understanding and operation of the JMC framework—in part following ten years of operation of devolution and in part a response to the recommendations of the Commission on Scottish Devolution. At the plenary meeting of the JMC in June 2008 Ministers commissioned officials to consider and present revisions to the Memorandum of Understanding; these have been broadly welcomed to date and the Government looks forward to agreeing the updated Memorandum of Understanding with the devolved administrations as soon as possible. Any alteration to the existing operation of JMC will be by agreement of the UK Government and the three devolved administrations; however the UK Government has already signalled its support for additional JMC(E) and JMC(E) (Officials) meetings throughout the calendar year, to allow for detailed discussion of strategy and policy issues outside of the immediate preparations for Council meetings. A discussion of improving relations will be held at the next JMC(D).

*Examples of communication and co-operation*

4.5 The Government Departments in Whitehall communicate with counterparts in the Welsh Assembly Government about many aspects of policy within their respective spheres of influence. All Government Departments are encouraged to engage with counterparts in the Welsh Assembly Government whenever they are developing new policy, whether it rests in a devolved or a non-devolved field. While it is impossible to catalogue every occasion that such bilateral discussions have taken place there are many examples to illustrate this process. Please note that these are not exhaustive.

4.6 *Regional Cabinet*—When the Cabinet held an out of London meeting in Cardiff in July 2009 the Wales Office provided an essential role in co-ordinating arrangements between No 10, the Cabinet Office and the Welsh Assembly Government leading to a successful event. The Wales Office worked with Whitehall Departments to design a programme of visits for Cabinet Members, with the Welsh Assembly Government advising on sourcing briefing and the provision of logistical support.

4.7 *Railways*—The Secretary of State for Transport, and former Minister of State, has maintained a close dialogue with the Secretary of State for Wales and the Deputy First Minister on issues such as electrification of the Great Western Main Line, High Speed Rail and inter-city services. Rail officials have given written and oral evidence to rail inquiries by the Enterprise and Learning Committee of the National Assembly for Wales, most recently on 18 November 2009. There are regular bi-lateral meetings between Department for Transport and Welsh Assembly Government officials to discuss issues of mutual interest, including all the cross-border franchises and freight issues. The Department intends to work closely with all the devolved administrations to ensure as consistent an approach as possible regarding high speed rail development. The benefits of this joined-up approach can be illustrated by these examples:

- The completion of the West Coast Main Line modernisation scheme has permitted an enhanced timetable of services for North Wales with improved intervals and connections at Chester.
- On 23 July 2009 the Prime Minister, First Minister and Transport Secretary unveiled £1.1bn plans for the first big electrification of the rail network since the late 1980s, involving the London to Swansea and Liverpool to Manchester lines.
- The Department for Transport, Network Rail, Arriva Trains Wales and the Welsh Assembly Government have been working together on investing approximately £40 million in 2009–14 to deliver rail capacity improvements for Cardiff area, in conjunction with the £200 million South Wales Main Line re-signalling scheme.

4.8 *Road safety*—Roads directors for the nations of the UK meet formally on a regular basis. And the Welsh Assembly Government has been represented on the Department for Transport’s steering group developing the new GB road safety strategy. For road safety where most but not all activities are devolved to Wales, there is Welsh representation on the road safety delivery board which considers barriers to meeting GB casualty targets.

4.9 *Ports*—The Welsh Assembly Government works closely with the Department for Transport on ports issues. The Assembly Government is liaising with the Department on the National Policy Statement on ports, published for consultation on 9 November, which will set out the UK Government’s policy for the future development of civilian sea ports in England and Wales. The National Policy Statement will provide the primary basis for decisions by the Infrastructure Planning Commission in relation to proposals for major port developments in England and Wales.

4.10 *Child Poverty*—The regular engagement that has taken place between the Child Poverty Unit (that sits across the Department for Children, Schools and Families, the Department for Work and Pensions and HM Treasury) and the Welsh Assembly Government at official level to share evidence and discuss issues has built good relationships and trust. This was of great benefit when the Child Poverty Unit in Whitehall reached agreement from the Welsh Assembly Government on the Child Poverty Bill as the foundation was already in place. The Head of the Child Poverty Unit sits on the Welsh Assembly Government’s Child Poverty Expert Group.

4.11 *Workforce Agreement Monitoring Group*—In January 2003, the Department for Children, Schools and Families and the Welsh Assembly Government, along with other stakeholders signed “Raising Standards and Tackling Workload—a National Agreement”. This Agreement led to the creation of the Workforce Agreement Monitoring Group (WAMG) whose signatories monitor and oversee the implementation of the Agreement and issues arising from it. Most signatories meet every Wednesday and a full WAMG meeting takes place every six weeks where all signatories meet. WAMG also has a role in discussing how Government policy developments (England and Wales) impact on schools, and provides an effective challenge to policy developments and suggests how initiatives will work in practice. Ministers from both Westminster and Wales meet regularly with WAMG members and are always very keen to know their thoughts on the latest policy issues. Recent WAMG work (linked to policy in Wales) has included:

- a review of Estyn’s Report, 2009—“Evaluation of the extent and impact of remodelling on learning and the school workforce”. Key issues and what inspectors look for during routine school inspections; and

- discussions about the overview and key priorities for the educational landscape in Wales. Overview of the Key Welsh Policies, including the Learning Country, School Effectiveness Framework, Learning Pathways 14–19, Welsh Baccalaureate, Foundation Phase. These involved Jane Hutt; Minister for Children, Education, Lifelong Learning and Skills; David Hawker, Director of DCELLS; and Helen Arthur—Head of Learning Improvement and Prof Dev Division.

4.12 *Qualifications*—As a matter of policy, the qualifications framework is operated jointly across England and Wales (and Northern Ireland). This means that the same qualifications are available in each country (although for some school qualifications reflecting slight differences in the curriculum), and qualifications such as GCSEs are in effect jointly owned by the three administrations. The regulators—Department of Children, Education, Lifelong Learning and Skills in Wales, and in England a new Non-Ministerial Department, Ofqual—work together to accredit qualifications and to develop joint approaches to qualifications regulation. Working on a three-country basis is therefore second nature to the regulators, and is something that policymakers are very aware of too—changes to qualifications policy in England, in particular, may impact on the qualifications that are available in Wales or Northern Ireland.

4.13 *UK City of Culture*—The Welsh Assembly Government was represented on the UK City of Culture Working Group, set up to advise ministers on the desirability and feasibility of the initiative, and the Department for Culture Media and Sport has continued to work closely with Welsh Assembly Government officials to ensure the initiative is properly UK-wide. Specifically, the Department for Culture Media and Sport has worked with them on the bidding criteria and guidance, and the constitution of the Independent Advisory Panel, which will make recommendations on successful bids to the Secretary of State.

4.14 *Digital Britain*—Stephen Carter, when Minister with responsibility in this area, held a Digital Britain event in Wales with stakeholders to help inform the final Digital Britain White paper. He also gave oral evidence to the National Assembly for Wales Culture Committee, and followed this with a meeting with the Culture Minister. Officials have also had an ongoing close relationship with officials from the Welsh Assembly Government and the Wales Office on development of the pilot Independently Funded News Consortia pilot for Wales. The Secretary of State has had meetings with Lord Carter, Ben Bradshaw, key Welsh stakeholders and others to encourage high quality news on Channel 3.

4.15 *World Heritage Issues*—The Department for Culture Media and Sport as lead Government Department for UK World Heritage issues has over the past four years worked closely with the Pontcysyllte Aqueduct and Canal bid partnership including Cadw, the historic environment service of the Welsh Assembly Government, Wrexham Borough Council, The Royal Commission on the Ancient and Historical Monuments of Wales and British Waterways. The site was successfully inscribed on the World Heritage List, having been considered by the World Heritage Committee at its 33rd session in Seville, Spain in June this year.

4.16 *The National Lottery*—Formal consultation of devolved administrations takes place on all policy issues as required by the National Lottery Act and as set out in Lottery protocols to the devolution Concordats, but the Department for Culture Media and Sport also seek devolved administration colleagues' views on any other Lottery policy matters impacting on their countries as well as providing advice when requested on reserved elements of policy. The team dealing with Lottery distribution policy has meetings every six months with colleagues from the devolved administrations who deal with Lottery matters and keeps up informal contacts in between the meetings.

4.17 *Four Nations Forum*—this is held between the Department of Business Innovation and Skills (representing England in this forum) and analogous departments in the devolved administrations to discuss issues of common concern and to keep abreast of developments in each administration. For Wales, this involves representatives from the Department of Economy and Transport. The Forum meets about every six to nine months.

4.18 *UK Trade & Investment (UKTI)*—UKTI has a very good working relationship with International Business Wales (IBW), which is part of the Department for the Economy & Transport in the Welsh Assembly Government. At working level, regular links are maintained with key members of the International Business Wales team to ensure trade and investment activities are as joined up as far as possible. IBW is represented (along with the other development agencies in the devolved administrations and the English Regional Development Agencies (RDAs)) on the International Business Development Forum (IBDF) for which UKTI provides the Secretariat. IBDF is the formal engagement mechanism for all UK wide trade and investment activities (eg maintaining the guidelines for all foreign direct investment activity in the UK, to which IBW have signed up), with the devolved administrations playing a full part. UKTI also holds annual “Summits” with the development agencies at Chief Executive level to discuss issues of concern and to update each other on new initiatives. The last Trade & Investment Summit (including representatives from the English RDAs) took place in the East Midlands in July 2009, with the Director of IBW attending, primarily to look at progress in delivering the 2006 UKTI Strategy.

4.19 *Marine and Coastal Access Act 2009*—the Department for Environment, Food and Rural Affairs engaged the Joint Ministerial Committee to successfully find a way forward with all the devolved administrations, and to ensure the outcome was as suitable for the needs of Wales as for those of England and the whole of the UK.

4.20 *“Bringing Foreign Policy Home”*—This campaign by the Foreign and Commonwealth Office was spearheaded by the Foreign Secretary. It has seen the Foreign Secretary; the Parliamentary Under Secretary; Heads of Mission and Foreign and Commonwealth Office officials undertake outreach programmes in Wales, as well as Scotland and Northern Ireland. These initiatives have furthered links into the Welsh Assembly Government and Welsh society.

4.21 *Foreign Affairs*—The Welsh Assembly Government regularly consults the Foreign and Commonwealth Office for briefing on issues and/or guidance. Our posts abroad provide assistance to all the devolved administrations and in particular the offices of the devolved administration First Ministers, when requested. The current Welsh Assembly Government secondees based in the Foreign and Commonwealth Office two days a week is an additional example of our close cooperation and good working relationship. The Foreign and Commonwealth Office’s Director Strategic Communications has also worked directly with the Welsh Assembly Government on a project to review creative industries in Wales. Wales published an EU engagement strategy this year, which has led to further and strengthened links to the Foreign and Commonwealth Office’s EU Directorate General. All of the devolved administrations have some form of representation in Brussels and work with UKRep, and the Parliamentary Under-Secretary of State for Wales makes regular visits to the Welsh Assembly Government Offices in Brussels to hold meetings with officials and to be briefed on European developments relevant to Wales. The devolved administrations also work closely with British Embassies abroad and in some instances are co-located within the British Embassy or Mission, eg the Welsh Assembly Government in Chongqing, China. In line with the spirit of the international relations and EU Concordats in the Memorandum of Understanding, the Foreign and Commonwealth Office and the devolved administrations meet quarterly with representatives from the international divisions of the devolved administrations, rotating between London and the three devolved administrations. This provides a forum for the devolved administrations to build contacts, flag upcoming events, discuss any issues etc. Foreign and Commonwealth Office policy leads may also attend to cover specialist areas of interest to all of the devolved administrations.

4.22 *UK Low Carbon Transition Plan*—Liaison took place at official level in drawing up the UK Low Carbon Transition Plan which the Department of Energy and Climate Change published in July 2009, setting out a transition path to a low carbon country which includes cutting emissions, maintaining secure energy supplies, maximising economic opportunities and protecting the most vulnerable. Chapter 9 of the plan sets out how each of the devolved administrations will contribute to meeting the UK’s renewable energy and climate change targets.

4.23 *UK Renewable Energy Strategy*—Department of Energy and Climate Change officials engaged closely with the Welsh Assembly Government in developing the UK Renewable Energy Strategy. This strategy, also published in July 2009, sets out how the UK intends to achieve its legally-binding target to for a minimum of 15% of its energy to come from renewables by 2020.

4.24 *Home Energy Management (HEM), formerly known as the Home Energy Savings Strategy (HESS)*—Most of the proposals in the Heat and Energy Saving Strategy consultation in February 2009 applied to England and Wales, though areas such as planning and local government are devolved. Welsh Assembly Government officials were consulted throughout the process of developing these proposals, and this engagement has continued since the consultation closed in May. The Government will be publishing its response to the consultation at the turn of the year.

4.25 *Community Energy Savings Programme (CESP)*—A number of public consultation road shows were held around the UK in the development of Community Energy Savings Programme/Carbon Emission Reduction Target + uplift and Home Energy Management. As part of this, an event was jointly hosted with the Welsh Assembly Government in Cardiff in March 2009. Discussions have continued with Welsh Assembly Government colleagues in the subsequent development of the Community Energy Savings Programme. The first 10 areas for Community Energy Savings Programme roll-out were announced on 21 October by British Gas; one of these areas is Swansea.

4.26 *British-Irish Council energy work stream*—The British and Irish Council, of which the Welsh Assembly Government is a member, along with the other devolved administrations, the Crown Dependencies and the Republic of Ireland, has agreed to a work stream comprising two main elements—electricity grid infrastructure, and marine energy. The Department of Energy and Climate Change leads the UK Government’s involvement in this work stream. Meetings have taken place at official level at which the Welsh Assembly Government has been represented and a ministerial meeting is being planned for March 2010. The overarching aim of the electricity grid theme is establishing a common vision of the appropriate economic and efficient grid infrastructure to exploit the British Isles’ significant renewable resource for the mutual benefit of the inhabitants of British and Irish Council members. The objective of the marine renewables theme is to help realise the potential for energy generation from wave and tidal sources through collaborative working.

4.27 *Cross-Border Health*—Welsh Assembly Government, Wales Office and Department of Health officials worked to agree an updated protocol to facilitate cross border healthcare. Although successful the protocol was not designed however as the mechanism through which all issues relating to England/Wales cross-border health services would be addressed. There is ongoing dialogue between officials from the Department of Health and the Welsh Assembly Government to take account of policy divergence and other

changes, for example, the recent changes to the structure of the NHS in Wales. Officials in the Department of Health and the Welsh Assembly Government are establishing a cross-border policy group to address policy and other changes and agree a process for addressing cross-border issues.

#### 5. THE MINISTRY OF JUSTICE LED REVIEW OF DEVOLUTION GUIDANCE

5.1 There is currently a wide variety of guidance available to civil servants and indeed the general public on the devolution settlements and their implications. However, this exists in a number of different places and not always in the most accessible form. As such the Ministry of Justice and the Cabinet Office are running a joint project to make it easier to read, use and access.

5.2 The joint MoJ and Cabinet Office project has involved a cross-Whitehall focus group and wider consultation with the devolved administrations. The refreshed guidance will be presented in the New Year as a devolution website page. It will link up to the rest of Whitehall through departments' intranets, and will also itself host links to relevant documents and resources such as the Devolution Guidance Notes, Memorandum of Understanding and Concordats.

5.3 The web-based guidance is to have various levels which link into each other, allowing the user to navigate successfully for training, information, or contacts. There will also be key messages tailored to particular audiences for whom the agenda is most relevant. For example Bill teams and those involved in new policy-making.

5.4 The Devolution Guidance Notes themselves are to be retained in their current form, but updated where appropriate. For example changes to DGN 4 are being considered in line with the Committee's comments in its Report into the Legal Services Commission Wales.

#### 6. TAKING FORWARD THE FINDINGS OF THE JUSTICE COMMITTEE'S REPORT "DEVOLUTION: A DECADE ON"

6.1 The Government response to the Report of the Justice Select Committee, "*Devolution: A Decade On*" was published in July 2009. The Government welcomed the Report and further work has been undertaken since the response was published. In response to the Commission on Scottish Devolution, the Government produced a White Paper on 25th November 2009 to take forward the proposals.

6.2 This Report also covered the issue of funding for Wales. The work undertaken on this has been covered in paragraph 1.32.

January 2010

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### **Written evidence from Wales Council for Voluntary Action (WCVA)**

#### 1. INTRODUCTION TO WCVA

1.1 Wales Council for Voluntary Action (WCVA) represents the interests of voluntary organisations, community groups and volunteers in Wales. It has over 2,600 organisations in direct membership and is in contact with many more through national and regional networks.

1.2 WCVA's mission is to strengthen voluntary and community action at the heart of a civil society in Wales that:

- is inclusive and offers equality of opportunity;
- empowers people to participate and fosters community leadership;
- encourages and promotes the independence of voluntary action;
- celebrates and reflects linguistic and cultural diversity and choice, and
- engages in genuine partnership with other sectors on a "who does what best" basis.

1.3 WCVA is pleased to be able to respond to this call for evidence. This response is based upon evidence gathered by WCVA's Voices for Change Cymru project which provides a range of services aimed at connecting the third sector in Wales to local and national decision makers. The project provides information to third sector organisations about the National Assembly for Wales, Welsh Assembly Government, UK Parliament and UK Government and aims to ensure that the sector is able to access, understand and influence decision making processes in all of these institutions.

1.4 WCVA's members regularly engage with Government and Parliament structures at both a Wales and UK-wide level; clear and transparent inter-governmental relations between the devolved nation and central Government are essential to ensuring that this engagement is as meaningful and effective as possible. Our response draws upon our own experiences of these relationships and information given to us by our member organisations.

## 2. SUMMARY

2.1 The main points that we would like to make the Committee aware of are:

- There is a great deal of overlap between devolved and non-devolved policy areas. These cannot be considered in isolation and the implications for Wales of a non-devolved policy may be different to the implications for England; these must be considered and discussed with the Welsh Assembly Government (WAG) at an early stage.
- There is a need for greater awareness and knowledge of devolution and its implications amongst Whitehall civil servants, this cannot be addressed by protocols alone.
- Communication between the WAG and Whitehall needs to be improved to ensure that there is clarity over who is responsible for what and exactly how policies will affect Wales. Earlier communication will also allow for any unnecessary confusions or problems to be mitigated including any potential cross-border issues.
- UK Government consultation documents should clearly state whether they apply to Wales and must take account of WAG policies in related areas.
- The role of Whitehall in the Legislative Competence Order process is not transparent and it acts almost as a “black hole” on occasions.
- Relations between Wales and Whitehall should be more transparent, more effective and lead to much clearer information being given to people in Wales about the impact of policies on their lives and the ways in which they can influence these policies.

## 3. RESPONSE

### 3.1 *Awareness of devolution at Whitehall and the UK Parliament*

3.1.1 As the majority of the discussions between the Welsh Assembly Government and Whitehall are undertaken behind the scenes it is hard for outside organisations to be able to comment extensively on the levels of awareness and understanding of devolution within Whitehall. However, what we do see is the end result of those discussions or the results of the fact that the discussions have not taken place. It appears that awareness of devolution is patchy across the various Whitehall departments with different departments having different levels of understanding of both the devolution settlement and its implications on policy.

3.1.2 In some departments it appears that there is little discussion with the Welsh Assembly Government and/or Welsh stakeholders in the development of policies where their main focus is a non-devolved topic but where there will be an impact in Wales. It is essential that where a non-devolved policy issue (eg social security benefit) touches on a devolved one (eg social service provision) the implications of this are thought through and clearly set out. Stakeholders in Wales need to be enabled to respond fully to consultations on issues that will affect them and should be provided with comprehensive information about how a policy will work in Wales and any impact on devolved matters.

3.1.3 One example of this is the recent Welfare Reform consultation which did not take account of the fact that even though welfare benefits are not devolved other related areas eg childcare, social services are and the consultation did not highlight how these would be dealt with or affected. It was therefore very unclear what actually applied to Wales and how the relevant Whitehall department had been and would be working with Welsh Assembly Government (WAG). A consultation event was held in Cardiff but the civil servants did not take account of devolution and could not answer questions about the implications for Wales, this was very frustrating for those who attended. It seemed as if the document has been written with little consultation with the WAG.

3.1.4 We are not in a position to comment in detail on the policies and protocols put in place to structure inter-governmental relations but it seems that there is a need for much better awareness of devolution and its implications (even on seemingly non-devolved issues) among civil servants in Whitehall. Protocols should involve early consultation with the Welsh Assembly Government and Welsh stakeholders along with a commitment to produce documents that clearly state whether a policy applies to Wales or not.

3.1.5 We are also aware of a lack of understanding amongst some MPs about devolution and about which policies and strategies apply to Wales. This can be very frustrating for organisations in Wales and begs the question—if MPs and civil servants aren’t clear about what applies in Wales how difficult must it be for the third sector to find out?

### 3.2 *Whitehall and the Welsh Assembly Government working together*

3.2.1 There do appear to be issues around a lack of communication between Whitehall and the WAG. For organisations wishing to influence policy it does not matter what the protocol is for this or where the responsibility lies what matters is the end result and how clear and transparent the processes are. This is not just an issue of Whitehall being unwilling to engage or not having the knowledge we have also heard that in some cases WAG civil servants seem unwilling to engage with issues that are primarily un-devolved.

3.2.2 However, this is not true across the board and many WAG civil servants have been very helpful to third sector organisations in explaining whether a particular policy applies in Wales and what its implications are. It is a telling sign though that on many occasions organisations need to contact these civil servants to ask whether a policy or consultation applies to Wales and sometimes the civil servants themselves do not know.

3.2.3 The issue here is that as the devolution settlement is complex it is not sufficient to pigeon-hole policy areas into devolved/non-devolved and attempt to deal with them in a vacuum. Devolved and non-devolved issues impact regularly on one another in many key policy areas and this must be considered by both Governments when developing policy.

3.2.4 If the UK Government is consulting on an issue that applies to Wales or has implications for Wales it might be useful for them to develop a joint consultation with the WAG or run joint consultation events. That way the WAG civil servants will be able to provide the Welsh context and there would be a requirement built in from the start to establish the implications for Wales.

3.2.5 There is also a lack of synergy in the way that UK Government and WAG policies are developing. In some ways this is an inevitable consequence of devolution and we do not have an issue with this in principle but where things are not thought through or communicated across Governments it can lead to unnecessarily complex outcomes. This is best highlighted by the example below of the way that legislation in the area of local government scrutiny is developing.

3.2.6 The Local Democracy, Economic Development and Construction Act has just been passed by the UK Parliament. Amongst other things, this Act will insert Matters into Field 12 of Schedule 5 of the Government of Wales Act 2006 and this will give powers to the National Assembly for Wales to legislate in the area of local government scrutiny (except for crime and disorder scrutiny). This in turn will allow the Welsh Assembly Government to bring forward a proposed Measure on governance and scrutiny as set out in their current legislative programme. This Measure will give power to local authorities to be able to co-opt external bodies, including third sector bodies, to scrutiny committees.

3.2.7 The Welsh Assembly Government has a long-standing commitment to the sector to legislate for co-option which is detailed in its own document, "*The Third Dimension. A Strategic Action Plan for the Voluntary Sector Scheme* (Jan 2008)". In this document there is a commitment to "develop a vibrant and effective cross-sector model of scrutiny" and to "obtain and apply new powers to enable local authorities to co-opt members to scrutiny committees from the third sector and other organisations, with voting rights as appropriate".

The third sector welcomes this step and is currently looking forward to the consultation on the proposed Measure.

3.2.8 Given the fact that the Welsh Assembly Government has articulated its desire to liberalise local government scrutiny in this way for a long time, it was disappointing to see the detail of the commencement in Wales of Sections 19 and 20 of the UK Police and Justice Act 2006 in October 2009. This UK Act imposes a duty on each local authority to have a Crime and Disorder Scrutiny Committee and allows for the co-option of additional members of responsible or co-operating bodies to serve on those committees. It is extremely disappointing to note that third sector groups are excluded from this provision (despite their involvement in crime and disorder issues through both service delivery and contributions to policy development) because they do not constitute the responsible or co-operating bodies defined in the legislation.

3.2.9 Without a change in the Police and Justice Act regulations for Wales, we will have the nonsensical and confusing situation where third sector organisations can be co-opted to all local government scrutiny committees except for Crime and Disorder Scrutiny Committees.

3.2.10 The issue here is that there should have been better communication between the relevant WAG and Whitehall departments to anticipate this situation and possibly try to avoid it if possible. WCVA noticed this anomaly on reading the two pieces of legislation so it is difficult to imagine that the relevant civil servants did not also see this discrepancy.

### 3.3 Clarity and transparency to make engagement easier

3.3.1 One simple way that engagement could be made easier would be for all UK Government consultation documents to very clearly state which parts of the UK they apply to. If different sections of a document apply to different nations this should be made clear. It should not be the responsibility of consultees to have to work this out. Third sector organisations in Wales have very limited capacity to influence policy and spend a lot of time responding to consultations. At the moment a great deal of excess work is involved simply to establish whether a consultation document is relevant to Wales or not.

3.3.2 The main issue for our members as people wishing to either influence policy, or as those affected by policy, is confusion over who is responsible for what and where the decisions are made—this is bad for democracy. Whilst we appreciate that much of this is tied up with the nature of the devolution settlement more could be done to make it clear where policy responsibilities lie.

3.3.3 It often seems that the implications of any UK policy on Wales are considered as an afterthought and not as an important step in developing and communicating policy. The impact of devolution on any policy should be thought through and discussed with the relevant devolved governments at the earliest possible stage in the process. The WAG should not be left to simply react to UK Government policy and Welsh stakeholders should be given a fair chance to have their say on any policy that will affect them.

#### 3.4 Legislation

3.4.1 Our members' experience to date is that the role of Whitehall in the Legislative Competence Order (LCO) process is not transparent. Organisations in Wales may have lobbied hard for an LCO and engaged in all of the relevant steps in the process in Cardiff Bay but when the LCO goes to Whitehall it appears to go into a black hole. Things seem to get held up there for a long time and it can be hard to know what is happening or when it might be possible to try to engage with the LCO again. Whilst we understand that timetabling is an issue and that it will not be possible to deal with all LCOs immediately it should be possible for interested parties to find out what is happening with the LCO and when it is likely to progress.

3.4.2 Our wider concerns about the LCO process are well documented and we would like to take this opportunity to re-iterate our view that not only is the system too complex, cumbersome and places an unnecessary burden on those wishing to influence it but also that the UK Parliament and Governments role in the process is very unclear and difficult for organisations to understand and engage with. Regardless of how we move forward with devolution in Wales this issue needs to be addressed in the short-term as recommended in the All Wales Convention's recent report.

3.4.3 We also have some concerns over the issue of powers for Wales being put into framework Bills. At present the decision as to whether to do this and for what Bills it might be applicable is taken entirely behind closed doors between the WAG and Whitehall—there is no involvement of the National Assembly for Wales or Welsh stakeholders. We believe that there should be an opportunity for Assembly Members and external organisations to suggest things for inclusion in framework Bills and that they should also be part of the discussion about whether the Bill adds Matters to Schedule 5 of the Government of Wales Act (ie gives the powers to the National Assembly for Wales) or gives powers to WAG Ministers. The current system and rationale for making these decisions is unclear.

#### 4. CONCLUSION

4.1 It is essential that third sector organisations in Wales are enabled to effectively engage with and influence the decisions that will affect their members, regardless of where those decisions are taken. The devolution settlement in Wales is complex and therefore time needs to be taken to fully understand and explain the implications of UK Government policies on Wales. This can be done by effective cooperation between Whitehall and the Welsh Assembly Government and through improving the levels of awareness about devolution amongst all of those engaged in policy and decision making.

4.2 We support the recommendation made in the Report of the Justice Committee "*Devolution: A Decade On*" that:

... there is still a considerable way to go in achieving consistent and effective practices in dealing with devolution issues across all Whitehall departments. This should not only involve a full and comprehensive understanding of the policy areas that have been devolved to Scotland and Wales, but also full appreciation and consultation so that Welsh and Scottish interests are taken into account in policy making in reserved or non-devolved areas which will have an impact on the UK as a whole.

4.3 Organisations in Wales work hard to represent the views of their members at both a Wales and a UK level and it is in the best interests of accountability and good democracy to make this process as easy as possible for them. We hope that this inquiry will go some way towards addressing these issues.

December 2009

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#### Written evidence from Wales Governance Centre, Cardiff University

##### SUMMARY

This evidence is submitted on behalf of the Wales Governance Centre at Cardiff University.

The Centre includes representatives of Cardiff Law School and the Department of Politics.

The evidence would like to address one aspect of the Committee's inquiry namely the extent of communication between Whitehall and the National Assembly for Wales.

We are concerned about the difficulty which the National Assembly, acting through its Subordinate Legislation Committee has in carrying out one of its important functions. This function is set out in the Assembly's Standing Order 15.6(ii). It relates to the scrutiny and reporting to the Assembly of the "Appropriateness of provisions in proposed Assembly Measures and in Bills for Acts of the United Kingdom Parliament that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General".

#### THE PROBLEM

It is important for the Assembly to whom the Assembly Ministers account for the exercising of their powers to be fully aware of the extent of such proposed powers. In relation to proposed Assembly Measures the Assembly is fully aware of such ministerial powers contained in the draft Measure and there is extensive machinery available to the Assembly by which proposed powers are debated during the progress of a Measure through the Assembly. Such in-depth consideration of ministerial powers is not currently available to the Assembly in relation to powers proposed to be granted to assembly Ministers in UK Bills.

Currently, more such powers are given through UK Bills (Acts) than are given through Measures. The structure of the Assembly is such that it appears that reliance is mainly made by the Assembly on the reports produced by the Subordinate Legislation Committee<sup>13</sup> on Bills going through Parliament which propose to give executive powers to the Assembly Government and legislative powers to the Assembly.

In the Parliamentary Session 2008–09, two Acts gave legislative powers to the Assembly to make Measures and nine Acts gave executive powers to the Assembly Government. This compares to three Legislative Competence Orders giving Measure making powers to the Assembly and six Measures made by the Assembly giving executive powers to the Assembly Government. A list is attached as Annex 1 to this submission.

Of the nine Acts giving executive powers to the Assembly Government the Subordinate Legislation Committee considered the extent of the executive powers in five of the Bills which eventually became Acts. A list of the Bills that were considered is attached as Annex 2.

The Subordinate Legislation Committee on 14 October 2009 reviewed the other Bills and certain Draft Bills before Parliament in 2008–09 Session which would give powers to the Welsh Ministers. A list of the Bills and draft Bills they have considered is attached as Annex 3.

The Committee concluded that it would not consider any of these Bills or Draft Bills.

Their main reasons for not considering the Bills and Draft Bills were:

1. either because the Bills and Draft Bills contained limited powers delegated to Welsh Ministers; or
2. because the Bills were so advanced that it was too late to attempt to influence the contents of the Bills.

For the current Parliamentary Session 2009–10, 6 Bills appear to devolve either legislative powers to the Assembly and executive powers to the Assembly Government or only executive powers to the Assembly Government. No doubt the Subordinate Legislation Committee will give consideration to at least some of these Bills. Presumably it is the UK Government's intention that at least some of these Bills should receive Royal Assent before next year's general election. This gives limited time to the Assembly to consider these Bills.

From what it is said above we have two main concerns:

1. Where the Subordinate Legislation Committee has reported on Bills its analysis of the proposed Welsh Minister's powers is clear and well argued. The Reports include the Committee's conclusion on written and oral evidence taken from Welsh Ministers based on the analysis by the Committee of these ministerial powers. However the Committee also have other important functions to carry out under the standing orders applicable to them. This is particularly so in the case of the consideration of many Assembly Government Statutory Instruments. The result is that the Committee is unable to report to the Assembly on all Bills giving powers to Welsh Ministers or legislative powers to the Assembly.
2. It is uncertain as to what is the ultimate effect, if any, on the contents of the Bills which have been reported on by the Committee. The reports do not seem to be sent to any relevant Committee of either House of Parliament. Neither Members of Parliament nor members of the House of Lords have any established machinery by which they can be kept informed of any concerns expressed by the Committee. It seems that it is left to the Assembly Government Ministers to decide to what extent they seek to take account of the Committee's comments in working on the Bills with their Whitehall colleagues.

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<sup>13</sup> Now called the Constitutional Affairs Committee.

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**CONCLUSION**

At least to outside observers, it does not seem that for various reasons the Assembly is able to play any fundamental role in influencing the contents of Bills which either give the Assembly legislative powers to make Measures or give executive powers to Welsh Ministers including some extensive powers to make Subordinate Legislation.

*January 2010*

**Annex 1****LEGISLATIVE AND EXECUTIVE POWERS**

1. Local Democracy, Economic Development and Construction Act 2009
2. Marine and Coastal Access Act 2009

**EXECUTIVE POWERS**

1. Apprenticeships, Skills, Children and Learning Act 2009
2. Business Rate Supplements Act 2009
3. Coroners and Justice Act 2009
4. Corporation Tax Act 2009
5. Health Act 2009
6. Policing and Crime Act 2009
7. Welfare Reform Act 2009

**MEASURES**

1. Learner Travel (Wales) Measure 2008
2. Learning and Skills (Wales) Measure 2009
3. Local Government (Wales) Measure 2009
4. Health Eating in Schools (Wales) Measure 2009
5. Children and Families (Wales) Measure 2009- Awaiting Royal Approval
6. Education (Wales) Measure 2009- Awaiting Royal Approval

**LEGISLATIVE COMPETENCE ORDERS (LCOs)**

1. Red Meat Industry LCO
2. Carers LCO
3. Exception to Matters LCO

**Annex 2**

In the Parliamentary Session 2008–09 the Subordinate Legislation Committee considered five UK Bills namely:

1. The Apprenticeships, Skills, Children and Learning Bill: Powers delegated to Welsh Ministers
2. The UK Business Rate Supplements Bill: Powers Delegated to Welsh Ministers
3. The Equality Bill: Powers delegated to Welsh Ministers
4. The Marine and Coastal Access Bill: Powers delegated to Welsh Ministers
5. Child Poverty Bill: Powers delegated to Welsh Ministers

**Annex 3****COMMITTEE'S REVIEW OF BILLS BEFORE PARLIAMENT (AND DRAFT BILLS) FOR POSSIBLE SCRUTINY UNDER STANDING ORDER 15.6(ii)**

The Subordinate Legislation Committee on 14 October 2009 reviewed the Bills before Parliament and draft Bills for possible scrutiny under Standing Order 15.6(ii) (Appropriateness of provisions in proposed Assembly Measures and in Bills for Acts of the United Kingdom Parliament that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General).

The following UK Bills which would give powers to Welsh Ministers were reviewed but not considered under the Standing Order:

1. Constitutional Reform and Governance Bill
  2. Coroners and Justice Bill
  3. Local Democracy, Economic Development and Construction Bill
  4. Policing and Crime Bill
  5. Postal Services Bill
  6. Welfare Reform Bill
  7. The Postal Services Bill
  8. Constitutional Renewal Bill
  9. Health Bill Coastal Bill
  10. The draft Floods and Water Management Bill
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### Written evidence from the Welsh Assembly Government

#### INTRODUCTION

1. This memorandum from the Welsh Assembly Government, in response to the Welsh Affairs Committee's inquiry on co-operation and consultation between Wales and Whitehall, is based on experience across the range of our responsibilities. We have drawn on that experience to highlight points which we believe will help in promoting good inter-governmental relations. Such relations are important since it is the experience of citizens and of organisations working for the people of Wales, be they private, public or voluntary that matters in assessing the operation of devolution. It behoves governments at all levels to work together for the benefit of the people they serve.

#### AWARENESS OF THE DEVOLUTION SETTLEMENT WITHIN THE CIVIL SERVICE INCLUDING DEVOLUTION GUIDANCE NOTES

2. Understanding of devolution is patchy across Whitehall, at two levels: awareness and capacity to deal with devolution issues generally, but also understanding of the asymmetric system of devolution across the UK, with the differences in the settlements compounded by policy and political differences. This is most evident in the handling of requests for legislative competence, which do not have an exact equivalent in any other administration. In this regard, our response to your request earlier this year regarding our experience of the Legislative Competence Order process is relevant. It is attached to this memorandum.

3. More generally, both awareness and assuredness are important. Awareness of devolution is not of itself sufficient; we need civil servants with confidence as to how to handle it. In order to advise their ministers well, civil servants need not only to know what is devolved as far as Wales is concerned and to understand the mechanics of the settlement, but also how to manage that positively and confidently. They need to know how to accept and work with policy differences between administrations. Broadly speaking, the two desiderata of awareness and assuredness are most frequently observed in areas where the subject matter is long devolved, such as education, health and social services, though there are examples elsewhere.

4. Conversely, lack of awareness and hence confidence in dealing with devolution can lead to unnecessarily complex arrangements which do not benefit organisations working across borders.

5. The biggest risks in this respect are:

- *where a subject is ostensibly non-devolved* (such as social security or defence) but impacts on devolved subjects (for example skills, economic development, health, education). Differences in infrastructure, roles and responsibilities for public services have developed in response to Welsh needs and circumstances. Accountability for funding decisions on devolved services lies with the Welsh Assembly Government. Delivery approaches which may be straightforward in an English context need careful consideration as to whether and how they will work in Wales. This calls for liaison at the very earliest stages of policy development. This is where Whitehall needs especially to be able to act with assuredness in sharing information at an early stage since it will avoid far greater difficulties and wasted energies down the line. In the absence of such sharing of information, difficulties can particularly arise when the UK Government issues policy documents which cover both non-devolved and devolved functions, both because it may be unclear how far the commitments apply to the devolved administrations and because such documents do not always take adequate account of different administrative structures in the devolved nations;

- *broad brush assumptions that where substantial parts of a subject are non-devolved (eg energy, employment law), all of it is.* For historical reasons, the boundary between what is and is not devolved in Wales is in some areas fairly convoluted. Establishing a shared understanding of the Welsh ministers' responsibilities in related policy areas at the outset will lead to better informed and thus more fruitful communications;
- *assuming that what goes for Scotland goes for Wales.* For many reasons—differences in the scope of powers, policy differences and legal differences—a solution which works for Scotland will not always work for Wales. Taking the trouble to check this before advice is prepared (or instructions for Bills drafted) will again avoid the need to unpick matters publicly and at a later stage, which inevitably uses more resources all round—including Parliamentary time;
- *treating the Welsh Assembly Government like another government department.* The Welsh Ministers have discretion over the allocation of resources for devolved public services and are accountable to their own elected legislature for the effective use of those resources. If decisions are to be taken at UK level which imply the commitment of those resources for particular purposes, this should only be done with the Welsh Ministers round the table as equal partners to those decisions; and
- *failing to recognise geographic boundaries:* establishing, in respect of non-devolved functions, new administrative structures which do not take account of the existence of Wales as a territory with its own distinct administrative identity, but rather are designed to operate on a cross-border basis in conjunction with adjoining regions of England.

#### THE ROLE OF THE WALES OFFICE AND THE MINISTRY OF JUSTICE

6. Direct bilateral relations between relevant policy departments are of prime importance. Whitehall departments should not hesitate in approaching Welsh Assembly Government departments directly in order to establish their policy position and their circumstances, while keeping the Wales Office informed. Officials must understand clearly the different roles of the Wales Office and the Welsh Assembly Government.

7. The Wales Office has a particular role in Welsh legislation—specifically, the Secretary of State for Wales and the Wales Office Minister have a role in piloting Legislative Competence Orders through Parliament and in checking, through their representation on Legislation Committee, that any outstanding issues with the Welsh Assembly Government regarding the Welsh content of Parliamentary Bills or draft Bills are resolved before introduction or publication. Wales Office officials therefore play a role in ensuring that the significant groundwork required on both Bills and LCOs takes place and that information is shared in both directions to enable this to happen. This facilitating role makes it particularly important that Whitehall departments receive consistent messages about the operation of the devolution settlement and about the ground rules for engagement, from both the Wales Office and the Welsh Assembly Government.

8. With regard to the role of the Ministry of Justice, there is a distinction between general constitutional policy issues, such as elections or reform of the House of Lords, which sit with that department, and the question of inter-governmental relations, which more naturally sits with the Cabinet Office as a department that routinely plays a brokering role. That does however highlight the point that somewhere in between general constitutional policy and inter-governmental relations there should be a focus within Government for its policy on devolution. The Wales Office interprets the Government of Wales Act 2006 but decisions which affect one devolved administration cannot be taken in isolation: decisions in relation to Scotland, for example, are just as likely to have an impact on Wales, but a different impact. The means of ensuring that such issues are considered in the round is not transparent, as the Justice Select Committee has already observed.

#### THE EXTENT OF COMMUNICATION BETWEEN WHITEHALL, THE WELSH ASSEMBLY GOVERNMENT, THE NATIONAL ASSEMBLY FOR WALES AND WELSH MPs

9. There are over 100 forums where Welsh Assembly Government and Whitehall officials meet. Despite this and despite 10 years of devolution, there are still many instances of lack of timely consultation on major policy announcements which have implications for Welsh Assembly Government policies and programmes or which leave unclear for audiences what the position is in Wales. There are still instances of Bills being introduced where time pressures mean that the provisions for Wales are not addressed as fully or in as timely a way as they should, although there are examples of good practice and effective co-operation too, to achieve mutually agreed outcomes in short timescales.

10. We recognise that policy differences or even uncertainty about sharing policy proposals which are subject to change may act as a constraint on sharing information. However as we have observed, early sharing of information where there is a “need to know”, in confidence where necessary, will lead to smoother and more effective delivery in the long run. The Memorandum of Understanding and Devolution Guidance Notes provide important guidelines to officials in this respect. Regular contacts (both structured and informal and at all levels), with clear ground rules, are essential to the good functioning of inter-governmental relations. There is increasing evidence of this happening in areas where it is clearly essential (such as where European legislation and regulation is involved) but we need to recognise that it is important in other areas too.

11. At official level, Welsh Assembly Government staff have worked with the Wales Office and directly with devolution contacts in other UK Government Departments to provide tailored training sessions for officials. These efforts will be stepped up in future, with a focus on helping people to identify the right contacts, understand the ground rules and share good practice, both in Whitehall and in the Welsh Assembly Government.

12. In looking for areas of good practice, the work of the British-Irish Council deserves more recognition for the extent of collaborative policy work on important issues of mutual interest. When looking for the reasons underlying productive relations between Wales and Whitehall it is sometimes the work undertaken in this forum that has provided the basis. For example the role of the British Irish Council's Social Justice strand (which focused on Child Poverty from 2006–08) was instrumental in creating the conditions for effective co-operation on child poverty. This co-operation has been continued in a UK context through a Four Nations Group on Child Poverty.

13. The work of the Joint Ministerial Committee (JMC) is also to be welcomed. We therefore support the points made both in the report of the Calman Commission and in the response of the UK Government to that report concerning the need for meetings of the JMC and of its Domestic Committee to be organised on a long term basis and take place regularly. We welcome the way in which the Cabinet Office and devolved administrations are working together to provide a joint secretariat for the JMC and regard this as an important principle for its operation. Similarly, the Finance Ministers' Quadrilateral should be a regular event. Regular meetings at departmental ministerial level are also valuable although we note that these are less widespread. These contacts can help in avoiding disputes arising in the first place; but we also note the absence to date of any independent or impartial element in cases where disputes do arise. For example the UK Government, in the shape of the Treasury, currently acts as judge and jury in the case of disagreement over how the Barnett formula operates. We highlight proposals for how this could be put right, in paragraph 22 below.

14. Much comes down to the skills, behaviours and experience of individuals and to the relationships they develop with their counterparts. Sometimes good communications at official level can be disrupted by teams being disbanded (eg after a Bill) or through reorganisation, so attention needs to be paid to handover briefings.

15. Just as it is possible to look overseas for models of arrangements for the allocation of funding between Governments, it may be worth examining existing models which apply to policy and the preparation of legislation. We are not suggesting that there are models which can simply be imported and applied in the UK context but we note, for example, the inter-governmental agreements in Australia which (normally) precede legislation; and arrangements in other countries where overarching meetings at head of government level are supplemented by meetings both at ministerial and official level on more specific subjects. The time has come to develop a more robust set of arrangements for inter-governmental relations: not to replace day to day engagement but to provide a framework for it.

16. Communications between Parliament and the National Assembly for Wales and their respective committees and members are not primarily for us to consider, however we comment in the attached note on the Legislative Competence Order process on the value of joint scrutiny where this is possible.

#### THE REVIEW OF WHITEHALL GUIDANCE ON DEVOLUTION, ANNOUNCED BY THE MINISTRY OF JUSTICE IN RESPONSE TO THE COMMITTEE'S REPORT ON THE LEGAL SERVICES COMMISSION

17. The review (which is taking rather longer than promised) needs to respect the fact that much extant guidance was closely negotiated with the devolved administrations. This is what underpins its worth as an operational tool. We welcome attempts to raise the profile of this guidance and provide simpler access but it is important that the results are acceptable to the devolved administrations. Guidance to officials in Whitehall and in Wales has to be mutually compatible: we recognised this ourselves in publishing guidance to Welsh Assembly Government officials which is consistent with that given in the Whitehall Devolution Guidance Notes.

#### TAKING FORWARD THE FINDINGS OF THE JUSTICE SELECT COMMITTEE IN ITS RECENT SUBSTANTIAL REPORT DEVOLUTION: A DECADE ON

18. As will be evident from the comments already made, we substantially agree with the findings of the Justice Select Committee. In particular we note its finding, which is supported by findings elsewhere including those of the Calman Commission, the House of Lords Select Committee on the Barnett Formula and the Holtham Commission, that the Barnett formula is "overdue for reform"; and that there is a lack of transparency in the process of decision making by the UK Government as to what spending is included in the calculations for the Barnett Formula and the rationale for those decisions.

19. We agree with the common conclusions from these reports that any revised formula for determining changes to the block grant of the devolved administrations should be needs based. The real consequence, if action is not taken to achieve this and if the Barnett formula continues to operate as at present, will be that future changes in public spending will lead to increasing convergence between levels of public expenditure per head in Wales and in England, thus failing to take account of the greater levels of need in the Welsh population.

20. We are glad that the UK Government has agreed, with regard to Wales, that the Barnett formula could lead to convergence to an extent that would be regarded as unacceptable (although it maintains that further convergence is not currently expected in the coming years); and its undertaking to make a full assessment of the extent of convergence with consideration of Wales' position relative to other parts of the United Kingdom as part of each spending review and take action, if appropriate, to ensure Wales is not disproportionately disadvantaged. We will continue to work with the UK Government to ensure that this undertaking is borne out in practice.

21. However this undertaking does not go far enough. It is fundamentally important to recognise that the level of resource required in Wales to achieve an equitable level of public services compared with England—in other words, an equivalent outcome—is higher than a straightforward population share, given the higher levels of deprivation in Wales and other factors such as demographics and sparsity. As the House of Lords Select Committee on the Barnett Formula concluded:

“We find the argument that devolution funding should be based on relative need to be a compelling one. Public spending per head of population should be allocated across the United Kingdom on the basis of relative need, so that those parts of the United Kingdom which have a greater need receive more public funds to help them pay for the additional levels of public services they require as a result.”

22. We also agree with the Justice Committee's view that for the purpose of reviewing the formula and addressing any anomalies that arise, there needs to be an adjudicating body which can command the respect of the devolved administrations and representatives of the bodies governing England as well as of the UK Government. The Lords Select Committee on the Barnett Formula also proposed a way of meeting this requirement. Its suggestion of an independent funding commission to make recommendations on the allocation of funding to devolved administrations through operation of a needs-based formula has many parallels with the conclusion of the Holtham Commission. The Holtham Commission recommended that technical aspects of the operation of the Barnett Formula should be administered by an independent advisory body that is at arm's length from both the UK Government and the Assembly Government.

23. We also agree with the Justice Select Committee's recommendation on promoting more exchanges of officials between different administrations. In addition to those Welsh Office civil servants who became members of the staff of the National Assembly for Wales when it was first established, roughly 10% of Welsh Assembly Government staff have another part of the home Civil Service as their previous employer, with others having worked for the UK Government at an earlier stage. We are keen to encourage continued interchange, whether through transfers, secondments or participation in shared learning and development. We welcome the fact that secondments are bringing relevant expertise and experience to bear on specific topics as a result. The regular meetings of Permanent Secretaries have provided a forum for leadership in promoting mutual understanding throughout the Civil Service. The Cabinet Secretary and Head of the Home Civil Service has shown his personal commitment to this, including by supporting a recent stocktake of Departments' relationships with devolved administrations which will allow everyone to benchmark progress. Continuing professional development, which is promoted across the whole of the Civil Service, is another way in which mutual learning, common standards and understanding is being supported.

#### CONCLUSION

24. There have been some positive developments over the past eighteen months, with new energy being put into raising the profile of devolution as a factor which now permeates government policy making and delivery. However experience remains mixed and it will be important to intensify efforts to establish a more comprehensive and assured approach to managing relations between the Welsh Assembly Government and Whitehall.

*Carwyn Jones AC/AM*  
Prif Weinidog Cymru/First Minister for Wales

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Dirprwy Brif Weinidog /Deputy First Minister

#### THE LEGISLATIVE COMPETENCE ORDER (LCO) PROCESS: PAPER FROM THE WELSH ASSEMBLY GOVERNMENT

1. This paper is a collective response to a request from the Chair of the Welsh Affairs Committee for Welsh Ministers who had been engaged in the process of progressing proposed LCOs through Whitehall to reflect on their experiences.

2. In summary, there is general agreement that the Legislative Competence Order (LCO) process has been a learning curve for everybody. We have sought to take the learning from each case and build on experience each time.

3. The experience of progressing LCOs both in Whitehall and in parliamentary pre-legislative scrutiny has varied depending on the subject matter of the Order, with Orders which were relatively narrow in scope generally proving more straightforward. However there are some key principles and common factors which help smooth handling.

4. At all stages, the focus needs to be on the legislative competence being sought rather than on the detail of the legislation that the Welsh Assembly Government has in mind. Conferring power on a legislature is fundamentally different from conferring subordinate legislative powers on ministers.

5. The unique nature of Legislative Competence Orders has posed challenges, given that a request for legislative competence is completely different from proposed delegated powers for ministers in a Bill—and completely different from subordinate legislation exercising those delegated powers, even if the Order itself takes the form of a Statutory Instrument. We have made progress in building understanding of the concept and of the approach which should therefore be adopted. The Devolution Guidance Note 16 for Whitehall officials, which the Wales Office developed in consultation with the Welsh Assembly Government, has helped in this respect. Ministers and officials in Whitehall have had to familiarise themselves with the concept of conferring power on the Assembly, as a legislature, on a case by case basis. It is this grasp of the principle which has been fundamental to progress. Much time in the negotiations on the first LCOs was spent in obtaining recognition of the changes to the devolution settlement introduced by the Government of Wales Act 2006.

6. The second principle, which follows naturally from the point that enduring powers are being conferred on a legislature, is that those powers should encompass coherent areas of policy. Trying to limit the competence to the immediate policy intent of the Government of the day, or to the precise boundaries of what is currently devolved to the Welsh Ministers, is unlikely to be consistent with enabling the National Assembly to achieve greater legislative coherence in relation to a particular topic. Such limitations, which may be sought in order to achieve clarity about the scope of the powers, will in practice result in greater complexity.

7. The practical factors which facilitate smooth handling include:

- a formal start to the process, through the relevant Welsh Minister writing to their counterpart;
- identification of a senior lead official in the Whitehall department responsible for the policy area in question, to co-ordinate the UK Government’s input;
- sharing of information on the intended scope of the Order, in advance of discussions on the draft of the proposed Order itself; and
- the communication of target timescales early on in the process.

8. Since the Wales Office has led on the formal clearance of LCOs by the UK Government and liaison with the Welsh Affairs Committee, as well as facilitating the process of official level clearance which precedes ministerial clearance, its assistance in the process has been essential, although it is the engagement and understanding of the relevant policy departments and their ministers that remains the key factor at the outset. We also of course rely on the contribution of Wales Office Ministers who take the LCOs through the parliamentary processes.

9. The Chair of the Welsh Affairs Committee commented on the “often lengthy” nature of the process. We remain concerned that the process is taking much longer than originally envisaged, with even a straightforward LCO such as that for the red meat industry taking over a year to secure.

10. Perhaps understandably, given their novelty and the fact that they were initiated by the Welsh Assembly Government, it was not always easy at first to convey the sense that these Orders are critical to delivery of the Welsh Assembly Government legislative programme, in the same way that the preparation of parliamentary Bills is time critical. It is interesting to observe that more legislative powers for the Assembly have been secured through parliamentary Bills than through LCOs in the last two years: this may be partly due to the fact that a Bill provides inbuilt reassurance as to the scope of the powers being sought, but also to the fact that Whitehall is accustomed to prioritising and delivering Bills within set timescales.

11. We have tried to tackle this, partly by setting out clearer expectations at the outset, with tighter project management, and partly thanks to the support and efforts of the Wales Office in endeavouring to secure clearances which recognise that the Welsh Assembly Government also has to timetable its legislative business in the Assembly. However the fact remains that the process does demand time and resource at all stages, even for relatively straightforward Orders. It puts particular pressure on those points through which all LCOs pass, given that they do currently all follow the same process whatever their scale.

12. What remains absolutely crucial to the Welsh Assembly Government is that those LCOs within our programme have the opportunity to progress in good time. It is of course only once the Assembly has acquired competence to legislate on an issue that as a Government we have the opportunity to propose legislation to deliver on our commitments. There is therefore another year’s worth of legislative process to go through as a minimum after the point an LCO is passed—and more, should regulations be required—before those commitments can be delivered. With the UK General Election happening at the latest in the spring of 2010 this is now brought into sharper focus. Given the time needed by Parliament and the Assembly to debate and approve each final draft Order, if pre-legislative scrutiny of those proposed LCOs which have already been laid is not completed by early February it will not be possible to complete their passage before the election. This in turn would remove the possibility of completing subsequent Measures before the Assembly election in 2011. We would therefore be grateful to you and the Committee for any assistance in endeavouring to complete the scrutiny of the current LCOs.

13. You also asked for any general comments on the LCO process. Given the variety of experiences to date, we have annexed a paper which includes further, more detailed illustrations based on individual cases.

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Dirprwy Brif Weinidog /Deputy First Minister

#### THE LEGISLATIVE COMPETENCE ORDER PROCESS 2007-2009: WELSH ASSEMBLY GOVERNMENT EXPERIENCES SUMMARISED

##### BACKGROUND

(i) Between June 2007 and July 2009 the Welsh Assembly Government published 10 proposed LCOs, of which 4 had become law, with the remainder at varying stages.

(ii) Of the 10, the first 4 to be produced had not been finally cleared by the UK Government before they were published, although the first of these, on special educational needs, was subsequently cleared and referred to Parliament within around two weeks. In the case of the Environment, Vulnerable Children and Affordable Housing LCOs, the Welsh Assembly Government and UK Government subsequently agreed revised versions which then went to Parliament for pre-legislative scrutiny. The remaining LCOs have received collective clearance by both the Welsh Assembly Government and the UK Government before publication, enabling the pre-legislative scrutiny process to proceed in parallel in Parliament and the Assembly; their production has also been staggered at wider intervals than the first 3 LCOs, which were published in the space of a month.

(iii) Between September and December 2009 a further 3 Government proposed LCOs were published and another 2 were made. Notes on experience of some of the individual Orders are set out below, where they highlight particular points which have informed the handling of subsequent proposals.

##### ENVIRONMENT

(iv) In contrast with the first LCO, it did not prove possible to secure rapid UK Government clearance of the second proposed LCO subsequent to its publication in the Assembly. The proposed Environment LCO was first published on 19 June 2007, a week before the “One Wales” agreement was made. It was in April 2009 that a revised version of the proposed LCO was agreed by the UK Government and laid before Parliament. The scope of the LCO was wide and affected the interests of more than one Whitehall Department. The subject matter also interacted with a number of topics including non-devolved aspects of transport and energy policy. It was not surprising, in this context, that it took a long time to reach agreement with Whitehall. Other contributing factors were that UK government civil servants and lawyers, confronted with a completely new legal concept, were concerned not to concede points the consequences of which they could not foresee. There was a particular concern, in terms of energy policy, not to lose the existing ability to determine policy at UK level. The key to progress, apart from intensive legal input, was:

- engagement at Ministerial level, leading to engagement by senior policy officials; and
- the development of agreed principles and approaches, such as recognising that where the Welsh Assembly Government has extensive executive competence in an area of policy, it is appropriate for the Assembly as a legislature to have powers which at least correspond to that competence.

(v) The subsequent process of pre-legislative scrutiny was thoroughly constructive.

##### VULNERABLE CHILDREN

(vi) The Vulnerable Children LCO was also wide in scope and had to be agreed with the UK Government following initial publication. Factors which led to more rapid progress in this case were:

- recognition on the part of the UK Government of the Welsh Assembly Government’s rationale for seeking powers and acceptance that it could pursue its own policies in a devolved area, while still engaging in constructive debate on the merits and risks of different policy approaches;
- the availability of a UK official willing to lead and co-ordinate negotiations at a senior policy level; and
- close engagement between Welsh Assembly Government and UK Government officials, with the Wales Office playing a facilitating role.

(vii) One further observation from this LCO is that it is fundamentally important to have a clear view at the outset about which topics the LCO is intended to cover and which it is not. Where an LCO covers a broad area of policy, greater care is needed to identify and explain the topics on which it would allow the Assembly to legislate. On the proposed Vulnerable Children LCO, the question of whether it would or would not have allowed the Assembly to legislate on the physical punishment of children would ideally have been clear from the start.

## HOUSING

(viii) The proposed Affordable Housing LCO was first published on 3 December 2007. Negotiations had been ongoing with the UK Government since July 2007. It was in May 2008 that a version of the Housing LCO agreed with the UK Government was laid before Parliament, which again meant that joint pre-legislative scrutiny was regrettably not an option.

(ix) In terms of pre-legislative scrutiny, it appears to the Assembly Government that in this case the Welsh Affairs Committee focussed too much on the policy to be taken forward in the intended Measure. This was against the spirit of the UK Government policy on which the Government of Wales Act 2006 was based. It is also an unworkable approach—at the time of proposing an LCO it is unrealistic to expect the full details of a Measure to be available for debate. More generally, if an LCO is drafted in terms too closely tied to an intended Measure it is likely to be unfit for the longer term and will inappropriately constrain the Assembly as a democratic legislature. The focus in pre-legislative scrutiny should be on the case for competence, not the intended policy detail.

(x) We would acknowledge however that the Welsh Assembly Government's own Explanatory Memorandum, by seeking to reassure MPs about its policy intentions on the Right to Buy, might have led the discussion in the direction of the intended Measure. The Explanatory Memorandum should focus more on the constraints in existing primary legislation—as Alun Michael MP said, “This goes back to the learning process where, as you rightly said, we are at the early stages... it would be helpful to assist pre-legislative scrutiny if the Explanatory Memorandum, as a matter of course, sets out the legislative constraints that justify the Order”. This advice has been followed in subsequent cases (although legislative constraints will not be the only justification for the Assembly acquiring legislative competence: the case may also be for achieving competence over a coherent topic or set of topics).

(xi) This LCO was very demanding of time from both Ministers and officials in both administrations and so was a resource intensive process. It is difficult to explain to the public why it has not proved possible to date to secure the powers the Assembly would need to deliver a policy commitment expressed in 3 of the 4 manifestos of the parties in the Assembly and widely supported in the housing sector. All involved need to consider how the process can be sharpened. It is also a matter of concern that the two scrutiny processes could produce quite contradictory findings, placing both the UK Government and WAG in a difficult position. As noted below, joint scrutiny or some element of joint consideration by the Parliamentary and Assembly committees has proved constructive in subsequent cases.

## DOMICILIARY CARE

(xii) Where the topic that the LCO covers is relatively limited, as was the case with the Domiciliary Care LCO, agreement is easier to achieve since the scope is easily defined and understood. The negotiations on this LCO proceeded with little delay to the timetable proposed by the Welsh Assembly Government.

(xiii) The joint scrutiny session held for the Domiciliary Care LCO was extremely helpful. It facilitated co-operation between Westminster and the National Assembly and common understanding of issues. We note that the Committee's Report on the proposed LCO included among its conclusions:

“We were pleased to be able to undertake joint working with the Welsh Affairs Committee in scrutinising the proposed Order, which we believe was a valuable exercise and mutually beneficial. We further believe, where circumstances permit, that joint working between Assembly Committees set up to consider and report on proposed Legislative Competence Orders and the Welsh Affairs Committee should be encouraged.”

We would endorse that view unreservedly.

## CARERS

(xiv) In relation to the Carers LCO the discussions with Whitehall showed a high level of engagement which helped to test the intended scope of the Order in a constructive way. Another aspect which was particularly helpful was the level of common interest demonstrated by Assembly Members in the aims of the LCO. Helen Mary Jones withdrew her own Member proposed LCO on the same subject. This contributed to a high level of cross-party support and enabled an open, constructive and co-operative approach. This was echoed in the constructive scrutiny by the Welsh Affairs Committee itself. The high level of contact and consultation with the voluntary sector was of significance, both in establishing the content of the LCO and achieving cross-party support. The briefing sessions held for Members at the Assembly and in Westminster were also helpful in ensuring that potential misunderstandings were resolved as early as possible.

## WELSH LANGUAGE

(xv) This is the only case where the Wales Office was the lead policy department. It was also the only proposed LCO to receive clearance from the UK Government for publication for pre-legislative scrutiny where the UK Government reserved its position with regard to final policy clearance. The Wales Office was therefore able to maintain some flexibility over its policy position during and after pre-legislative scrutiny. The experience showed that positive negotiations need to be based on transparent communications, with clear records of decisions taken, and reasons for policy changes given. The more information that can be shared about the process and rationale among all involved, the greater the confidence people will have in it.

(xvi) This was also the only LCO where the UK Government proposed a Welsh Grand Committee debate, which added at least a further two months to the overall timescale. In these respects, the process followed by this LCO was not typical.

#### RED MEAT INDUSTRY

(xvii) This LCO is probably the most limited in scope to be brought forward thus far. Nevertheless, it took 5 months to produce and agree with the UK Government, followed by 9 months for pre-legislative scrutiny, production and clearance of the final draft Order, debates in the Assembly and Parliament and approval by Her Majesty in Council. This compares with the original UK Government estimates of three to six months for completion of pre-legislative scrutiny and approval of the final draft (evidence to the Welsh Affairs Committee, 19 December 2006).

#### TRANSPORT

(xviii) This LCO is also fairly limited in scope, covering learner transport safety and concessionary fares. The original timetable allowed some three months for the Assembly Government to reach agreement with the UK Government, so that the draft Order could be published for pre-legislative scrutiny ahead of the Christmas recess. This was achieved, but only through an intensive fortnight of negotiation involving ministers and senior officials and by substantially compressing certain processes in the timetable. The detailed discussions on the Order reflected the relatively complex nature of the devolution settlement for transport, particularly in relation to safety and vehicle standards, and a tendency to focus on the Assembly Government's policy intentions rather than whether it was appropriate to transfer competence.

#### OTHER GENERAL OBSERVATIONS

(xix) Both the Justice Select Committee and the Calman Commission have recently expressed concerns about the level of understanding of devolution at senior civil servant level in Whitehall. It would certainly help in progressing LCOs if Whitehall officials had more background knowledge about the distinctive character of the Welsh devolution settlement. This would help avoid misunderstandings which in turn lead to delay: for example, requests that impact assessments should be carried out on LCO proposals, when their only purpose is to confer legislative competence on the Assembly. Welsh Assembly Government officials are already working with the Wales Office to step up the level of briefings to departments across Whitehall.

(xx) Clarity and transparency about roles, responsibilities and lines of communication is essential. Negotiations have to be with the lead policy departments since they understand the legislative framework in their area in depth. Given the number of players that may be involved, including the Wales Office, legal advisers and drafting counsel, it will often be quicker to make progress on complex issues by getting all the key players round the table. Senior officials need to monitor progress and familiarise themselves with the subject at the outset, since this will help speed progress on any issues that have to be referred to more senior levels for resolution.

#### CONCLUSION

(xxi) The main lessons learned so far are that all involved need to focus on the legislative competence being sought, rather than on the detail of the legislation that may subsequently be proposed to the Assembly; and recognise that coherent and appropriately-scoped legislative competence should be conferred in relation to the policy areas where powers are requested. The timescales involved remain a concern. Progress has however been made in terms of increasing understanding of the settlement and establishing good practice in handling LCOs. The pace at which the LCOs in the 2009–10 Welsh Assembly Government legislative programme have been developed is evidence of this, although lack of familiarity in Whitehall with the "nature of the beast" can still cause hitches.

*January 2010*

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#### **Written evidence from the Welsh Language Board**

Thank you for the opportunity to contribute to the Welsh Affairs Committee's inquiry into collaboration and consultation arrangements between Wales and Whitehall. The advice offered below is based on our remit under Section 3 of the Welsh Language Act 1993.

##### **Welsh Language Act 1993**

###### Part 1

###### Section 3.—(2) . . . the Board shall—

- (a) advise the Secretary of State on matters concerning the Welsh Language;
- (b) advise persons exercising functions of a public nature on the ways in which effect may be given to the principle that, in the conduct of public business and the administration of justice in Wales, the English and Welsh languages should be treated on a basis of equality;

- (c) advise those and other persons providing services to the public regarding the use of the Welsh language in their dealings with the public in Wales.

It is not within the Board's remit to voice its opinion on governance arrangements such as the devolution settlement for Wales but those arrangements of course have an impact on legislation and policy implementation with regards to the Welsh language and its speakers. As a devolved matter the power to do so lies with the Welsh Assembly Government under the Government of Wales Act 2006. The Welsh Assembly Government is currently working with the United Kingdom Government (UK Government) to seek legislative competence in order to legislate on Welsh language. It is not for the Board to comment on the success of such joint working. Needless to say the road to a new Welsh Language Legislative Competence Order has been long and arduous and it would be sensible to assess the effectiveness of that procedure in the wake of introducing a Measure.

The Welsh Assembly Government's devolved powers to legislate and implement policy do not, of course, cover all walks of life and Wales and Whitehall must work together closely to ensure that Whitehall departments fully consider the needs of Wales and its people in the course of their work. This paper aims to present evidence on the consideration given to the Welsh language and its speakers by Whitehall departments when legislating and implementing policy that affects Wales. Based on that evidence, the following recommendations suggest ways of improving collaboration and consultation arrangements between Wales and Whitehall:

- (1) New Welsh language legislation will be introduced shortly and we trust that the UK Government will seize this opportunity to ensure improved awareness among Whitehall departments of the need to consider how their work might affect the Welsh language and its speakers, and to find ways of doing so.
- (2) Should Whitehall departments be expected to operate in accordance with new Welsh language legislation, the appropriateness of current arrangements for advising Whitehall departments on Welsh language matters should be considered.
- (3) We believe that Whitehall departments, the Welsh Assembly Government and Welsh Members of Parliament would all benefit from the establishment of appropriate arrangements for continued discussion on Welsh language matters following the introduction of new language legislation. That would be a means of seeking to ensure that Whitehall departments and their officers give appropriate consideration to the language at all times when legislating and implementing policy that affects Wales, and do not hinder the use of Welsh. It would also allow the Welsh Assembly Government to ensure that any joint working between Whitehall and Wales was focused on delivering its aims for the language, as stated in its Welsh language action plan, *Iaith Pawb*.

#### AWARENESS OF THE DEVOLUTION SETTLEMENT WITHIN THE CIVIL SERVICE AND OF PROTOCOLS THAT ARE IN PLACE REGARDING LEGISLATION AND POLICY THAT AFFECT WALES

In presenting evidence under the above heading, the Board's interest clearly lies in awareness of protocols that are in place in relation to Welsh language legislation and policy. The Welsh Language Act 1993 places a duty on public bodies to treat English and Welsh on a basis of equality when conducting public business. In practice this means that public bodies are expected to produce language schemes, explaining how the Welsh language and its speakers are considered in all aspects of their work. Though these statutory duties were not placed on Whitehall departments, a promise was made by the UK Government on passing the Language Act that those departments would follow the requirements of the Act. Appendix 1 below lists the number of Whitehall departments that have prepared a language scheme in accordance with the requirements of the 1993 Act. Only a few Whitehall departments have prepared schemes to provide for the use of Welsh and the consideration given to the Welsh language is inconsistent across departments. Over the past few years there have been numerous occasions where departments have failed to give appropriate consideration to the Welsh language when legislating and developing policy that affects Wales, which has hindered the use of Welsh by members of the public. Here are some examples:

- *Statutory forms*—Whitehall departments produce some statutory forms which members of the public are required to use, for example cremation service application forms, alcohol license applications, nomination papers for prospective election candidates and forms to obtain a gambling license. Ministers have the right, under Section 26 of the Welsh Language Act 1993, to provide bilingual forms, but forms such as the above are often provided in English only, forcing members of the public to complete them in English.
- *Registering Births and Deaths*—People living in some parts of East Wales are required to use services located in England when registering births and deaths. Consequently, those services are only provided in English and an English-only birth or death certificate is the sole option. In Wales, certificates can be provided in English or bilingually, but there are no Welsh language certificates available. Measures to address these shortcomings were proposed for inclusion in the Welfare Reform Bill 2009 but were refused by Whitehall.

- *National Insurance*—Some National Insurance forms and cards are not available bilingually. This means that English must be used when completing some forms or when receiving a card. The Welsh Language Board conducted an investigation under Section 17 of the Language Act into the failure of HM Revenue & Customs to provide bilingual National Insurance forms and cards.
- *Tax credits*—some individuals or families on low incomes and/or with children are entitled to government benefits called “tax credits”. Tax credit notifications or renewal documentation sent by HM Revenue & Customs are English-only, forcing members of the public to use English when discussing tax credits.
- *Criminal record disclosures*—an increasing number of job applicants and employees are required to apply for criminal record disclosures. English-only disclosures are provided in all cases. The Home Office has not solved this problem.
- *Identity cards*—the Government has begun to introduce identity cards for some UK citizens. We understand that bilingual cards cannot be obtained, despite pressure from the Board and a number of other individuals and organisations calling on the Home Office to introduce bilingual cards.

These are just a few examples of Whitehall departments failing to consider the needs of Welsh speakers and the welfare of the Welsh language when legislating and implementing policy that affects Wales. New Welsh language legislation will be introduced shortly and we trust that the UK Government will seize this opportunity to ensure improved awareness among Whitehall departments of the need to consider how their work might affect the Welsh language and its speakers, and to find ways of doing so.

#### ROLE OF THE WALES OFFICE AND MINISTRY OF JUSTICE

On its website the Wales Office notes its responsibility as “representing Welsh interests within the UK Government and the UK Government in Wales. “Welsh interests of course include the welfare of the Welsh language and the needs of Welsh speakers. It is not entirely clear at present what arrangements have been made by the Wales Office to promote the interests of the Welsh language and its speakers within the UK Government’s work. Should Whitehall departments be expected to operate in accordance with new Welsh language legislation, the appropriateness of present arrangements for advising Whitehall departments on Welsh language matters should be considered.

The Welsh Language Board has a duty under Section 3 of the Welsh Language Act 1993 to “advise persons exercising functions of a public nature on the ways in which effect may be given to the principle that, in the conduct of public business and the administration of justice in Wales, the English and Welsh languages should be treated on a basis of equality. The Board regularly advises Whitehall departments on matters affecting the Welsh language and its speakers. Advice was given in relation to some of the examples listed above of failures by departments to duly consider the language when legislating and implementing policy. Unfortunately departments have not always heeded the advice given, for instance in the case of the Ministry of Justice’s refusal to provide bilingual application forms for cremation services.

While the laws and policies introduced by Whitehall continue to affect Welsh speakers, we recommend that the UK Government develops effective methods of ensuring awareness of the needs of Welsh speakers in those departments.

#### COMMUNICATION BETWEEN WHITEHALL, THE WELSH ASSEMBLY GOVERNMENT, THE NATIONAL ASSEMBLY FOR WALES AND WELSH MEMBERS OF PARLIAMENT

There has been much debate recently between the above parties regarding the introduction of new legislation in relation to the Welsh language. We believe that there would be clear benefits if these parties were to establish arrangements for continued discussion on Welsh language matters following the introduction of new language legislation. That would be a means of seeking to ensure that Whitehall departments and their officers have regular access to expert advice on Welsh language matters, which would help them give the language due consideration at all times when legislating and implementing policy that affects Wales. It would also allow the Welsh Assembly Government to try to ensure that any legislation or policy development undertaken by Whitehall departments likely to affect Wales was in accordance with the national aims for the Welsh language, stated in the Government’s action plan, *Iaith Pawb*.

#### CONCLUSIONS

It is not clear at present what arrangements are in place between Whitehall and Wales in order to ensure that appropriate consideration is given to the Welsh language by the UK Government when legislating and implementing policy that affects Wales. Despite the UK Government’s promise that Whitehall departments would operate in accordance with the principles of the Welsh Language Act 1993, the departments who have taken deliberate steps to do so are few and far between. Consequently, there have been numerous occasions where lack of consideration of the Welsh language by Whitehall departments has hindered the use of Welsh by members of the public in Wales. We trust that the evidence and recommendations given above will be useful in ensuring improved collaboration and consultation between Whitehall and Wales with regard to matters relating to the Welsh language in the future.

## APPENDIX 1

<i>Ministerial Departments</i>	<i>Welsh Language Scheme approved by the Welsh Language Board?</i>
Department for Business, Innovation and Skills	✓
Department for Culture, Media & Sport	✓
Ministry of Defence	✓
Department for Environment, Food and Rural Affairs	✓
Home Office	✓
Department for Transport	✓
Wales Office	✓
Department for Work and Pensions	✓
Ministry of Justice	X
Cabinet Office	X
Government Equalities Office	X
Foreign & Commonwealth Office	X
Attorney General's Office	X
Department for Energy and Climate Change	X
Department for Communities and Local Government	X
Department of Health	X
Department for Children, Schools and Families	X
Office of the Advocate General for Scotland	X
Department for International Development	X
HM Treasury	X
Office of the Leader of the House of Commons	X
Office of the Leader of the House of Lords	X
Scotland Office	X
Northern Ireland Office	X

### Written evidence from the Welsh Local Government Association (WLGA)

#### INTRODUCTION

The Welsh Local Government Association (WLGA) represents the 22 local authorities in Wales, and the three national park authorities, the three fire and rescue authorities, and four police authorities are associate members.

It seeks to provide representation to local authorities within an emerging policy framework that satisfies the key priorities of our members and delivers a broad range of services that add value to Welsh Local Government and the communities they serve.

It should be noted that much of the Welsh Local Government Association/Local Authorities' focus in Wales is on the interface with Assembly Government, rather than UK Government officials (except in non-devolved areas as specified below). Therefore, the Association is not regularly exposed to some of the issues highlighted in the Committee's key questions, such as relations between civil servants or protocols. The following evidence is specific therefore, to those issues which are of interest to local government in Wales:

- The increasing volume of Welsh law at primary and secondary level has an impact upon local government and indeed the public and private sector in Wales as the development of a Welsh jurisdiction. Even before the Government of Wales Act 2006 the increasing divergence of subordinate legislation was making it difficult to identify the law in Wales as it applied to specific issues. The anticipated growth in Assembly Measures will only add to this problem. There is an increasing need to ensure that all legislation and the common law flowing from it is easily accessible. This requirement is not only from a national level but also in the form of traditional legal texts.
- In relation to the first issue, professional legal training for local government lawyers associated with the new legislation risks being makeshift and ad hoc.
- The time consuming process of the introduction of legislation pertaining to Wales impacts on the Welsh Assembly Government's ability to react to the particular needs of local government in Wales.
- Community safety and policing and the delivery of national strategies alongside devolved budgets can lead to confusion.
- Asylum and immigration policy and difficulties emerging when operating in a non-devolved policy area, that nonetheless depends on devolved areas of responsibility for delivery.

1. *The increasing volume of Welsh law at primary and secondary level has an impact upon local government and indeed the public and private sector in Wales as the development of a Welsh jurisdiction. Even before the Government of Wales Act 2006 the increasing divergence of subordinate legislation was making it difficult to identify the law in Wales as it applied to specific issues. The anticipated growth in Assembly Measures will only add to this problem. There is an increasing need to ensure that all legislation and the common law flowing from it is easily accessible. This requirement is not only from a national level but also in the form of traditional legal texts.*

1.1 Those with responsibilities for advising on law relating to public policy in Wales have traditionally used commercially supplied encyclopaedias/electronic reference material as a means of identifying the relevant legislation. Since 1999 these suppliers have increasingly focused on cataloguing the law as it relates to England and no longer attempt to provide comprehensive references regarding Wales. From the suppliers perspective the scale of the Welsh market does not justify the resource now required to reference all legislation applying only to Wales.

1.2 As a result in Wales the process of preparing legal advice now requires complex and time consuming searches of the Welsh Assembly Government web-site in an attempt to identify what legislation actually exists, even before its impact can be assessed. This is time consuming. It duplicates efforts in different public service organisations. There is the potential for error in that there is no means of ensuring that all the relevant legislation has been identified.

1.3 Any economies of scale associated with publishing a single Welsh encyclopaedia are lost to publishers (eg. Butterworth's/Sweet and Maxwell). Linked to this, the jurisdiction of both English and Welsh law in Wales, requires lawyers and policy makers in Wales to have an understanding of and access to the law of England and Wales.

1.4 An initial response in this regard, has been developed by Cardiff University: Welsh Legislation on line <http://www.wales-legislation.org.uk/> supported by the national Assembly for Wales and the Welsh Assembly Government. However, while this is going in the right direction, the facility is not widely known and it does not deal with the common law, nor is there legal text support as found in published reference material.

1.5 As the volume and complexity of Welsh legislation increases, so the case grows for some active intervention on the part of the Welsh Assembly Government or the National Assembly for Wales to facilitate the creation of a single comprehensive reference of legislation impacting on Wales. This case is supported by the findings of the Justice Select Committee, "We recognise that the process of enhancing the legislative competence of the National Assembly for Wales with the consent of Whitehall and Westminster is seen by some commentators as complex. It is a new process..."<sup>14</sup>

2. *In relation to the first issue, professional legal training for local government lawyers associated with the new legislation risks being makeshift and ad hoc.*

2.1 Historically, continuous professional development has been sourced and delivered by reference to subject area rather than jurisdiction. As the amount of Welsh secondary legislation grows following devolution, so the relevance of much available training to Welsh local government lawyers diminishes due to the lack of relevance and reliance of trainers on English law. Local Authorities are responding to this matter by running bespoke courses among themselves and identifying relevant "experts."

2.2 There is potential for a more organised and streamlined approach to this issue, one which could be of benefit to other public sector partners, including health or education. Equally recognition of the issues affecting the development of "Welsh Law" and support for course providers in understanding those issues would benefit the legal profession in England and Wales.

3. *The time consuming process of the introduction of legislation pertaining to Wales impacts on the Welsh Assembly Government's ability to react to the particular needs of local government in Wales.*

3.1 The impact of the time required and the reliance on Whitehall to progress LCO's is too early to measure but has the potential to impact on local government in Wales. There is no great demand in local government for ever more legislation. Nevertheless should there be a need for a timely legislative response to a change circumstance there is a concern that existing procedures may prove inflexible.

4. *Community Safety and Policing*

4.1 Community Safety Policy and Policing Policy in Wales is an area which does suffer to a fairly considerable degree from devolution. This is largely due to a lack of sufficient recognition by Whitehall departments of the devolved context in Wales. When the Home Office or Ministry of Justice develop policies that are purely of a non-devolved nature, such as changes to police powers, there isn't always an issue. The problems arise when the Home Office or Ministry of Justice develop policies in conjunction with other Whitehall departments, such as the department for Communities and Local Government, which have little or no remit in Wales. When this occurs, there often have not been the same discussions and joint working

<sup>14</sup> Justice Committee, Fifth Report of Session 2008–09, *Devolution a Decade On*, HC 529, para 146

with the Welsh Assembly Government which can result in policies or strategies not being applicable in Wales. This can cause significant confusion for Community Safety Partnerships as they are uncertain to what extent strategies apply and whether funding streams attached to new policies or initiatives are available in Wales.

4.2 There are many examples of strategies being developed in this way at the national level eg the National Community Safety Plan (this only applies to Wales where it refers to the Police); the Youth Crime Action Plan; and the RESPECT agenda.

#### 5. *Asylum and Immigration Policy*

5.1 Some difficulties can occur when dealing with a non-devolved policy area that nonetheless depends on devolved areas of responsibility for delivery. An example of this would be the development of policy relating to asylum seekers and immigration or migration. Often, policies are developed at Whitehall but will require the active involvement of local authorities in its implementation. The recent consultation document from the United Kingdom Borders Agency (UKBA and part of the Home Office) on “Earned Citizenship” proposes an increased role for local authorities in an enhanced “check and send” service, verification of active citizenship and a co-ordination role in providing simple advice and sign posting. However, it is unclear as to whether there were previous discussions with the Assembly Government on the proposed role of local authorities and whether the approach being taken is in line with wider social policy in Wales.

5.2 Also, while communication from UKBA has improved significantly over recent years and discussions on initial policy ideas can be discussed with the LGA, there is little or no recognition that there is also a need for similar discussions with the WLGA, for example, the development of the strategy “Enforcing the Rules”.

February 2010

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### Written evidence from Welsh Women’s Aid

#### 1. SUMMARY

1.1 The main points that Welsh Women’s Aid (WWA) will be raising in this response to the inquiry are as follows:

- Traditionally, Welsh policy development in the area of violence against women (VAW) has necessarily followed Whitehall’s lead. The constraints of the devolution settlement may have hampered progress in Wales. Scotland is internationally seen as progressive and innovative in its approach to VAW, and its approach is helped by greater devolved powers.
- Recent progress in England is not mirrored in Wales, and Wales is lagging behind in strategic VAW policy development (for example, the Home Office’s new strategy, Together we can End Violence against Women and Girls (November 2009), will have limited impact in Wales due to the devolution settlement, but WAG does not have its own Wales-specific integrated strategy). Where policies do apply in Wales, public authorities often do not receive the same guidance (or any guidance) as those in England, such as in the case of the Gender Equality Duty and single-sex services.
- Devolution is a complex area which is not fully understood by Governments, NGOs and other agencies. WWA regularly experiences difficulties resulting from a lack of understanding of devolution, as some policy areas relating to violence against women (VAW) are devolved, some are non-devolved, and some overlap.
- WWA has experienced difficulties regarding engagement, including not being invited to key meetings which affect our member groups and their service users, as well as Welsh citizens not being consulted on policies which will affect them.
- In some areas relating to VAW, the overlap between Wales and Whitehall and lack of clarity regarding responsibility between the two Governments has sometimes led to a negative impact upon some of our most disadvantaged services users. This is most apparent in the example of women with no recourse to public funds (NRPF).
- Wales and Westminster seem to take divergent approaches to international conventions, with Wales again lagging behind, particularly in relation to CEDAW (the UN’s Convention on the Elimination of Discrimination Against Women).

#### 2. ABOUT WELSH WOMEN’S AID

2.1 Welsh Women’s Aid (WWA) is one of four UK Women’s Aid Federations and was founded in 1978 to campaign and lobby for improvements in public policy and government legislation in relation to women and children experiencing domestic abuse in Wales. WWA is the national umbrella organisation with a membership of 34 local Women’s Aid Groups situated throughout Wales. Our member groups provide emergency temporary accommodation, outreach and floating support, information and practical support

on legal issues, benefits, housing, children's issues and other matters related to the experience of domestic abuse. As a national organisation we also provide training, specialist support and information to affiliated groups and challenge and inform national policy on their behalf.

2.2 Welsh Women's Aid also manages the Wales Domestic Abuse Helpline, a free 24-hour, gender-neutral, bilingual and confidential helpline providing support and information on emergency accommodation, welfare and benefit rights, housing issues, legal issues, child welfare and perpetrator programmes.

### 3. INTRODUCTION

3.1 WWA warmly welcomes the Welsh Affairs Select Committee's inquiry into the relationship between Wales and Whitehall. We hope that the inquiry leads to improvements in understanding of devolution within Whitehall, improved communication between Wales and Whitehall and improvements in integrating policies and strategies across both Governments.

3.2 Violence against women (VAW), including domestic abuse (WWA's particular area of expertise), affects all aspects of a woman's life. Abused women often deal with a number of agencies, including health, the Police and the courts. Strategic efforts to reduce the prevalence of VAW require measures to be taken in education, public awareness and social justice. As such, Government policies, strategies and initiatives to tackle the problem originate in a number of departments, some of which are devolved and some of which are non-devolved. Furthermore, some key areas in relation to VAW are partially devolved and partially not, such as elements of the victim support system, youth justice, the realm of public awareness and women with uncertain immigration status who are experiencing domestic abuse but have no recourse to public funds (NRPF). As a result, policies to address VAW not only need to be integrated across all departments of individual Governments, but also between the two Governments, to ensure that the complexity of the devolution settlement does not disadvantage women in Wales who have experienced gendered violence and abuse.

3.3 In relation to domestic abuse, the key non-devolved area is the criminal justice system, and non-devolved agencies and departments that WWA, our member groups and their service users deal with include the Home Office; the Ministry for Justice; the Police; Court Services; the Crown Prosecution Service, and the Legal Services Commission. However, a number of departments who we deal with and which are key to dealing with VAW are devolved, including Housing; Health and Social Services; Rural Affairs; Education; Children's Services (including CAF/CASS Cymru); Local Government and Local Authorities; Economy, and Transport.

3.4 Despite the complexities of the devolution settlement, there are some good examples of inter-government working, with devolved service practitioners working with Home Office, Ministry of Justice and the Police to have a network of Multi-Agency Risk Assessment Conferences (MARACs) and 11 Specialist Domestic Violence Courts (SDVCs) to provide support for victims at different stages of the criminal justice system and beyond. There have also been significant positive developments within Wales in the areas that affect WWA, our member groups and their service users as a result of devolution, particularly in Health, Local Government and Education.

### 4. VAW POLICY DEVELOPMENT IN WALES

4.1 WAG launched the All Wales Domestic Abuse Strategy in 2005, and domestic abuse has been on the agenda in Wales for some time, leading to increased provision and funding for domestic abuse services in Wales, which was warmly welcomed. However, as noted in Dr. Paul Chaney's recent review of equality and human rights in Wales since devolution:

Domestic abuse policy in Wales has been subject to a "Westminster drag" effect. In contrast to more innovative policies seen in Scotland, the Welsh Government has been constrained by having to follow the dominant Whitehall policy frame on criminal justice and policing in relation to domestic abuse.<sup>15</sup>

4.2 This focus on criminal justice is problematic given that only approximately 10% of victims report to the police. Following the Westminster framework, which until the recently launched VAW strategy *Together we can End Violence against Women and Girls* was very much criminal-led, has also been constricting in terms of policy development in Wales in devolved fields such as health, housing and education. Scotland, on the other hand, is seen across the UK and internationally as an exemplar in the field of VAW policy, and has been able to lead the way with innovative and integrated approaches due to greater devolved powers.

4.3 WAG has recently consulted on a *Strategic Action Plan to Address Violence Against Women and to Update the Domestic Abuse Strategy*. We have been told that this will be published late 2009/early 2010, and that we will be consulted further before its publication. We felt that the original document was weak and we produced a report with the Wales Violence Against Women Action Group: *VIOLENCE AGAINST WOMEN: Why an Integrated Strategy in Wales?* This was intended as a template for a Wales-specific strategy to address all forms of VAW, integrated across all WAG departments and specifying how WAG will work with the Home Office on non-devolved issues.

<sup>15</sup> Chaney, P (2009), *Equal Opportunities and Human Rights: The First Decade of Devolution in Wales* (Cardiff: EHRC)

4.4 The devolution settlement restricts the effectiveness of a Home Office-driven approach in Wales so WWA believes that it is vital, in order to retain the highest level of protection and provision for women in Wales, for WAG to lead on the development and delivery of an integrated strategy to tackle violence against women in Wales. It can provide the political, administrative and funding leadership for Wales, directing services for women at a national level in Wales, whilst also developing effective partnership agreements with the CPS, Police, Borders and Immigration Agency and other UK Departments operating in Wales. Our *Why an Integrated Strategy?* report is being submitted as part of our written evidence, and we submitted it as part of our response to WAG's consultation.<sup>16</sup>

4.5 The most recent version of WAG's *Strategic Action Plan* that we have seen was a significant improvement on the consultation draft, but still falls short of the full strategy that the Home Office has just launched in England. WAG has informed us that they have been waiting for the Home Office to publish their strategy so that they can take on board the content therein in order to inform their *Strategic Action Plan*. While we fully appreciate the importance of this, again it means that there will be a delay in policy development in Wales. We feel that closer working between Wales and Whitehall could lead to more joined-up, integrated and timely policy development between the two Governments.

4.6 An amended motion was passed in Plenary on 14 October 2009 for WAG to "develop an integrated strategy to tackle all forms of VAW as well as domestic abuse".<sup>17</sup> WWA welcomed this, though it remains unclear as to whether WAG intends its current *Strategic Action Plan* to become a full strategy (in which case we are concerned that it falls short of being one), or a stop-gap Action Plan until they develop a full strategy. The apparent separation of domestic abuse from the wider VAW agenda is worrying to WWA, and is not happening in England, where domestic abuse is quite rightly situated within the context of gender-based violence. We feel that a full Welsh strategy is needed which situates domestic abuse within the wider framework of VAW and ensures that women in Wales are not less well-protected than women in England as a result of devolution.

## 5. VAW POLICY DEVELOPMENT IN WHITEHALL AND CROSSOVERS WITH WALES

5.1 In November 2009, the Home Office published their VAW strategy in England. WWA has been an active member of the End Violence Against Women (EVAW) campaign group and we have been supporting calls for an integrated violence against women strategy to tackle all forms of violence, including domestic abuse, forced marriage, female genital mutilation, stalking, honour-based violence, trafficking, rape and sexual violence.

5.2 While much of the Home Office strategy does not include Wales, there are a number of actions outlined around criminal justice which are not devolved and we hope that the Home Office and WAG liaise closely in taking forward non-devolved areas relating to the strategy. Regarding those areas that are devolved, as stated above, we are concerned that women in Wales will lose out on the initiatives proposed in Westminster's strategy, and are urging WAG to develop a comprehensive and integrated approach in Wales to ensure that key devolved areas are also on board in tackling VAW.

5.3 In terms of joined-up working between Wales and Whitehall, UK Government action on VAW is currently led by an Inter-Ministerial Group, chaired by a Home Office minister, with ministers from across the UK Government. At its launch, its membership included three ministers from Wales. There is currently no evidence in the public domain to demonstrate the efficacy of this approach, though any joint work is to be welcomed. Indeed, it seems from an answer to a written question (WAQ54452) that only one WAG minister is now a member, and that he does not attend the meetings.

5.4 The Home Office has provided guidance to local authorities in England around VAW, but similar guidance has not been provided by either the Home Office or WAG to local authorities in Wales. WWA has learned from Women's National Commission (WNC) meetings and other stakeholder meetings in London that guidance has been produced by the Minister for Women at the Government Equality Office (GEO) for local authorities, which are devolved. Guidance has been issued for local authorities on their duties relating to supporting women with no recourse to public funds (NRPF—more information on this later), as well as guidance on the Gender Equality Duty (GED) and the need to retain single-sex services such as Women's Aid refuges under the GED. This lack of guidance in Wales is a result of the fact that neither the GEO nor immigration policy are devolved, but local authorities are. Women's Aid groups in Wales have been pressured to open their doors to men under the GED, which a lack of guidance cannot have helped; and there is a worrying inconsistency in the ways in which local authorities across Wales deal with women with NRPF, and often no record of where these women go if they are turned away (presumably back to violent relationships or into destitution).

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<sup>16</sup> Not printed, see [www.welshwomensaid.org](http://www.welshwomensaid.org)

<sup>17</sup> 2 Amendment 1 to Motion NDM4297, Welsh Conservatives Debate, Violence Against Women (Wednesday 14 October 2009)

## 6. LACK OF UNDERSTANDING OF THE WELSH CONTEXT

6.1 WWA has significant dealings with both Whitehall and WAG. We attend a number of meetings in London, including the Home Office stakeholders' meeting, Crown Prosecution stakeholders' meeting, Women's National Commission (WNC) meetings and Family Justice stakeholders' meetings (facilitated by the Legal Services Commission). In addition we attend several key Welsh Assembly Government (WAG) meetings, including the Domestic Abuse and VAW Working Group, Wales Council for Voluntary Action (WCVA) meetings and CAF/CASS Cymru.

6.2 Through our dealings with both Whitehall and WAG departments, we have experienced a number of occasions where devolution has not been understood within Government. In meetings that we attend, devolution is often not understood by the facilitators and we regularly have to clarify whether the issues discussed will have an impact on women in Wales or whether a certain pilot is occurring in Wales. In a number of Home Office and Legal Services Commission meetings, pilots are discussed which are only happening in England because some aspects of the pilot are devolved. For example, Legal Service Commission pilots deal with the work of CAF/CASS, who are devolved; so these pilots are carried out in England only.

6.3 Lack of understanding is also evident within written documents such as consultation papers and final policy documents. In a number of documents where the policy contexts of England, Scotland and Northern Ireland have been included, the Welsh context has not. One example of this is WAG's definition of domestic abuse, which is different to other UK countries. WAG defines domestic abuse in the *All Wales Domestic Abuse Strategy* (2005) as:

the use of physical and/or emotional abuse or violence, including undermining of self-confidence, sexual violence or the threat of violence, by a person who is or has been in a close relationship.

6.4 As such, the definition is gender-neutral. It uses the term "abuse" rather than "violence", which is used in Scotland and Northern Ireland. The WAG definition includes physical, sexual, emotional and financial abuse. It is not limited to interpersonal violence—it explicitly includes "violence perpetrated by a son, daughter or any person who has a close or blood relationship with the victim/survivor" as well as "violence inflicted on, or witnessed by, children". It recognises that "domestic violence is not a 'one-off' occurrence; it is frequent and persistent." This definition is different to the ones used by the Home Office, in Scotland and Northern Ireland but in many policies dealing with violence against women in the UK, WAG's definition is rarely referred to.

6.5 WWA have had to clarify the Welsh context when responding to a number of formal consultations, relating to both devolved and non-devolved areas. One recent example where the information about Wales was incorrect was the updated Crown Prosecution Service (CPS) policy for prosecuting cases of domestic violence, which covers both England and Wales. WWA provided a detailed response, including highlighting the fact that the national organisations in the Annex did not include the Wales Domestic Abuse Helpline (which is run by WWA and is separate to the National Helpline for England). There are a number of issues which the Wales Domestic Abuse Helpline can advise on but England's National Helpline cannot. These include the role of CAF/CASS Cymru, Children Matter, homelessness codes, local authority duties and Supporting People funds, all of which are linked to domestic abuse. Having highlighted this to the CPS, WWA was further disappointed when the final policy provided incorrect information around WWA, stating that we support a network of over 500 services in the UK (Women's Aid England does this, and the information appeared to have been copied and pasted).

## 7. CONSULTATION AND ENGAGEMENT

7.1 WWA has encountered problems in making Whitehall departments aware that the issues they are discussing have an impact on the women that we represent in Wales. While we attend a number of meetings, there remain a number of key Home Office and Ministry for Justice meetings to which we have not been invited (which we have found out about through third sector organisations in England). We have been proactive and written to these departments highlighting that we are separate to Women's Aid England, pointing out that the issues discussed in their meetings will affect our groups and their service users, and expressing concern that women in Wales are not being represented.

7.2 For the Home Office's consultation for the *Together we can End Violence against Women and Girls* strategy, WWA was disappointed at the lack of consultation within Wales. The Home Office commissioned the WNC to organise a comprehensive and national programme of consultation events across England, including regional roadshows, stakeholder events, discussion fora for the general public and outreach activities with "hard to reach" groups such as BME women, sex workers, younger and older women, and many more. However, these consultation events did not take place in Wales. As a result, the expertise within the VAW sector in Wales, as well as the experiences of WWA groups, their service users, and the views of the general public, were not gleaned in policy development. WWA organised focus groups across Wales, in partnership with Wales Women's National Coalition, to ensure that the voices of women in Wales were reflected. However, these were self-funded and organised at short notice, and as a result were nowhere near as extensive as they could have been, had we been resourced appropriately or had the Home Office consulted Wales.

7.3 This perceived insufficient engagement with Welsh stakeholders around policy development is compounded by further barriers to engagement for organisations in the VAW sector in Wales. Many organisations working in the VAW sector in Wales come across difficulties in strategic engagement to inform policy, whether on a WAG level or (particularly) a Whitehall level. The majority of organisations working within this field in Wales as elsewhere (though in rural areas of Wales, organisations are obviously much smaller) lack the capacity to engage with policymakers in one Government, let alone two. WWA would therefore like to see more pro-active engagement with such organisations to ensure that the expertise of the VAW sector in Wales is taken into account in policy development.

## 8. NO RECOURSE TO PUBLIC FUNDS

8.1 A clear example of how the complexity of the devolution settlement can hamper the protection of women in Wales includes direction on women with no recourse to public funds (NRPF). The issue straddles immigration (non-devolved) and local government provision (devolved). In order to provide clearer guidance, the Home Office sent a joint letter with the Department of Communities and Local Government to the chief executives of all local authorities in England. No such letter, which would have to have been sent in conjunction with WAG, was sent in Wales. Such matters can reflect a poor understanding of devolution in Whitehall, or obstruction from officials or ministers in Whitehall or Cathays Park. Whatever the underlying reason, women in Wales probably received less protection from violence as a result.

8.2 Adequate support and safety for women with NRPF continues to be a major concern. Many women who experience violence are caught in a trap as their immigration status means that they cannot access the type of support that local authorities and the third sector can provide. Many women are forced to remain in violent relationships or risk destitution. This may include women who come to Wales as students, women from some accession countries or women who marry British citizens. Women in this situation can usually not apply for housing or welfare benefits in their own right, and therefore this support cannot be used to pay for a refuge placement.

8.3 WAG has no clear policy for dealing with women with NRPF. Local authorities remain inconsistent in how they apply statutory criteria and support for women in this situation remains very much a postcode lottery. Children also suffer due to this anomalous funding situation. While local authorities have a statutory power to make appropriate provisions for children to ensure that their needs are met, this is subject to interpretation. Some local authorities pay for the housing and subsistence costs for women with children to live in refuge whilst others discharge their duty by taking the children into care.

8.4 Lack of funding from local authorities for women in this situation has a direct impact on third sector expenditure. BAWSO Women's Aid (Black Association of Women Step Out) have indicated that the total cost to them for supporting women with NRPF was £222K in 2008–09 through cost of refuge, outreach support and subsistence allowance. Some 204 women in Wales have been supported in this way over the last three years. In 2008–09, 40% of BAWSO's service users who were fleeing domestic violence had no recourse to public funds. Forty-two women remained on BAWSO's waiting list for space in a refuge.

8.5 Currently, a new pilot is being tried out in England and Wales, but we share the concerns of the women's sector across the UK that this will be ineffective in dealing with women with NRPF. In addition, guidance issued from the Home Office was short-notice and while WWA are monitoring the pilot for our groups, we are concerned that our groups will have had insufficient time to prepare for the pilot.

## 9. INTERNATIONAL

9.1 As Dr Paul Chaney pointed out in his recent evaluation of equality and human rights in Wales since devolution:

Issues and challenges exist in relation to Cardiff and Westminster administrations taking divergent approaches to the application of UN/European Convention human rights principles in their respective policy programmes. Not least, the UK Government's willingness to allow such divergence in the two polities (with the, potentially, constraining influence this may have on devolved policymaking).<sup>18</sup>

9.2 WWA has been lobbying for WAG to adhere to the UN's Convention for the Elimination of Discrimination Against Women (CEDAW). CEDAW defines VAW as "violence that is directed towards a woman because she is a woman, or that affects women disproportionately". The UK Government specifically references, and adheres to, the requirements under CEDAW in its new strategy. While the latest version of WAG's *Strategic Action Plan* includes reference to CEDAW (following lobbying for its inclusion from the VAW sector in Wales), it falls short of adhering to CEDAW requirements because it is not gender-specific. We have been lobbying for WAG to adhere to CEDAW requirements but the gender specificity of gender-based violence is still being missed.

9.3 In 2008, the CEDAW committee labeled the UK Government's lack of an integrated national VAW strategy "most alarming for a developed country". Since then, *Together we can End Violence against Women and Girls* has been published. However, given that much of this does not apply in Wales, and that Wales does not yet have an integrated strategy to address VAW, we are concerned that the next CEDAW Committee

<sup>18</sup> Chaney, *op cit*, p 24

(2011) will find that Wales is lagging behind. As the UK is the Member State which has responsibility for ensuring that all of its devolved nations are adhering to CEDAW requirements, this could also reflect badly on the UK.

9.4 European Conventions and Directives also set out obligations for European Governments, and requirements and recommendations on developing integrated approaches to VAW. The Council of Europe (CoE) adopted Recommendation Rec (2002)5 which calls on Member States to adopt national strategies on VAW. Specific obligations here include:

- All relevant institutions dealing with VAW (including police, medical and social professions) should develop co-ordinated action plans that include preventative work.
- Ensuring that all measures are coordinated nationwide (Council of Europe, 2002).

9.5 In March 2008, the CoE also called “on member states and their local and regional authorities to step up implementation of the standards to fight VAW”. While England can be seen to have developed coordinated action plans under the new strategy, preventative work is largely a devolved matter (as education is devolved) and in the CoE context, “nationwide” will include across all devolved nations of the UK. As such, we would hope that Whitehall would encourage WAG to ensure it is adhering to CoE and CEDAW Conventions.

## 10. CONCLUSION

10.1 While there have been significant improvements in some aspects of domestic abuse policy since devolution, the current settlement is both frustrating for NGOs and is hampering progress on VAW policy in Wales. We are concerned that Wales is lagging behind in policy development in this area in comparison to England, that there is insufficient joint working between the two Governments, and that women in Wales are receiving less protection than their counterparts in England as a result of insufficiently integrated policies. There is a great need for increased understanding of devolution within Whitehall, for greater consultation of people in Wales in relation to policy development that will affect them, and for NGOs representing Welsh citizens to be invited to decision-making meetings. WWA welcomes this inquiry and hopes that it will go some way towards finding a solution to these complex problems.

## RECOMMENDATIONS

WWA recommends that:

1. WAG should develop a multi-faceted, cross-departmental, integrated strategy to tackle VAW in Wales. This should include new ways of working with Whitehall on non-devolved issues to ensure that the complexities of the devolution settlement do not disadvantage women in Wales, and should adhere to requirements under CEDAW, including gender-specificity and including domestic abuse within the wider VAW agenda. It should be developed in conjunction with the VAW sector in Wales, including WWA and the Wales VAW Action Group.
2. Where guidance is issued by the UK Government on matters related to VAW, such as the need to retain women-only services under the Gender Equality Duty, Whitehall should work with WAG to ensure that equivalent guidance is sent to public authorities in Wales.
3. Departments within Whitehall should be further educated on the devolution settlement including what is and what is not devolved.
4. As a matter of course, WWA and other Welsh NGOs should be invited to stakeholder meetings and decision-making fora within Whitehall when policies will affect the citizens of Wales.
5. Consultation exercises should extend into Wales where a policy proposal will affect Welsh citizens. Welsh NGOs could be commissioned to assist in this process and are best placed to reach the grassroots citizens whom the policies will affect. They should be resourced appropriately for this work.
6. A solution to the problem of women with no recourse to public funds who are fleeing violence and seeking refuge should be developed as a matter of urgency between WAG and Whitehall, and a protocol to ensure consistency of approach throughout Wales should be developed, with guidance for all Welsh local authorities.
7. Wales should adhere to requirements relating to VAW under international human rights conventions, including CEDAW, and Whitehall should ensure that this happens as Wales is a devolved nation within the Member State of the UK.

**Letter from Sir Gus O'Donnell KCB, Cabinet Secretary and Head of the Home Civil Service, to the Chairman**

In your letter of 10 February, you asked for an outline of the preliminary findings arising from my review of departmental awareness of devolution. All departments have now conducted their internal review and provided an overview of their findings to the Cabinet Office. The returns provided by departments demonstrate that a thoughtful and rigorous process of reflection has been undertaken which in itself has raised the profile of devolution within each department and contributed to several departments undertaking improvements.

The key themes to emerge are:

- *Resources*: all departments have some dedicated working level resource and approximately half have existing senior champions. A number of other departments are looking to identify responsibilities at Director/Director-General level as a result of this process.
- *Knowledge*: in the majority of departments knowledge and expertise is concentrated in a few teams—with most departments viewing levels as needing to improve.
- *Internal communications and training*: the majority of departments identified improving internal communications and training on devolution as a priority and a number are already in the process of implementing changes eg better reflecting devolution messages in induction, core training or via their intranet.
- *Relationships with the Welsh Assembly Government*: as with the Northern Ireland and Scottish Executives there is a mixed picture regarding established forums for communication—with some very good examples between both officials and ministers but some gaps identified.

While in the main it will be for individual departments to determine their own next steps, I am firmly of the view that the question of how we relate to each of the three devolved administrations is critically important and so should be looked at collectively. Therefore all Permanent Secretaries, including Dame Gillian Morgan, will shortly discuss these results to identify those actions which all departments need to take and also highlight examples of good practice for further consideration.

On the issue of secondments which we discussed when I gave evidence to your Committee, many departments highlighted examples of successful, and often senior, secondments with the Welsh Assembly Government and *vice versa*. However, there was a general acknowledgement that secondments could be more systematically encouraged and the resulting skills and knowledge better utilised. In order to help secure improvements in this area I have asked officials who lead on this area from within the Cabinet Office to meet with HR directors in the Scottish Executive and the Welsh Assembly Government and a representative group of departments.

You also invited me to give my views on the LCO process and how it is working in practice. I am happy to confirm that from my perspective the process has bedded in and is working well, including the Welsh Affairs Committee's scrutiny role within the process. However, the Secretary of State for Wales supported by the Wales Office lead on the management of the process and I would not wish to add to the detailed evidence given by them to your Committee's inquiry.

1 March 2010

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